No. 20-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2020

RYAN JAMES HOYT,

*Petitioner*,

v.

THE STATE OF CALIFORNIA,

*Respondent*.

**CAPITAL CASE**

**ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## INDEX TO APPENDIX

# IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE

Plaintiff and Respondent,

v.

RYAN JAMES HOYT,

Defendant and Appellant.

S113653

Santa Barbara County Superior Court

1014465

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January 30, 2020

Justice Kruger authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Chin, Corrigan, Liu, Cuéllar, and Groban concurred.

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PEOPLE v. HOYT

S113653

Opinion of the Court by Kruger, J.

Defendant Ryan James Hoyt was convicted of the kidnap and murder of Nicholas Markowitz and sentenced to death. We affirm the judgment.

## I. BACKGROUND

On October 30, 2000, defendant was charged by grand jury indictment with kidnapping 15-year-old Nicholas Markowitz (who was known as Nick) for ransom or extortion and for murdering him, as well as a personal firearm use enhancement. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)(B), 209, subd. (a).) Codefendants Jesse James Hollywood, Jesse Rugge, Graham Pressley, and William Skidmore were charged with the same crimes, but the cases were severed and defendant stood trial first. A jury convicted defendant of one count of first degree murder in violation of Penal Code section 187 and one count of kidnapping committed with the personal use of a firearm in violation of Penal Code sections 207 and 12022.5, respectively. The jury also found true the special circumstance allegation that the murder was committed during the course of a kidnapping under Penal Code section 190.2, subdivision (a)(17)(B). The jury returned a verdict of death. This appeal is automatic. (*Id.*, § 1239, subd. (b).)

### A. Guilt Phase Prosecution Case

The events that led to Nick's kidnap and murder stemmed from a feud between Jesse James Hollywood and Nick's half-brother, Ben, over a drug debt. Ben was supposed to have sold illegal drugs for Hollywood but failed to do so. As a result, Ben owed Hollywood $1,200, and their relationship had soured over this debt. On one occasion, Hollywood retaliated against Ben by running up a tab in the restaurant where Ben's girlfriend worked and leaving a note saying Ben could pay the bill from the debt he owed Hollywood. For his part, Ben took revenge on Hollywood by telling Hollywood's insurance company that Hollywood had falsely reported a vehicle stolen. Ben later broke windows in Hollywood's home. Although there was conflicting testimony about precisely when the windows were broken, one prosecution witness testified the event occurred on August 4, 2000. The next day, Hollywood would inform others that he needed to move because his windows had been "busted out" and people knew where he lived. The day after that, Hollywood arranged to have Nick kidnapped. A few days later, worried about the serious penal consequences if that crime was discovered, Hollywood decided to eliminate Nick.

Hollywood enlisted defendant's help. Defendant, like Ben, sold drugs for Hollywood, and he also owed Hollywood money. Mutual friends described defendant as the "low man on the totem pole" in their circle. To pay for the drugs he purchased from Hollywood for resale, defendant performed—and was often teased for doing—menial, odd jobs for Hollywood, including yard work, pet care, and housework. According to Brian Affronti, a friend of both defendant and Hollywood, defendant did whatever Hollywood asked of him, without complaint. Defendant agreed to carry out the killing, along with two accomplices, in exchange

for financial compensation including the forgiveness of his debt to Hollywood.

**Timeline**

*1. August 5, 2000*

The events leading up to the crimes began on Saturday, August 5, 2000, when Casey Sheehan, who also sold marijuana for Hollywood, delivered a van to Hollywood's West Hills home.[1] Hollywood had told Sheehan that Hollywood needed to move because people knew where he lived. When Sheehan arrived at Hollywood's home, defendant, Skidmore, and one other friend were there, drinking beer and smoking marijuana. Some hours later, Sheehan, Hollywood, and Skidmore met again at Sheehan's apartment, where Hollywood and Skidmore talked about driving to Santa Barbara for a local party known as Fiesta.

That same evening, Nick returned home a half hour before his midnight curfew. His parents noticed he looked "glazed," his speech was slurred, and he had a bulge in his pocket. When they confronted him, he ran out of the house and did not return for an hour. When he returned, he agreed to speak with his parents in the morning. Nick's parents worried that he had been getting involved with drugs, in part because Ben was a drug user.

*2. August 6, 2000*

On the morning of Sunday, August 6, two passersby saw a dark-haired teenager being beaten by four other similar-aged boys in West Hills. Both the assailants and their victim appeared to be Caucasian. When the assailants were done

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[1] As the jury was informed, Sheehan testified under a grant of immunity, which would be void if he failed to be truthful.

hitting and kicking the dark-haired boy, they threw him into a white van.

Affronti testified that at about 2:00 that afternoon, Hollywood, Skidmore, and their friend Jesse Rugge picked him up in a white van to drive to Santa Barbara for Fiesta. When Affronti entered the van, he saw Nick in the back. Affronti knew Ben, but he did not initially realize Nick was Ben's younger brother. Affronti did not know anything was out of the ordinary until Hollywood told Nick "that his brother was going to pay up his money" and "for Nick not to run or anything like that, not to try and do anything irrational."

When the men arrived in Santa Barbara, they stopped at an apartment belonging to Richard Hoeflinger, a longtime friend of Rugge's. Hollywood asked Affronti to park the van and directed Rugge to make calls from Affronti's cell phone to unknown recipients. Telephone records also showed that two phone calls were placed that afternoon from Hoeflinger's home to defendant's home phone number. Hollywood and Skidmore then went into the apartment with Nick. When Affronti entered after parking the van, he saw Nick in a bedroom with his hands duct-taped in front of him and his shins also taped. Hollywood and Rugge then left for a time; when Hollywood returned, Affronti and Skidmore left in the van.

Hoeflinger, the apartment's primary tenant, had not seen his friend Rugge for a while before Rugge stopped by on August 6. Rugge asked if he could come in and Hoeflinger readily agreed, but Hoeflinger was surprised when a group—which included Nick—came in with Rugge. Emilio Jelez, Jr., Hoeflinger's roommate at the time, and their friend Gabriel Ibarra were also at the house when Rugge and others arrived

with Nick. Jelez and Ibarra saw Nick sitting in a bedroom of the house with his wrists and ankles bound with duct tape. Ibarra had never met Hollywood, but testified he did not call the police or tell anyone what he had seen because he was afraid of Hollywood after Hollywood walked up to Ibarra, intimated he had a gun, "and pretty much threatened [Ibarra], told [him] that [he] better keep [his] F'ing mouth shut."

At some point that evening, Hoeflinger walked into his bedroom and saw Rugge and Skidmore removing duct tape from Nick's wrists. Skidmore assured Hoeflinger that everything was " 'cool' " and they were " 'just talking' " to Nick. Reassured, Hoeflinger left his house less than a half hour later to attend a barbecue. Hoeflinger returned home at dusk to find Nick and Rugge drinking alcohol together in his living room with Nick still unbound. Nick and Rugge then left Hoeflinger's home together a few hours later.

In the meantime, Affronti and Skidmore drove back to Los Angeles in the white van. Affronti realized en route that he had forgotten his cell phone and returned to Hoeflinger's home to retrieve it; there he saw Nick and Hollywood still spending time together. Back in Los Angeles, Skidmore dropped Affronti off at home and continued to Hollywood's house, where he met defendant. Skidmore did not mention Nick. Defendant and Skidmore returned the van to its owner. Defendant and Skidmore walked back to Hollywood's house, where defendant left Skidmore.

*3. August 7, 2000*

*a. Nick Spends the Day in Santa Barbara*

On the morning of August 7, Natasha Adams-Young, then age 17, met Nick at Rugge's house in Santa Barbara. Adams-Young had been spending time with Rugge that summer. After meeting Nick, Adams-Young spoke with Pressley, a mutual friend of hers and Rugge's. Pressley told her "that they, quote unquote, kidnapped this kid [Nick] and brought him back up here to Jesse Rugge's house." The group then caravanned to Adams-Young's house. Adams-Young, feeling concerned for Nick's welfare, spoke with Nick, and suggested he was free to leave. Nick declined, explaining to Adams-Young that he planned "to stick around" "to help out his brother and that he was fine."

The group eventually returned to Rugge's home. Hollywood and his girlfriend, Michele Lasher, met up with the group there. Then-16-year-old Kelly Carpenter, another mutual friend of Adams-Young and Rugge, had met Hollywood the week before and knew that Hollywood, Rugge, and Pressley were involved with selling marijuana. Adams-Young understood that Nick's presence in Santa Barbara and at Rugge's home was related to Hollywood in some fashion.

At Rugge's home, Nick remained in a separate bedroom talking to Rugge. Carpenter overheard Hollywood speaking to his girlfriend about their plans that night and also heard Hollywood talking to others about what he would do with Nick. Hollywood said he might tie Nick up, throw him in the backseat of the car, and then get something to eat. Although it was said in a joking manner, the comment made Carpenter

uncomfortable. Carpenter and Adams-Young left Rugge's house shortly thereafter.

*b. Hollywood Confesses the Kidnapping to Sheehan*

Sheehan testified that Hollywood and Lasher socialized at Sheehan's apartment later on the night of August 7, drinking alcohol and smoking marijuana with him. Sheehan conceded he was "probably" "pretty wasted" and did not recall whether Hollywood and Lasher spent the night. Sheehan did recall Hollywood telling him he had taken Nick to Santa Barbara on Sunday, August 6. Hollywood, Rugge, Affronti, and Skidmore "pulled over" and "picked up" or "grabbed" Nick while he was walking down the street. Sheehan did not believe anyone other than those four men were involved in Nick's capture. Hollywood told Sheehan that Nick was still staying with Rugge in Santa Barbara on August 7.

*4. August 8, 2000*

Nick's parents reported their son missing on Tuesday morning, August 8, after finally reaching Ben and realizing Nick was not with him.

*a. Nick's Time in Santa Barbara*

Adams-Young testified that Nick was still at Rugge's house when she returned there the morning of August 8. Adams-Young was concerned with Nick's continued presence in Santa Barbara when "he wasn't supposed to be" there and discussed the issue with Pressley and Carpenter. Pressley told Adams-Young he was not sure what he planned to do "but that they weren't going to hurt [Nick] in any way and that they were just waiting to get a call from Jesse Hollywood." Pressley also told Adams-Young that "Hollywood had called Jesse Rugge and

offered him money to kill Nick Markowitz." Adams-Young recalled "being shocked and appalled," and Pressley assured her he had no plans to kill Nick but also confessed he was not sure what should be done with Nick. Pressley believed they were all in danger.

Adams-Young returned to Rugge's home and confronted him. Rugge told Adams-Young he was not sure what he should do, but "knew he was going to take Nick home" and planned to provide him with a bus ticket, though he feared Nick would tell someone about the kidnap when he returned home. Rugge expressed concern about going to jail. Nick, who was present during this conversation, assured Rugge he would not tell anyone when he got home.

Shortly thereafter, Rugge suggested the group go to a motel for the evening. Pressley's mother drove Pressley, Carpenter, Rugge, and Nick to the Lemon Tree Inn, where the group stayed from 7:00 p.m. until 11:30 p.m. Rugge selected and paid for the motel. Once there, they were joined by a friend, Nathan Appleton, and Adams-Young met up with the group later. The mood was celebratory, as Adams-Young and Carpenter believed Nick would be going home that evening. Nick spoke happily about what he would do once he returned home. Around 11:00 or 11:30 p.m., Rugge asked Adams-Young, Appleton, and Carpenter to leave for the night.

*b. Hollywood's Activities on the Evening of August 8, 2000*

On August 8, Hollywood visited the home of Stephen Hogg, a criminal defense attorney who had a professional relationship with both Hollywood and his father, John. Hollywood explained to Hogg that acquaintances had picked up

the brother of the man who had damaged his home and had taken the brother to Santa Barbara. Hollywood sought Hogg's advice. When Hogg suggested Hollywood go to the police, Hollywood said he could not do that. Hogg described to Hollywood the penalties for kidnapping as eight years, or—if ransom was sought—life. Hollywood made clear that this was something other people had done and that he was personally uninvolved. Hollywood became agitated and left Hogg's home within five minutes of Hogg's explaining the potential penalties for kidnapping. Hogg tried to page Hollywood several times after Hollywood left, but Hollywood did not respond.

On the evening of August 8, Hollywood and Lasher went to Sheehan's apartment to borrow Sheehan's car. Hollywood ran an errand in the car while Lasher stayed at the apartment. Hollywood then returned without the car, and all three went out to dinner to celebrate Lasher's birthday.

*5. August 9, 2000–August 17, 2000*

*a. Hollywood's Father Rushes Home*

Hollywood's father, John, testified that on the evening of August 8, he contacted Hogg and learned that Hollywood had "a problem" or was "in trouble." John was on vacation in Big Sur but left for home after learning his son might be in trouble. John tried unsuccessfully to reach his son numerous times on his way home. John finally reached Hollywood via Lasher, and Hollywood directed him to Lasher's home. John arrived at Lasher's Calabasas home at 2:00 a.m. on the morning of August 9 to find his son looking "nervous and rattled." John understood that Hollywood believed his life was in some danger, that Hollywood and Ben had been in a feud for some time, and that

Hollywood's agitation was related to the kidnapping of Ben's younger brother.

*b. Hollywood's Father Contacts Defendant*

Later that day, John paged defendant and asked to meet at a park. John asked defendant what was " 'going on with this situation, you know, this kid' " and suggested they go " 'find out where he is,' " " 'go get him and take him home.' " Defendant told him that "he didn't have control of the situation. And he, you know he was trying to find out, but he wasn't having any luck." John told defendant that when he asked his son where Nick was and who was holding him, Hollywood had not provided those details and instead told John to call defendant. Defendant told John he did not know those details either, but "would see what he could find out." John and defendant agreed this was "a bad situation," and defendant indicated that "he wasn't involved in this thing from the start, and he was kind of irritated that he was even being dragged into it."

*c. Sheehan and Defendant Spend Time Together*

When Sheehan came home from work on the afternoon of August 9, he noticed the car he had loaned to Hollywood the day before had been returned. That evening, Hollywood, Affronti, Skidmore, Lasher, and defendant were at Sheehan's home. Defendant told Sheehan that "a problem was taken care of." Sheehan understood this to refer to Nick. When Sheehan asked defendant to elaborate, defendant initially said it was "best that [he] left things unsaid," but eventually confessed that "Nick had been killed."

After this conversation, Sheehan drove defendant to a store where defendant purchased shirts, pants, and shoes totaling a "couple hundred dollars," paying in cash. Sheehan did not believe defendant was working at the time, and he had known that defendant was in debt to Hollywood. Defendant assured Sheehan that the debt to Hollywood "was taken care of." In fact, Hollywood had given defendant "three or four hundred bucks" the day before his birthday and told defendant, "[W]e're straight. No more debt." Defendant spent the night at Sheehan's house that evening and celebrated his 21st birthday the next day. After enjoying a party with between 20 and 30 guests at Sheehan's home, defendant again spent the night there.

A few days later, Sheehan and defendant again discussed Nick's killing. Defendant told Sheehan they killed Nick somewhere in Santa Barbara. Defendant described picking Nick up from a motel and taking him to a site where they "shot him and put him in a ditch," and covered him with a bush. Sheehan and defendant were together when defendant was arrested; Sheehan was also arrested and released that same evening.

*d. Nick's Body Is Discovered*

On August 12, 2000, a group of hikers, including witness Darla Gacek, were hiking in the Los Padres National Forest in Santa Barbara County. They were passing through an area known as Lizard's Mouth, which is situated approximately three and one-half miles from Highway 154. The hikers heard what they thought was a swarm of bees coming from a location approximately one-quarter mile beyond the point where vehicles can go no further. The group saw brush piled high, and when

they began removing it, they realized a human might be buried beneath it. The group of hikers left the site to find a cell phone to call the police. They encountered a group filming nearby.

Lars Wikstrom, a film video editor, had gone to the Lizard's Mouth area that day to help friends film a music video. While Wikstrom was filming there, a man pointed out an area to him about 20 to 30 yards away. Wikstrom followed the man, initially noting a strong odor similar to that of a dead animal by a roadside. As the two got closer, Wikstrom could see and hear numerous flies near the ground. Wikstrom saw fine powder on the ground, and then noted what appeared to be Levi's denim jeans and part of a shirt. Because Wikstrom was unsure whether what he saw was a person, he decided to call the police. Wikstrom waited for the police to come, directing hikers away from the area.

Law enforcement arrived about an hour and a half after Wikstrom called. Detective William Michael West, one of the first detectives at the scene, observed cut brush along the entire trail, from the trail head at West Camino Cielo all the way to the location of the shallow grave. Detective West testified that "[i]t looked like somebody had cleared the trail," both at the gravesite and all along the trail.

Criminalist George Levine also responded to the scene. Nick's body was only lightly and partially covered with dirt. The weather that day and for a few days before was warm, resulting in significant decomposition. Law enforcement officials removed cartridge casings and a bullet from the first few inches of the shallow grave. After the body was removed from the site, a TEC-9 weapon, modified to be fully automatic, was found under the area where Nick's feet had been resting. Nick's mouth

had been duct-taped. Duct tape was also wrapped around Nick's hands and head.[2]

An autopsy revealed Nick had suffered a total of nine gunshot wounds. Several of the gunshots would have independently been fatal, but due to the level of decomposition the medical examiner was unable to state which of the injuries caused Nick's death.

*e. Pressley Confesses to Digging the Gravesite*

Detective Jerry Cornell testified that he interviewed Pressley on August 16, and Pressley admitted digging a grave in the trail area off San Marcos Pass known as Lizard's Mouth in the early morning hours of August 9.

*f. Defendant Confesses to the Killing*

On August 16, defendant was arrested, taken to a Santa Barbara jail, and advised of his *Miranda* rights.[3] According to Detective West, defendant said that he decided to speak to detectives after seeing a television broadcast regarding the case and speaking to his mother. After defendant informed jail officials he wished to be interviewed, detectives met with defendant in the sheriff headquarters in Goleta, where they audio- and video-recorded their encounter with him. Defendant

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[2] Once the tape was removed at the morgue, Nick was seen to be wearing a ring. Nick also wore a distinctive belt buckle. The parties stipulated to the identification of the deceased at trial.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

was re-*Mirandized* and asked to explain why he was involved in the crime.

Defendant told Detective West and Sergeant Ken Reinstadler, "I'm going down. I, I just realized that." The detectives asked defendant to explain "how this went down," and defendant asked if they would "mind if I go back to my cell and think about [it] tonight and talk to you guys tomorrow because I know my arraignment is Monday." Defendant expressed concern that what he said would be repeated in court, but then requested water and continued the conversation with the detectives, explaining, "I had nothing to do with the kidnapping." Defendant asked why he was charged with that crime.[4] The detectives responded by urging defendant to tell his story.

Defendant told them Ben owed Hollywood significant sums of money, as did he. Defendant explained he was told he could erase his own debt in exchange for killing someone; the person was someone unknown to him. Defendant told detectives

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[4] Defendant alleges the transcript used at trial contained two inaccuracies. After his assertion to detectives that he had nothing to do with the kidnapping, the transcript given to jurors indicated that there was some whispering before defendant asked why he was charged. A later-filed corrected transcript of the interview indicates that Reinstadler had responded to defendant's initial assertion that he had nothing to do with the kidnapping by whispering, "We know that." Defendant also claims the transcript used at trial contained an error in an exchange during which defendant indicated he met someone at the Lemon Tree Inn. At trial, the transcript read, "WEST: You met someone there? HOYT: Nick." The corrected transcript reads, "WEST: You met someone there? HOYT: Yeah." These discrepancies do not affect our evaluation of the issues in this case.

he drove Sheehan's car to a motel in Santa Barbara. When asked what happened next, defendant said, "You guys know what happened. I think I'm going to stop there for now." He again requested water, then expressed concern for his family's well-being.

Sergeant Reinstadler reminded defendant that he had the right to stop speaking to them at any point. Detective West offered to let defendant "collect [his] thoughts," and defendant said he wished "more than anything" that he had a cigarette. Sergeant Reinstadler reminded defendant, "You wanted to talk to us, man." Defendant asked whether he had been helpful, and the detectives urged him to fill in more "piece[s] of the puzzle." Reinstadler asked him, "Who are you ultimately concerned with? Who, who do you feel sorry for here?" Defendant replied, "Not me," continuing, "That kid I buried." Reinstadler asked him if he was "[w]ak[ing] up thinking about someone saying, 'Please. Please.' " The detectives asked if that was what the duct tape around the victim's mouth was for, and defendant replied, "Close."

Reinstadler asked defendant if he put the duct tape on Nick's mouth, but defendant denied doing it. Reinstadler then asked whether Jesse did it, and defendant said Hollywood was not in Santa Barbara. Reinstadler clarified he meant Jesse Rugge, not Jesse Hollywood, and told defendant that Rugge had said that defendant placed the duct tape around Nick's mouth. Defendant replied, "I love this one. *The only thing I did was kill him*." Defendant added that he did not select the gravesite or dig the grave; Pressley, whom he had not previously known, handled both those tasks. The detectives asked defendant if he had any moments of feeling what he was doing was wrong, and he said he did think that, for a moment, "right before."

## B. Defense Case

### *1. Defendant's Testimony*

Defendant testified on his own behalf. He acknowledged that he was friends with, and sold drugs for, Hollywood. He was indebted to Hollywood and did odd jobs, including yard work, to reduce his debt.

On August 5, 2000, defendant helped Hollywood pack up his house. Someone had broken the windows of the house, and Hollywood had received a voicemail that Ben, who sometimes sold marijuana for Hollywood, was the culprit. Defendant finished cleaning up the broken glass and went to his grandmother's home around 10:00 p.m. that evening.

On August 8, 2000, at around 2:30 p.m., defendant went to Hollywood's home. He and Hollywood drove around for a while, and Hollywood seemed excited. Hollywood asked if defendant would like to work off the last $200 of his debt by delivering a package to Rugge in Santa Barbara. Defendant testified that Hollywood told him if he delivered the package, his debt would be "clear" by his birthday a few days later. Defendant was to drive Sheehan's car. Defendant assumed Hollywood was not going himself because he was celebrating his girlfriend's birthday. Defendant agreed, and Hollywood told him where Rugge was staying and gave him a phone number to reach Rugge. Defendant testified he then waited at Hollywood's home for about three or four hours, at which point Hollywood picked up defendant and took him to Sheehan's home to pick up Sheehan's car. Hollywood gave defendant a bag to deliver to Rugge, and defendant testified that he did not look inside, presuming it to contain marijuana. No one mentioned anything about Nick to defendant.

Defendant drove to Santa Barbara. He called Rugge from a mini-market off the highway, and Rugge directed him to a room at the Lemon Tree Inn. Defendant delivered the bag, annoyed that Pressley was in the room because defendant had asked that Rugge be alone. Rugge asked defendant to drive him back to the San Fernando Valley in the morning, and defendant agreed. Rugge and Pressley borrowed the car for several hours, returning to the room about 2:30 a.m. Once they returned, defendant and Rugge drove back toward Los Angeles. Defendant dropped Rugge off at Rugge's mother's home. Defendant then drove to his grandmother's house, where he was then living.

Defendant testified that he did not hear of Nick's death until the evening of August 12, when Skidmore told him that "Ben's brother had been found murdered." Several days later, defendant learned Skidmore had been arrested. Defendant began calling mutual friends, including Sheehan, who told defendant "he didn't want [him] at his house." Defendant did not heed Sheehan's request. Defendant received several pages from a number he did not recognize, and believed police were trying to reach him. Defendant asked Sheehan to take him to a pay phone so he could call the police. He was arrested shortly thereafter.

Following his arrest, he was eventually taken to Santa Barbara, although he did not recall events with specificity. He recalled throwing up and knew he called his mother but claimed to have no memory of the content of the phone call. In fact, defendant testified that he recalled nothing from the time of his arrest on August 16 until he woke up alone in a jail cell four days later. He did not remember his confession to detectives on August 17.

Defendant's taped confession was played for the jury. Defendant testified that none of the statements indicating he was responsible for Nick's death were true.

*2. Dr. Kania's Testimony*

The defense proposed to call Dr. Michael Kania to testify that defendant's confession was false. Following an Evidence Code section 402 hearing, the trial court ruled that Dr. Kania could testify in response to hypothetical questions that assumed defendant suffered from amnesia, including the characteristics of amnesia. But the court ruled that Dr. Kania would not be permitted to "testify as to circumstances, the things that he was told by the defendant. The defendant can testify to those things."

Following the trial court's ruling, Dr. Kania testified that he believed defendant's claim of amnesia concerning his confession was credible. Defendant told Dr. Kania the only thing he recalled from the interrogation was walking into the room, being told to calm down, and to wait. Defendant told him the next thing he remembered was leaving the interrogation.

**C. Guilt Phase Rebuttal Case**

Dr. David N. Glaser and Dr. Dana Chidekel testified for the prosecution in rebuttal. Dr. Glaser testified that after examining defendant and reviewing a great deal of case information, he concluded defendant suffered from "no current major mental illness." Dr. Glaser opined that defendant suffered from an avoidant personality disorder "with dependent features." He had low self-esteem, was willing to endure "unpleasant conditions" to remain near the person on whom he was dependent, and was uncomfortable acknowledging his feelings. None of these features, in Dr. Glaser's opinion, made

defendant more likely to falsely confess. Dr. Glaser also evaluated defendant for amnesia. Because defendant was unable to recall anything about his interview with police based upon cues given from the transcripts, and because total amnesia absent a traumatic event or general anesthesia is very uncommon, Dr. Glaser concluded that defendant was malingering.

Dr. Chidekel testified that she evaluated defendant and administered numerous psychological tests to determine whether defendant had a psychological disorder rendering him susceptible to falsely confessing. Dr. Chidekel determined defendant suffered from "avoidance [*sic*] personality disorder, with self-defeating and dependent features." Based on the tests administered, Dr. Chidekel was unable to diagnose defendant with any other neuropsychological condition that interfered with his "ability to see, to understand, or to be able to communicate effectively."

### D. Penalty Phase

#### *1. Aggravation*

Nick's mother, Susan Markowitz, testified about the impact the loss of her son had on her and on her relatives and friends. Nick was one of three children, and his sister had the comfort of knowing Nick held his niece before his death, but not his sister's second child, who was not yet born at the time Nick died. Susan testified that she twice tried to commit suicide, "only to succeed in accumulating a twenty thousand dollar hospital bill." She told the jury, "There is no meaning to life without Nick."

*2. Mitigation*

Victoria, defendant's mother, testified about defendant's dysfunctional upbringing. Victoria was 19 years old when she married defendant's father, James Hoyt, and 21 when she gave birth to defendant. Victoria testified that her husband was "extremely abusive" to her, and not nice or attentive to the children. James grabbed her by the hair and threw her against a car and to the ground when she was eight months pregnant with defendant, nearly resulting in miscarriage. When defendant was four years old, James threw Victoria to the ground in front of her children and beat her with a pipe wrench. James had to be physically restrained by Victoria's brother. The couple divorced when defendant was five years old and, despite the physical abuse, James was awarded custody. Following their divorce, Victoria began using cocaine and drinking heavily.

Victoria's sister, Anne Stendel Thomas, testified that defendant's father and mother verbally abused and threatened defendant throughout his childhood. Thomas testified that Victoria abused drugs and alcohol from an early age, and her alcohol abuse continued and worsened throughout defendant's childhood. Her family was dysfunctional, and Victoria had been a depressed child who would spend hours or days alone in her room without moving or talking. Thomas testified that defendant was a "sweet kid," and she viewed him—the middle child—as a mediator.

Victoria's mother, Carol Stendel, testified about Victoria's early childhood. When Victoria was in fourth grade, she would stand in class and walk around without being aware of her behavior, despite performing at or above grade level in her coursework. At age 14, Victoria began seeing a psychiatrist, who recommended she be hospitalized due to depression. The family

decided against treatment. Defendant's grandfather also suffered from depression.

Stendel made efforts to make her grandchildren feel welcome in her home. She worried the children would feel abandoned or abused by their parents. She testified that "in their young lifetime, nobody, I mean nobody really helped them to have safety and comfort." Her eldest grandchild—defendant's sister, Christina—was a heroin addict. Stendel testified that she loved defendant very much.

At the time of defendant's trial, his younger brother, Jonathan, was serving a 12-year prison sentence for armed robbery and conspiracy to commit home invasion. Jonathan committed the crimes as a 16 year old but was tried as an adult. Jonathan testified about their abusive family, particularly their abusive stepmother, and the physical abuse defendant suffered at their father's hands. When asked how he would feel if defendant were to receive the death penalty, Jonathan responded that he could "hardly take him being in jail period." He continued, "As far as putting him . . . on death row . . . , that's pretty awful." James, defendant's father, was asked about the effect on him if his son was sentenced to death. He responded that "[i]t would be a living nightmare you can't wake up from."

## II. DISCUSSION

### A. Jurisdictional Claim

Defendant's first claim on appeal concerns the superior court's jurisdiction to hear the case. The evidence indicates that the murder took place at or near the location where Nick's body was found in the area known as Lizard's Mouth, which is situated within the boundaries of the Los Padres National Forest. Defendant contends that because the murder took place

in a national forest, the case falls within the exclusive territorial jurisdiction of the courts of the United States, and thus outside the jurisdiction of the superior court.

Defendant did not raise this argument in the trial court, which would ordinarily bar him from raising it on appeal. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 880–881.) But if, as defendant contends, the superior court lacked territorial jurisdiction, then it was without authority to act in the matter and should not have entered judgment in the case. (*People v. Betts* (2005) 34 Cal.4th 1039, 1050.) A claim of fundamental jurisdictional defect is not subject to forfeiture or waiver. (*People v. Lara* (2010) 48 Cal.4th 216, 225.) We are therefore obligated to address the claim. It is, however, without merit.

The fact the murder was committed within the boundaries of a national forest does not necessarily mean that the federal government, and the federal government alone, was empowered to prosecute the crime. As this court explained more than a century ago, federal ownership of land does not necessarily establish "federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the state . . . ." (*People v. Collins* (1895) 105 Cal. 504, 509.) "[F]or many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States," including the punishment of "public offenses, such as murder or larceny, committed on such lands." (*Utah Power & Light Co. v. United States* (1917) 243 U.S. 389, 404; see *People v. Rinehart* (2016) 1 Cal.5th 652, 660.) Whether the federal government has exclusive jurisdiction over crimes committed on federal lands depends on the terms on which the lands were acquired from the states. (See *Kleppe v. New Mexico* (1976) 426 U.S. 529, 542–543 [under enclave clause of the federal Constitution (U.S. Const.,

art. I, § 8, cl. 17), state may cede either exclusive or limited jurisdiction to federal government].) Defendant points to no authority indicating that the federal government acquired the Los Padres National Forest on terms establishing exclusive federal jurisdiction to prosecute crimes committed therein.

Defendant's argument against state criminal jurisdiction is rooted in an apparent misreading of California history. The Los Padres National Forest was first created by presidential proclamation in 1903, when it was known as the Santa Barbara Forest Reserve. (Pres. Proc. No. 14, 33 Stat. 2327, Dec. 22, 1903.)[5] As defendant notes, the national forest is made up of lands that had been ceded by Mexico in the Treaty of Guadalupe Hidalgo, under which title to lands not privately held passed to the United States. (Feb. 2, 1848, 9 Stat. 922; see *Thompson v. Doaksum* (1886) 68 Cal. 593, 596.) Defendant claims that Congress asserted exclusive jurisdiction over these lands when California was admitted to the Union two years later. (Act for the Admission of the State of Cal. into the Union, Sept. 9, 1850, ch. 50, § 3 (Act for Admission) 9 Stat. 452.)

Defendant is incorrect. The Act for Admission contains no provision reserving to the federal government exclusive jurisdiction over all public lands ceded by Mexico in the Treaty of Guadalupe Hidalgo. (See *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1522–1523; accord, *Martin v. Clinton Construction Co.* (1940) 41 Cal.App.2d 35, 46; see generally *Fort Leavenworth R. R. Co. v. Lowe* (1885) 114 U.S. 525, 539.) Defendant relies on the noninterference clause of the Act for Admission: "That the said State of California is admitted

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[5] The Los Padres National Forest took its present name in 1936. (Exec. Order No. 7501 (Dec. 3, 1936).)

into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned." But this noninterference clause is not unique to California (see *Van Brocklin v. State of Tennessee* (1886) 117 U.S. 151, 164), and it offers no support for defendant's argument. Suffice it to say, a prohibition on interfering with federal title is not the same as a prohibition on prosecuting crime. (See *Coso Energy*, at pp. 1522–1523, citing *U.S. v. Bateman* (N.D.Cal. 1888) 34 F. 86, 88–90.)

In the alternative, defendant argues that California relinquished its prosecutorial power to the federal government in an 1891 act ceding "exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein." (Stats. 1891, ch. 181, § 1, p. 262.) That statute was reenacted in 1943 as Government Code section 113, subsequently repealed, and eventually reenacted in its current form to provide for the state's acceptance of the retrocession of jurisdiction from the federal government of "land within this state." (Gov. Code, § 113; see Stats. 1943, ch. 134, p. 898 [1943 version].)

The difficulty with this argument is that the cession provision on which defendant relies contains an explicit exception for "the administration of the criminal laws of this State." (Stats. 1891, ch. 181, § 1, p. 262.) Defendant asserts that this exception "has been uniformly interpreted as limited

to the right to serve process," but that is not what the statute says, and defendant offers no support for his unlikely interpretation. Nor is there any evidence that Congress declined the terms of California's partial cession of jurisdiction. (See *S. R. A., Inc. v. Minnesota* (1946) 327 U.S. 558, 563.) As particularly relevant here, only a few years later Congress explicitly recognized the states' authority to reserve jurisdiction over national forest lands: In Title 16 United States Code section 480, enacted in 1897, Congress provided that the states' jurisdiction "over persons within national forests shall not be affected or changed by reason" of the creation of national forests. "By this enactment Congress in effect . . . *declined* to accept exclusive legislative jurisdiction over forest reserve lands . . . ." (*Wilson v. Cook* (1946) 327 U.S. 474, 487, italics added.)

In sum, although California ceded the lands comprising the Los Padres National Forest to the United States, California also retained jurisdiction to administer its criminal laws on the ceded lands. Defendant points to nothing in the history of the Los Padres National Forest to suggest it was an exception to this reservation of criminal jurisdiction. The superior court did not err in exercising jurisdiction in this matter.

### B. Jury Selection Claims

#### *1. Adequacy of Voir Dire*

Defendant argues the trial court committed several errors that resulted in inadequate voir dire of prospective jurors. Defendant's claims lack merit.

##### *a. Denial of Request for Sequestered Voir Dire*

Defendant first points to the trial court's decision to deny defendant's request for sequestered voir dire. Before jury

selection began, defendant had filed a motion seeking sequestered voir dire concerning prospective jurors' attitudes toward the death penalty and regarding the extent of pretrial publicity. Defense counsel argued that sequestration would avoid the potential contamination of prospective jurors who might learn what others had seen or heard in the media. Defense counsel also argued sequestered voir dire was necessary to determine prospective jurors' attitudes toward the death penalty "alone, separately," and "face-to-face" with counsel. The prosecution opposed the motion on the ground that sequestration was unnecessary; jurors' attitudes and exposure to pretrial publicity could be explored through juror questionnaires. The trial court denied the motion, agreeing with the prosecution that juror questionnaires would adequately respond to defendant's concerns.

Although defendant now asserts that the trial court erred in denying the motion, he offers no substantive argument to support the claim and has therefore forfeited it. But even if the claim were properly presented for review, we would find no error. " '[I]n reviewing a trial court's denial of a defendant's motion for individual sequestered jury selection, we apply the "abuse of discretion standard," under which the pertinent inquiry is whether the court's ruling "falls outside the bounds of reason." ' " (*People v. Perez* (2018) 4 Cal.5th 421, 443, quoting *People v. Famalaro* (2011) 52 Cal.4th 1, 34.) We remain mindful that " '[i]ndividual sequestered jury selection is not constitutionally required, and jury selection is to take place "where practicable . . . in the presence of the other jurors in all criminal cases, including death penalty cases." ' " (*Perez*, at p. 443, quoting Code Civ. Proc., § 223.) Here, defendant has not shown that group voir dire was impracticable. He sought

sequestered voir dire because of concerns about potential juror bias, but he has not shown that group voir dire resulted in any actual juror bias. (Cf. *People v. Vieira* (2005) 35 Cal.4th 264, 288 ["group voir dire may be determined to be impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias"].) The trial court acted within its discretion in concluding defendant's concerns could be adequately addressed by means other than individual sequestered voir dire.

*b. Exclusion of Questions from Juror Questionnaire*

Defendant next complains that the trial court erred in excluding certain questions from the juror questionnaire. The parties exchanged proposed juror questionnaires in early October 2001. The trial court warned the defense that its proposed questionnaire, which was twice as long as the prosecution's, ran the risk of alienating prospective jurors. The court explained that the questionnaire "looks pretty formidable . . . and the [jurors] may get in a hurry to finish, and you don't really get the kind of answers you want; whereas, if they see they've got a more limited question[naire] then they've got some time." The parties eventually settled on a questionnaire, which was provided to four panels of prospective jurors. Before distribution, a number of questions, including four that had been proposed by the defense to examine jurors' attitudes toward an intentional kidnap murder of a minor (proposed questions 78, 79, 98, and 120), were excluded from the questionnaire.

Excluded question number 78 inquired, "What was your first reaction when you heard this was a 'kidnapping murder' case?" Question number 79 inquired whether a prospective

juror's "feelings about the issue of kidnapping and murder [were] such that" the juror "could not be fair and impartial in relation to the defendant" or "to [a] complaining witness," or alternatively if "[n]either statement applie[d]." Question number 98 inquired, "During the course of the trial, the prosecution may present evidence that includes pictures of Mr. Markowitz after he died, and a gun that was used in the killing. The prosecution may even display the gun itself. How do you think this type of evidence would affect your judgment of the case as a whole?" Question number 120 inquired, "During this trial you may hear detailed descriptions of kidnapping and murder. Would that effect [*sic*] your ability to be fair and impartial?" followed by a short blank line. The question continued, "If so, please explain."

Defendant argues it was error to exclude these questions. Without the ability to question jurors about their attitudes toward the death penalty in a case involving the intentional kidnap murder of a minor, he argues, the defense had no adequate means of determining whether the jurors harbored disqualifying biases concerning the commission of such a crime. We disagree.

A trial court has " 'wide latitude' " in the conduct of voir dire, including with respect to the questions to be asked and their format. (*People v. Landry* (2016) 2 Cal.5th 52, 83; see Code Civ. Proc., § 223.) Voir dire must be " ' " 'reasonably sufficient to test the jury for bias or partiality.' " ' " (*Landry*, at p. 83.) But "[i]t is not the purpose of voir dire to ' "educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." ' " (*Ibid.*)

Here, although defendant suggests otherwise, the prospective jurors were informed of the nature of defendant's alleged crime. Before adjourning for one week on October 17, 2001, the court briefly described the case to the prospective jurors. The court explained that the crime involved "the alleged kidnapping of the 15 year old Nicholas Markowitz, and resulted, allegedly, in the killing of Mr. Markowitz." The court explained that the series of events at issue occurred over a period of four days and that defendant was charged with kidnapping, first degree murder, and a special circumstance allegation that the murder occurred during the commission of a kidnapping. The juror questionnaire then sought to evaluate prospective jurors' attitudes toward the death penalty in such a case, by asking jurors whether they would always vote guilty as to first degree murder and true as to the special circumstance, so as to guarantee a penalty phase, and whether jurors would automatically vote for death.

The additional questions on the subject proposed by defendant—which asked, for example, for the jurors' "first reaction" to hearing "this is a 'kidnapping murder case' "—were not well-tailored to meaningful further exploration of the jurors' views on the death penalty in this context. And to the extent defendant sought the jurors' predictions about how their judgment would be affected by "detailed account[s]" of the crime or other prosecution evidence, it is well established that a defendant has "no right to ask specific questions that invite[] prospective jurors to prejudge the penalty issue . . . [or] to educate the jury as to the facts of the case." (*People v. Burgener* (2003) 29 Cal.4th 833, 865, citations omitted.)

*c. Conduct of Voir Dire*

Defendant next argues that voir dire was inadequate because the questioning was insufficient to determine whether any of the jurors held disqualifying views concerning the automatic application of the death penalty for the intentional kidnap murder of a minor. Defendant argues: "Six jurors, fully half the panel, were not questioned at all except [as to] whether they could volunteer a basis for their own disqualification." Defendant contends, "Such general inquiries are insufficient under long-standing United States Supreme Court case law." (See *Morgan v. Illinois* (1992) 504 U.S. 719, 734–735.) In *Morgan*, the high court held that the petitioner "was entitled, upon his request, to inquiry discerning those jurors who . . . had predetermined . . . whether to impose the death penalty." (*Id.* at p. 736.)

As an initial matter, defendant's claim that these six jurors were not questioned "at all" is inaccurate. The court questioned these jurors with some care and permitted the parties to do the same. To the extent defendant took issue with the nature of the trial court's questioning, he made no mention of it before the court. It is now too late to complain that the court's questioning was inadequate. (*People v. Salazar* (2016) 63 Cal.4th 214, 236 ["We have held that 'a defendant may not challenge on appeal alleged shortcomings in the trial court's voir dire of the prospective jurors when the defendant, having had the opportunity to alert the trial court to the supposed problem, failed to do so.' "].)

Defendant contends that the questioning of four individual jurors raised "particular concerns about impartiality" that were not adequately explored in voir dire because the trial court impermissibly restricted questioning. But contrary to

defendant's contention, the trial court's decision to remove the four defense-proposed questions from the juror questionnaire is not reasonably interpreted as precluding counsel from asking follow-up questions regarding prospective jurors' attitudes toward the death penalty in a kidnap-murder case. It appears from the record that the defense could have asked additional questions of the prospective jurors but did not do so.

Nor, in any event, does the record support defendant's assertion that the prospective jurors' answers raised particular concerns about impartiality that were not adequately explored in voir dire. Defendant asserts that Juror No. 9184's questionnaire suggests she was biased against defendant because she responded affirmatively to the question, "Do you have any feelings against the defendant solely because the defendant is charged with this particular offense?" She also responded affirmatively to the question inquiring whether "the mere fact that an information was filed against the defendant cause[d her] to conclude that the defendant is more likely to be guilty than not guilty." But during voir dire, defense counsel asked her to explain these responses. She indicated that she initially made a "natural" or "snap judgment" but after "sitting here for a while, [she] believe[d] that there's a due process that people should go through now, and [she] underst[ood] a little bit more about the situation." Defense counsel probed further whether she meant that her position on these two questions had "changed somewhat" in that she "now . . . realize[d] that just because someone is charged with an offense, or [had] been arrested for an offense that isn't evidence of anything." Juror No. 9184 agreed with defense counsel that she had "changed [her] feelings somewhat on that." Juror No. 9184 also confirmed to the trial court that she had "no reason to think" she could not

give both sides a fair trial, that she was prepared to follow the law, and that she would accord defendant the presumption of innocence.

Defendant argues that Juror No. 8919's questionnaire responses raised particular concerns because Juror No. 8919 "[d]isagree[d] somewhat" with the statement, " 'Anyone who intentionally kills another person should always get the death penalty.' " Juror No. 8919 added that "self defense can be seen as 'intentional.' " Juror No. 8919 also "[d]isagree[d] somewhat" with the statement, " 'Anyone who intentionally kills another person should never get the death penalty,' " adding, "should vs. shall." Taken together, these responses do not indicate, as defendant argues, that Juror No. 8919 would vote for the death penalty for all intentional murders other than self-defense. Nor did voir dire raise such concerns; on the contrary, the juror responded affirmatively to questions as to whether he could deal "fairly and impartially" with the question of penalty.

Defendant similarly argues that Juror No. 0555's questionnaire responses raised concerns because she indicated she "[a]gree[d] somewhat" with the statement, "Anyone who intentionally kills another person should always get the death penalty" and "[s]trongly disagree[d]" with the statement, "Anyone who intentionally kills another person should never get the death penalty." But Juror No. 0555 also stated she would consider both possible penalties if the case reached the penalty phase and that she would vote for life imprisonment in an appropriate case. Defendant elected not to question Juror No. 0555 on these subjects, and he points to nothing in her voir dire responses to indicate that the juror would not be impartial.

Finally, defendant asserts that Juror No. 6619 raised particular concerns because, among other things, she wrote in her juror questionnaire that, philosophically, she was strongly in favor of the death penalty and "agreed somewhat" that anyone who kills intentionally should always receive the death penalty. But Juror No. 6619 also said she was amenable to either punishment, depending on the evidence, and affirmed that she would vote for life imprisonment in an appropriate case. During voir dire, defense counsel probed some of Juror No. 6619's responses concerning her views on the death penalty. Although Juror No. 6619 had initially offered "self-defense" and "automobile accidents" as examples of intentional killings where the death penalty would not be warranted, counsel then clarified that the question was whether there would be a situation in which the juror could envision reaching the penalty phase of a trial, after finding defendant "guilty of first-degree murder," and determining "life imprisonment without parole to be the most appropriate sentence." Juror No. 6619 responded affirmatively, at which point defense counsel passed for cause, thereby waiving any claim of juror bias. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 59.) To the extent defendant now argues voir dire was inadequate to determine whether Juror No. 6619 was capable of serving as an impartial juror, we see no merit to the claim.

*2. Excluding Prospective Juror F.G. for Cause*

Defendant contends the trial court erred by excluding Prospective Juror F.G. for cause. We hold the court acted within its discretion.

F.G. was a musician who had performed at many prisons and who had also worked on antidrug programs with the health

department and the county sheriff's department. During voir dire, the trial court asked F.G. whether any of these experiences would preclude him from being a fair juror, "knowing what the juror's job is." F.G. replied, "No, I don't think so. The only caveat I would put on that is that I have . . . witnessed firsthand the results of the sentencing. And I have spoken with people who have been, for instance, sentenced for life, with no chance of parole and stuff like that. And that—it's a very heavy burden to judge someone. So that's all I can say." The trial court explained to F.G. that the concept of punishment and penalty had no place in the determination of a defendant's guilt and asked whether F.G. understood those distinctions. F.G. indicated his assent.

The court inquired whether, in light of F.G.'s experience working with people who had received life sentences, he "would be inclined to consider the potential sentence in determining the issue of guilt or innocence" and whether those experiences "would influence [his] view of the facts." F.G. replied that he "would like to think it wouldn't, but it hangs on me very heavily, morally." The court clarified that "the question is, if you wind up on this jury, are you going to deliberate with the other jurors, consider the facts, decide the facts based on the evidence, without consideration of any potential sentence that may be imposed, if you get to that phase of the case. That's the question." F.G. responded, "I would have to say that no matter what I did, that would be a factor." The court excused the prospective juror.

Criminal defendants are constitutionally entitled to a trial before an impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; see *Duncan v. Louisiana* (1968) 391 U.S. 145, 149–150; see also *Turner v. Louisiana* (1965) 379 U.S. 466, 471;

*People v. Black* (2014) 58 Cal.4th 912, 916.) But the state also has a vital interest in ensuring cases are tried before juries able to make decisions concerning punishment "within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.) "[I]n determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." (*Ibid.*) "When the prospective juror's answers on voir dire are conflicting or equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence." (*People v. Duenas* (2012) 55 Cal.4th 1, 10.) A trial court has the power, though not the obligation, to excuse biased prospective jurors on its own motion. (*People v. Cunningham* (2001) 25 Cal.4th 926, 981 [upholding sua sponte excusal of a prospective juror for cause]; *People v. Bolin* (1998) 18 Cal.4th 297, 315–316 [no duty to excuse on court's own motion].)

Although this was a capital trial, here it was F.G.'s views toward a life sentence, not the death penalty, that raised concerns about his ability to serve as a juror. The court engaged in a colloquy with F.G., probing his responses to questions suggesting an inability to put aside considerations of punishment in determining guilt. F.G. unequivocally explained that the potential penalty of life imprisonment "would be a factor" in determining guilt. The trial court concluded F.G. would be unable to follow the trial court's instructions and evaluate the evidence of defendant's guilt without considering the potential penalty, and for that reason determined dismissal was warranted. Substantial evidence supports the trial court's determination. (*People v. Duenas*, *supra*, 55 Cal.4th at p. 10.)

Defendant raises several challenges to this conclusion, but none is persuasive. First, defendant argues it was improper for the trial court to excuse F.G. absent a request from one of the parties. Our cases, however, do not forbid a trial court from excusing a juror for cause on its own motion (see *People v. Cunningham*, *supra*, 25 Cal.4th at p. 981), and defendant offers no persuasive reason for us to create such a bar.

Defendant next argues the excusal was improper under *Adams v. Texas* (1980) 448 U.S. 38, which held that the federal Constitution prohibits the exclusion for cause of a potential juror because he or she is unable to state under oath that the mandatory sentence of death or life imprisonment " 'will not affect his [or her] deliberations on any issue of fact.' " (*Id.* at p. 42, quoting Tex. Pen. Code Ann. § 12.31.) The court explained the effect of the requirement was to exclude from the jury pool those who stated "they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." (*Adams*, at pp. 49–50.)

This case presents no comparable circumstances. Although defendant argues otherwise, in this case the trial court reasonably understood F.G. to say not merely that his prior experiences and views would cause him to perform his duties as a juror with a particular sense of seriousness and gravity, but that they would undermine his ability to impartially evaluate the evidence of defendant's guilt. *Adams* does not bar the excusal of such a juror. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 963 [*Adams* does not forbid excusal of juror who admitted that his views on the death penalty would cause him to apply a standard of proof higher than proof beyond a reasonable doubt].)

Defendant also attempts to analogize this case to *People v. Heard* (2003) 31 Cal.4th 946, in which we held that a prospective juror was dismissed without adequate basis after assuring the court he would be able to follow the law. (*Id.* at p. 964.) The analogy is inapt; here, F.G.'s responses to voir dire indicated he would be unable to perform the duties of a juror insofar as he informed the court he could not follow the court's instructions to determine guilt without taking into account the possible penalty. Substantial evidence supports the trial court's dismissal, and we are presented with no reason to upset that decision on appeal. (*People v. Duenas*, *supra*, 55 Cal.4th at p. 10.) [6]

### C. Guilt Phase Claims

#### *1. "Second Kidnap" Theory*

Defendant contends there was a material variance between the kidnap alleged in the indictment and the prosecutor's argument regarding his actual offense, rendering him unable to defend against the charge in violation of his rights

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[6] At oral argument, defense counsel also contended Prospective Juror F.G.'s responses to the questionnaire indicated his willingness to follow the court's instructions in general. He contended that dismissal was not warranted because, in their oral exchange, the court did not specifically advise F.G. that the court's instructions would include an instruction to decide guilt based on the evidence presented, without allowing the potential penalty to factor into the jurors' evaluation of the facts of the case. Based on our review of the record, we see no genuine potential for confusion on this point. It was not necessary for the trial court to explicitly advise F.G. that a juror's determination of the facts should be based solely on the evidence presented.

under the Fifth and Sixth Amendments to the United States Constitution. We reject the argument.

*a. Background*

Defendant, along with Skidmore, Rugge, Pressley, and Hollywood, was charged by indictment with kidnapping for purposes of ransom or extortion. Specifically, the charging document stated that "[o]n or about August 6, 2000 through August 9, 2000, in the county of Santa Barbara, the said defendants . . . did willfully, unlawfully, and forcibly detain, take, carry away, and kidnap NICHOLAS SAMUEL MARKOWITZ, age 15, for purposes of ransom or to commit extortion, or to extract money from another person, in violation of Penal Code section 209(a)." Five special allegations were charged along with the kidnapping count, including that the victim suffered death in the course of the kidnapping and that defendant intentionally discharged a firearm resulting in Nick's death.[7]

During his closing argument, defense counsel maintained that defendant had taken no part in the charged kidnapping, because that kidnap, which began on August 6, had ended before defendant drove to Santa Barbara. Specifically, counsel argued that the kidnap ended when the victim could have fled his captors—but did not—at several points during his captivity. "[T]his kidnapping . . . ended before Mr. Hoyt ever spoke with Jesse Hollywood on the 8th [of August, 2000] to take a bag up to Santa Barbara. The kidnapping was done." In response, the

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[7] Of the three remaining special allegations, two related to Pressley's age and the last stated that Skidmore, Rugge, Pressley, and Hollywood were principals in a felony in which a coprincipal, defendant, possessed an assault weapon.

prosecutor argued that even if the defense was correct that the kidnap concluded when Nick could have fled, defendant was guilty of kidnap because "independent of the kidnapping that took place on the 6th where [the victim] was brought from Los Angeles County to Santa Barbara, there is as well the kidnapping that took place in the late evening hours of the 8th, into the early morning hours of the 9th of August, where he's taken from the motel, perhaps taken as well to Rugge's house at some point, we'll never know, and then taken up to the location on West Camino Cielo and there he was killed. That we know is an independent kidnapping. And certainly, he would be guilty of that offense."

The prosecutor pointed out before the jury that defense counsel's argument never addressed whether defendant would be guilty of the kidnap based on movement of the victim from the motel to the murder site. Defense counsel objected at this point, noting that only one count of kidnapping was charged. The following colloquy occurred:

"THE COURT: He said the count, the kidnapping for—count, relates only to the incident of the—I'll have to look. Isn't that your point?

"MR. CROUTER [Defense]: That there is only one count charged.

"MR. ZONEN [Prosecution]: Well, you have to look at the date on the pleading there, and the time, and whether or not it governs an entire period of time. And I believe in an Indictment you'll find that it covers the period of time from the 6th through the 9th.

"THE COURT: Let's see. That's the way the count is drawn. August 6th through August 9th.

"MR. ZONEN: See, a kidnapping can go over a period of time, and in this case it did. That kidnapping took place from the 6th through the 9th. It is one count, but it's one count that covers the entirety of his movement from the time he left at the location near his residence in that area, I think near Ingomar and Platt in San Fernando Valley, to the point where he was killed up in Santa Barbara County. That's all covered in the pleading in that one count as a kidnapping."

Defense counsel raised no further argument or objection, and the prosecutor continued his rebuttal.

*b. Discussion*

*i. Material Variance*

" 'Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them.' " (*People v. Williams* (2013) 56 Cal.4th 630, 681.) Notice is supplied in the first instance by the accusatory pleading. (E.g., *People v. Jones* (1990) 51 Cal.3d 294, 317.) But a variance between the pleading and proof at trial will be disregarded if it is not material. (*People v. LaMarr* (1942) 20 Cal.2d 705, 711.) "The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense." (*Ibid.*; accord, *People v. Maury* (2003) 30 Cal.4th 342, 427–428; *People v. Arras* (1891) 89 Cal. 223, 226.)

Here, the indictment alleged defendant and his codefendants committed an aggravated kidnap (Pen. Code, § 209, subd. (a)) by forcibly abducting Nick on August 6, 2000, and detaining him until he was murdered on August 9, 2000. The jury was instructed on the elements of aggravated kidnap and on the lesser included offense of simple kidnap. The aggravated kidnap statute provides in pertinent part, "Any person who . . . kidnaps or carries away another person by any means whatsoever with intent to hold or detain . . . that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony . . . ." (Pen. Code, § 209, subd. (a).) Simple kidnap, in turn, requires proof of three things: "that (1) the defendant took, held, or detained another person by using force or by instilling reasonable fear; (2) using that force or fear, the defendant moved the other person, or made the other person move a substantial distance; and (3) the other person did not consent to the movement. ([Pen. Code,] § 207, subd. (a).)" (*People v. Burney* (2009) 47 Cal.4th 203, 232.)

Defendant argues the prosecution crafted a new theory of kidnap during the rebuttal phase of closing argument for the dual purposes of surprise and to have the last word. This new theory was that there were two distinct kidnap offenses in this case, the first one commencing on August 6, 2000, and the second on August 8, 2000. Defendant argues that because he was charged with a single kidnap offense in the indictment, the "second" kidnap constitutes a material variance from the charged offense in violation of his Fifth and Sixth Amendment rights.

The argument lacks merit. As the prosecution correctly explained in the trial court, the indictment charged defendant

and his codefendants with a continuing kidnapping offense that extended over a period of time. That period included the time the victim left his home and was taken to Santa Barbara, the time he spent in Santa Barbara, and the time he was taken from locations within Santa Barbara to the site of his murder. True, defense counsel theorized that the kidnapping was interrupted by a period during which Nick could have eluded his captors at some point before defendant became involved on August 8, 2000. But the indictment put defendant on notice that the prosecution intended to prove kidnapping based on the events of August 8 and 9, 2000, as well. Defendant could not have been misled by his own "interruption" theory into believing otherwise. There was no fatal variance between indictment and proof, and cases finding fatal variances under dissimilar circumstances do not help defendant's case. (Cf. *U.S. v. Adamson* (9th Cir. 2002) 291 F.3d 606, 615–616; *U.S. v. Tsinhnahijinnie* (9th Cir. 1997) 112 F.3d 988, 990.)

*ii. Alleged Hearsay*

A corollary of defendant's "two kidnap" theory is that there were also two distinct conspiracies, the first involving the August 6 to 8 kidnapping of Nick and the second involving a separate and unrelated agreement to kidnap and murder Nick. Under this theory, defendant argues that the trial court erred by admitting various out-of-court statements by Hollywood, Rugge, Skidmore, and Pressley, as testified to by various witnesses at trial, because the statements were not admissible as statements of coconspirators in the only conspiracy and kidnapping defendant participated in, and therefore constituted inadmissible hearsay.

Coconspirators' hearsay statements may be admitted if there is independent evidence of a conspiracy and the party seeking to admit the hearsay shows the speaker was involved in the conspiracy when the hearsay statement was made, the statement was made in furtherance of the conspiracy, and the person against whom the statement is being offered either was participating in, or later would participate in, the conspiracy. (Evid. Code, § 1223; *In re Hardy* (2007) 41 Cal.4th 977, 995–996.) Here, the trial court permitted introduction of hearsay statements testified to by Affronti, Hoeflinger, Carpenter, Adams-Young, Sheehan, and Hogg regarding Nick's time in Santa Barbara. As generally set forth above, these witnesses testified about Nick's kidnap and captivity. Although defendant alleges these statements were not in furtherance of the conspiracy to kidnap Nick, the trial court reasonably concluded otherwise. We find no error.

As an initial matter, it is unclear that defendant has preserved his objections to the introduction of the statements: When the statements in question were introduced, defendant generally failed to object on the bases he now raises on appeal. For example, although he raised a "hearsay upon hearsay" objection at trial to Adams-Young's testimony regarding a statement made by Pressley after she had expressed concern to him about Nick's continued presence in Santa Barbara, defense counsel stated, "And I don't disagree with the . . . in furtherance of the conspiracy" theory of admission, "but I still have the problem that there appears to be a second level of hearsay." The court overruled defendant's objection.

"Because the question whether defendant[] . . . preserved the[] right to raise this issue on appeal is close and difficult, we assume that defendant[] . . . preserved the[] right, and proceed

to the merits." (*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6.) Having done so, we conclude the trial court committed no error in admitting the hearsay statements recounted by these witnesses. Defendant argues that the conspiracy he entered into with Hollywood to murder Nick was a wholly separate enterprise from the one Rugge and others entered into to kidnap Nick, and the statements admitted regarding Nick's capture were therefore inadmissible with regard to Nick's murder and defendant's involvement therewith. The trial court was not compelled to so finely parse this case. The evidence showed that Hollywood, the mastermind, had his friends kidnap Nick to exact a ransom from Nick's brother. When Hollywood learned that the potential penalty for Nick's kidnap was too high a price for him to pay, he asked defendant to kill Nick. The hearsay statements that were admitted, which tell the story of Nick's initial capture and subsequent captivity, were relevant to demonstrating this overarching conspiracy, and were made in furtherance of the conspiracy.

*iii. Jury Questions*

Defendant also argues the court's responses to juror inquiries regarding whether one or two kidnaps were alleged, and the relevance of conspiracy, ultimately worked to direct a verdict on the kidnap count and kidnap-murder special-circumstance charges.

During the second day of deliberations, the jury posed a question about whether one or two kidnapping events occurred and asked about the relevance of the conspiracy instruction. The jury asked whether "the kidnapping [is] a continuous, single event" and "what are the correct dates" of the kidnapping. The court explained, "[T]hat was one of the issues in the case that I

gave you an instruction when a kidnapping terminates, and there was some, the defense—there was some argument that the initial kidnapping had already terminated and he was free to go, remember that, and then there was some subsequent argument that the facts supported a second kidnapping based upon what you found there, and so that's really one of the issues that you have to decide. I can't answer that question for you. I can just point out to you that that was one of the disputed issues in the case. One, was the kidnapping that happened in the San Fernando Valley still ongoing when this happened. And there was argument about that. And then, even if it wasn't, was there another kidnapping. Those were the issues that were presented to the jury. And I can only remind you of what those issues were. I can't answer that question for you, because I'd be stepping in and I'd have to send all of you home because I'd be taking over your responsibility." The foreperson responded, "[T]hat's helpful in itself." Defense counsel was present and raised no objection.

The court also responded to the jury's question regarding the dates of the kidnapping offense, noting that the dates the jury had to keep in mind were August 6 and 9, 2000. The court noted, "[A]gain, whether or not the kidnapping was ongoing through that period or there were two kidnappings or there was only one that had terminated, those are the dates that you have to keep in mind, the 6th through the 9th."

The jury also asked about the lesser included offense of simple kidnap under Penal Code section 207. The court reminded the jury to consider defendant's involvement only when considering the elements of the offense. The jury then asked, "So being a coconspirator has nothing to do with it?" The court reminded the jury that defendant was not charged with

conspiracy, and the jury was instructed regarding coconspirators to give context to certain statements made. The jury thanked the court and indicated its question had been resolved.

Defendant argues the trial court's responses were faulty insofar as they instructed the jury they could convict on the basis of the prosecution's "second kidnap" theory; failed to clarify that the jury could not convict defendant of the kidnap if the movement of the victim during this kidnapping was incidental to the murder (*People v. Brents* (2012) 53 Cal.4th 599, 612); and failed to clarify that defendant could not be held "strictly liable" for an earlier kidnap by other participants. To the extent, if any, the court's response caused confusion, defendant's failure to object forfeits any claim of error on appeal. (See *People v. Tully* (2012) 54 Cal.4th 952, 1061.) In any event, there was no significant risk of confusion. The trial court correctly advised the jury it could convict defendant of kidnapping based on his own involvement in the transportation of the victim to the site where he was murdered. Under the circumstances of the case, there was no danger the jury would misunderstand the trial court as advising that it could hold defendant "strictly liable" for the earlier abduction of Nick on August 6; no such argument was raised at trial. Defendant's argument that the trial court's responses worked to direct a verdict on the kidnap count and kidnap-murder special-circumstance charges is without merit.

*iv. Instructional Issues*

Defendant argues that a unanimity instruction was warranted or could have cured whatever error the court created through its responses to juror questions. Such instructions

"generally appl[y] to acts that could have been charged as separate offenses, and . . . must be given ' "only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." ' " (*People v. Seaton* (2001) 26 Cal.4th 598, 671.) Here, for reasons already explained, there was no realistic possibility of disagreement. The indictment charged a continuous course of conduct—albeit one involving various actors at different times—that began with Nick's abduction on August 6, 2000, and culminated with his murder on August 9, 2000. The evidence at trial showed that defendant's involvement began on August 8 when he took and transported Nick to the location where he was killed. The trial court advised the jury that it was to evaluate only defendant's involvement when determining defendant's guilt. The trial court was not obligated to give a unanimity instruction.

Finally, we note that while defendant argues the jury should have been instructed with CALJIC No. 9.56,[8] setting forth the asportation-by-fraud defense, he neither requested the instruction nor objected to the trial court's failure to give the instruction. The trial court had no sua sponte duty to give the instruction because the instruction was inconsistent with the

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[8] CALJIC No. 9.56 provides: "When one consents to accompany another, there is no kidnapping so long as the condition of consent exists. [¶] To consent, a person must: [¶] 1. Act freely and voluntarily and not under the influence of threats, force, or duress; [¶] 2. Have knowledge that [he] [she] was being physically moved; and [¶] 3. Possess sufficient mental capacity to make an intelligent choice whether to be physically moved by the other person [or persons]. [¶] [Being passive does not amount to consent.] Consent requires a free will and positive cooperation in act or attitude."

theory of the defense. There was thus no error in connection with this instruction.

*2. Admission of Custodial Confession at Trial*

Defendant contends the trial court erred by admitting the audio and videotapes of his custodial confession to killing Nick, which he claims were involuntary and were obtained in violation of his *Miranda* rights. The trial court did not err in admitting defendant's confession.

*a. Background*

While housed at the Santa Barbara jail, defendant spoke twice with his mother. Evidently believing her son to be innocent and taking the blame for someone else's crime, she suggested he talk to the detectives to "spill [his] guts and get out." Defendant apparently heeded her advice and asked to speak with a detective.

Defendant then spoke with Detective West and Sergeant Reinstadler, who began by confirming that defendant had initiated the conversation and reminding him of his *Miranda* rights. Defendant waived his *Miranda* rights orally and in writing. After conversing back and forth about the crime, Hoyt told the detectives that he had asked to speak with them to "say that this picture that everybody's painting of me is not me." Detective West responded, "Well, tell us who you are. Tell us how this went down." Hoyt told them he could not do that and instead asked, "Do you mind if I go back to my cell and think about tonight and talk to you guys tomorrow because I know my arraignment is Monday?" The detectives responded by telling defendant, "Once you're arraigned, we can't talk to you. That's the bottom line. I mean, if you want to tell us something, I'm

being honest with you, this is your opportunity to do it. This is it." Defendant replied, "There's no way I can talk to you tomorrow?" Sergeant Reinstadler explained, "No. I know why," continuing, "you won't want to talk to us tomorrow because somebody's gonna get to you, telling you not to talk to us."

When the detectives asked if he was okay, defendant responded: "I mean, I'm going down for life." Sergeant Reinstadler replied: "There's a difference between life and the death penalty. And everything else in between. All we want is the truth." The interview continued, and after additional discussion, defendant explained how he had become involved in the crimes. Defendant explained to the detectives he was indebted to Hollywood and was told by an intermediary (whom defendant did not name) that he could erase his debt if he went to "take care of somebody," which defendant understood to mean killing him. The intermediary did not tell defendant the name of his intended victim but relayed a location—Santa Barbara. Defendant drove Sheehan's car to the Lemon Tree Inn in Santa Barbara, where he found a gun waiting.

When the detectives asked what happened next, defendant said, "I think I'm going to stop there for now," and asked for a glass of water. The detectives complied with the request for water and asked defendant whether he was asking to take a break or "telling us you don't want to talk anymore, period." Defendant replied that he would like an overnight break. The detectives responded that that would be "[t]oo late," and told defendant that "[o]nce a lawyer contacts you, we are precluded from speaking with you anymore, period." Defendant asked whether a lawyer would be contacting him the next day, and the detectives replied, "Oh, I'm sure. It's normal. It's their job." Defendant told the detectives his mom was unable to afford

an attorney for him, so he would have to work with a public defender. While the detectives assured him "[t]hat's fine," defendant worried aloud, "[A] public defender, I'm going nowhere with that one." The detectives then reminded defendant, "You wanted to talk to us, man." Defendant responded, "And have I helped you out at all?" The detectives told him that there were still pieces of the puzzle to fill in, and the conversation continued.

Defendant admitted to feeling sorry for "[t]hat kid that I buried." He told the detectives he had not put the duct tape on Nick's mouth. When the detectives said Rugge had told them otherwise, defendant responded: "I love this one. The only thing I did was kill him."

After answering additional questions about Pressley's involvement, defendant said: "All right. You guys I think I want to stop there. I think you guys got a pretty good picture." Detective West agreed: "Yeah, I've got a good picture, and it's pretty grim for you . . . . I'm sorry, uh, that that's what you painted for me." Sergeant Reinstadler asked defendant whether there was "ever a time when right before you pulled the trigger that you just thought, you know, I shouldn't do this? This is wrong." Defendant replied: "Hell, yes. Right before." The conversation ended not long thereafter.

Before trial, defendant sought to suppress the confession, arguing that it was coerced and obtained in violation of *Miranda*. Defense counsel argued that Sergeant Reinstadler and Detective West threatened defendant with the death penalty and urged him to correct the impression that he was a "stone-cold killer." The trial court concluded the confession was not coerced, explaining the detectives' reference to the death

penalty "was actually in response to the defendant's initiation of the subject of penalty. He said something about the fact that he was looking at life and then the detective said, 'Well, that's better than death or what's in-between,' or something like that, this was not a subject that was pursued after that. And it doesn't appear to me that that reference was anything that resulted or led to Mr. Hoyt's confession."

The trial court also examined whether defendant's admission was coerced because he was called "a stone-cold killer" during the interrogation. The court reasoned that use of that phrase, "in and of itself" was not sufficient to conclude his admission was coercively obtained. The court acknowledged the argument's logic: that if a person is truly a killer, that person would receive the death penalty and would be required to demonstrate facts in mitigation in order to avoid that consequence. The court did not find the detectives' use of the phrase "stone-cold killer" to have been used as a threat. Rather, the court concluded, it was somewhat factual and therefore was not coercive.

The superior court next examined defendant's invocation of his right to remain silent, concluding that the transcript as a whole reflected defendant's desire to continue talking. The court explained that defendant "was not expressing a wish to terminate the interview, to terminate his colloquy with the police, he was temporizing it. He didn't quite know what he wanted to do, and he was sort of postponing the inevitable, but he didn't really want to stop talking *because he didn't quit talking*." (Italics added.) The court continued, "I don't think the officers ever tried to coerce [defendant] into further discussions. I don't think they attempted to question him until after it was obvious that he wanted to resume the discussion. So, I don't find

that there's been any violation of *Miranda* as far as [defendant] is concerned."

The court concluded that defendant's statement to the detectives was admissible because he did not "ever vent[] any real interest in terminating [his] interview." The court noted that when defendant sought an overnight break, the detectives correctly informed him that he would be provided with an attorney, and that attorney might advise him not to continue speaking to the detectives. Because defendant continued talking despite having a basis to cease doing so and because nothing the detectives told defendant was misleading, the court concluded defendant's *Miranda* rights were not violated. Later in the colloquy, the parties acknowledge that defendant says, "Yeah, I think I want to stop there, I think you guys got a pretty good picture." The court did not explicitly rule on whether any statement made following defendant's invocation was admissible because the prosecution agreed to terminate the tape at that point, and the court acknowledged this evidence, the so-called "Side-B" evidence, was not going to be admitted unless defendant elected to testify, which had not yet been determined at the time the court evaluated this statement. Accordingly, the trial court did not expressly rule on whether the statement that followed this third invocation was admissible under *Miranda*.

*b. Discussion*

The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." (U.S. Const., 5th Amend.) "To safeguard a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of custodial interrogation (*Miranda*, *supra,* 384 U.S. at p. 467), the high court adopted a

set of prophylactic measures requiring law enforcement officers to advise an accused of his right to remain silent and to have counsel present prior to any custodial interrogation (*id.* at pp. 444–445)." (*People v. Jackson* (2016) 1 Cal.5th 269, 338–339.) During such an interrogation, if a defendant invokes either the right to remain silent or the right to counsel, " ' "the interrogation must cease." ' " (*Id.* at p. 339.) " '[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' (*Edwards v. Arizona* (1981) 451 U.S. 477, 484–485." (*Jackson*, at p. 339.) "[W]hen, as in this case, a defendant has waived his *Miranda* rights and agreed to talk with police, any *subsequent* invocation of the right to counsel or the right to remain silent must be unequivocal and unambiguous." (*People v. Sanchez* (2019) 7 Cal.5th 14, 49 (*Sanchez*).)

"An involuntary confession may not be introduced into evidence at trial." (*People v. Carrington* (2009) 47 Cal.4th 145, 169 (*Carrington*).) It is the prosecution's burden to establish by a preponderance of the evidence that the defendant's confession was voluntary. (*Ibid.*) "In determining whether a confession is involuntary, we consider the totality of the circumstances to see if a defendant's choice to confess was not ' " ' "essentially free" ' " ' because his will was overborne by the coercive practices of his interrogator." (*People v. Spencer* (2018) 5 Cal.5th 642, 672.) A "confession [is] not 'essentially free' when a suspect's confinement was physically oppressive, invocations of his or her *Miranda* rights were flagrantly ignored, or the suspect's mental state was visibly compromised." (*Ibid.*)

A confession obtained in violation of *Edwards* and *Miranda* is likewise inadmissible during the prosecution's case-in-chief. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1204–1205.) It is the prosecution's burden to establish by a preponderance of the evidence that the defendant's waiver of his *Miranda* rights was knowing, voluntary, and intelligent. (*People v. Jackson*, *supra*, 1 Cal.5th at p. 339.) In reviewing a trial court's denial of a suppression motion, we accept its resolution of factual disputes when supported by substantial evidence and determine independently whether, on those facts, a challenged statement was obtained illegally. (*Ibid.*)

Defendant raises several challenges to the admission of his confession to the detectives. Preliminarily, he argues that the trial court erred by failing to hold an evidentiary hearing before denying his motion to suppress his confession. Defendant concedes the trial court asked if he wanted such a hearing and he declined. The trial court accordingly decided the suppression issue based on the transcripts and tapes the parties had submitted to the court. We find no abuse of discretion on this score.

Defendant argues that his confession is inadmissible under *Edwards v. Arizona*, *supra*, 451 U.S. 477, because he requested counsel on arrest and did not voluntarily initiate further contact with the detectives. The record is to the contrary: It shows defendant did initiate further contact by requesting an audience with Detective West and Sergeant Reinstadler, who then renewed *Miranda* warnings before proceeding with the interview. Indeed, West reminded defendant before the interview began in earnest that defendant had initially asked to speak with an attorney and confirmed that

he now wanted to make a statement to law enforcement. Defendant said he did.

Defendant claims, however, that police coerced him into reinitiating contact through the medium of his mother, who had cajoled him over the phone to talk to detectives to secure his release. This claim is utterly devoid of merit. Defendant points to no evidence suggesting that the police had anything to do with the conversation with defendant's mother, except insofar as they facilitated the conversation by allowing defendant to make a collect call. There is nothing coercive about allowing a detained suspect to call his mother.

Defendant also contends he did not act knowingly, intelligently, and voluntarily when he waived his *Miranda* and *Edwards* rights, due to substantial memory deficits as well as his limited experience, education, young age, and below average intelligence. Defendant did not present any evidence of mental or other impairments at the suppression hearing, so he cannot now claim the trial court erred in failing to consider them. And defendant points to nothing else in the record, including his age (21 at the time of the interview), that would have raised questions about his ability to understand his rights as they had been explained to him. The state satisfied its burden of demonstrating by a preponderance of the evidence that defendant's waiver was knowing, intelligent, and voluntary. (See *People v. Nelson* (2012) 53 Cal.4th 367, 375; *People v. Williams* (2010) 49 Cal.4th 405, 425, 428.)

Defendant contends that even if he voluntarily reinitiated contact with the detectives and waived his *Miranda* rights, the detectives later improperly failed to honor his requests to cut off questioning. Defendant points to two episodes in particular.

The first episode occurred when defendant asked detectives: "Do you mind if I go back to my cell and think about tonight and talk to you guys tomorrow . . . ." Defendant contends that at this point, detectives should have stopped questioning him. But after a suspect has waived his *Miranda* rights, officers are not required to cease questioning unless the suspect invokes his rights unambiguously and unequivocally. (*Sanchez*, *supra*, 7 Cal.5th at p. 49.) Defendant's question did not amount to an unambiguous and unequivocal invocation of the right to cut off questioning. Nor did the colloquy that followed. Sergeant Reinstadler told defendant that once he was "arraigned, we can't talk to you. That's the bottom line. I mean, if you want to tell us something, I'm being honest with you, this is your opportunity to do it. This is it." Defendant reiterated his request to speak with the detectives the next day and was told "No. I know why. [¶] [Y]ou won't want to talk to us tomorrow because somebody's going to get to you, telling you not to talk to us. Play the games that we know people play. And then, the next thing you know, you're looking at you being triggerman." Defendant asked clarifying questions of the detectives about whether he could speak to them with anonymity, and they answered his questions. The conversation continued from there. Because defendant never unambiguously invoked his right to stop the interview, the detectives were under no obligation to do so.

Defendant invokes *People v. Neal* (2003) 31 Cal.4th 63 in support of his argument, but that case is easily distinguished. There, the defendant repeatedly and clearly invoked his rights to silence and counsel without waiving his rights under *Miranda*, only to be ignored by the questioning officer, who hoped to obtain evidence for impeachment purposes. (*Id.* at

p. 74.) Here, by contrast, defendant voluntarily waived his *Miranda* rights at the outset of the conversation and did not unambiguously invoke his right to stop the interview.

The second episode occurred after defendant had spoken to the detectives for some time about how he had learned he could erase his debt to Hollywood in exchange for traveling to Santa Barbara to kill a person unknown to him. When the detectives asked defendant what happened next, defendant said, "You guys know what happened. I think I'm going to stop there for now. Can I get some more water, please?" Defendant argues that even if the detectives were not obligated to stop before, they were obligated to stop questioning him at this point. But once again, defendant never unambiguously invoked his right to silence. The detectives accommodated his request for water, and defendant told them a number of things: He thought the quality of water he had been given was poor; he described the love he had for his eight-year-old brother; he discussed his mother and her dependency upon him, his incarcerated brother, and his drug-addicted sister, all to justify his hesitancy to add to the story he had thus far provided to the detectives regarding the crime. Sergeant Reinstadler reminded defendant about his right to remain silent. Detective West offered to let defendant "collect [his] thoughts," and then, to clarify defendant's meaning, asked whether defendant wanted only a short break or to cut off the conversation altogether. Defendant asked for a cigarette, saying, "I'd love just to take a break. Do some more thinking." The detectives and defendant discussed whether defendant wanted a break overnight or just for a few moments, and defendant indicated the break he had in mind would be overnight.

Sergeant Reinstadler told defendant a break between "now and tomorrow" would be "too late" because "[o]nce the lawyer contacts you, we are precluded from speaking with you anymore, period." Defendant asked whether a lawyer would contact him the next day, and the detective explained it was "normal" and "their job" to do so. Defendant then asked the detectives whether he had been helpful to them, and Reinstadler explained that defendant had an opportunity to be of more help, to fill in more "pieces of the puzzle." The conversation continued. At no time did defendant unambiguously signal a desire to end the interview, even though the detectives gave him ample opportunity to do so.

Defendant contends that the detectives improperly coerced him into continuing the conversation when they told him they would be "precluded" from talking to him again if he chose to take a break until the next day. Defendant contends that the detectives' statements were deceptive and that their deception undermined the voluntariness of his statements. "While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness." (*People v. Hogan* (1982) 31 Cal.3d 815, 840–841.) Here, it was certainly an exaggeration for the detectives to tell defendant they would not be able to speak with him again, "period," if he took a break and spoke with a lawyer; represented suspects can, of course, speak with law enforcement officials if they choose. It is unclear whether the detectives intended to deceive defendant on this point; what the detectives may have meant to convey is that a lawyer would likely advise against speaking with detectives—meaning that, from their perspective, they almost certainly

would not have another opportunity to speak with defendant. But in any event, insofar as they spoke in absolutes, the detectives overstated the case. Regardless, we are not persuaded the statements rendered defendant's statement involuntary. Just before the challenged exchange, the detectives had reminded defendant that he had the right to remain silent and the right to speak with a lawyer. Defendant responded to the exchange by asking for clarification about when a lawyer would contact him, then went on to ask whether he had been helpful to the detectives, and the conversation continued from there. The record does not support defendant's claim that he was coerced into continuing to speak with detectives after he had asked for a break.

Defendant next contends the detectives employed other coercive interrogation tactics that rendered his confession involuntary. (See *People v. Jackson*, *supra*, 1 Cal.5th at p. 340 [" ' "A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence." ' "].) In particular, he argues that Detective West and Sergeant Reinstadler impliedly threatened him by mentioning the death penalty and that they improperly induced his confession by exaggerating the evidence against him.

" 'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." ' " (*People v. Williams*, *supra*, 49 Cal.4th at p. 436.) As the trial court found, there was nothing coercive about the detectives' brief—and accurate—acknowledgment that the death penalty was a potential punishment for the crimes with which defendant

was charged, and it does not appear that the mention of the death penalty prompted defendant's confession. Nor is urging a defendant to tell his story before matters go any further an impermissible law enforcement tactic. (*Id.* at pp. 438–439, 443; *Carrington*, *supra*, 47 Cal.4th at p. 171.)

As for defendant's claim that the detectives improperly exaggerated the strength of the evidence against him, defendant points to an exchange in which detectives said others had told them that defendant gagged and shot the victim and dug the grave, which caused defendant to blurt out, "[T]he only thing I did was kill him." As defendant acknowledges, however, "the use of deceptive comments does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is ' " 'of a type reasonably likely to procure an untrue statement.' " ' " (*People v. Williams*, *supra*, 49 Cal.4th at p. 443.) Defendant fails to explain why, in his view, the detectives' questioning fits that description. The only element of deception in the relevant exchange was the detectives' assertion that others had told them defendant had dug Nick's grave, but defendant fails to explain how the assertion undermined the voluntariness of defendant's claim to have "only" killed Nick.

Defendant's final challenge to the admission of his confession concerns the introduction of the last exchange that took place between the detectives and defendant after defendant told the detectives, "I think I want to stop there. I think you guys got a pretty good picture." In the colloquy that followed, Reinstadler asked defendant if "there ever [was] a time when right before you pulled the trigger that you just thought, you know I shouldn't do this? This is wrong. Because I haven't

heard that from you." Defendant asked if the detectives wanted his "honest[]" response and when they answered in the affirmative, he told them, "Hell, yes. Right before." Defendant now argues that this exchange—what he refers to as "side B"[9] evidence—should have been excluded, or an effective limiting instruction should have been given.

The Attorney General does not dispute that defendant had unequivocally invoked his right to remain silent before this exchange. Nonetheless, we conclude defendant's claim lacks merit. As the high court made clear in *Harris v. New York* (1971) 401 U.S. 222, 225–226, "although statements elicited in violation of *Miranda* are generally not admissible, statements that are otherwise voluntarily made may be used to impeach the defendant's trial testimony." (*People v. Case* (2018) 5 Cal.5th 1, 18.) Defendant argues that the trial court should have excluded the evidence altogether as a sanction for the detectives' deliberate violation of defendant's right to remain silent. But even if defendant's characterization were correct, the "side B" evidence would nevertheless be admissible as impeachment evidence. (*People v. Peevy*, *supra*, 17 Cal.4th at p. 1188; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1076.)

As for defendant's argument about jury instructions, the jury was, in fact, instructed that it was to consider the "side B" evidence only for purposes of impeachment, and not as evidence of guilt. To the extent defendant would have preferred for the instruction be phrased differently to make it more effective, it was his obligation to request a correction of the instruction given

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[9] This exchange was captured on the second side, or "side B" of the audiotape used to record Detective West's and Sergeant Reinstadler's interview with defendant.

or seek a new, more specific instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1308.) Having done neither, defendant has forfeited the claim on appeal. Accordingly, we conclude no error arose from the introduction of the "side B" evidence for impeachment purposes.

*3. Defendant's Testimony*

Defendant argues the court violated his rights under the Fifth and Sixth Amendments to the United States Constitution by compelling him to testify as a foundation for testimony by his expert, Dr. Michael Kania, that his confession was false. We conclude his claim is forfeited and lacks merit in any event.

The defense proposed calling Dr. Kania to testify that defendant's confession was false. The trial court held a hearing under Evidence Code section 402 to determine the admissibility of that testimony.[10] During the hearing, the court and parties discussed the possibility of defendant testifying before Dr. Kania to provide a foundation for Dr. Kania's testimony. Specifically, the court indicated its assumption that "defendant is going to testify that he doesn't remember giving that interview" to police to contextualize Dr. Kania's opinion about anxiety causing amnesia of the sort defendant alleges he suffered. The defense did not object at this juncture or indicate

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[10] Evidence Code section 402, subdivision (a) provides: "When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article." Subdivision (b) provides: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests."

there was uncertainty about whether or when defendant planned to testify. The court "made it clear that I don't believe that [Dr. Kania] can get on the stand and testify to things that he was told [while interviewing defendant] and, in effect, present the defendant's defense, the defendant's own testimony through the interview, I've said he can't do that." Defendant raised no objection to the court's characterization. The court informed counsel that Dr. Kania's testimony would be limited to his opinion about defendant's anxiety and amnesia, not the content of Dr. Kania's interview with defendant. The court explained, "I'm not going to let him [Dr. Kania] testify as to circumstances, the things that he was told by the defendant. The defendant can testify to those things and he [defendant] can be asked questions about it." The court further rejected defense counsel's argument that Dr. Kania should be permitted to testify as to whether or not defendant gave a false confession, concluding the issue was one for the jury to decide. Defense counsel responded: "We understand your ruling. We object to it on state and federal due process grounds, but we accept it."

Defendant now claims that he testified at trial only because the court compelled him to do so on pain of forfeiting the ability to present Dr. Kania's expert testimony. This compulsion, he argues, violated his Fifth and Sixth Amendment rights. The record does not support the claim. It is true that the trial court observed that an adequate foundation would need to be laid for the expert's testimony. It is also true that the trial court at various times appeared to assume—without contradiction from defense counsel—that defendant would supply the necessary foundation through his testimony. But the trial court did not rule that Dr. Kania's testimony would be permitted if and only if defendant took the stand, nor did

defendant object on the ground that the trial court had, in effect, issued such a ruling. Nor has defendant established it would have been futile to raise such an objection; had he objected, the court could have considered whether, as he now claims, defendant's testimony was in fact unnecessary to lay the foundation for Dr. Kania's opinion. By failing to object in the trial court, defendant has forfeited the claim on appeal.

To the extent defendant argues it was error for the court to make admission of Dr. Kania's testimony contingent on the introduction of foundational evidence, the claim lacks merit. Defendant sought to present expert testimony that he suffered anxiety-induced amnesia and did not recall confessing. But without some foundational evidence that defendant did not remember the confession, Dr. Kania's opinion would lack relevance. Dr. Kania could not be the source of the evidence that defendant did not remember his confession because that information would be the product of inadmissible hearsay, having originated from Dr. Kania's interviews with defendant. (Evid. Code, § 1200.) An adequate foundation was, in fact, required.

Despite defendant's arguments to the contrary, nothing in that conclusion contradicts the high court's teachings in *Crane v. Kentucky* (1986) 476 U.S. 683, 689. In that case, the high court held that when the prosecution's case was based on the defendant's confession, it was error to preclude the defendant from introducing evidence about the manner in which his confession was obtained as part of his defense. (*Id.* at p. 691.) But *Crane* does not require the admission of any and all defense-proffered evidence about the circumstances of a confession, without regard to the ordinary rules of evidence.

Defendant also argues that the trial court violated his constitutional rights by effectively requiring him to testify before Dr. Kania. Defendant relies on *Brooks v. Tennessee* (1972) 406 U.S. 605, in which the United States Supreme Court struck down a Tennessee statute requiring a defendant to testify first or not at all because it deprived "the accused and his lawyer" of the "opportunity to evaluate the actual worth of their evidence" and make tactical decisions after observing the testimony of other defense witnesses. (*Id.* at p. 612.) Here, the trial court placed no comparable restrictions on defendant. The court and parties both appear to have simply assumed that defendant would testify before Dr. Kania, so that Dr. Kania's testimony could be properly contextualized. But defendant never gave any indication that he planned or hoped to testify after Dr. Kania. Because defendant raised no concerns, we conclude this objection is forfeited on appeal. (See, e.g., *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 371 (*Bryant*).)

Defendant also claims that the court improperly limited his own direct testimony in a few instances. In some of these instances, review of the record reveals defendant is simply incorrect. For example, he claims he was not permitted to answer whether he would have been willing to go to prison for life in Hollywood's place at the time he was arrested. Although there was an objection, the question was rephrased, and defendant was given an opportunity to, and did, respond. As for the claim that defendant was improperly precluded from explaining what he meant by certain words he used in his confession, there was nothing improper in this ruling. The trial court permitted defendant to testify as to the truthfulness of his incriminating statements, but not what he meant at the time he

said them, since he claimed not to recall having uttered the words in the first place. The trial court did not abuse its discretion by ruling that defendant could not speculate about what he might have meant by words he claimed not to remember saying. (See *People v. Riggs* (2008) 44 Cal.4th 248, 289 [trial court has discretion to determine the relevance of evidence].) Defendant claims the ruling violates *People v. Webb* (1993) 6 Cal.4th 494, 535, in which we said that "a defendant's absolute right to testify cannot be foreclosed or censored based on content." But *Webb* concerns a defendant's right to testify against the advice of counsel, where such testimony will have a deleterious effect necessitating special jury instructions. *Webb* neither holds nor suggests that a testifying defendant is entitled to speculate about matters of which he or she claims no direct knowledge.

*4. Expert Witness Testimony*

Defendant argues that the trial court erred by limiting Dr. Kania's and Dr. Glaser's testimony. With regard to Dr. Kania, defendant contends the trial court categorically excluded testimony regarding defendant's statements during certain interviews, which defendant claims was admissible for nonhearsay purposes. He alleges the court erred by prohibiting Dr. Kania from explaining that accepting telephone calls from his mother provoked anxiety in defendant. He also alleges Dr. Kania was prohibited from describing the effects of defendant's personality disorders, his relationship with Hollywood, his sleep deprivation, and drug intoxication on his alleged false confession. Defendant fails to provide any citation to the record for these alleged prohibitions and makes no assertion that he made contemporaneous objections, and we have not located any passage showing that defendant attempted

to offer this testimony but was precluded from so doing. Both by failing to interject contemporaneous objections and by failing to support his appellate arguments with record citations, defendant has forfeited any claim of error on appeal. (See *People v. Tully*, *supra*, 54 Cal.4th at p. 1061; *People v. Stanley* (1995) 10 Cal.4th 764, 793.) In any event, whatever errors defendant now claims occurred could not have affected the outcome of the case; Dr. Kania testified at length about defendant's alleged anxiety-inducted amnesia based on his evaluation of defendant.

Defendant also claims the trial court erred by permitting Dr. Glaser to testify for the prosecution whether, in his opinion, defendant's claimed amnesia was a fabrication, while "Dr. Kania was not permitted to share his opinion that [defendant's] confession was false in most respects." There is, however, no inconsistency in the court's treatment of the two experts. Dr. Kania was permitted to offer his opinion on precisely the same subject as Dr. Glaser, testifying that he believed defendant's claim of amnesia was credible.

Finally, defendant contends the court erred by denying his request to recall Dr. Kania for purposes of responding to the prosecutor's experts' reports and their testimony. We review for abuse of discretion a trial court's decision to exclude surrebuttal evidence, and we see none here. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) Defendant does not explain what it was, precisely, about the experts' reports or testimony that required a further response via additional testimony from Dr. Kania, nor did defendant offer such an explanation to the trial court. The claim is therefore forfeited on appeal. Defendant also argues that Dr. Kania should have been permitted to testify in surrebuttal as to the content of defendant's interviews with him in order to respond to the prosecution's evidence that

defendant's claimed amnesia was a fabrication. The trial court did not abuse its discretion in ruling that this was largely territory that had already been covered and did not require additional surrebuttal evidence. If any error occurred, it was not prejudicial. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*).)

*5. Psychiatric Examination*

Defendant argues the trial court erred by compelling him to undergo a prosecution-conducted psychiatric examination. The Attorney General concedes the compelled examination was error but argues it did not prejudice defendant. We agree.

Before trial, the prosecution moved to compel defendant to undergo a psychiatric examination by prosecution experts. In support of the motion, the prosecution argued defendant had placed his mental state at issue by claiming he gave a false confession induced by various psychological factors. The defense objected. After hearing argument, the court granted the motion. The court opined that when "a defendant presents expert psychological or psychiatric evidence" explaining his conduct, "the prosecution is entitled to rebut that evidence, and the only realistic manner in which the prosecution can do that is to be entitled to have a psychiatric evaluation of its own in order to prepare an expert to testify."

The prosecution retained Drs. Glaser and Chidekel, both of whom testified for the prosecution in rebuttal. Dr. Glaser testified that after examining defendant and reviewing a great deal of case information, he concluded defendant suffered from "no current major mental illness," but had low self-esteem, was uncomfortable acknowledging his feelings, and was willing to suffer "unpleasant conditions" to remain near the person on

whom he was dependent. Defendant had no disorders rendering it more likely that he would falsely confess. Dr. Glaser also evaluated defendant for amnesia and concluded defendant was malingering because he recalled nothing even after being given cues from the transcripts.

Dr. Chidekel evaluated defendant, administering numerous psychological tests, and determined defendant suffered from "avoidance [*sic*] personality disorder, with self-defeating and dependent features." Based on the tests administered, Dr. Chidekel was otherwise unable to diagnose defendant with any neuropsychological condition that interfered with his "ability to see, to understand, or to be able to communicate effectively."

We have previously described the shifts in the law governing court-ordered psychological examinations like the one ordered in this case. "At the time of defendant's trial in [2001], decisional law authorized trial courts to order a defendant who placed his or her mental state in issue to submit to mental examination by prosecution experts. [Citation.] This court later held that after the 1990 passage of Proposition 115 (the Crime Victims Justice Reform Act), which resulted in the enactment of the criminal discovery statutes, the courts 'are no longer free to create such a rule of criminal procedure, untethered to a statutory or constitutional base.' (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116 (*Verdin*).) We have applied *Verdin* retroactively." (*People v. Clark* (2011) 52 Cal.4th 856, 939, fn. omitted (*Clark*).)

"Shortly after *Verdin*, the Legislature amended [Penal Code] section 1054.3 to expressly authorize courts to compel a mental examination by a prosecution-retained expert. (See

[Pen. Code,] § 1054.3, subd. (b), as amended by Stats. 2009, ch. 297, § 1.)" (*People v. Banks* (2014) 59 Cal.4th 1113, 1193.) But in *Banks*, we concluded that *Verdin* continues to apply to cases predating that amendment. (*Banks*, at p. 1193.) This is such a case. For that reason, the Attorney General concedes that "*Verdin* compels the conclusion that it was error under state law to require [defendant] to submit to mental examinations by prosecution experts." It follows that it was also error for the trial court to admit testimony by the prosecution's experts based on their interviews with defendants. (*Clark*, *supra*, 52 Cal.4th at p. 940.) The Attorney General urges, however, that these errors were harmless under the relevant standard articulated in *Watson*, *supra*, 46 Cal.2d at page 836. We agree.

In *Clark*, *supra*, 52 Cal.4th at page 940, we rejected the argument that errors in mandating examination by prosecution experts are subject to review under the more demanding standard for federal constitutional error set forth in *Chapman v. California, supra*, 386 U.S. 18. We explained that we were aware of no decision "holding that the Fifth Amendment or any other *federal constitutional* provision prohibits a court from ordering a defendant who has placed his or her mental state in issue to submit to a mental examination by a prosecution expert." (*Clark*, at p. 940.) "We thus assess the errors for prejudice under the standard for state law error, inquiring whether there is a reasonable probability that the outcome of trial would have been more favorable to defendant had the court not ordered him to submit to examinations by" prosecution-retained experts. (*Id.* at pp. 940–941.)

We conclude it is not reasonably probable that the outcome of the trial would have been more favorable had defendant not undergone examinations conducted by prosecution-retained

experts. Defendant gave his friend Casey Sheehan a detailed confession to Nick's murder and confessed to the detectives that "the only thing he did was kill" Nick. The details of defendant's confession to Sheehan were corroborated by witnesses who spent time with Nick at the Lemon Tree Inn before he was killed and those who found his body in a shallow grave covered by a bush. On the other hand, defendant's claim of amnesia was a highly selective one: He claimed that although he remembered enough of the events surrounding the crimes to exonerate himself and shift blame to his codefendants, he experienced a brief lapse in memory that happened to coincide with the period during which he confessed to police detectives. It is not reasonably probable that, had the prosecution's experts not testified to their findings based on their examination of defendant, the jury would have discredited defendant's confessions and instead credited his claim of amnesia. Under the circumstances, we conclude there is no reasonable probability that the jury would have reached a result more favorable to defendant had the court not issued an order requiring him to submit to mental examination by Drs. Glaser and Chidekel and had these experts not testified against defendant based on those examinations.

*6. Prosecutorial Misconduct During the Guilt Phase Closing Argument*

Defendant alleges the prosecutor engaged in numerous instances of misconduct during his closing argument. He failed to object to nearly all such instances and has therefore forfeited these claims on appeal. In any event, no misconduct occurred.

As we have explained, to preserve a claim of prosecutorial misconduct for appeal, " ' "a criminal defendant must make a timely and specific objection and ask the trial court to admonish

the jury to disregard the impropriety." ' [Citation.] The lack of a timely objection and request for admonition will be excused only if either would have been futile or if an admonition would not have cured the harm." (*People v. Powell* (2018) 6 Cal.5th 136, 171.) " ' "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*Id.* at p. 172.) To the extent the alleged instances of misconduct were not forfeited by defendant's failure to object, we conclude none infected the trial with unfairness or deceived the court or jury.

Defendant first contends that the prosecutor argued "facts not in evidence" when he stated in closing argument that defendant did " 'considerably more' " than shoot the victim and was " 'probably involved in the taping and the burial process, if not digging the grave.' " Defendant did not object to this argument at trial and does not argue that objection would have been futile. The claim is therefore forfeited. (See *People v. Powell*, *supra*, 6 Cal.5th at p. 171.)

But the claim lacks merit in any event. Defendant's argument presumes that the only basis for the prosecutor's argument was certain statements conveyed by Pressley to Detective Jerry Cornell. Detective Cornell testified to some of Pressley's out-of-court statements at trial, but because Pressley himself did not testify, Detective Cornell was not permitted to

relay certain statements implicating defendant in the grave-digging and burial. When Detective Cornell nevertheless testified that Pressley had said "they"—presumably meaning both Pressley and defendant—had buried the victim, the trial court admonished the jury to ignore the use of the pronoun "they" and to consider only that portion of Detective Cornell's statement relaying that Pressley went to Lizard's Mouth and dug the grave. Defendant argues that the prosecution violated the court's ruling by referring to Pressley's statements in closing argument.

Pressley's statements were not, however, the only basis for the argument. Sheehan told the jury that defendant came to him asking for advice and told him Nick had been shot "somewhere in the middle of nowhere." Defendant also told Sheehan that after shooting the victim, he put a bush over him. This testimony was consistent with the evidence of where and how hikers found Nick's body. The prosecutor's reference to defendant "probably" doing more than shooting the victim was a reasonable commentary on the evidence and does not constitute misconduct. (See *People v. Farnam* (2002) 28 Cal.4th 107, 168.)

Defendant next argues that the prosecutor committed misconduct by telling the jury that none of the experts, including Dr. Kania, testified that defendant gave a false confession. Defendant objected to the argument on the ground that the prosecution was "arguing the Court's restriction on the evidence." In response, the trial court clarified for the jury that none of the experts had so testified because the court had previously ruled that no expert would be permitted to give an opinion as to whether or not a false confession was given in this case; the question was instead one for the jury to decide. Both

the prosecutor and defense counsel thanked the court for the clarification, and the prosecutor resumed the closing argument.

To the extent defendant now believes the trial court's clarification was insufficient, he has forfeited the objection. (*People v. Powell*, *supra*, 6 Cal.5th at p. 171.) But even were his claim preserved, we would find no error. The prosecutor's remarks were accurate, if susceptible to misunderstanding. The court cleared up any possible misunderstanding with its clarification. (See *ibid.*)

Defendant also argues that the prosecutor referred in closing argument to "side B" of defendant's confession, during which defendant was asked whether it occurred to him that what he was doing was "wrong" and defendant replied, "Honestly? [¶] Hell yes. Right before." Defendant has forfeited any challenge to the prosecutor's argument regarding "side B" of defendant's confession by failing to object. (*People v. Powell*, *supra*, 6 Cal.5th at p. 171.)

Defendant argues that the prosecutor committed misconduct during the guilt phase closing argument by making improper remarks about witness Sheehan, who had testified under a grant of immunity. First, the prosecutor argued the jury could be assured that Sheehan would be even more truthful than other witnesses because he was subject to greater consequences for lying. Second, the prosecutor argued the jury could infer that Sheehan would not have needed immunity if defendant were innocent because otherwise Sheehan would have been harboring a friend, not a fugitive. Defendant objected, claiming the prosecution's argument was speculative. The court sustained the objection and admonished the jury to disregard the prosecutor's remarks. Defendant now renews his

objection to the prosecutor's remarks, arguing the prosecutor impermissibly vouched for Sheehan based on the prosecutor's own personal beliefs (and decisions about how and why to grant witness immunity), rather than evidence in the record. (See *People v. Martinez* (2010) 47 Cal.4th 911, 958.) But defendant offers no persuasive reason to believe the trial court's admonition to disregard the prosecutor's brief, passing remarks was insufficient to cure any unfairness. We see no basis for reversal.

Finally, defendant argues that the prosecutor committed misconduct by spending six transcript pages describing the "original" kidnap, in which defendant was not involved. In fact, the prosecutor spent less than two transcript pages describing the kidnapping, and some of the events described involved defendant. The prosecutor referred to the victim's abduction from West Hills, his time in Santa Barbara, and his murder, arguing "there is a kidnapping at the very beginning, there's a kidnapping at the very end. Is there a kidnapping in between? Okay." The defense did not object to this discussion. Assuming for the sake of argument that this claim is not forfeited despite the lack of specific, contemporaneous objection (see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1339), we find no misconduct because the prosecutor has "wide latitude to comment on the evidence during closing argument." (*People v. Peoples* (2016) 62 Cal.4th 718, 797.) Discussion of a significant aspect of the criminal endeavor that culminated in the victim's death during closing argument constitutes a reasonable comment. (*Ibid.*)

### *7. Instructional Error Concerning Accomplices and Immunity*

Defendant argues the trial court erred by failing to modify CALJIC No. 3.16, concerning accomplice testimony, and

CALJIC No. 2.20, concerning witness credibility. Defendant also argues the court erred by failing to give CALJIC No. 3.19, concerning the determination whether a corroborating witness is an accomplice. We find no grounds for reversal.

*a. CALJIC No. 3.16*

Penal Code section 1111 provides that an accomplice's testimony cannot support a conviction without corroboration by other evidence "as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The statute defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (*Ibid.*; *People v. Gomez* (2018) 6 Cal.5th 243, 307; see *id.* at p. 308.)

On November 2, 2001, defendant submitted his list of proposed jury instructions, which included CALJIC No. 3.16, Witness Accomplice as Matter of Law. Defendant listed Rugge, Pressley, Hollywood, Sheehan, and Affronti among the witnesses to be included in the instruction. But when the jury was ultimately instructed with CALJIC No. 3.16, the instruction named only two of these individuals: "If the crimes charged were committed by anyone, Jesse Rugge and Graham Pressley were accomplices as a matter of law and their testimony is subject to the rule requiring corroboration."

The record does not reveal why the instruction named only Rugge and Pressley. Defendant explains that the trial court conducted an " 'informal' " conference with the attorneys to address jury instructions, and the content of that conference was not settled or recorded. Defendant argues he should not be

faulted for the lack of recorded proceedings and contends the denial of his request to name Skidmore, Hollywood, and Sheehan in CALJIC No. 3.16 should be deemed preserved for appeal.

Even assuming the claim has been adequately preserved, the claim lacks merit. Although the informal conference may not have been recorded, defense counsel conceded on the record that Sheehan was not an accomplice and was therefore not an appropriate person to include among those listed in CALJIC No. 3.16. And although Skidmore and Hollywood "meet [Penal Code] section 1111's definition of an accomplice" in that "[e]ach was liable to prosecution . . . for the identical offenses charged against defendant" (*People v. Williams* (1997) 16 Cal.4th 635, 682), neither Skidmore nor Hollywood provided statements requiring corroboration, which is the concern of CALJIC No. 3.16.

"A court must instruct on the need for corroboration only for accomplice *testimony* ([Pen. Code,] § 1111); ' " 'testimony' within the meaning of . . . [Penal Code] section 1111 includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances." ' " (*People v. Williams*, *supra*, 16 Cal.4th at p. 682.) " 'The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.' [Citation.] 'On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as "testimony" and hence need not be corroborated under . . . section 1111.' " (*People v. Williams* (1997) 16 Cal.4th 153, 245.)

Here, neither Skidmore nor Hollywood testified at trial, but defendant identifies various out-of-court statements they made that were admitted through other witnesses. For example, defendant himself testified Skidmore had told him "Ben's brother had been killed" several days before Nick's body was found. Other witnesses testified to statements Hollywood made to his fellow codefendants and others about Nick's kidnap. And witnesses reported statements Hollywood made to his father and Hogg in which Hollywood described the crime without owning up to his role in it. But none of these statements were made under "suspect circumstances" undermining their reliability. (*People v. Williams*, *supra*, 16 Cal.4th at p. 682 ["[S]tatements made in the course of and in furtherance of the conspiracy were not made under suspect circumstances and therefore were sufficiently reliable to require no corroboration."].) Accordingly, we find no error in the trial court's decision not to name Skidmore and Hollywood in the jury instruction concerning corroboration of accomplice testimony.

*b. CALJIC No. 3.19*

Defendant also requested that the jury be instructed with CALJIC No. 3.19, entitled "Burden to Prove Corroborating Witness Is an Accomplice." The instruction states: "You must determine whether the witness [blank] was an accomplice as I have defined that term. [¶] The defendant has the burden of proving by a preponderance of the evidence that [blank] was an accomplice in the crime[s] charged against the defendant." (CALJIC No. 3.19.) Defendant now says he proposed filling the blank with witness Casey Sheehan and argues that whether Sheehan was an accomplice constituted a question of fact the jury should have been permitted to determine.

We conclude the claim of error fails because, as noted above, defense counsel agreed on the record that Sheehan—who was not charged with any of the same offenses as defendant or his codefendants—was not an accomplice. In any event, any error would have been harmless because the jury was adequately instructed concerning the definition of accomplices pursuant to CALJIC No. 3.10, which states that "[a]n accomplice is a person who [is] . . . subject to prosecution for the identical offense charged . . . against the defendant on trial by reason of . . . [being a member of a criminal conspiracy]," and the need for corroboration of accomplice testimony. It is not reasonably probable the jury would have returned a more favorable result had it also been instructed with CALJIC No. 3.19. (*Watson*, *supra*, 46 Cal.2d at p. 837 [setting forth standard for evaluating harmlessness of state law error]; see *People v. Carpenter* (1997) 15 Cal.4th 312, 393 ["Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution"].)

c. *CALJIC No. 2.20*

At trial, the jury was instructed with CALJIC No. 2.20 concerning the "believability of a witness." The instruction told jurors to "consider anything that has a tendency reasonably to prove or disprove the truthfulness" of witness testimony and listed numerous factors, including "demeanor," whether the witness had "bias, interest, or other motive" to testify, and "[w]hether the witness is testifying under a grant of immunity." Defendant argues that, unbeknownst to the jury, a number of witnesses in addition to Sheehan—namely, Adams-Young, Affronti, Carpenter, Hogg, John Hollywood, and Lasher—received immunity in exchange for their testimony. He contends

the court should have modified CALJIC No. 2.20 to specifically identify all of the witnesses testifying under a grant of immunity and to advise the jury to view their testimony with " 'care and caution.' "

At trial, defendant made no request to identify any declarant other than Sheehan who testified under a grant of immunity and thus forfeited that claim. But the claim fails regardless. There is no duty to instruct a jury that the testimony of immunized witnesses must be viewed with care and caution. (*People v. Daniels* (1991) 52 Cal.3d 815, 867, fn. 20 ["Defendant points to no authority requiring the court to instruct the jury that immunized-witness testimony is to be viewed with distrust. We have held that the court has no such duty to instruct sua sponte."]; see also *People v. Leach* (1985) 41 Cal.3d 92, 106.) It follows that the trial court did not err by failing to convey to the jury, via modification of CALJIC No. 2.20, which witnesses were testifying under a grant of immunity.

Finally, and in any event, the trial court's failure to modify CALJIC No. 2.20 could not have prejudiced defendant. The role these six witnesses played in the prosecution's case was minimal when compared with the substantial evidence of guilt presented at trial unrelated to their testimony, including defendant's own detailed confession and Sheehan's testimony that defendant killed the victim. Moreover, the jury was instructed to consider the witnesses' "bias, interest, or other motive" for testifying. (CALJIC No. 2.20.) It is not reasonably probable defendant would have achieved a more favorable result if jurors viewed the testimony of these six peripheral witnesses with somewhat greater caution. (See *People v. Lewis* (2001) 26 Cal.4th 334, 371; *Watson*, *supra*, 46 Cal.2d at p. 836.)

### D. Special Circumstances Claim

At one time, proof of the kidnap-murder special circumstance required that the prosecution show a defendant had an independent felonious purpose, " 'that is, the commission of the [kidnapping] felony was not merely incidental to an intended murder.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 62–63; *id.* at p. 117; see *People v. Brents*, *supra*, 53 Cal.4th at pp. 608–609.) The statute was amended to eliminate this independent felonious purpose requirement in 1998, five months before the crimes at issue here. (See Pen. Code, § 190.2, subd. (a)(17)(M), added by Stats. 1998, ch. 629, § 2, p. 4165, and approved by voters, Primary Elec. (Mar. 7, 2000); *Brooks*, at p. 63, fn. 8; *Brents*, at pp. 608–609, fn. 4.)[11] Nonetheless, the jury in this case was instructed to find an independent felonious purpose to kidnap. Defendant now argues the evidence was insufficient to support the jury's finding. And although he acknowledges that the statute then in force did not, in fact, require the jury to make such a finding, defendant contends that without the independent felonious purpose requirement, the kidnap-murder special circumstance is unconstitutional. We reject the first part of this argument, which makes it unnecessary to address the second: Because the jury was instructed on the independent felonious purpose requirement and because the evidence was sufficient to support the jury's finding that the requirement was

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[11] As amended in 1998, Penal Code section 190.2, subdivision (a)(17)(M) provides, "To prove the special circumstance[] of kidnapping[,] . . . if there is specific intent to kill, it is only required that there be proof of the elements of th[at] felon[y]. If so established, [the] special circumstance[] [is] proven *even if the felony of kidnapping . . . is committed primarily or solely for the purpose of facilitating the murder*." (Italics added.)

satisfied, we need not decide here whether the kidnap-murder special circumstance is constitutional in the absence of an independent felonious purpose requirement. (See, e.g., *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1102 ["Our jurisprudence directs that we avoid resolving constitutional questions if the issue may be resolved on narrower grounds."]; see *id.* at p. 1103.)

The jury here was instructed that, to find the special circumstance of kidnap felony murder true, "it must be proved, one, the murder was committed while the Defendant was engaged in the commission of a kidnapping; or, two, the murder was committed in order to carry out or advance the commission of the crime of kidnap, or to facilitate the escape therefrom, or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the kidnap was merely incidental to the commission of the murder."[12]

" 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have

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[12] At oral argument, defendant argued for the first time that this instruction was defective because the "or" in the first sentence of the instruction would have conveyed to the jury that it could find the special circumstance true so long as it concluded that "the murder was committed while the Defendant was engaged in the commission of a kidnapping," even if it did not find that defendant had an independent purpose to kidnap Nick. While it does appear the disjunctive "or" in the first sentence was included in error, we see no likelihood that the jury was confused by it. The second sentence of the instruction unambiguously informed the jury that "the special circumstance . . . is not established if the kidnap was merely incidental to the commission of the murder." The instruction thus expressly told the jurors that they must find an independent felonious purpose to find the special circumstance true.

found [this] element[] of the crime beyond a reasonable doubt." ' [Citation.] 'Substantial evidence' is evidence which is ' "reasonable in nature, credible, and of solid value." ' " (*People v. Morgan* (2007) 42 Cal.4th 593, 613–614.)

Defendant's sufficiency of the evidence argument depends on the premise that the evidence established two separate kidnappings, only the second of which involved defendant. Defendant argues that "the jury may have applied an incorrect theory if it believed [defendant] committed the murder in order to assist Hollywood in avoiding detection for the August 6th completed kidnap." And to the extent the jury instead focused on defendant's later act of moving Nick to the gravesite at Lizard's Mouth, defendant argues there was insufficient evidence to support a finding that defendant had an independent purpose to kidnap Nick: "[N]o properly-instructed rational trier of fact could have found that this 'second kidnap' (if it were a 'kidnap') was not merely incidental to the murder, with the murder being the defendant's primary purpose."

Defendant's argument suffers from an overly narrow view of the kidnap, one inconsistent with our duty to view the evidence in the light most favorable to the prosecution. As already noted, the indictment charged defendant and his codefendants with a continuing kidnapping offense that extended over the period of time from when the victim left his home and was taken to Santa Barbara, to the time he spent in Santa Barbara, and the time he was taken from locations within Santa Barbara to the site of his murder. As previously discussed, there was evidence from which a jury could conclude defendant moved Nick against his will as part of that single, continuous kidnapping. In addition, there was evidence from which the jury could conclude the murder was committed to

"advance the commission of the crime of kidnap, or to facilitate the escape therefrom, or to avoid detection." The jury could conclude that Nick was murdered to silence him and eliminate the risk the kidnappers—including defendant, who belatedly joined in the kidnapping—would be caught and that defendant shared that purpose. In short, there was substantial evidence from which the jury could conclude the kidnap was more than incidental to the murder—indeed, that the kidnap was the reason for the murder and not the other way around.

## E. Penalty Phase Claims

### *1. Prosecutorial Misconduct During the Penalty Phase Closing Argument*

Defendant argues his rights to due process, a fair trial, and a reliable penalty determination under the Fifth, Sixth, and Eighth Amendments to the United States Constitution were violated by the prosecutor's prejudicial misconduct during penalty phase closing argument. We hold defendant's claims of prosecutorial misconduct are forfeited and lack merit in any event.

#### *a. Background*

During penalty phase closing argument, the prosecutor described the various factors in aggravation and mitigation under Penal Code section 190.3, including factor (k). Specifically, the prosecutor explained that factor (k) evidence included " '[a]ny other circumstances which extenuate[] the gravity of the crime.' " The prosecutor continued, "This is the part where you can really consider just about anything you want, and this is the part where the defense will ask you to consider the fact that he had a childhood that was less than stellar, that that would be considered a matter in mitigation for

your consideration." The prosecutor described defendant's "dysfunctional family," including defendant's sister, a 23- or 24-year-old "life-long heroin addict"; defendant, the second child, who "manages to commit a horrific murder before the age of 21"; and defendant's younger brother who, at age 16 "commits a crime so scary and so horrible that he's not only tried as an adult in this home invasion armed robbery at age 16, but he's given a sentence of 12 years in state prison. I mean, that's a remarkable sentence for a teenager to receive, that is to believe that there's nothing redeemable about this person at all." The prosecutor also described defendant's home as "dysfunctional," his mother as neurotic, his father as heavy-handed, and argued "they batted zero with the accomplishments of all three of the children in this family."

The prosecutor suggested to the jury that the defense was "effectively saying," with the Penal Code section 190.3, factor (k) evidence, "that the consequence of this childhood has created somebody who really lacks any notion of empathy at all for other people. And aren't they really saying that that is in effect a violent person?" The prosecution described defendant as "a person whose childhood was so completely lacking in morality that he's missed that part of his education and his development," which "speak[s] to his dangerousness." The prosecutor asked how that could be considered "a matter in mitigation as against any matter in aggravation," leaving it for the jury to "consider during your deliberation." Defendant raised no objection to these characterizations. The prosecutor also addressed Penal Code section 190.3, factor (i), "[t]he age of the defendant at the time of the crime," explaining that if defendant had been 17 as had been "one of the co-defendants, Mr. Pressley, then maybe that would be a factor to give a lot of consideration to." Because

defendant was 20 years old, within days of turning 21, at the time he committed the offense, the prosecutor argued, the amount of consideration owed his age was "minimal." The prosecutor noted that defendant's age was the same as most college seniors and "among the older ones" of "our fighting force currently in Afghanistan." Defendant raised no objection.

Finally, the prosecutor focused heavily on the alternative to a death sentence, urging the jury to conclude that "three meals every single day" was better than the life defendant had prior to imprisonment, other than the "freedom of movement like he had before." If defendant faced a life sentence, he would be given a warm bed, friends, possibly a girlfriend, hot meals every day, and the ability to play basketball, "to feel the rush of running to a basket and being able to score." The prosecutor urged the jury to conclude this was insufficient punishment for "the worst" type of crime, an "intentional killing of a child for no more reason than because it improved his temporary status, his moment of comfort at that moment in time," committed with "planning and preparation and premeditation and thought and deliberation." Defendant did not object.

*b. Discussion*

Defendant argues that the prosecutor committed prejudicial misconduct by suggesting that defendant's family history and age were factors in aggravation. As an initial matter, the claim is forfeited because defendant failed to object. "In order to preserve any claim of prosecutorial misconduct, there must be a timely objection and request for admonition. [Citation.] ' "[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 786.)

Although defendant alleges that an objection would have been futile, he fails to demonstrate there were prior efforts to object that were overruled.

The claim lacks merit in any event. The prosecutor argued that defendant's age and family background must be considered under Penal Code section 190.3, factors (i) and (k), read the language of those factors, and described the relevant facts. The prosecutor referenced defendant's family history, questioning how "a childhood . . . completely lacking in morality" was "a matter in mitigation against any matter in aggravation," and urged the jury to consider that question while deliberating. How the jury ultimately weighed these facts is of no moment provided the jury was properly instructed, and here they were. (Cf. *People v. Sims* (1993) 5 Cal.4th 405, 464 [where prosecutor "did not imply that the jury should disregard the evidence of [the] defendant's background, but rather that, in relation to the nature of the crimes committed, it had no mitigating effect," prosecutor's remarks "fall within the bounds of proper argument"].) The prosecutor urged the jury not to consider defendant's age as a factor in mitigation, explaining that were defendant 17 years old like codefendant Pressley, the jury might give greater weight to his age. At the time of trial, defendants as young as 16 could receive the death penalty. (*Stanford v. Kentucky* (1989) 492 U.S. 361; contra, *Roper v. Simmons* (2005) 543 U.S. 551 [declaring the death penalty for 16- and 17-year-olds unconstitutional].) A jury could rationally differentiate between the culpability of a 17 year old and someone nearly 21. It was not misconduct for the prosecutor to urge the jury to give defendant's age little weight as a factor in mitigation. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 787.)

Defendant also argues that the prosecutor committed misconduct by presenting evidence concerning conditions of confinement under a life sentence. Defendant contends such evidence is not relevant under Penal Code section 190.3, factor (k). "[E]vidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant's character, culpability, or the circumstances of the offense under either the federal Constitution or [Penal Code] section 190.3, factor (k)." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 963.) But defendant failed to object to the prosecutor's argument concerning conditions of confinement; accordingly, any claim of error is forfeited. (*Ibid.*) Even if preserved, any error in admitting the statement was harmless, as the prosecutor's comment did not so "infect[] the trial with . . . unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

*2. Challenges to California's Death Penalty Statute*

Defendant raises a number of challenges to California's death penalty law, each of which we have previously rejected.

" '[T]he California death penalty statute is not impermissibly broad, whether considered on its face or as interpreted by this court.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 767, quoting *People v. Dykes*, *supra*, 46 Cal.4th at p. 813.)

Penal Code section 190.3, factor (a), which permits a jury to consider the circumstances of the offense in sentencing, does not result in arbitrary or capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth, or Fourteenth

Amendments to the United States Constitution. (*People v. Simon* (2016) 1 Cal.5th 98, 149.)

The "death penalty statute 'is not invalid for failing to require . . . unanimity as to aggravating factors [and] proof of all aggravating factors beyond a reasonable doubt' "; *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, do not alter that conclusion. (*People v. Lopez* (2018) 5 Cal.5th 339, 370; see *People v. Lewis* (2008) 43 Cal.4th 415, 533 [aggravating factors need not be found beyond a reasonable doubt].) Nor is the death penalty statute unconstitutional for "permitting jury consideration of a defendant's unadjudicated violent criminal activity under [Penal Code] section 190.3, factor (b)." (*Bryant, supra*, 60 Cal.4th at p. 469.)

Defendant's claims concerning the burden of proof are identical to those we considered and rejected in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1096: " ' "The death penalty scheme is not unconstitutional because it fails to allocate the burden of proof—or establish a standard of proof—for finding the existence of an aggravating factor." ' " "Nor was the trial court required to instruct the jury that there is no burden of proof at the penalty phase. [Citation.] The federal Constitution does not require that the state bear some burden of persuasion at the penalty phase, and the jury instructions were not deficient in failing to so provide." (*Ibid.*)

CALJIC No. 8.88 provides the jury with sufficient guidance to administer the death penalty and meet constitutional minimum standards. "More specifically, CALJIC No. 8.88's use of the . . . term 'warranted' . . . does not render the instruction impermissibly vague or ambiguous. [Citations.] Where, as here, the jury is instructed in the language of CALJIC

No. 8.88, the court need not further instruct that life without parole is mandatory if mitigation outweighs aggravation, or that life without parole is permissible even if aggravation outweighs mitigation." (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1097, fn. omitted.)

"The failure to instruct the jury that the prosecution bears some burden of persuasion regarding the jury's penalty determination does not violate the Sixth, Eighth or Fourteenth Amendment." (*People v. Taylor* (2010) 48 Cal.4th 574, 662.) "Nor does the failure to instruct jurors they must unanimously agree on the existence of particular aggravating factors, but not on the existence of any mitigating factors, violate the Sixth, Eighth, or Fourteenth Amendment." (*Ibid.*) "There is no constitutional requirement that a trial court instruct the jury on the ' "presumption of life." ' " (*Ibid.*, quoting *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.)

The lack of written jury findings during the penalty phase does not violate due process or the Eighth Amendment, nor does it "deprive a capital defendant of meaningful appellate review." (*People v. Winbush* (2017) 2 Cal.5th 402, 490, citing *People v. Linton* (2013) 56 Cal.4th 1146, 1216.)

"Intercase proportionality review, comparing defendant's case to other murder cases to assess relative culpability, is not required by the due process, equal protection, fair trial, or cruel and unusual punishment clauses of the federal Constitution." (*People v. Winbush*, *supra*, 2 Cal.5th at p. 490.) " 'California's death penalty law does not violate equal protection by treating capital and noncapital defendants differently.' " (*People v. Anderson* (2018) 5 Cal.5th 372, 425.) California's death

penalty statute does not violate international law. (*Ibid*; see also *People v. Sánchez* (2016) 63 Cal.4th 411, 488.)

### F. State Bar Motion to Quash Defendant's Subpoena

On February 13, 2002, defendant's retained counsel, Cheri A. Owen, submitted a tender of resignation, with charges pending, from the State Bar. She resigned from the State Bar, again with charges pending, on April 17, 2002. In July of that year, defendant subpoenaed Owen's records from the State Bar. The State Bar moved to quash the subpoena, and the trial court granted the motion. Defendant contends this was error. We disagree.

Defendant's subpoena sought " '[a]ny and all documents pertaining to attorney CHERI A. OWEN, who was admitted to the California State Bar on June 9, 1999, with state bar number 201893. The documents should include but are not limited to all notes, reports, complaints, and investigative notes and reports.' " The State Bar moved to quash the subpoena on grounds that the request for "any and all" records was overbroad and that the information sought was privileged and confidential. In response, defendant's counsel argued that in camera review of all State Bar complaints related to Owen was necessary to ascertain whether Owen performed deficiently for clients other than defendant while defendant's trial was ongoing. This would, he claimed, help determine whether Owen performed adequately during defendant's trial.

The trial court granted the State Bar's motion to quash on grounds that the documents were privileged. And while the court acknowledged that due process might nevertheless require release if the requested information met a certain standard of

relevance, defendant had not made such a showing. The court explained the best lens through which to view whether or not Owen competently performed her duties while representing defendant was "looking at what Miss Owen did or did not do in connection with this case. If she didn't make the proper investigation, if she didn't talk to the witnesses she should have talked to, if she didn't properly prepare her briefs or the legal issues in the case, if she didn't properly present the case in trial, that's what you look at, and that's the proof of the pudding." Looking at a complaint made by someone else would have no bearing on the adequacy of her performance in defendant's case. The trial court also denied defendant's request that the requested documents be produced to the court and sealed.[13]

Contrary to defendant's arguments, we see no error in the trial court's ruling. Numerous provisions of law establish the privileged and confidential status of the information defendant sought from the State Bar. For example, Business and Professions Code section 6086.1, subdivision (b) provides that State Bar disciplinary investigations are confidential until charges are filed. Business and Professions Code section 6094 further provides that complaints made to a disciplinary agency regarding attorney misconduct issues or incompetence are privileged. The State Bar Rules of Procedure, rules 2301 and 2302(a), likewise state, respectively, "the files and records of the Office of the Chief Trial Counsel are confidential" and, with

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[13] In record augmentation proceedings that took place in 2009 in anticipation of briefing before this court, defendant's counsel argued Owen's State Bar records might have relevance to an eventual habeas corpus proceeding before this court. With that in mind, the trial court ordered the State Bar to preserve the records.

exceptions, "information concerning inquiries, complaints or investigations is confidential."

Nor has defendant established that the ruling violated his due process rights. Defendant invokes the high court's decision in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57–58, in which the court ruled that a defendant accused of child sexual abuse was entitled to have a court conduct an in camera review of confidential case reports that might have contained evidence relevant to his defense. But here, by contrast, the information defendant sought to obtain from the State Bar was not relevant to defendant's case. Defendant sought information about complaints made by others about Owen's performance as a lawyer but failed to show how complaints made by others would bear on whether she committed prejudicial errors in her representation of defendant. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Accordingly, we conclude the trial court's decision granting the State Bar's motion to quash defendant's subpoena for Owen's records was not in error.

### G. Denial of Motion for New Trial

Defendant also filed a motion seeking a new trial on numerous grounds, including, as relevant here, Owen's deficient performance as defense counsel. The trial court denied the motion without holding a hearing. Defendant contends this was error. We conclude the trial court acted within its discretion in disposing of the new trial motion.

*1. Background*

On March 19, 2002, defendant filed motions for new guilt and penalty phase trials via *Keenan*[14] counsel Richard V. Crouter. Numerous declarations and memoranda of points and authorities followed, and the motion, initially set to be heard on March 25, 2002, was not heard until February 7, 2003. In the meantime, defendant retained new counsel, Robert Sanger, and Crouter was relieved. Sanger made supplemental arguments in support of the new trial motion, largely focused on the adequacy of defense counsel's performance at trial. In support of the motion, counsel contended that Attorney Owen—who had been admitted to the State Bar just two years before the trial began and who would resign from the Bar before the proceedings were over—was "woefully inexperienced and fell short of the minimum standards of competence required of defense counsel in a capital case."

The trial court addressed and rejected each of the claims of error raised in the new trial motion, including the claims of ineffective assistance of counsel.

*2. Discussion*

Defendant raises several challenges to the trial court's denial of the new trial motion. " ' " 'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] ' "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling

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[14] *Keenan v. Superior Court* (1982) 31 Cal.3d 424. In *Keenan*, we held Penal Code section 987.9 funds may be used to appoint a second attorney for a defendant in a capital case. (*Keenan*, at p. 434.)

absent a manifest and unmistakable abuse of that discretion.' ' " ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) We find no such abuse of discretion here.

As a procedural matter, defendant contends the trial court erred by ruling on the new trial motion without holding an evidentiary hearing that would have permitted him to adduce new evidence in support of his ineffective assistance claims. He further contends the trial judge's consideration of the motion was rushed and inadequate due to the trial judge's imminent retirement. These procedural arguments lack merit. The trial court was not required to hold an evidentiary hearing on the new trial motion; the court's "only obligation is to ' " 'make whatever inquiry is reasonably necessary' " to resolve the matter.' " (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 517.) And the record does not support defendant's claim that the trial court rushed to dispose of the motion without thoroughly considering its merits. On the contrary, the court granted numerous extensions to allow defense counsel the opportunity to augment the new trial motion and to allow the prosecutor an opportunity to respond. The motion, initially set to be heard in March 2002, was not heard until almost one year later, in February 2003. The trial court thereafter issued a thoroughly reasoned denial of the motion; its order alone comprises 23 pages of transcript, and the discussion spans dozens of pages on top of that. There is no basis for defendant's suggestion that the trial court cut corners in considering the motion.

On the merits, defendant contends that the trial court erred in rejecting his claim that he did not receive the effective assistance of trial counsel guaranteed by the United States and California Constitutions. Usually, "ineffective assistance [of counsel claims are] more appropriately decided in a habeas

corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) But we have also held that a defendant may raise the issue of counsel's effectiveness as a basis for a new trial, and, to expedite justice, a trial court should rule "[i]f the court is able to determine the effectiveness issue on such motion." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582–583.) To make out a claim that counsel rendered constitutionally ineffective assistance, "the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) To make out an ineffective assistance claim on the basis of the trial record, the defendant must show "(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*Ibid.*)

Here, in support of his new trial claim, defendant emphasizes Owen's remarkable lack of professional experience—she was a new lawyer who had never before worked on a capital case—and the cloud under which she abruptly exited the representation of defendant (and the profession as a whole). He notes that Owen did not satisfy the criteria for appointed trial counsel in a capital case. (See Cal. Rules of Court, rule 4.117.)

But Owen was not appointed by the court; she was privately retained. And although defendant's appellate counsel suggested otherwise at oral argument, Owen's brief history as a lawyer and the circumstances of her resignation from the bar do not establish that defendant was totally deprived of counsel during trial, requiring automatic reversal of the judgment. (*United States v. Cronic* (1984) 466 U.S. 648, 658–659.) Although defendant alleges Owen was absent for portions of jury selection and guilt phase testimony because she was meeting with a State Bar investigator, Owen was, in fact, present during most of the trial (as was *Keenan* counsel, who was present during those portions of trial when Owen was absent). Owen made arguments and objections; she presented witnesses. The question before us, at this juncture, is whether the trial record alone establishes that her performance fell below professional norms and that there is a reasonable probability that her deficient performance affected the result. Defendant has not made the necessary showing. The trial court therefore did not err in concluding it could not determine counsel was ineffective in the context of defendant's new trial motion. (*People v. Fosselman*, *supra*, 33 Cal.3d at pp. 582–583.)

Defendant contends that Owen did not adequately prepare a defense. This lack of preparation was demonstrated by Owen's failure to interview witnesses and to develop a guilt phase case because she felt the police investigation was adequate and because defendant had confessed. But defendant's primary argument regarding Owen's deficient performance concerns her failure to develop and present evidence that defendant suffered from brain damage or a similar impairment. In support of the argument, defendant introduced the opinion of Dr. Albert Globus, a psychiatrist. Based on a social and medical history

including an infantile skull fracture and febrile seizures, as well as postverdict neuropsychological testing, Dr. Globus opined that defendant suffered from organic brain syndrome. Defendant contends Owen was deficient for failing to develop and present such evidence of defendant's impairments because such evidence was "*the* best defense" to charges that defendant killed Nick with premeditation and deliberation, as is required for first degree murder, as well as "*the* most compelling showing of mitigation" at the penalty phase.

The trial court reasonably ruled that defendant's postverdict brain damage evidence was not a sufficient basis for granting a new trial. As to defendant's first point, after hearing defendant's evidence, the trial court concluded that competent counsel would not have presented a brain damage defense at the guilt phase "since it's inconsistent with what the defense actually presented, which seems to me, under the circumstances, was a better shot," given defendant's confession to police. "That defense was that this was a false confession and somebody else was the killer." The trial court noted that it had been presented with no cogent argument that the choice of this false confession strategy was itself the product of deficient performance.

Defendant criticizes the trial court's reasoning but fails to grapple with the court's central point: There are plausible reasons why competent counsel would choose not to present a brain damage defense in an attempt to negate the prosecution's showing of premeditation and deliberation. By defendant's own account to police, he accepted Hollywood's assignment to kill Nick; traveled from Los Angeles to Santa Barbara armed with a handgun; picked up Nick from the Lemon Tree Inn and transported him to a remote location where a grave had already

been dug; then shot Nick several times and buried him. This account strongly points to a conclusion that defendant acted with premeditation and deliberation when he killed Nick. As the trial court noted, competent counsel might reasonably determine that defendant's "better shot" was to convince the jury that the entire confession was false, rather than attempting to argue that defendant did in fact commit the crime but without premeditating or deliberating. Further, as we have previously noted, "presenting expert mental health testimony inherently risks inviting damaging cross-examination." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 624, fn. 5.) At least on this record, we cannot say the choice not to pursue a brain damage defense was incompetent. Nor has defendant shown that the presentation of such a defense would likely have changed the outcome of the trial.

Insofar as defendant argues that competent counsel would have presented the brain damage evidence to bolster his claim that his confession was false, the trial court reasonably rejected that argument as well. Defendant argued that brain damage evidence would have neutralized the prosecution's rebuttal witness, who opined that an individual would not falsely confess and claim amnesia without suffering serious mental illness or brain damage. But, the trial court noted, defendant's own expert had not agreed that brain damage was an "essential precondition to the person's predilection to give a false confession under certain circumstances," and had not relied on evidence of brain damage in offering his opinion in support of the defense. Under the circumstances, we cannot say there is no plausible reason why competent counsel would choose not to develop a brain damage defense and instead to rely on the opinion of the defense expert. And once again, defendant has

not shown that the presentation of his brain damage evidence would likely have altered the jury's view of whether to believe defendant's confession or instead to believe that he gave the confession while suffering from temporary amnesia, as he testified at trial.

Turning to the question of mitigation, the trial court concluded that defendant's newly presented evidence of mental defect or brain damage, even if available, would not have made a difference at the penalty phase. In making an independent determination of the propriety of the penalty, the trial court reweighed the mitigating circumstances that had been presented, including defendant's lack of criminal record, lack of violent history, peacemaking role among his friend group, excessive use of alcohol and marijuana, dependent personality, and obedience to Hollywood. The court concluded that no mitigating circumstance "appear[ed] to significantly extenuate the crime." The court concluded defendant's newly presented evidence of brain damage would not likely have altered the relevant balance of factors. We see no error in the court's determination.

Defendant's next claim of ineffective assistance centers on a set of two agreements executed in February 2002, in which defendant agreed to give Owen an "exclusive grant" to the media and literary rights to his background and story and to waive attorney-client privilege to permit Owen to speak and write about his criminal case. Defendant contends that these agreements created a conflict of interest that "tainted the representation *ab initio*," and that establish grounds for a new trial. The trial court disagreed, and we do as well.

As the trial court acknowledged, these agreements "grant[ed] [Owen] exclusive rights to exploit her client's story for her benefit," creating the potential for a conflict of interest. But to establish a deprivation of his constitutional right to counsel, defendant must show more than a " 'theoretical division of loyalties' "; he must show that counsel "labored under an actual conflict of interest '*that affected counsel's performance*.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) Or as the trial court put it, to succeed on the conflict claim, "there has to be some showing of cause and effect, in other words, that the act or omission of the lawyer in seeking the benefits of the agreement has placed her client's defense in jeopardy." As the trial court explained, no such showing had been made here. Indeed, the agreements were made some two months after the jury rendered its penalty verdict and just one day before Owen tendered her resignation to the State Bar. And contrary to defendant's argument, nothing in the record shows that the parties had been operating under any comparable agreement previously, while Owen was still representing defendant at trial.

The case before us thus differs in critical respects from *People v. Corona* (1978) 80 Cal.App.3d 684, on which defendant relies. In that case, the record showed that trial counsel agreed to represent the defendant, who was facing 25 counts of first degree murder, in exchange for exclusive literary rights to the defendant's life story, including the criminal proceedings against him. (*Id.* at p. 703.) Trial counsel went on to make decisions in the interests of "his own pocketbook" rather than "the best interests of his client" (*id.* at p. 720), including the abandonment of mental defenses central to the case (*id.* at pp. 721, 727). No comparable circumstances are present here. The record neither shows that Owen labored under a potential

conflict of interest during the course of her representation of defendant, nor shows that "the conflict of interest . . . resulted in obvious prejudice" to defendant's case, as it had in *Corona*. (*Id.* at p. 720, fn. omitted.)

Finally, defendant asks us to compel the trial court to reconsider its handling of various other claims in the motion for new trial, including a claim that Owen was acting as an informant for the Los Angeles District Attorney and a claim that Owen instructed defense investigators not to investigate the case and instead diverted investigation funds to satisfy other obligations. The trial court rejected these arguments on the grounds that the claims were unsupported by the record and, even if true, would not have established that defendant was prejudiced by Owen's deficient performance. The trial court did not abuse its discretion in concluding that none of these claims constituted a basis for granting defendant's new trial motion.

## III. DISPOSITION

The judgment of the superior court is affirmed.

**KRUGER, J.**

**We Concur:**

**CANTIL-SAKAUYE, C. J.**
**CHIN, J.**
**CORRIGAN, J.**
**LIU, J.**
**CUÉLLAR, J.**
**GROBAN, J.**

S113653

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

---

THE PEOPLE, Plaintiff and Respondent,

v.

RYAN JAMES HOYT, Defendant and Appellant.

---

Appellant's request for judicial notice filed on January 11, 2011, at page 336, footnote 228 of Appellant's Opening Brief, is denied.

Appellant's request for judicial notice filed on January 11, 2011, at page 350, footnote 238 of Appellant's Opening Brief, is granted.

Appellant's "Motion to Unseal Habeas Exhibit 208 Only as to Appellate Counsel and to Augment Sealed Record on Appeal or Take Judicial Notice," filed on May 24, 2019, is denied.

CANTIL-SAKAUYE

*Chief Justice*

No. S113653

# IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

*v.*

RYAN JAMES HOYT, Appellant.

Upon request of appellant for appointment of counsel, Roger Teich is hereby appointed to represent appellant Ryan James Hoyt for the direct appeal in the above automatic appeal now pending in this court.

GEORGE, C. J.

*Chief Justice*

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>-vs-<br>RYAN JAMES HOYT,<br>Defendant and Appellant. | SUPERIOR COURT<br>No. S113653<br>**(Death Penalty)** |

**APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY**
**HONORABLE WILLIAM L. GORDON, JUDGE**

**REPORTERS TRANSCRIPT ON APPEAL**

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For the Respondent:

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SANTA BARBARA, CALIFORNIA, FRIDAY, FEBRUARY 7, 2003
DEPARTMENT NO. 1 HON. WILLIAM L. GORDON, JUDGE
AM SESSION

APPEARANCES:

The Defendant with his counsel, ROBERT SANGER, Attorney at Law; Deputy District Attorneys RON ZONEN and GERALD FRANKLIN, for the County of Santa Barbara representing the People of the State of California; SHARON E. REINHOLD, Official Court Reporter.

PRONOUNCEMENT OF JUDGEMENT
AND SENTENCING

THE COURT: Good morning.

All right. We'll call the matter of People versus Ryan James Hoyt.

This is the time set for hearing on the motions for new trial and the automatic motion for reduction of the jury's finding on the penalty.

We also have a couple of issues of the overall constitutionality of the death penalty and whether it violates international law, and we have a proportionality motion.

There's also an issue that's been brought up, and maybe we should talk about first, Mr. Zonen, you had proposed to call some witnesses today, Mr. Sanger had

kidnapping, and that evidence was more than sufficient to support the finding on the special circumstance that a kidnapping occurred based upon the fact that Mr. Markowitz was taken from the hotel room at the Lemon Tree, taken up to the mountains and killed.

Now, as far as Count 2 is concerned, back to Count 2 and the conviction for simple kidnapping, the dates alleged in Count 2 were all-inclusive, they covered the period from the initial abduction to the date of the killing, and, therefore, I think would be sufficient to encompass all conduct amounting to kidnapping perpetrated within that time period, and certainly the activities occurring during that time period were sufficient to implicate Mr. Hoyt in a kidnapping other than the initial kidnapping for ransom. So, I find no basis to grant a new trial on anything regarding the kidnapping and I find no error.

Now, subsequent to the filing of these Points and Authorities by Defendant's initial counsel Mr. Crouter, Defendant filed supplemental Points and Authorities, two sets of them, raising additional grounds for a new trial, and the bulk of these issues involve competence of counsel -- competence or lack of competence of trial counsel.

Well, the initial assertion is that Miss Owen, whose counsel was woefully inexperienced and fell short of the minimum standards of competence required of defense counsel in a capital case.

Now, of course, first, we have the obvious problem initially, that Miss Owens was counsel of defendant's choice and certainly lack of experience alone doesn't translate into incompetent presentation. I can say that I think that it's a given that even experienced counsel can be incompetent. So the real question is, did Miss Owen -- and we have to consider, also, that Mr. Crouter was co-counsel, who was experienced -- did Miss Owen and Mr. Crouter, her co-counsel, commit any acts or omissions in the preparation and presentation of the defense that were below acceptable levels of competence in which prejudiced Defendant, compromised or jeopardized his defense.

And that brings us, then, to the literary contract, which is the first evidence of incompetence that's been raised in the moving papers, and, apparently, based upon what I read, Miss Owen did obtain Defendant's signature on documents purporting to waive attorney/client privilege granting to her exclusive rights to exploit her client's story for her benefit.

Now, by definition, the potential for a conflict of interest between attorney and client is obvious, agreements such as this are violative of the canons of the American Bar Association and the California State Rules of Professional Conduct and could subject a lawyer to discipline.

The question, though, is such an agreement by

itself, does that alone create some sort of an inference or presumption that therefore the Defendant was not properly or competently represented, and I think there -- as I understand it, there has to be some showing of cause and effect, in other words, that the act or omission of the lawyer in seeking the benefits of the agreement has placed her client's defense in jeopardy.

Of course, the major case in that regard is that Corona case, in which Counsel's conduct in furtherance of his economic interest under the contract was fairly blatant in the way it impacted on the defense.

I can't find that kind of cause and effect in this case and none has been shown to me.

In a similar vein, we have assertions of overreaching or downright fraud by Counsel in her retainer arrangements and the use of funds.

Now, again, counsel -- in other words, we're being asked to assume that these allegations are true. Counsel Miss Owen didn't come in and hasn't filed any declarations, we have nothing from her by way of defending herself of these charges. But assuming that -- I guess I have to assume for the sake of the argument that she may have overreached in her retainer arrangements, there's the allegation that she told her investigator to use certain funds to satisfy other obligations, it's not clear to me that these were funds

that were necessarily obtained from Defendant or from the county, they were funds in which she paid to him, or that -- but, again, I think that, you know, it might be grounds to discipline Miss Owen, but I don't -- I can't see anything in that that tells me that that translates into incompetent representation, unless we're going to try to establish some presumption, and I don't think the cases say there's a presumption of incompetence flowing simply because of allegations of misconduct of that kind.

It's also alleged that Counsel was incompetent in not -- well, the allegation is that Miss Owen misled the Court and Mr. Crouter concerning the change of venue. The contention is that she represented that she had consulted with a -- or she retained a jury consultant who told her that, you know, it would be better to keep the case in Santa Barbara because of the way juries tended to act and react. And that was representation made to me at the time that the case was -- that the announcement was made that there would be no motion for change of venue, the consultant felt that it was better to keep it here.

Now, again, if this in fact were the situation and in fact there was this blatant disregard for the truth in terms of whether or not a expert had been consulted, it does reflect adversely on Miss Owen's character, but the question is, what impact did it have upon Mr. Hoyt's defense.

And this particular decision to abandon the change of venue was made after the jury panel members had filled out their questionnaires, all counsel had a chance to review the questionnaires, it was apparent from reviewing the questionnaires that the issue of pretrial publicity was not going to be a problem in selecting an unbiased jury in this jurisdiction. And it turned out that way.

Now, to the extent that the argument is that there should have been a change of venue motion made, I can't say that if they hadn't made one, if they had simply said, "We've reviewed the questionnaires, we're not going to make a motion for change of venue because it appears that unbiased panel can be obtained in this jurisdiction," I don't think that that would be incompetent representation.

I've read the questionnaires, I heard the jury, I was involved in the jury selection, I think it's quite likely a motion for change of venue would have been denied in any event.

And I can't see that because Miss Owen may have told Mr. Crouter that she had consulted with a jury consultant when she hadn't makes that a legitimate ground for new trial. And I don't think it would have been if they had simply not made the motion, or said we're not making a motion and left out the part about the jury consultant. So, I can't see that there's any prejudice to Mr. Hoyt in that.

Then we get into the question of witnesses and one of which was, well, Mr. Arias, but more is made of the witnesses Seymour and Silverstein. Initially, why, the argument was that neither Mr. Seymour or Mr. Silverstein were interviewed and that was error, and so on, and initially the argument was that neither of them had been called. Well, it turns out that Mr. Seymour, I guess it was Mr. Seymour was called. And these were witnesses that had given statements to the officers, the investigators, which they felt they might recognize that Mr. Hollywood, Jesse James Hollywood, as having been present in Santa Barbara at the Lemon Tree Motel at times relevant to the defense, and, therefore, this would buttress the assertion that Mr. Hoyt wasn't the killer, Mr. Hollywood was the killer, and Mr. Hoyt was simply running errands, and it would help the defense and tend to give credence to the argument that whatever confession he had given to the officers, which was clearly a confession, was totally false and so on. But, in fact, Mr. Seymour was called, he did identify a photo of Mr. Hollywood as a photo of a person he had seen at the relevant time and place. Mr. Arias was called and he also testified.

Mr. Silverstein was not called, but I haven't seen any evidence from Mr. Silverstein by way of declaration as to how Silverstein's testimony, including any identification of Hollywood, would have been anymore definitive or would have added anything to the equation.

Now, the fact that the identifications given were shaky as to the stature of Mr. Hollywood, as to the certainty of the identifications, that's a problem of eyewitness testimony not competence of counsel. So I don't think there's any basis for a new trial motion on that ground.

The dismissal of the writ of prohibition, there apparently was a writ of prohibition taken in response, or, as a result of the Court's decision to allow the prosecutor to have a psychiatric evaluation of the Defendant, the allegation is that the writ was dismissed due to Miss Owen's failure to perfect the record.

Now, I'm sure there's no doubt that a failure such as this could be regarded as grievous in terms of performance of Counsel under circumstances that could jeopardize a particular defense, but in this particular case, assuming the writs had merit in the first place, the Court's error -- the error is reviewable on appeal, so I don't know why it comes under the -- it would justify a new trial because the review wasn't taken at that time.

Then there's the allegation that there was a failure to prepare Mr. Hoyt for his testimony. Now, I wouldn't expect Mr. Hoyt to say that he had been well prepared for his testimony, but putting that aside, I heard the testimony, the jury heard the testimony, and, of course, he was testifying under circumstances in which he was confronted, he and his lawyers were

confronted with his own confession, which is a fairly formidable obstacle to overcome.

It appeared to me that his testimony was well presented as it could have been under those circumstances. The fact that he now asserts that his lawyers didn't properly prepare, it's understandable, but it doesn't convince me that that had any adverse impact on the case.

Then we come to the question of the failure to develop and produce evidence of brain damage. There are two problems to this argument in terms of the guilt phase. The first relates to minimizing the impact of the testimony given in rebuttal of plaintiff's expert Dr. Kania, and then the second prong relates to the possibility of raising a defense based on defendant's lack of the requisite intent or mental state for first-degree murder.

Now, as to the second prong, I'm a little bit at a loss to understand that argument, because it doesn't appear that that kind of a defense would have been asserted by competent counsel since it's inconsistent with the defense actually presented, which seems to me, under the circumstances, was a better shot. That defense was that this was a false confession and somebody else was the killer.

There's been no argument made by the defense that the selection of the false confession defense was itself incompetent, or that the presentation of that

defense was contrary to the wishes of the Defendant, or that the defense was bogus. Therefore, it's hard for me to see how the second prong of the defense would have come up in the first place even if some evidence of brain damage had been perfected.

Now, as to the first prong of the argument that the rebuttal witness, Dr. Glaser, testified, essentially, that persons making false confessions and suffering from amnesia concerning the process must suffer from serious mental illness or brain disorder. Now the argument by the defense that the impact of this testimony would have been neutralized had the evidence of the defendant's brain damage been diagnosed as Dr. Globus -- if the evidence as diagnosed by Dr. Globus had been available at the time of trial.

Now, Dr. Kania, of course, didn't agree that brain damage was an essential precondition to the person's predilection to give a false confession under certain circumstances; furthermore, there's no evidence from Dr. Kania, who was the Defendant's expert and I assume has been available to the defense, that he had requested or required this kind of information, or that he requested any information from the defense that was not provided to him.

In other words, there was a choice made to present a certain defense, an expert that was apparently qualified to give testimony on the defense was called, testified as to what he felt were characteristics of a

person who might give a false confession, he testified as to what characteristics, personal characteristics Mr. Hoyt had and Dr. Glaser disagreed with him.

There's nothing that says that Dr. Kania, nothing from Dr. Kania says, I asked for this, I asked for that in order or present this evidence, in order to form an opinion and I didn't get it. So, I don't know how that jeopardizes the defense.

As it happened, the rebuttal witness didn't agree with Dr. Kania, which is typical of these kinds of cases.

Then we get the argument that Miss Owen compounded the error by arguing to the jury as a fact that the Defendant did not suffer -- had not suffered and did not have any brain damage.

Now, I read that transcript and that's not what I read. In fact, her argument to the jury was a paraphrase of Dr. Glaser's opinion that only persons with brain disorders or retardation make false confessions, and she argued, her argument was that that was a ridiculous argument. She was criticizing Dr. Glaser's position, she was not conceding the point. And I think that particular ground is a result of a misreading of the transcript.

And I heard that testimony. She was simply saying here's what Dr. Glaser told you, that's ridiculous, it's not necessary to have these kinds of things in order to make a false confession. That's the

thrust of that argument, it was not a concession that he did or did not have any brain damage.

Now, that pretty much sums up the basis for the motion for new trial based on the guilt phase.

There's another one, that's right, there's also the argument that Counsel's performance was deficient with respect to their efforts to exclude the confession because the false confession issue should have been raised as a part of the exclusion motion made to the Court, and then, secondly, that certain psychological opinions regarding coercive conduct and Miranda violations by the inquisitors should also have been presented at the time of the suppression motion.

But at the time of the suppression motion the Court was concerned with the due process issues, focusing on the conduct of the officers, not whether the Defendant was lying, so I can't see how the false confession issue would have been relevant to whether the confession should have been suppressed.

And then the argument goes on that somehow if the Defendant should not have testified the issue should have been raised and suppression motion and if denied the Defendant should not have testified. And yet, I don't know how you can -- you can assert a false confession issue unless the Defendant is going to testify and repudiate the false confession. I don't think you can frame the issue by having the expert rely on the hearsay from the Defendant. The first step, the

Defendant has to repudiate the confession, so I think he was going to have to testify. And I don't know how the -- in other words, he's got to testify, he's got to repudiate it, and then this raises issues of credibility, which are jury issues, not issues for the Court during a suppression motion.

Now turning to the psychological opinions regarding coercion and Miranda violations by the officers. I don't know what level these would have been admissible. It's hard to understand that the context in which that would be presented is the idea that the witnesses would come in during the suppression motion and point out to the Court that the officers were violating his Miranda Rights, or they were asserting coercion on him, some sort of subtle psychological coercion.

The standards are legal standards which set the criteria to determine whether there's been coercion or not, whether or not there had been Miranda violations, and I don't think you need a psychiatrist or a psychologist to help with that. In fact, I think that probably would be irrelevant at that stage. So, I can't find any error in that regard. And I can't find any incompetence of counsel in the manner in which the efforts were made to suppress the confession.

So, therefore, I'm denying the motion for new trial as to the guilt phase.

All right. Mr. Sanger, do you wish to argue

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

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| THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>RYAN HOYT,<br><br>Defendant. | Case Number 1014465<br><br>**REPLY TO OPPOSITION TO DEFENDANT'S MOTION FOR NEW GUILT PHASE AND PENALTY PHASE TRIALS**<br><br>The Honorable Judge Gordon<br>Date: February 7, 2003<br>Time: 8:30 a.m.<br>Dept.: TBD |

## I.

## THERE IS EVIDENCE OF ORGANIC BRAIN DISORDER

Mr. Zonen's opposition demonstrates that he has consulted experts who he would present to the jury in opposition to the ones who should have been consulted and called by competent counsel for the defense. In the course of present counsel's investigation significant medical problems were discovered. Mr. Hoyt was hospitalized for head injuries, febrile seizures and infections as an infant and toddler. Furthermore, Mr. Hoyt underwent an electorecnephalogram (EEG) at St. Francis Hospital in Santa Barbara which was found to be abnormal. Dr. Globus, an experienced neuro-psychiatrist, determined that this is indicative of a brain disorder which is consistent with the diagnosis of Dr. Kania. (See

Exhibit G, Report of Dr. Globus attached to Points and Authorities Number Two in Support of Motion for New Trial "hereinafter Defendant's Supp. No. Two".)

Obviously, the psychiatric opinion of Dr. Globus which was rendered before he had the results showing organic brain damage would have been relevant to counsel and the defendant in the preparation of the defense. Furthermore, the comprehensive testimony as set forth in Dr. Globus' opinion would have been more appropriate in conjunction with the opinion of Dr. Ofshe and the investigation done by the current investigators in this case in presenting a defense at the guilt phase.

However, the evidence of organic brain damage is significant. It should have been discovered and addressed in testimony at the guilt phase. It should have been addressed by way of cross-examination of the prosecution experts as well. It would have been up to the jury to decide what weight to give to the evidence but it was clearly relevant and should have been provided.

This Court is not to resolve conflicts between the experts but to decide if Mr. Hoyt was deprived of a fair trial and his constitutional rights by counsel who failed to investigate, introduce evidence, consult experts and call them at trial.

**II.**

**TRIAL COUNSEL CREATED A DIRECT CONFLICT OF INTEREST WHEN SHE ENTERED INTO A LITERARY CONTRACT AND WAIVERS FOR HER OWN PERSONAL BENEFIT**

Deputy District Attorney Ron Zonen argues that "although it was inappropriate for Ms. Owen to have entered into such a contract the effect of her conduct appears to be benign." (Plaintiff's Opp. p. 3.) However, the fact that an attorney creates a direct conflict of interest with his/her client is not "benign" nor does that answer the question before this Court. A financial conflict of interest is a direct infringement on the constitutional rights of the defendant. As such, the prosecution has the burden to show that it was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].)

Defendant, Ryan Hoyt, has a constitutional right to the effective assistance of counsel. (People v. Juan Corona (1978) 80 Cal.App.3d 684, 705 [145 Cal.Rptr. 894] citing Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799]; Powell v. Alabama (1932) 287 U.S. 45 [77 L.Ed. 158].) Effective

assistance of counsel requires the services of an attorney devoted to the interest of the client and undiminished by conflicting considerations. (*Juan Corona, supra*, at p. 720.) The fact that Ms. Owen had the defendant sign a waiver of attorney client privilege along with a grant of all literary rights creates a relationship in which the services of the attorney are not devoted entirely to the interests of the client but rather to the interests of the attorneys own pocketbook. The prosecution does not demonstrate that this is harmless beyond a reasonable doubt per *Chapman*. To the contrary, the Defendant demonstrates irrefutable harm.

Defendant's Strickland expert, Steve Balash, stated in his declaration that

> in [his] opinion the conflict of the book agreement is obvious because if the story had any monetary value as a movie or book, it would be worth much less if the defendant were to plead guilty. A sensational trial which generated a substantial amount of publicity would be worth much more as a story. (See Exhibit H to Defendant's Supp. P & A No. Two, p. 2: 23-26.)

Mr. Balash went on to state that "no ethical attorney would enter into such an agreement before trial or while any issues in the case are still pending." (*Id.* at p.3: 5-7.)

Mr. Zonen argues that "there is no evidence that Ms. Owen made any decision, asked any question, offered into evidence any exhibit or made or refrained from making a single objection based on some perceived literary benefit." (Plaintiff's Opp. p. 1:27-2:2.) Merely making an argument does not prove there was no harm beyond a reasonable doubt. (*Chapman, supra.*) However, Mr. Zonen's claim is simply not supported by the evidence.

The evidence that Ms. Owen made major decisions in several identifiable areas, and probably many others yet undetected, is established in the record. For instance, Ms. Owen did not object to cameras in the courtroom; Ms. Owen dropped her request for a change of venue; and she stayed on as lead counsel in a case where she clearly was not competent to do so. Each of these actions is evidence that Ms. Owen was not acting in the best interests of her client but in the best interests of her own financial gain.

Mr. Zonen argues that Ms. Owen made a reasoned choice when she decided not to request a change of venue, however, Mr. Zonen fails to address the fact that she deceived both the client and co-counsel with the fact that she allegedly consulted a jury expert. Furthermore, Ms. Owen did not know the process by which a change of venue would occur. (See Exhibit A, Declaration of Bobette Tryon attached hereto.) Making a statement that this was a "reasoned choice" flies in the face of the evidence and certainly does not carry the burden of establishing, to the contrary, that it was harmless.

All of these actions by Ms. Owen worked to prejudice Mr. Hoyt and are evidence that she was not working for the best interests of the client.

## III.

## CHERI OWEN DID FAIL TO MAKE AN INFORMED CHOICE TO WAIVE THE MOTION FOR CHANGE OF VENUE

In addition to being evidence of a conflict of interest, the failure to move for a change of venue was ineffective assistance in and of itself. Deputy District Attorney Ron Zonen argues that Ms. Owen's decision to not seek a change of venue was based on a "reasoned belief that defendant faced greater likelihood of receiving a death verdict, if convicted, in some other venue in California rather than Santa Barbara." However, this is simply not true. Ms. Owen could not have made such a reasoned decision when she did not understand or know the procedure to be followed when a change of venue is granted. (See Exhibit A, Declaration of Bobette Tryon attached hereto.)

Richard Crouter, Ms. Owen's co-counsel, stated in his declaration (See Defendant's Supp. No. Two Exhibit I), that Ms. Owen not only told him she had consulted with Wendy Saxon on the issue of venue but also that if a change of venue was granted the case would be sent to Victorville. This is, of course, false on both counts. Ms. Owen never talked with Ms. Saxon and there is no way to know where the Judicial Council would send a case if change of venue were granted.

Furthermore, the fact that Mr. Zonen argues he had "numerous conversations" with Ms. Owen about a change of venue does not change the fact that she allegedly consulted an expert and informed her co-counsel she consulted an expert. Richard Crouter, Ms. Owen's co-counsel relied upon this information in making the decision to withdraw the motion. (See Defendant's Supp. No. Two, Exhibit I)

Since this information was false, neither Mr. Crouter nor Ms. Owen could have made a reasoned decision.

Mr. Zonen argues that Mr. Crouter could not have believed the case would automatically be transferred to Victorville. However, Mr. Crouter stated in his declaration signed under the penalty of perjury that Ms. Owen gave him this information and he based his decision on this information. Mr. Zonen's argument cannot override the evidence before the court.

This is not only ineffective assistance of counsel in and of itself but it is also an abject failure to properly advise the defendant and allow him to participate in his defense.

**IV.**

**PREDECESSOR COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE GUILT PHASE OF THE TRIAL**

Predecessor counsel did not interview witnesses because first, Ms. Owen used the defendant's investigation funds to pay prior debts to investigator George Zeliff. (See Declaration of George Zeliff filed in Defendant's Supp. Motion for New Trial) Second, it was predecessor counsel's stated belief that the police did such a thorough job that the defense did not need to re-interview them. (See Defendant's Supp. No. Two, Exhibit I, & Exhibit A, Declaration of Bobette Tryon attached hereto.) Neither is a defense to the duty of counsel to adequately investigate a case particularly a capital case. (People v. Pope (1979) 23 Cal.3d 412, 424-425.)

For instance, had trial counsel interviewed Mr. Seymour they would have known that not only did he identify Mr. Hollywood as being present at the Lemon Tree Hotel but that Mr. Hollywood introduced himself to Mr. Seymour. (See Defendant's Supp. Motion No. Two, Exhibit I, Declaration of Roger Best.) Mr. Zonen argues that Mr. Seymour believed the photo of Mr. Hollywood was the same person who he talked to on the balcony. However, had trial counsel properly interviewed Mr. Seymour they would have brought out the fact that not only did he identify Mr. Hollywood but that Mr. Hollywood actually introduced himself to Mr. Seymour. Thereby giving even more credence to Mr. Seymour's testimony.

Deputy District Attorney Ron Zonen argues that Kelly Carpenter, Natasha Adams and Nathan

Appleton testified that Jesse Hollywood was not present at the hotel. However, Ms. Carpenter, Ms. Adams and Mr. Appleton were not present for the entire day and night at the hotel and their testimony as prosecution witnesses is not beyond contradiction. It is possible that Mr. Hollywood was present at the hotel at a time when those three witnesses were not present and it is possible that they are afraid of Hollywood or covering for their own involvement.

Mr. Zonen argues that the witnesses who testified that Mr. Hollywood was present at the hotel only saw a single photograph of Mr. Hollywood that was viewed days or weeks after the incident. He argued at trial and now that these identifications cannot be credible. These arguments only strengthen the fact that trial counsel should have interviewed all three witnesses who identified Mr. Hollywood as being at the hotel. Had trial counsel done so they could have showed them pictures of others involved in the case and gained further credence that Mr. Hollywood was present at the hotel and further credence to Mr. Hoyt's defense.

Had trial counsel interviewed the owner of the Outback Steakhouse they could have presented evidence showing that the restaurant closed at 10:30 p.m. thereby impeaching the credibility of Casey Sheehan's testimony. (See Defendant's Supp. No. Two, Exhibit J.) This was a major contention of defense counsel during cross-examination of prosecution witnesses and could have easily been established by independent testimony. This would have directly impeached Casey Sheehan's and would have destroyed the alibi for Mr. Hollywood presented by the prosecution through Michelle Lasher and Casey Sheehan.

**V.**

**TRIAL COUNSEL FAILED TO UNDERSTAND THE CONFESSION ISSUES IN THIS CASE**

Although trial counsel did address the admissibility of the defendant's confession they failed to understand what the issues were with regard to the confession. (See Defendant's Supp. No. Two, Exhibit M.) As addressed by Dr. Ofshe whether the fact that Mr. Hoyt had certain personality defects and high levels of anxiety and whether he was not fit to undergo an interrogation, the interrogation was manipulative, the admissions were suspect and there were several invocations of his right to remain silent.

Trial counsel failed to address "whether or not the tactics used by the interrogators depended on the use of coercion to elicit the admissions made by Mr. Hoyt and the tactics the interrogators used to 'roll over' Mr. Hoyt's attempts to terminate the interrogation." (See *id.*) The failure of trial counsel to identify, to elicit testimony and to argue these key issues in a motion to suppress is ineffective assistance of counsel.

Dr. Ofshe states in his reports that he reviewed the following materials in connection with Mr. Hoyt's case: the interrogation of Ryan Hoyt both the audio and transcript, Mr. Hoyt's trial testimony, the two calls between Mr. Hoyt and his mother, both the audio and transcript, a copy of Dr. Kania's file and the trial testimony of Dr. Kania. (See *Id.*) Based on his review of these materials, Dr. Ofshe found that the detectives interrogation was "based on a psychologically coercive strategy." (See *Id.*) The detectives tactic was to make Mr. Hoyt believe that if he did not admit participation in the killing and adopt a suggested reason as to why the killing occurred that Mr. Hoyt "would be charged with pre-meditated murder and receive a life sentence or the death penalty." (See *Id.*) However, if he did go along with the detectives then "he would be charged with a crime that was less serious and receive a lighter sentence." (See *Id.*)

Furthermore, Dr. Ofshe pinpointed three points during the interrogation in which Mr. Hoyt attempted to end the interrogation. (See *Id.*) First at pages 7-8 of the interrogation Mr. Hoyt first attempts to end the interrogation by stating: "You mind if I go back to my cell and think about it tonight and talk to you guys tomorrow cause I know my arraignment is Monday." Second, at page 17-18 of the interrogation Mr. Hoyt attempts to again terminate the interrogation by stating "I think I'm going to stop there for now." "I'd just love to take a break. Do some more thinking." Dr. Ofshe indicates that in response to both of these requests the detectives employ "tactics designed to lead Mr. Hoyt to reverse his decision rather than simply acceding to his stated request." (See *id.*) On Mr Hoyt's third attempt to terminate the interrogation he stated "I think I want to stop there." Instead of terminating the interrogation "the detectives continued to attempt to reverse Mr. Hoyt's decision. Detective West's immediate response to Mr. Hoyt's request was to try to change his decision and both detectives continued to ask questions designed to elicit damaging information from Mr. Hoyt. Pages 29 and 30 of

the transcript document that the detectives were successful in eliciting at least one further admission from Mr. Hoyt." (See *id.*)

In addition, counsel failed to bring out the nature of the alleged "admissions" before the jury. Therefore, the jury was not presented with valuable information regarding the weight of the proffered evidence. Counsel should have retained an expert to explain the nature of these admissions and the coercive environment under which they were made. The failure of trial counsel to properly address the confession issues in this case was a violation of Mr. Hoyt's right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Therefore, this Court should grant a new guilt phase trial allowing Mr. Hoyt a fair trial and the effective assistance of counsel.

## VI.

## PREDECESSOR COUNSEL FAILED TO PREPARE RYAN HOYT FOR TESTIMONY

The failure to properly prepare Ryan Hoyt to testify during the guilt phase of the trial was a denial of the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution.

Once again the prosecution has the burden of establishing that this was harmless beyond a reasonable doubt. (*Chapman, supra.*) It was clearly harmful and, therefore, the prosecution cannot carry the burden. Mr. Hoyt was informed by trial counsel that he needed to testify. Trial counsel never discussed with Mr. Hoyt why they felt it necessary for him to testify or the pros and cons of testifying versus not testifying. Mr. Hoyt relied solely on trial counsel for guidance during the trial proceedings and did not question the fact that trial counsel told him he needed to testify. Furthermore, trial counsel spent a total of 11/2 to 2 hours talking with Mr. Hoyt about his testimony, the day before he was called as a witness. Prior to this meeting trial counsel had not discussed the fact that Mr. Hoyt would be testifying or the possible subject matter of his testimony. Failure to properly communicate with Mr. Hoyt regarding whether or not he should testify and the failure to properly prepare to testify were violations of Mr. Hoyt's Sixth Amendment right to the effective assistance of counsel and Article I section 15 of the California Constitution. (See Defendant's Supp. No. Two, Exhibit E)

## VII.

## DEFENDANT RYAN HOYT DID ADDRESS THE ISSUE OF WHETHER OR NOT THE COURT ERRED IN GRANTING THE PROSECUTION DEMAND FOR A PSYCHOLOGICAL EXAMINATION OF MR. HOYT

Deputy District Attorney Zonen argues that the defense has failed to preserve the issue of whether or not this Court properly compelled the defendant to submit to a psychological examination, however, this is not true. An objection was made at the time of the prosecution's request and, on March 19, 2002, a motion for new guilt phase trial was filed and the issue of whether or not the Court erred in granting the prosecutions demand for a psychological examination was specifically addressed.

Therefore, the subject matter of Ms. Owen's flawed petition was properly preserved to be addressed by the appellate court. It was not properly presented to the appellate court and Ms. Owen lied to co-counsel to cover up her error.

Counsel has an obligation to provide a defendant with reasonably effective assistance of counsel. (Strickland v. Washington (1984) 466 U.S. 668, 687.) In the case at hand, due to the fact that Ms. Owen failed to properly perfect the record for the Writ of Prohibition Mr. Hoyt lost his opportunity to immediately challenge the trial court's decision to compel Mr. Hoyt to submit to a psychological examination. Furthermore, Ms. Owen's failure to honestly communicate with Keenan counsel lead him to believe that Ms. Owen had followed all of the proper procedures. Had Ms. Owen consulted with Keenan counsel regarding the procedures to follow in filing the writ of prohibition the correct procedures would have been filed and the writ would not have been denied based on a procedural defect.

The prosecution filed an opposition to defendant's motion for new guilt phase trial on March 22, 2002, and suggested that the defendant willingly submitted to an exam "presumably on the advice of counsel." First, we note the court ordered the examination and placed defendant in the untenable position of either cooperating or having the prosecution comment on his refusal to cooperate. Secondly, defense counsel did ask for permission to have someone present to wit, Dr. Kania, and that was denied. Thirdly, however, the failure to advise the client to assert his right to remain silent and the failure to afford the client the presence of counsel during questioning, would be ineffective assistance of counsel.

Therefore, the defendant was denied his rights under the Sixth Amendment to the United States Constitution and Article 1 Section 15 of the California Constitution.

## VIII.

## PREDECESSOR COUNSEL FAILED TO PROPERLY PREPARE FOR THE PENALTY PHASE

"'The constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.'" (Caro v. Calderon (9th cir. 1999) 165 f.3d 1223, 1227 [citations omitted].) "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" (Mayfield v. Woodford (9th Cir. 2001) 270 F.3d 915, 927; citing Williams v. Taylor (2000) 529 U.S. 362, 393.) As argued in Supplemental Points and Authorities in Support of the Motion for New Trial there are certain standards that should be followed with regard to investigation in order to effectively represent a person facing the death penalty. (See Defendant's Supp. Motion For New Trial, Exhibit H) Here trial counsel failed to meet these standards. First, Ms. Owen directed her first investigator, George Zeliff, not to contact the client or do other investigation. Instead, she directed him to pay off old debts she owed on other cases with the defendant's money in this case. Second, Danny Davis states he met with the client many times but this is not true. We do not know what he did with the substantial money paid to him but it does not appear it was earned on this case. He met with the client twice for two brief periods of time as represented in the jail logs. (See Defendant's Supp. Motion for New Trial, Exhibit J) Third, not only was there almost no investigation conducted with regard to the guilt phase but there was no meaningful investigation with regard to the penalty phase.

### 1. Failure to Discover and Present Evidence of Organic Brain Damage and Psychiatric Opinion

As set forth above, counsel did not uncover evidence of head injuries and childhood illness that suggests the possibility of organic brain damage. Worse yet, they did not have adequate testing and obtain the advice of experts who suggest the presence of organic brain damage. This, of course, not only relates to ineffective assistance at the guilt phase but amounts to an abject failure at the penalty phase.

**2. Failure to Retain and Present Evidence from a Prison Adjustment Expert**

"Defense counsel has a duty to investigate and consult relevant experts, and the failure to do so is ineffective assistance of counsel." (Schell v. Witek (9th Cir. 2000) 218 F.3d 1017, 1022.) Individualized sentencing requires that the sentencer hear, listen and give full consideration to all relevant mitigating evidence. (Mills v. Maryland (1988) 486 U.S. 267, 387.) In *Skipper v. South Carolina* (1986) 476 U.S. 1, 7, the Supreme Court stated "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is an aspect of his character that is by its nature relevant to the sentencing determination." In the case at hand, a prison adjustment expert could have testified to Mr. Hoyt's adjustment to the county jail and the fact that he is an inmate who does not cause trouble. (See Defendant's Supp. No. Two, Exhibit E)

Mr. Zonen argues that if a prison adjustment expert were called to testify then he/she would be asked to comment on the alleged threats made by Mr. Hoyt to Mr. Rugge when he was in a cell with Mr. Rugge awaiting an appearance in court. However, it is not the trial court's duty to address the factual disputes between the defense and the prosecution in a motion for new trial. It is the trial court's duty to address whether or not the failure to put on such evidence prejudiced Mr. Hoyt's case. Therefore the Court must decide whether or not "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The fact that the prosecution would present new information at a new trial should not influence the judge's decision because that is a factual question that must be resolved by the jury.

**3. Failure to Call an Expert to Explain the Impact of Alcoholism, Drug Abuse and Violence on Children was Ineffective Assistance of Counsel**

It was critical that an expert be called to explain to the jury the impact of alcoholism, drug abuse and violence on children can have on a person. Here, Deputy District Attorney Ron Zonen specifically argued that the information presented with regard to Mr. Hoyt's dysfunctional family environment supported his argument that Mr. Hoyt was a violent person. In order to counteract such an argument trial counsel should have been prepared to offer expert testimony either from at least a mitigation specialist such as Richard Wood, who could effectively portray Mr. Hoyt's background to the jury. (See

Defendant's Supp. No. Two, Exhibit L)

The failure to present such critical experts was ineffective assistance of counsel. According to the United States Supreme Court the sentencer may "not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence of less than death." (Lockett v. Ohio (1978) 438 U.S. 586, 604.) Here, trial counsel precluded mitigating evidence from the jury by not presenting evidence of a prison adjustment expert and a mitigation specialist. Thereby, prejudicing Mr. Hoyt's case and denying him a right to a fair trial.

**4. Predecessor Counsel Failed to Properly Prepare Witnesses to Testify at the Penalty Phase.**

Anne Stendel Thomas, Mr. Hoyt's aunt, was informed by Cheri Owen five minutes before she was put on the stand that she was going to testify. (See Defendant's Supp. No. Two) Ms. Stendel was unprepared and not clear headed due to medication, causing her difficulty in recalling particular incidents of abuse and mental illness within Mr. Hoyt's family. (See *id.*) Ms. Stendel could have testified to the extensive mental illness and depression in Mr. Hoyt's family, the widespread drug addiction and alcoholism in the family.

Vicki Hoyt, Mr. Hoyt's mother, was subpoenaed two days before she was to testify on behalf of Ryan Hoyt. Ms. Hoyt was never told what to expect while testifying or what she could or could not testify to. Had trial counsel properly prepared Ms. Hoyt they would have presented the following mitigating information: Mr. Hoyt shares close relationships with his brothers Jonathon and Austin and his sister Kristina and is adored by his family; Mr. Hoyt was a good athlete and Mr. Hoyt was always protective of his family and supportive of his mother. (See Defendant's Supp. Motion for New Trial.) In addition, had trial counsel properly interviewed Ms. Hoyt the fact that Mr. Hoyt had three significant medical problems that may have lead to neurological problems would have been obtained thereby giving trial counsel reason to consult with a neurologist for possible mental defects which may have impacted on Mr. Hoyt's defense.

Carol Stendel, Mr. Hoyt's grandmother, did testify at the penalty phase, however there was a significant amount of information that was not brought before the jury. For example, had trial counsel

properly interviewed and prepared Mrs. Stendel she would have testified to the following evidence: First, Mr. Hoyt is a trusting and loyal kid who is easily taken advantage of; he always needs to feel accepted and like he belongs; he is rational, even-tempered and mellow; his siblings and cousins always look to him for advice because he was the family's problem solver; and he does not stick up for himself because he is afraid if he does someone might not like him. Second, Vicki Hoyt, was sexually assaulted as a teenager; she has a history being suicidal and as a teenager she was often found in her closet in the fetal position. (See Supp. Motion for New Trial, Exhibit D.)

Although, James Hoyt was called to testify he was completely unprepared. As stated in his declaration attached to Supp. Points and Auth. Number Two in Support of Motion for New Trial as Exhibit C, he was very uncomfortable testifying; he did not know the attorney questioning him and he was never asked about Mr. Hoyt's close relationship with his younger brother Austin and the fact that he did well in school.

It is true that testimony was given during the penalty phase of Mr. Hoyt's trial, however, there was a significant amount of testimony that was not presented to the jury. A significant amount of additional information that those witnesses already called could have provided to the jury had they been prepared.. (See Exhibits A, B, C, D, E, H, K, L to Defendant's Supp. No. Two)

Just as in Ainsworth v. Woodford (2001) 268 F.3d 868, 874, this Court should find that had the jury been able to consider the wealth of mitigating evidence available to counsel with reasonable investigation and preparation, there would be a reasonable probability that the jury would have rendered a verdict of life imprisonment without possibility of parole.

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## CONCLUSION

For the reasons stated herein[1] the defendant respectfully requests the Court grant a new guilt and penalty phase trial.

Dated: January 31, 2003

Respectfully submitted,

SANGER & SWYSEN

Robert M. Sanger,
Attorney for Defendant Ryan Hoyt

[1]And for the reasons stated in all previous papers filed with the Court and any supplemental papers or arguments the Court may allow.

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Attorneys for Defendant
RYAN HOYT



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

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|---|---|
| THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>RYAN HOYT,<br><br>Defendant. | Case Number 1014465<br><br>**SUPPLEMENTAL POINTS AND AUTHORITIES NUMBER TWO IN SUPPORT OF MOTION FOR NEW TRIAL**<br><br>Date: January 16, 2002<br>Time: 10:00 a.m.<br>Dept.: 6 |

## I.

## GUILT PHASE

### A. PREDECESSOR COUNSEL FAILED TO PRODUCE EVIDENCE TO THE JURY THAT MR. HOYT SUFFERED BRAIN DAMAGE.

#### 1. Introduction

Cheri Owen did not present to the jury the fact that Mr. Hoyt suffered from brain damage. She did not do so because she did not do enough basic investigation to learn that he had been hospitalized for head injuries, febrile seizures and infections as an infant and a toddler. She did not do so because she

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## DECLARATION OF RICHARD CROUTER

I, Richard Crouter, declare the following:

I am an attorney duly licensed to practice law in the State of California. I previously represented Ryan Hoyt in the case of *People v. Ryan Hoyt*, Santa Barbara Superior Court case number 1014465.

On approximately September 20, 2001, I received a message from attorney Cheri Owen stating "important please call." When I spoke to Ms. Owen she informed me that she recently learned for the first time that the district attorney would be seeking the death penalty in the case of *People v. Ryan Hoyt*. Ms. Owen requested that I assist her in this matter and come in as second chair as Keenan counsel. Ms. Owen informed me that she requested a continuance as soon as she found out the district attorney would be seeking the death penalty but that this request had already been denied. Ms. Owen informed me that she had already put in her request for appointment of Keenan counsel.

Mr. Hoyt was the first client I have represented who faced the death penalty. I was a prosecutor and tried several murder cases but none were capital cases. I was a municipal judge and handled preliminary hearings and misdemeanors. I have tried approximately five murder cases as a defense attorney and was involved with one case in which the co-defendant was facing the death penalty.

Ms. Owen told me that she handled at least one non-capital murder case but I do not know if that was a jury trial or not. I knew Ms. Owen as a fairly new attorney who made court appearances in some of the local trial courts in the San Bernardino and Riverside area where I practice. When she called me on this case, she acknowledged that she needed assistance..

I made my first appearance in this case on October 4, 2001. I was appointed by the court on October 11, 2001. Although I was brought in on the eve of trial, since Ms. Owen told me her motion to continue was denied, I believed there was no alternative but to prepare for trial in the time allotted.

I do not recall seeing either the notice stating the district attorney intended to seek the death penalty or a statement of aggravating evidence. I was surprised when I was told by Ms. Owen that the district attorney waited over a year to state their intention of seeking the death penalty. I wanted to know why after such delay the prosecutor was now seeking the death penalty.

Ms. Owen disclosed to the prosecution that she would be calling an expert with regard to a false confession prior to my involvement in the case. To my knowledge she did not have a written report from the expert, Dr. Kania. I believe Ms. Owen had supplied the expert with some discovery in the case and received an oral opinion based on that information.

It was Ms. Owen's theory that Mr. Hoyt was responding to the stress of the situation and she told the prosecutor she would be proceeding with a psychological expert.

I was unaware that Ms. Owen asked Mr. Hoyt to sign a waiver of the attorney client privilege and a unconditional grant of literary rights to the facts of his case. If I had been aware of these actions by Ms. Owen I would have told her that it was unethical and that she had a direct conflict of interest. I would have advised Ms. Owen that she must withdraw as attorney of record unless some other corrective action was taken..

Ms. Owen requested that I physically file with the Court of Appeal a Petition for Writ of Prohibition and Memorandum of Points and Authorities and Stay of Trial Proceedings. I filed the papers that Ms. Owen gave to me with the Court of Appeal. The issue raised in the writ was whether the state's request resulting in the Superior Court's order compelling defendant Ryan Hoyt to submit to a prosecution's psychological examination and/or evaluation was unconstitutional. I was later informed by Ms. Owen that the Court of Appeal had denied the writ. However, Ms. Owen never informed me that the petition was denied due to a procedural failure on her part to provide the court with the record of the proceedings below. I did not know that Ms. Owen failed to provide the correct record to the court. Had I known that Ms. Owen did not follow the correct procedures I would have attempted to correct the situation.

Ms. Owen informed me that she had consulted with Dr. Wendy Saxon with regard to the issue of change of venue. I have previously worked with Dr. Saxon and found her expertise to be greatly helpful. Ms. Owen informed me that if a change of venue were granted, the case would be sent to Victorville and heard by Judge Yent. She also told me that her research showed that Santa Barbara had the lowest percentage of death verdicts of any county in California. Based on this information I agreed it would be good trial tactics to withdraw the motion for change of venue.

I never spoke with Ms. Saxon about this case nor did I see any reports from Ms. Saxon and simply accepted Ms. Owen's word that she consulted with her. I later learned that Ms. Owen had a discussion with deputy district attorney Ron Zonen in which he suggested the case be sent to Victorville since I would be coming on as Keenan counsel. I was not aware there was never a determination the case would be sent to Victorville.

The admissibility of Mr. Hoyt's statements to the police was raised by way of a 995 motion. This was denied by Judge Gordon. The issue needed to be raised again at a motion in limine to preserve the issue for appeal, and it was. At that time deputy district attorney Ron Zonen indicated that he agreed Mr. Hoyt had invoked his right to remain silent near the end of side A of the tape recording of his statements and stipulated that side B of the tape would not come before the jury. At some point Ms. Owen told the judge that if he was going to let in a part of the tape that the entire tape should come in. It is my belief that Ms. Owen allowed the entire tape to come in since Dr. Kania, our expert, had reviewed and relied upon the audio and video tape for his opinion so the entire tape would come in anyway.

Danny Davis was the investigator working with Ms. Owen when I was asked to assist in the case. I do not know exactly what investigation was completed by Mr. Davis. I believe that he interviewed family members and several other witnesses. I vaguely recall that there was a prior investigator but I never saw any reports written by him.

I told Ms. Owen that the investigator needed to find out everything he could about Mr.

Hoyt's background for the penalty phase. I do recall that we received medical records with regard to Mr. Hoyt but nothing extensive. I recall something about Mr. Hoyt having a childhood head injury. I do not recall any information about Mr. Hoyt having a viral infection or febrile seizures when he was an infant and toddler. Whatever information we received was presented in the penalty phase. If it was not presented, I did not know about it.

Our initial witness list contained everyone in the police reports. This list was then narrowed down to 63 witnesses. Most of these witnesses were not interviewed by the defense to my knowledge. Mr. Davis interviewed both Mr. Seymour and Mr. Arias. I do not know if any of the other witnesses were interviewed. I do remember stating to the court and Mr. Zonen that we did not have witness statements or reports because the police did such a thorough job that we did not have to re-interview them.

Mr. Arias testified that he saw Jesse Hollywood at the Lemon Tree Inn. Mr. Davis interviewed Mr. Arias before he was called as a witness. However, I was surprised when on cross-examination Mr. Arias testified that the person he thought was Jesse Hollywood was six feet tall.

During the cross-examination of Mr. Sheehan I made a mistake with regard to his prior testimony at the grand jury proceedings. I mixed up the pages of the grand jury transcript and it was my belief that Mr. Sheehan testified before the grand jury that Mr. Hollywood told him of the shooting and not Mr. Hoyt. This belief was incorrect. In the middle of my cross examination Mr. Zonen pointed out to me that I was looking at the wrong pages. This error was embarrassing.

Ms. Owen told me she had some type of neurological problem during the time she acted as lead counsel in this case. There were days that Ms. Owen would feel poorly. On at least one occasion, Ms. Owen told me she had to miss an afternoon of the proceedings due to a doctor's appointment. In addition, Ms. Owen was absent from court on at least one other occasion during voir dire. On that occasion I believe she had a conflicting appearance in Riverside. When she

was not present, I appeared for the defense without her, with Mr. Hoyt's consent.

I declare under the penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on this 13th day of December, 2002 at Yucca Valley, California.

Richard Crouter

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, ANACAPA DIVISION

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>RYAN HOYT,<br><br>Defendant. | CASE NO. 1014465<br><br>[PROPOSED]<br>ORDER DENYING DEFENDANT'S MOTION TO COMPEL DOCUMENTS FROM THE STATE BAR OF CALIFORNIA |

The Defendant's Motion to Compel the California State Bar to Turn Over Files, Records, and Documents with Regard to Complaints Made Against Cheri Owen from August 1999 Through the Present (hereinafter the "Motion to Compel") and the State Bar of California's Opposition to the Motion to Compel came on regularly for hearing on October 8, 2002, in the above entitled Court, before the Honorable William L. Gordon, Judge presiding. Rachel S. Grunberg appeared on behalf of the non-party witness, the State Bar of California, Robert M. Sanger appeared on behalf of the Defendant, Ryan Hoyt, and Joanne E. Robbins, appeared on behalf of Cheri Owen.

IT IS HEREBY ORDERED that, for good cause appearing, the Defendant's Motion to Compel is hereby denied and the State Bar of California's objections to the production of

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the records related to Cheri Owen is sustained.

DATED: Oct 21, 2002

Honorable William L. Gordon
Judge of the Superior Court

02198

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>-vs-<br>RYAN JAMES HOYT,<br>Defendant and Appellant. | SUPERIOR COURT<br>No. S113653<br>**(Death Penalty)** |

**APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY**
**HONORABLE WILLIAM L. GORDON, JUDGE**

**REPORTERS TRANSCRIPT ON APPEAL**

Appearances:

For the Appellant:

For the Respondent:

STATE ATTORNEY GENERAL
300 South Spring Street
Los Angeles, California 90013

Reported By:

SHARON E. REINHOLD, CSR #7794
SANDRA A. FLYNN, CSR #4794
LESLIE L. HEINTZ, CSR #4079
JANE A. CIACIO, CSR #9064
ELIZABETH JONES, CSR #4327
Official Court Reporters
Superior Courthouse, Department 6
WILLIAM S. STEPHENS, CSR #10033
LISA LEMUS, CSR #11484
Reporters Pro Tempore
Santa Barbara, California 93101

VOLUME XI (of XI Volumes)
Pages 2334 through 2600, inclusive

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SANTA BARBARA, CALIFORNIA, TUESDAY, OCTOBER 8, 2002

DEPARTMENT NO. 6 HON. WILLIAM L. GORDON, JUDGE

AM SESSION

APPEARANCES:

The defendant with his Counsel, ROBERT SANGER, Attorney at Law; Senior Deputy District Attorney RONALD ZONEN, for the County of Santa Barbara representing the people of the State of California; JOANNE ROBBINS, Attorney at Law, representing Cheri Owen; RACHEL SIMONE GRUNBERG, representing the State Bar; SHARON E. REINHOLD, Official Court Reporter.

THE COURT: All right. Hoyt.

MR. SANGER: Would it be all right to have Mr. Hoyt down here?

THE COURT: I don't care.

MR. SANGER: Your Honor, maybe -- I don't know if you're ready to call the case.

THE COURT: Yes.

MR. SANGER: If we could address the issue of the subpoenas that were issued to Cheri Owen and Danny Davis. And your Honor had issued subpoena and then --

THE COURT: I had issued and held the body attachment for the two witnesses on your representation that they hadn't complied with what I had ordered, and, therefore, that's what happened. Okay.

issued. All right.

MR. SANGER: They were just on paper. I understand they never went into the system.

THE COURT: All right. Now on the present issue which involves the subpoena which was directed to the State Bar. The State Bar has filed objections to the production of the information which is requested, and then Miss Owen, through her counsel, has filed a motion to quash the subpoena. So it amounts to the same thing, I guess, so were're dealing with the same issues.

And, Mr. Sanger, I would still like you to explain to me how these complaints that have been filed against Miss Owen, how these complaints that other persons are making about the manner in which she has conducted their affairs are relevant as to any issue regarding Mr. Hoyt's motion for new trial. I can't see it.

MR. SANGER: Yes. If I could respond to that, I'll answer the Court's question, or attempt to, and then I'd like to orally respond to the motion to quash that was filed October 7th.

THE COURT: Well, you go ahead and answer my questions.

MR. SANGER: Yes, sir.

I refer the Court, respectfully, to page 4 of our original motion to compel which was filed September 6th, where we did set forth with as much particularity as we can the specific factual basis that I think gets

us through the door.

And let me just take one of these examples, and this is by way of answering the Court's focus question here, and I'd like a chance to say a couple of other things.

But with regard to this, if you look at line 14, there's a reference to a specific complaint.

THE COURT: That's right.

MR. SANGER: That's a civil lawsuit that was filed. And in that civil lawsuit it alleges that Cheri Owen didn't file a claim with the City of Long Beach that was supposed to be filed on or before August the 12th of 2000, and that Miss Owens claimed that she was too ill to file a government claim. Which is a, as you know, is a one-page document, is not a big thing.

THE COURT: Go ahead.

MR. SANGER: At that same time, that's approximately the same time that she's agreeing to take on a death penalty case to represent a man who is facing a death sentence and ultimately gets a death verdict.

We referred to some other complaint there and some other litigation that goes on. We don't have the records, so, therefore, we can't look at the records and say, your Honor, this one is relevant and that one is relevant, we have to ask the Court to look at them in camera.

THE COURT: How is this one relevant? The question is, what did she do in this case, not what she

did in some other case.

MR. SANGER: No, that's true.

There's two prongs to Strickland, as the Court knows, there's the failure to meet the standard of care that's reasonably expected from a criminal law practitioner in representing a client in a case of the nature that is pending, this was a death penalty case; the second issue is whether or not there was prejudice to the Defendant's case.

It's true, and we are seeking in other ways to show the prejudice, but the failure to meet the standard required of a lawyer I think is directly impacted by the complaints that are filed against this person by the State Bar. Because not only do we have, as I say this sort of gets our foot in the door, but not only do we know that there are lawsuits pending at that time, we are informed, and believe, that some of those lawsuits, maybe all of them, resulted in complaints to the State Bar. We know that there were complaints pending while this case was pending and that she was defending her State Bar action while she was attempting to represent Mr. Hoyt.

THE COURT: But you don't need all of these complaints for that. You don't need all of this -- these complaints people file like this, they're full of gossip, they're full of all sorts of unsubstantiated charges.

This business of getting into those files on

some marginal relevance theory that somehow they're going to show that Miss Owen didn't perform properly in this case, if you've got evidence that she didn't perform properly in this case, then that's what you need, not what she did in some other case.

MR. SANGER: Well, of course, your Honor, I understand that. That's obviously what we're working on.

But part of the picture that's developing, for instance, we have a declaration from her first investigator who was told not to work on the case and was told to take funds from this case and apply them to money she owed on other cases. And so we have a pattern of dealing on the part of this now resigned lawyer that shows that she was not operating in the best interests of Mr. Hoyt during this entire period of time.

And while it may be -- it may ultimately turn out to be icing on the cake, you know, I don't know, but I think that I'm obligated on behalf Mr. Hoyt to get to the bottom of this. I mean, this is a travesty the way this thing was handled. And we're finding --

THE COURT: If you know that it's a travesty, Mr. Sanger, you don't need this information. Obviously, you know what your problems are.

MR. SANGER: I understand. But I think that I would be -- I would be failing to meet the standard here if I didn't explore this. And I think there may well be something in there that will help us.

I'm somewhat distracted, because you're looking at a note from the other jury.

THE COURT: All right. Either counsel wish to respond? State Bar Counsel.

MS. GRUNBERG: The State Bar maintains that the documents are privileged and confidential under state law. They contained attorney/client privilege documents, were product privilege documents and official information which is confidential under Section 1040 of the Evidence Code.

And the State Bar has already testified that it has conducted a diligent search of the records and has found no disciplinary records pertaining to Miss Owen's representation of Mr. Hoyt.

THE COURT: That's not what they're after, they want every claim that's ever been filed against her.

MS. GRUNBERG: Exactly. And there's been no ethical -- no determination that an ethical violation has been committed by Miss Owens. She resigned with charges pending and that's -- a lot of complaints that came to the State Bar are merely unfounded allegations at this point.

Disclosure of the documents here today would tend to jeopardize or compromise third-party privacy interests, those of the complainants and the witnesses and financial institutions that came forward in the context of attorney disciplinary proceedings, if they knew that their information would be made public in this

disinterested third-party criminal litigation they may have thought twice about coming forward. And, in fact, it could create a chilling effect on future participants coming forward in State Bar proceedings.

The State Bar also notes that it may have ongoing or residual proceedings with or against Miss Owen and that disclosure of these documents could also tend to jeopardize our position in those proceedings as well.

MS. ROBBINS: Thank you, your Honor. I would like to first point out that this subpoena was issued on July 16th.

THE COURT: I know. I'm aware of that.

MS. ROBBINS: We were not aware of it.

THE COURT: I want specifically to know about this issue of whether these are in any way relevant to why they should be produced. He's claiming somehow these other claims are somehow relevant to his search to determine whether Miss Owen was incompetent in representing Mr. Hoyt in this case.

MS. ROBBINS: As the State Bar's Counsel has already pointed out, there's no complaint by anyone on behalf of Mr. Hoyt, or by Mr. Hoyt, I'm not aware of any references to Mr. Hoyt that have any relevance to this matter.

And more importantly, I think your Honor has really gone to the gravamen of it, that the complaints are full of innuendos, speculation, gossip, many things

that have no substantiation or foundation whatsoever. They would be highly prejudicial to be exposed both to Miss Owen and to the complainants and other parties involved in these complaints. They're confidential under the law. They were understood to be confidential by the complainants that filed them. There's been no probable cause found on any of those matters. No charges have been filed formally with the State Bar Court. There's no basis whatsoever for those to be relevant to this matter at all.

THE COURT: All right.

MR. SANGER: Can I respond briefly?

THE COURT: Yes. Briefly.

MR. SANGER: Just very briefly.

No charges filed because Miss Owens has resigned and foreclosed the system from doing that, so that's of no significance.

We're not asking to use innuendo, rumor, or anything else, we're asking to have the Court, first of all, look at the things in camera and determine which of them pertain to the time period and the conduct of counsel.

For instance, using that one example, if she was claiming that she was too ill to file a one-page claim while she's taking on a death penalty case, that's going to have impact and it's going to help put in context her failure to investigate this case.

So, we ask the Court to look at those things.

We don't expect that those complaints will come into evidence, we expect those complaints provide us with the basis to conduct further investigation as to her qualifications as under the first prong of Strickland to handle this case, and give an explanation as to why she failed to handle in a competent fashion, and why there's a prejudice to the defendant.

Just very quickly on a couple of the other issues that were raised. One, 1040 is not an absolute privilege, 6086.1 of the Business and Professions Code is not an absolute privilege. Those -- both of those Code Sections have to be evaluated in the context of a criminal prosecution, particularly one in a death penalty case, and the Court has to perform a weighing function, much like a Pitchess motion, the Court performs a weighing function, looks at the Pitchess material in chambers with regard to police officers and decides what if anything should be disclosed. Maybe all that's disclosed is the name and address and phone number of a witness, maybe nothing is disclosed, but there is a weighing process, there is no absolute privilege.

So based on all of that, I think the Court should do an in camera review. And I would submit it.

THE COURT: All right.

Well, as far as I'm concerned the issue of whether or not Miss Owen competently performed her duties in relating to Mr. Hoyt is not going to be -- the

issue is best framed by looking at what Miss Owen did or did not do in connection with this case. If she didn't make the proper investigation, if she didn't talk to the witnesses she should have talked to, if she didn't properly prepare her briefs or the legal issues in the case, if she didn't properly present the case in trial, that's what you look at, and that's the proof of the pudding.

And what someone else not connected with this case may have thought of Miss Owen's performance in another case has no relevance whatsoever to that. And the fact she didn't do a proper job in another case doesn't establish anything about what she did in this case.

And it seems to me to be looking through complaints, to be looking at them from other people, trying to determine whether or not there are claims which would reflect on Miss Owen's competence in those cases doesn't further the investigation regarding her performance in this case.

Now, Counsel has talked about the fact that -- and I think there's no question that this information is privileged, I mean, that's clear. Counsel has talked about the fact, well, but even under -- even if it's privileged, due process requires that the privilege be disregarded so the information can be made available, then that's what we have to do, but due process, a due process violation has to be based upon some relevance,

some finding that the materials sought to be disclosed has some relevance to any issue as to which the due process violation is being claimed.

For example, that case, that Ansbro case that was cited in the Defendant's Points and Authorities, that was a slam dunk in that case. There was a due process issue was clear cut. This guy was charged with manslaughter, drunk driving manslaughter, and he said, look, we want to show that it wasn't my driving that caused this accident, it was the configuration of the roadway, the design of the roadway, and we need to have information about other similar accidents that may have happened there in order to develop that. But that was a direct connection between the circumstances that existed on that roadway and the conduct of the driver who was charged with this felony. We don't have that here. We're speculating that there might be some stuff in those complaints that would reflect badly on Miss Owen's ability to do the job she was supposed to do in those cases.

As far as I'm concerned, the question is what did she do in this case. I don't see anything that compels me to go behind the privilege, or even to take the time to review all of these things in camera, because it just doesn't have any relevance to whether or not she performed properly in this case.

So, the objections are well taken, and I'm going to sustain the State Bar's objection. They need

not produce the documents. And I'll sustain the motion to quash on behalf of Miss Owen.

Now, with regard to the request for sanctions, I don't award sanctions on a motion that's filed one day before the hearing, and, therefore, if you wish to pursue the sanctions I'll have to set it for another time. I'm not telling you whether I'll grant them or not, but I'm not going to decide sanctions today.

MS. ROBBINS: Thank you, your Honor. We waive any issue as to that.

MR. SANGER: Your Honor, I have one request that I believe that I have to make on the record based on a case the name of which escapes me, a recent case.

THE COURT: Do you have the citation of the case?

MR. SANGER: No, I don't as I'm standing here. I don't even have the name in mind, but it will come to me.

The case involved Pitchess material, and the Court held that it was incumbent upon the trial Court to make a record and obtain the material and retain the material, at least a copy of it, so it would be available for Appellate review, because without looking at it, the Appellate Court had no ability to determine whether or not the trial Court's determination was correct. I understand your Honor is taking the position that it should not even be produced to the Court, but I think I would be remiss in my duty if I didn't request

that the Court order that the material be produced and at least a copy of it be preserved and sealed with this record, and so that is my request.

THE COURT: I'm not going to do that. If the Court of Appeal thinks that that material should be available I'm sure the State Bar will have it available, but I'm not going to order it produced in this courtroom.

All right. That's the order.

MR. ZONEN: Your Honor, next appearance is on the 12th of November, is that correct, and that's for hearing on the motion and sentencing?

THE COURT: That's correct.

MS. GRUNBERG: May I submit a proposed order?

THE COURT: Yes, please.

(Proceedings concluded.)

(Whereupon, pages 2511 through 2515 were sealed and filed under separate cover by order of the Court.)

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Attorneys for Non-Party Witness
CHERI OWEN

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA BARBARA**

**ANACAPA DIVISION**

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| THE STATE OF CALIFORNIA,<br>Plaintiff<br>vs.<br>RYAN HOYT,<br>Defendant | CASE NO. 1014465<br>**MOTION TO QUASH SUBPOENA DUCES TECUM TO THE STATE BAR OF CALIFORNIA FOR PRODUCTION OF DOCUMENTS REGARDING CHERI A. OWEN; DECLARATION OF JOANNE EARLS ROBBINS; REQUEST FOR ATTORNEY FEES**<br>Date: October 8, 2002<br>Time: 8:30 a.m.<br>Dept.: 6<br>The Honorable William L. Gordon |

TO THE HONORABLE WILLIAM L. GORDON, DEP. DISTRICT ATTORNEY RONALD J. ZONEN, ROBERT M. SANGER, AND THE STATE BAR OF CALIFORNIA:

Non-party witness Cheri A. Owen, ("Owen") by and through counsel JoAnne Earls Robbins of Karpman & Associates, hereby files this **Motion to Quash Subpoena Duces Tecum** issued by Robert M. Sanger ("Sanger") on July 16, 2002, to the State Bar of California ("State Bar") for production of all documents pertaining to Cheri A. Owen.

This Motion is based on **four separate and distinct grounds**:

(1) The Subpoena is invalid because the records and documents requested are **by law confidential**, pursuant to Business and Professions Code sections 6086.1(a) and 6094(b).

(2) The production of documents requested by Subpoena would result in **prejudice** to **ongoing investigations** by the **State Bar** and the **Los Angeles County District Attorney's Office**.

(3) The Subpocna is invalid because Sanger **failed to give proper notice** to Owen pursuant to Code of Civil Procedure sections 1985.3 and 1985.4.

(4) The production of documents requested by the Subpoena would only result in documents that are **inadmissible and irrelevant** to the Motion before this Court, and highly prejudicial to Owen.

## I. INTRODUCTION

The Subpoena Duces Tecum at issue was signed by Sanger on July 16, 2002, directed to the State Bar, requesting production of "Any and all documents pertaining to attorney CHERI A. OWEN." The State Bar, Office of General Counsel, filed an Objection and Motion to Quash ("Objection") on July 24, 2002. Sanger filed a "Motion to Compel" on September 6, 2002, and the State Bar filed an Opposition to the Motion to Compel ("Opposition") on September 23, 2002.

There are **four separate and distinct grounds** on which this Subpoena should be quashed, any one of which justifies this Court in ruling that the requested records should **not** be produced by the State Bar.

## II. THE RECORDS ARE **CONFIDENTIAL** UNDER THE LAW, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTIONS 6086.1(b) AND 6094(a).

Business and Professions Code sections **6086.1(b)** states:

"All disciplinary investigations are confidential until the time that formal charges are filed . . . ." [Following that segment are several exceptions that are not pertinent to this case.]

Business and Professions Code sections **6094(a)** states:

"Communications to the disciplinary agency relating to lawyer misconduct or disability or competence, or any communication related to an investigation or

proceeding and testimony given in the proceeding are privileged . . . ."

There are multiple reasons why State Bar investigation records are confidential. These relate to both the protection of the State Bar, to allow it the maximum ability and opportunity to accomplish the goal of the disciplinary system, and to the protection of the privacy and reputation of the attorney.

The California Legislature and the Supreme Court of California have authorized the State Bar to investigate and prosecute attorney misconduct. Business and Professions Code sections 6040 et seq. and 6075 et seq. The goals of the attorney discipline system are protection of the public and the maintenance of high professional standards. (Title IV. Rules of Procedure of the State Bar of California) The State Bar has been granted broad powers to accomplish those goals. Business and Professions Code section 6044 (Investigative Powers) and section 6049 (Power to Take Evidence, Administer Oaths and Issue Subpoenas). The confidentiality of those investigations is an integral part of the discipline system. It would significantly hamper the State Bar's investigative ability if the information it gathers **before** the filing of formal charges is not kept confidential.

As more specifically set forth in the attached Declaration of JoAnne Earls Robbins, who was employed by the State Bar for more than fourteen (14) years, the majority of complaints made to the State Bar are closed without any action. The State Bar receives thousands of complaints each year that do not allege any conduct over which the discipline system has jurisdiction (such as fee disputes), complain of facts that are not misconduct (e.g., the client did not get the desired result), or relate to a civil dispute such as negligence (e.g., the attorney did not make a persuasive enough closing argument).

Many of the complaints consist of bare allegations, unsubstantiated by any facts and unsupported by any evidence. Some of the complaints are even anonymous. Unless formal charges are filed with the State Bar Court, in the form of a Notice of Disciplinary Charges, much of the information collected by the investigators and attorneys of the State Bar's Office of the Chief Trial Counsel consists of hearsay and innuendo. At that level, most information is unsupported and unsubstantiated accusation.

If this investigative information were to be made public, at the point where none of the accusations have been proven, it would be extremely unfair to the attorney, since it could result in false and misleading information being made public. It flies in the face of one of the fundamental tenets of our system of justice, that everyone is **innocent until proven guilty**.

III. PRODUCTION OF THE RECORDS WOULD PREJUDICE **ONGOING INVESTIGATIONS** OF THE STATE BAR AND THE LOS ANGELES DISTRICT ATTORNEY, AND MIGHT JEOPARDIZE OWEN'S **PHYSICAL SAFETY**.

Owen has been integrally involved for several months in assisting in ongoing investigations of the State Bar, relating to attorneys accused of misconduct, and the Los Angeles County District Attorney's Office, relating to accusations against non-attorneys. Owen has cooperated fully in these matters and is continuing to assist in those investigations. Some of the allegations against Owen, **none of which have ever been proven**, overlap significantly with the information that is still being developed in those ongoing investigations.

Owen and her counsel have met several times with the State Bar attorney who is prosecuting the ongoing investigations in which Owen is assisting. She has provided valuable information that is **still confidential**, and stands ready to assist the State Bar in any way she can.

Owen and her counsel have twice met personally with the Los Angeles County deputy district attorney supervising the investigations into criminal activity of the non-attorneys involved, and her counsel has had several additional telephone conversations with him. The disclosure of the State Bar information requested in the Subpoena could lead to those suspects knowing that Owen has assisted the District Attorney's Office in the criminal investigations. That deputy district attorney has on three separate occasions warned that **Owen might be in physical danger** if some of those persons being investigated knew about her cooperation and involvement.

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IV. SANGER **FAILED TO SERVE** THE SUBPOENA ON OWEN AND DID NOT EVEN GIVE INFORMAL NOTICE TO OWEN OR HER COUNSEL.

The Subpoena is invalid because Sanger **failed to give proper notice** to Owen pursuant to Code of Civil Procedure sections 1985.3 and 1985.4. Sanger did not serve the Subpoena on Owen or her counsel.

Section 1985.3(b) states in pertinent part:

"Prior to the date called for in the subpoena duces tecum, for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum . . . ."

Section 1985.4 states in pertinent part:

"The procedures set forth in Section 1985.3 are applicable to a subpoena duces tecum for records containing "personal information" . . . which are maintained by a state or local agency . . . ."

Not only did Sanger fail to serve the Subpoena formally on Owen or her counsel, **he failed to advise them or inform them in any way that any subpoena had been issued.** Owen's counsel had numerous conversations with staff in Sanger's office from **June 2002 to the present.** Owen's counsel has had at least two telephone conversations and one face-to-face conversation with Sanger personally. At no time did Sanger ever advise her that Owen's confidential State Bar records were being subpoenaed.

As Sanger himself said in his Declaration under penalty of perjury, signed on August 29, 2002, which was filed in support of his Motion to Compel:

"Ms. Owen was herself represented by counsel, JoAnne Robbins . . . . as to the charges against her with the California State Bar." Declaration of Robert M. Sanger, page 4, lines 5 - 6.

In open court on September 10, 2002, Sanger stated to the Court:

"MR. SANGER: I might point out, your Honor, we've had a constant communication with Miss Robbins ever since we located her as the lawyer for Miss Owens (sic)." Reporter's Transcript of Proceedings, Tuesday, September 10, 2002, page 9, lines 8 - 10, attached as Exhibit 1.

Notwithstanding his "constant communications," by telephone as early as June 2002, and the discussions with Owen and her counsel in person in the Courthouse on September 10, 2002, Owen and her counsel had absolutely no knowledge of the Subpoena until they received the transcript of those proceedings, on or about September 19, 2002. Sanger did not even advise them, as a **professional courtesy**, that the Subpoena existed. Please see Declaration of JoAnne Earls Robbins.

V. THE STATE BAR RECORDS WOULD YIELD ONLY INFORMATION THAT WOULD BE IRRELEVANT AND INADMISSIBLE TO THIS PROCEEDING.

Whatever any persons, former clients or others, may have alleged to the State Bar regarding Owen, none of those **unproven allegations** have any relevance at all as to whether or not Owen provided effective assistance of counsel to the defendant **in this case**. All that is at issue in this matter is **what Ms. Owen did in this case**, not what she did in any other case. This Court, which presided over the trial below, has all the information and records that are pertinent to this case. Owen did not fail to appear at any scheduled proceeding in the matter, was not late to court, and timely filed numerous motions. This Court had abundant opportunities to observe and evaluate the quality of Ms. Owen's representation. If Sanger believes that there was ineffective assistance of counsel, he should establish it by fact and legitimate evidence, not vague accusations and innuendo.

Another fact which Sanger consistently fails to mention is that attorney Richard Crouter, an experienced criminal defense attorney and a former judge, was co-counsel throughout the proceedings. Owen discussed the case with Crouter at every juncture. Crouter participated in all facets of the case.

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Any documents that would be produced by the State Bar would be inadmissible as hearsay and inherently unreliable. Their relevance to what Owen did in her representation of the defendant is so specious and attenuated that it is gross speculation. Sanger's own Memorandum of Points and Authorities, attached to his Motion to Compel, even admits the uncertainty that the State Bar's records would be pertinent.

(1) ". . . **if** there were complaints . . . they **may** have affected her representation . . . ." Page 7, lines 13 - 14, emphasis added.

(2) "It **may** be that Ms. Owen was having financial troubles at the time of Mr. Hoyt's case . . . ." Page 7, lines 16 -17, emphasis added.

To base any order for revealing records **which are confidential under the law**, and allow the blatant "fishing expedition" on such unfounded guesses, would be highly prejudicial and extremely unfair to Owen.

In addition, Sanger makes **flagrantly irresponsible statements**, which are grossly inaccurate and that have no basis in fact whatsoever:

"It is **our belief** that Ms. Owen has approximately 50 complaints pending against her with the State Bar." Page 7, lines 18 - 19, emphasis added.

While Sanger is certainly free to believe anything he likes, our system of justice and courts of law function based on **facts**, not feelings. This kind of rank speculation, with the flimsiest of foundation, borders on defamation, and is outrageously unfair to Owen. It would be extremely unjust to accord this kind of innuendo any relevance whatsoever in Sanger's attempts to obtain confidential and private information that is inconsequential and immaterial to this matter.

## VI. THERE IS NO LEGAL BASIS ON WHICH TO REQUIRE THE STATE BAR TO PRODUCE CONFIDENTIAL RECORDS OF OWEN.

Sanger has proffered no legitimate grounds to establish any reason why the State Bar should be required to produce records that are confidential and privileged under the law. In

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addition, there are numerous reasons, set forth above, why there would be serious prejudice and even physical danger to Owen if the State Bar records were produced. Accordingly, we respectfully request that this Court quash the Subpoena to the State Bar, and deny Sanger's Motion to Compel.

VII. SANGER SHOULD BE ORDERED TO PAY OWEN'S REASONABLE ATTORNEY FEES INCURRED TO RESPOND TO THE UNREASONABLE SUBPOEN, AS WELL AS SANCTIONS.

Because of Sanger's Subpoena, which was frivolous and was based on no legitimate exception to the confidentiality afforded the State Bar's records, Owen hereby requests that this Court order Sanger to pay the reasonable attorney fees which were incurred by Owen to oppose the Subpoena. These attorney fees exceed **$1,500**, calculated at $250 per hour for more than six (6) hours.

In addition, Owen requests that the Court impose sanctions of **$1,000** on Sanger for failure to serve Owen with a copy of the Subpoena, as required by law.

Respectfully submitted,

KARPMAN & ASSOCIATES

Dated: October 7, 2002

BY: JoAnne Earls Robbins
JoAnne Earls Robbins

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**SANGER & SWYSEN**
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Attorneys for Defendant
RYAN HOYT



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

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| THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>RYAN HOYT,<br><br>Defendant. | Case Number 1014465<br><br>**MOTION TO COMPEL THE CALIFORNIA STATE BAR TO TURN OVER FILES, RECORDS AND DOCUMENTS WITH REGARD TO COMPLAINTS MADE AGAINST CHERI OWEN FROM AUGUST 1999 THROUGH THE PRESENT**<br><br>Dept.: 6<br>Time: 10:00 p.m.<br>Date: September 10, 2002<br><br>The Honorable William L. Gordon |

**TO THE DEPUTY DISTRICT ATTORNEY RON ZONEN, RACHEL S. GRUNBERG AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

PLEASE TAKE NOTICE that on September 10, 2002, in Department 6 at 10:00 a.m., or as soon thereafter as counsel may be heard, the defendant, Ryan Hoyt, will make a motion to compel the California State Bar to turn over all files, records and documents with regard to complaints made against Cheri Owen from June 1999 through the present. This motion is based on the grounds that there is good cause for such discovery, the request is not overboard, that the privilege claimed does not outweigh the need for this discovery, the defendant's right to the effective assistance of counsel, due process of law,

equal protection and to be free from arbitrary, cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and relevant provisions of the California Constitution.

This motion is based on this Notice of Motion and on the Declaration of Robert M. Sanger and Memorandum of Points and Authorities attached hereto and on all other papers, records, and files herein, as well as any other supplemental points and authorities, documents, or evidence submitted at or before the hearing on this motion.

Dated: September 6, 2000

Respectfully submitted,

SANGER & SWYSEN

Robert M. Sanger,
Attorney for Ryan Hoyt

## DECLARATION OF ROBERT M. SANGER

I, Robert M. Sanger, declare:

I am an attorney at law duly licensed to practice law in the State of California and I am the attorney of record for the defendant herein, Ryan Hoyt. I am a Certified Criminal Law Specialist and have been in practice in Santa Barbara for over 28 years.

On July 18, 2002 Defendant, Ryan Hoyt, served a subpoena duces tecum on the State Bar of California requesting production of the following documents:

> "Any and all documents pertaining to attorney CHERI A. OWEN, who was admitted to the California State Bar on June 9, 1999, with state bar number 201893. The documents should include but are not limited to all notes, reports, complaints and investigative notes and reports."

On July 23, 2002, Defendant was served with the State Bar of California's objection to Defendant's subpoena duces tecum for the production of state bar documents. This objection filed for the California State Bar was based on the following grounds:

> "(1) the subpoena is unreasonably burdensome and overly broad in that it does not define with any degree of specificity the documents that are necessary, and therefore, it cannot be determine who, on behalf of the State Bar, would be the appropriate custodian of records; and (2) the subpoena seeks information that is privileged and confidential under California law and protected by the qualified privilege for official information." (Objection page 1.)

A hearing was held on August 8, 2002 with regard to the subpoena duces tecum. The Honorable William L. Gordon requested the Defendant brief why the California State Bar should be compelled to turn over information with regard to Cheri Owen.

On February 13, 2002 Cheri Ann Owen filed a resignation with charges pending with the State Bar Court. On March 18, 2002, the Supreme Court of California accepted the voluntary resignation of Cheri Ann Owen, State Bar No. 201893.

In August 2000, Cheri Owen was hired as counsel for Ryan Hoyt. At the time Ms. Owen was retained to represent Mr. Hoyt she had been a practicing lawyer for approximately fourteen months. During the time that Ms. Owen was representing Mr. Hoyt she had at least one if not more complaints filed against her with the California State Bar.

During Mr. Hoyt's trial Ms. Owen was herself represented by counsel, JoAnne Robbins. Ms. Robbins represented Ms. Owen as to the charges pending against her with the California State Bar. It is my belief that additional were pending charges pending against Ms. Owen, by the time of the Hoyt trial and that there was an investigation by the State Bar.

The fact that complaints were made against Ms. Owen and charges were pending while Ms. Owen was representing Mr. Hoyt in a capital case is relevant to Mr. Hoyt's motion for new trial. In order to evaluate the further relevance of these complaints it is necessary that Defendant be provided with a copy of said complaints and any other material related to said complaints. This is the same time period that Ms. Owen agreed to take on the Hoyt death penalty case.

Two complaints filed against Ms. Owen in the Los Angeles Superior Court. The first complaint was filed on August 13, 2001, *Elpidio and Bertha Madera v. Cheri Owen*, Does 1-5, case number BC 256044. (See exhibit A.) This complaint alleges legal malpractice, breach of fiduciary duty and breach of contract. Plaintiffs allege that Cheri Owen did not file the necessary claim with the City of Long Beach in order to pursue a civil suit. This claim was to be filed on or before August 12, 2000. Plaintiffs allege that Ms. Owen claimed she was too ill at the time to file the claim.

The second complaint was filed on May 13, 2002, *Joseph Albert Mendoza v. Cheri Owen*, case number BC274687. (See exhibit B.) The plaintiff alleged that Ms. Owen, on or about October 15, 2001, agreed to represent plaintiff on appeal of a criminal conviction. Plaintiff further alleged that Ms. Owen never filed an appeal on his behalf. This conduct allegedly occurred during the Hoyt trial.

In addition, Ms. Owen filed a lawsuit against Brent Carruth et. al., in the Los Angeles Superior Court-Northwest District, case number LC055382. (See exhibit C.) In this complaint she alleges that in July 2000 she began seeking the assistance of physicians and therapists to counsel her for the emotional shock and distress caused by Brent Carruth and American Justice Publications. (See exhibit C, p. 7.) In

addition, she alleges that she had to hire other attorneys to assist her because she was unable to attend to the day-to-day affairs of her practice. (See exhibit C, p. 7.) Less than one month later after Ms. Owen was allegedly unable to attend to her day to day affairs and seeking the assistance of physicians and therapists she took on Ryan Hoyt's capital case.

I have been informed and believe and allege thereon that there maybe as many as 50 complaints against Ms. Owen filed with the State Bar.

Defendant, Ryan Hoyt, specifically requests all documents, files, investigation, notes and other related information to the complaints made against Cheri Owen from the time she was admitted to the state bar to the present. It is my understanding that in the past month new complaints may have been filed against Ms. Owen. The complaints made with the State Bar are relevant to the claim of ineffective assistance of counsel to be raised in the motion for new trial.

We respectfully ask the Court to inspect such records in camera and to determine if any of them pertain to conduct that would relate to Ms. Owen's competency to represent Mr. Hoyt in his pending capital case and, if so, to release such records for inclusion in the materials to be considered by the Court at defendant's motion for new trial.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 29th day of August, 2002 at Santa Barbara, California.

Robert M. Sanger

## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## DEFENDANT, RYAN HOYT'S, SUBPOENA DUCES TECUM IS NOT OVERLY BROAD

Cheri Owen was admitted to the California State Bar in June 1999. Ms. Owen resigned from the bar on February 13, 2002. Defendant specifically requests that the State Bar provide all complaints filed against Cheri Owen and investigation with regard to such complaints and any other related documents to such complaints from June 1999, her admittance to the bar through the present.

Cal. Code of Civ. Proc. § 2020(d) states that a subpoena "shall designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item." In this case we are unable to specifically describe each item since we are unaware of the specific complaints, however, we are able to request specifically all documents, notes, files relating to any and all claims filed against Cheri Owen. Therefore, the subpoena is not overly broad, overly burdensome or oppressive to the California State Bar.

## II.

## DEFENDANT, RYAN HOYT'S, CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE HEIGHTENED STANDARD OF RELIABILITY GIVEN TO A DEFENDANT FACING A DEATH VERDICT OUTWEIGH ANY PRIVILEGE OR CONFIDENTIALITY RULES

In capital cases a court generally demands a heightened standard of reliability. This heightened standard of reliability is demanded because "of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright (1986) 477 U.S. 399 [91 L.Ed.2d 335, 106 S.Ct. 2595].)[1]

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[1]In *Monge v. California* (1998) 524 U.S. 721, 732 [141 L.Ed.2d 615, 118 S.Ct. 2246], the Court stated: "Because the death penalty is unique 'in both its severity and its finality,' (citation omitted), we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also

Even if the Court finds that the documents requested by defendant are privileged, this privilege is outweighed by the defendant's constitutional rights to the effective assistance of counsel, due process of law, a fair trial and the heightened reliability required in death penalty cases. This is a capital murder case in which Mr. Hoyt was found guilty and the jury sentenced him to death. Ms. Owen resigned from the State Bar before the motion for new trial or formal sentencing in this case. As a result, we have substituted in as counsel of record. In order to effectively represent Mr. Hoyt it is imperative that we not only investigate the case itself but also Cheri Owen's representation of Mr. Hoyt. Directly related to Ms. Owen's representation of Mr. Hoyt are the complaints filed against Ms. Owen.

During the time that Cheri Owen represented Mr. Owen she was also represented by counsel, JoAnne Robbins, with regard to the California State Bar Proceedings. During the course of Mr. Hoyt's trial Ms. Owen attended meetings with the California State Bar and had numerous conversations with her attorney regarding these matters. It appears that there were irregularities in the manner in which Ms. Owen handled this case and if there were complaints she was dealing with during Mr. Hoyt's case this may have affected her representation of Mr. Hoyt.

In addition, there are questions with regard to Ms. Owen's handling of the funds disbursed by the County specifically for investigation and the services of Dr. Kania. It may be that Ms. Owen was having financial troubles at the time of Mr. Hoyt's case and complaints filed by other clients may lead counsel to figure out what was really occurring with Ms. Owen at the time of this case. It is our belief that Ms. Owen has approximately 50 complaints pending against her with the State Bar. These complaints may lead defense counsel to information with regard to Ms. Owen 's representation of the Mr. Hoyt.

If the Court finds that the documents requested by defendant are privileged then an in camera hearing is required.. (Pennsylvania v. Ritchie (1987) 480 U.S. 39, 60 [94 L.Ed.2d 40, 59; 107 S.Ct. 989, 1002].) By having an in camera review the Court is able to review the records and make a determination

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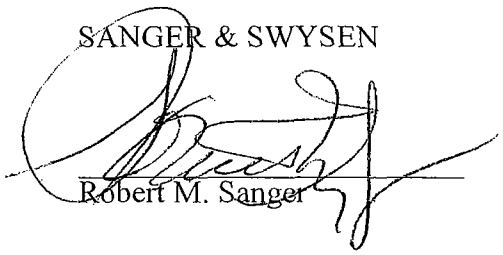
*Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')."

as to whether or not Mr. Hoyt's right to effective assistance of counsel, due process, a fair trial and heightened reliability is outweighed by the California State Bar's right to keep these documents confidential.

Dated: September 6, 2002

Respectfully submitted,

SANGER & SWYSEN



Robert M. Sanger

**PROOF OF SERVICE**

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On September 6, 2002, I served the foregoing document entitled: **NOTICE OF MOTION AND MOTION TO REDUCE OFFENSE FOR LACK OF PROPORTIONALITY** on the interested parties in this action by depositing a true copy thereof as follows:

| | **BY FACSIMILE** |
|---|---|
| Ron Zonen | (415) 538-2321 |
| Deputy District Attorney | Rachel S. Grunberg |
| 1105 Santa Barbara St. | Office of General Counsel |
| Santa Barbara, CA 93101 | State Bar of California |

____ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

X **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at the above numbers.

__X__ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address above.

__X__ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

**Executed September 6, 2002, at Santa Barbara, California.**

Jessica E. Dzamba

Jessica E. Dzamba

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Attorneys for Defendant
RYAN HOYT



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA BARBARA

| | |
|---|---|
| THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>RYAN HOYT,<br><br>Defendant. | Case Number 1014465<br><br>**SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL**<br><br>Date: September 10, 2002<br>Time: 10:00 a.m.<br>Dept.: 6 |

## I.

## TRIAL COUNSEL WAS INEFFECTIVE PER SE BECAUSE SHE HAD ENTERED INTO A LITERARY CONTRACT AND WAIVERS FOR HER OWN PERSONAL BENEFIT

On February 12, 2002, Cheri Owen along with her paralegal Gloria Pernell met with Ryan Hoyt at the Santa Barbara County Jail. It appears that Ms. Owen's visit to meet with Mr. Hoyt was for the sole purpose of obtaining Ryan's signature on two relatively unprofessional documents which purported to have Ryan Hoyt convey any and all of his rights, including literary rights, to Ms. Owen. On this day Mr. Hoyt signed two documents. First, he signed a waiver of attorney-client privilege. This document is

attached as exhibit A and stated:

> I, Ryan James Hoyt, hereby waive the attorney-client privilege I hold with my attorney, Cheri A. Owen. I waive my privilege so that Ms. Cheri Owen, in any capacity, as my attorney or not as my attorney, may speak and write about my entire personal background and my criminal case in Santa Barbara. The case name is People v. Ryan James Hoyt, Case No. 1014465.

The second document Mr. Hoyt signed was entitled Unconditional Grant of Rights and is attached as exhibit B. This document stated:

> I, Ryan James Hoyt, do hereby unconditionally grant to Cheri A. Owen any and all of my rights involving my entire personal background and any and all right involving and stemming from my criminal matter from my case in Santa Barbara, People v. Ryan James Hoyt, Case No. 1014465.
>
> I, Ryan James Hoyt, do hereby unconditionally grant to Cheri A. Owen, as stated above all of my rights. By the unconditional granting of any and all of my rights, Ms. Cheri A. Owen owns my rights. Further, I unconditionally grant to Cheri A. Owen any and all of my rights regarding any and all literary and media individuals or entity's.

This creates a conflict of interest which, in a death penalty case, probably cannot be waived even with the advice of independent counsel. Even if it could be waived, it was not in this case. Instead, Ms Owen was an ambitious, quite frankly greedy, lawyer who talked her elderly receptionist into paying a sizable retainer consisting of her entire retirement and savings, on behalf of her grandson. Ms. Owen accepted the money and the case knowing that she did not have the training or experience to handle such a serious and specialized matter. But Ms. Owen did not stop there. She took part of the money paid to her by the grandmother and used to pay off other accounts with an investigator for work done on other cases. (See Exhibit C, Declaration of Zeliff.)

Ms. Owen further offended by obtaining $100,000 in Penal Code 987.9 funds for which she did

not account and regarding which there are discrepancies. Then she pressured the family for more money and eventually had them pay her bills and living expenses, including buying her clothing. (See Exhibit D, Declaration of Anne Stendal.)

Ms. Owen had her client, in custody, who was hearing that his family was being pressured for money they did not have, sign these amateurish documents — documents Ms. Owen must have thought would bring her wealth: book rights, magazine rights, movie rights. And these rights were to literature that she had positioned herself to be the star as lead counsel. Greed and ambition.

All of this worked to the prejudice of Mr. Hoyt. First, Ms. Owen treated the case as a media case. She did not object to cameras it the courtroom, although she did fight to keep her client's video tape out. The video made her client look bad in the pre-trial press but film of her in the courtroom was acceptable, particularly for someone who believed she had the book, magazine and movie rights to the story.

Second, Ms. Owen dropped her request for a change of venue. She never, in fact, even began preparing a motion. Although Jesse Hollywood had made America's Most Wanted and there had been national attention, clearly, the most publicity would occur if the case stayed in Santa Barbara. She represented to the court and her client that she had consulted a jury expert on this issue, there is no evidence that she ever did so. There was no need to fabricate this except to cover up her own agenda in keeping the case where it would get the most press.

Third, and perhaps most prejudicial of all, she stayed on as "lead counsel" in a case where she had absolutely no business doing so. In part, there can be no question that she was motivated by ambition and greed. The contracts for book, magazine and movie rights could only have promoted the conflict between her duty as a lawyer and her ambition and greed.

Our investigation is continuing into this matter.

Mr. Hoyt has a constitutional right to the effective assistance of counsel. (People v. Jaun Corona (1978) 80 Cal.App.3d 684, 705 [145 Cal.Rtpr. 894] citing Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed. 2d 799]; Powell v. Alabama (1932) 287 U.S. 45 [77 L.Ed. 158.].) Effective assistance of counsel includes the requirement that the services of an attorney are devoted to the interest of the client and undiminished by conflicting considerations. (*Juan Corona, supra*, at page 720 citing Glasser v. U.S.

(1942) 315 U.S. 60 [86 L.Ed. 680].) "California Rules of Professional Conduct, rule 4, . . . provides that 'A member of the State Bar shall not acquire an interest adverse to a client.' (*Juan Corona, supra*, at p. 720 fn. 23.)

By entering into a literary contact this created a divided loyalty of choosing between the best interests of Mr. Hoyt and Ms. Owen's own pocketbook. We can only assume based on Ms. Owen's actions that she was motivated from the beginning to take Mr. Hoyt's case based on the financial gain she would incur by eventually gaining the rights to Mr. Hoyt's story.

## II.

## TRIAL COUNSEL VOLUNTARILY RESIGNED FROM THE PRACTICE OF LAW IN ORDER TO AVOID DISCIPLINARY PROCEEDINGS

Cheri Owen voluntarily resigned from the State Bar of California with charges pending in order to avoid disciplinary proceedings. We have subpoenaed the state bar records with regard to the complaints filed against Ms. Owen. We intend to file a motion with regard to whether or not the State Bar will be compelled to turn over these documents based on information still under investigation regarding these complaints.

## III.

## TRIAL COUNSEL DID NOT HAVE THE MINIMUM EXPERIENCE OR TRAINING TO HANDLE A CAPITAL CASE

Cheri Owen was admitted to the State Bar of California in June 1999. At the time she was retained to represent Mr. Hoyt she had been practicing law for a total of 14 months.

Although California has not yet adopted a set of standards to be met by capital case trial attorneys there is a proposed new California Rules of Court Rule 4.117 which would set qualifications for capital trial counsel. The proposed rule requires lead counsel to have the following qualifications:

1. Be an active member of the State Bar of California;
2. Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law;
3. Have prior experience as lead counsel in either
   a. At least 10 serious or violent felony jury trials, including at least 2

murder cases, tried to argument, verdict, or final judgment; or

b. At least 5 serious or violent felony jury trial, including at least 3 murder cases, tried to argument, verdict, or final judgment;

4. Be familiar with the practices and procedures of criminal courts;

5. Be familiar with and experienced in the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence;

6. Have completed within two years prior to appointment at least 15 hours of capital case defense training approved for minimum continuing legal education (MCLE) credit by the State Bar of California; and

7. Have demonstrated the necessary proficiency, diligence and quality of representation appropriate to capital cases.

(See Exhibit E, proposed rule 4.117.)

Not only was she not qualified to handle this case, she was not emotionally and physically stable.

On March 1, 2001, Cheri Owen filed a complaint for damages and injunction against Brent Carruth, American Justice Publications, Inc., Professional Account Services Corp., Terry Carruth, and Hal Smith in the Los Angeles Superior Court - Northwest District. In this complaint Ms. Owen alleges that due to her dealings with the defendant's that in July 2000 she suffered "emotional shock and distress that she sought the assistance of physicians and therapists to counsel her. She was unable for a time to attend to day-to-day affairs of her practice, and had to hire other attorneys to assist her . . ." (See Exhibit F, page 7.)

During the trial Ms. Owen was suffering from some sort of infection that had not been diagnosed but that she later into the hospital. (See Exhibit G, Declaration of Tara Haaland.)

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## IV.

## RYAN HOYT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE AND PREPARE THE PENALTY PHASE AND BY THEIR FAILURE TO PRESENT AND EXPLAIN ALL THE AVAILABLE MITIGATING EVIDENCE TO THE JURY. THEREFORE, HIS DEATH SENTENCE SHOULD BE SET ASIDE.

A defendant in a capital case is entitled to the effective assistance of counsel at the penalty phase of his trial. (U.S. Const. Amend. VI; *Williams v. Taylor* (2000) 529 U.S. 362 [120 S.Ct. 1495, 146 L.Ed.2d 389.) "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present [ ] and explain [ ] the significance of all the available [mitigating] evidence.' " (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927 citing *Williams v. Taylor* (2000) 529 U.S. 362, 393.)

Where trial counsel's performance is deficient and there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different, the death sentence must be set aside. (*Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 694, 693, 104 S.Ct. 2052].)

It appears that trial counsel did no investigation with regard to the guilt phase of the trial and a minimal amount of investigation with regard to the penalty phase. In a death penalty case there are certain standards that are to be followed with regard to investigation. (See Exhibit H, Checklist for Handling Capital Cases.) The first thing an investigator is told to do is meet with and establish a rapport with client. (See Exhibit I, Declaration of Roger Best.) In this case Cheri Owen initially retained George Zeliff to conduct the investigation of Mr. Hoyt's case. However, Mr. Zeliff was told specifically that he was not to contact the client in any way. The second investigator, Danny Davis, states that he met with the client several times, however, Mr. Davis met with Hoyt only twice at the jail, according to the jail visitation logs. (See Exhibit J, Declaration of Jasen Neilsen.) Mr. Davis met with Mr. Hoyt first on August 2, 2001, for approximately sixteen minutes. He next met with Mr. Hoyt on August 29, 2001, for approximately an hour and seventeen minutes.

There was no investigation conducted with regard to the guilt phase George Zeliff states in his declaration that he only spoke to a few family members with regard to this case. Even though Mr. Zeliff

felt a complete work up should be done on the case he was told to hold off on interviews. (See exhibit C.) Danny Davis admits that they did not conduct investigation as to the guilt phase except for the work done trying to prove that Mr. Hoyt's confession was false. (See exhibit I.)

At least two witnesses identified by Roger Best from the police reports should have been interviewed and possibly called at Mr. Hoyt's trial. First, Ernest Seymour a guest at the Lemon Tree Inn identified Jesse James Hollywood and Jesse Rugge as being present at the Lemon Tree Inn. (See Exhibit I, declaration of Roger Best.) In additon, Mr. Seymour informed Mr. Best that not only did he identify Mr. Hollywood but that Mr. Hollywood introduce himself to Mr. Seymour. Mr. Best's interview of Mr. Seymour was cut short due to a disconnection of Mr. Seymour's cell phone. Mr. Best has been unable to yet complete this interview. (See Exhibit I, declaration of Roger Best.)

Second, Mr. Best has attempted to contact Skip Silberstein. In the police reports it states that Mr. Silberstein identified Jesse James Hollywood as being present at the Lemon Tree Inn. Mr. Silberstein was never interviewed by the defense. Mr. Best believes Mr. Silberstein is away at college and has been unable to speak with him. (See exhibit I, declaration of Roger Best.) Mr. Best has not had adequate time to fully investigate this case and is continuing to interview witnesses.

The failure of predecessor counsel to investigate the guilt phase of the trial severely prejudiced Mr. Hoyt. The defense put on by predecessor counsel was that Mr. Hoyt did not commit the crime. In order to effectively and adequately represent Mr. Hoyt in this matter it was absolutely essential that witnesses be interviewed and a case developed. Here, defense counsel did absolutely nothing.

**A. Duty to Investigate and Present Mitigating Evidence**

In addition, although Strickland expert Steve Balash has not had adequate time to prepare, he is of the opinion that the guilt phase was improperly handled. For instance, Dr. Kania's testimony should have been presented as a part of a comprehensive 402 motion to suppress the alleged confession. If that failed, then the client should not have been called to the stand. (See exhibit K, Declaration of Steve Balash.)

Counsel in a death penalty case has a duty to adequately investigate the penalty phase, unearth all relevant mitigating evidence and present it to the jury:

"It is imperative that all relevant mitigating information be unearthed for

> consideration at the capital sentencing phase. 'The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.'" ( *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227 [citations omitted].)

In *Ainsworth v. Woodford* (2001) 268 F.3d 868, the Court found that counsel was ineffective when he failed to prepare and present mitigating evidence to the jury and failed to argue its relevance. "The available mitigating evidence would have provided the jury with insight into Ainsworth's troubled childhood, his history of substance abuse, and his mental and emotional problems." (*Ainsworth v. Woodford, supra,* at 875.) The court concluded that had the jury been able to consider the wealth of mitigating evidence available to counsel with reasonable investigation and preparation, there was a reasonable probability that the jury would have rendered a verdict of life imprisonment without possibility of parole:

> "In the instant case, counsel failed to adequately investigate, develop, and present mitigating evidence to the jury even though the issue before the jury was whether Ainsworth would live or die. A reasonable investigation would have uncovered a substantial amount of readily available mitigating evidence that could have been presented to the jury. Instead the jurors as in Wallace, 'saw only glimmers of [the defendant's] history and received no evidence vis-a-vis mitigating circumstances.'." ( *Ainsworth v. Woodford, supra,* at 874.)

Counsel in *Ainsworth* engaged in minimal preparation. He interviewed only one witness for 10 minutes on the morning she was scheduled to testify. Although he had obtained school records, he failed to examine employment records, prison records, past probation reports, and military records. He abdicated the investigation of Ainsworth's psychological history to a female relative. He failed to present evidence of his positive adjustment to prison life, the fact that he had received favorable reviews from prison staff and had presented no management or custody problems. As the court noted, "[t]he evidence would have aided the jury in determining whether Ainsworth would be a danger to other inmates or prison officers if sentenced to life in prison." (*Ainsworth v. Woodford, supra,* at 874.) The testimony of the four penalty phase defense witnesses touched upon general area of mitigation but the cursory examination of these witnesses failed to adduce any substantive evidence in mitigation.

In this case predecessor counsel failed to develop mitigating evidence. In order to develop mitigating evidence an attorney must investigate at a minimum the following: family history, employment, school, medical history, psychiatric history, drug and alcohol use, criminal history, hobbies

and activities. (See Exhibit L, declaration of Dr. Wendy Saxon and exhibit H, Checklist.) In this case almost no background development was conducted, as a result of this, all the information available was not presented to the jury.

First, Robin Hoyt, Ryan Hoyt's step-mother was interviewed just after Ryan's arrest, by George Zeliff for approximately fifteen minutes. She was never contacted by Danny Davis, Cheri Owen or Richard Crouter, nor was she called to testify at the trial. Robin Hoyt could have testified as to Ryan's character and the fact his father did at times hit the children more than was necessary. In addition, she specifically could have testified to the fact that on one incident Ryan's father did admit to her that he kicked Ryan in the stomach. Robin Hoyt could also have testified to fact that Ryan felt basically abandoned by his mother Vicki Hoyt. Vicki Hoyt would be gone from his life for long periods of time and then all of the sudden she would be back. Vicki would often leave angry obscene messages on the answering machine, which Ryan Hoyt and his siblings would hear. Robin Hoyt kept a journal at this time and has records of missed visitations, phone messages and other abuse and information. (See Exhibit M, declaration of Robin Hoyt.)

In addition, although, Vicki Hoyt was called to testify at the penalty phase she was not prepared to testify. (See exhibit N, Declaration of Vicki Hoyt.) Two days before Vicki Hoyt testified, she was served a subpoena by someone identifying himself as a friend of Danny Davis'. It was 11:00 p.m. and the man gave no information to Vicki and could not answer her questions. Vicki appeared in court as directed by the subpoena. No one ever contacted Vicki to tell her what was expected of her or gave her any idea what would be required of her in court. Prior to receiving a subpoena, Vicki Hoyt was told repeatedly by Cheri Owen that she would not testify. (See exhibit N, Declaration of Vicki Hoyt.)

Had Vicki Hoyt been prepared to testify she could and have and would have told the jury much more about Ryan. First, when Ryan was a baby he had three major medical problems that may have had an impact on his mental health. When Ryan was a baby she tripped and dropped him on his head. Ryan was taken to the emergency room to be checked and at that time he seemed to be alright. Second, when Ryan was six months old he was hospitalized for a week with a viral infection. I still do not know exactly what the final diagnosis was but it was thought to be a viral infection, possibly meningitis, or perhaps pertussis as a result of a DPT inoculation he had received. Third, when Ryan was 2 ½ years old

he was hospitalized once more for a viral infection after severe vomiting and diarrhea for days. (See exhibit N, Declaration of Vicki Hoyt.)

No one ever discussed with Vicki, nor did she ever have an opportunity to tell the jury about Ryan's good character. For example, Ryan shares close relationships with his brothers Jonathon and Austin and his sister Kristina. Ryan is very protective of his family. Ryan had a very social life with his extended family and cousins. Ryan would do a lot of camping and surfing with all of them including his grandparents and myself. They often had picnics and dinners together. Ryan's cousins Nicole, Alex, Sarah, Lindsey and Sean absolutely adore him and are completely devastated by his absence in their lives. Ryan also had a close circle of friends. Ryan's best friend Evan is also devastated by Ryan's arrest and is at a loss as to what he can do. No one ever contacted Evan. (See exhibit N, Declaration of Vicki Hoyt.)

Anne Stendel was called to testify on behalf of Ryan, however, she was never prepared to testify and did not know she was going to testify until just before she was called to the stand. (See exhibit D, Declaration of Anne Stendel.) Cheri Owen told Ms. Stendel numerous times that she would not be testifying. Cheri Owen told Ms. Stendel "if you do it will be the penalty phase but there won't be one so don't worry. He'll be home by Christmas." Cheri Owen also told me that "you don't have the money for a penalty phase anyway." (See exhibit D, Declaration of Anne Stendel.)

On the day that Ms. Stendel testified she was totally surprised. She felt that she was not dressed appropriately and felt that she was unprepared and her appearance may have had a negative impact on the jury. In addtion, she was on medication that day and was not clear headed, causing her difficulty in recalling particular incidents. (See exhibit D, Declaration of Anne Stendel.).

Had Ms. Stendel been properly prepared to testify she would have wanted to express to the jury the mental health issues and depression that she, Ryan's mother, Ryan's grandfather, Ryan's' niece, Ryan's aunt, Ryan's uncle and others in the family have experienced throughout their lives. In addition, she would have testified to the widespread drug addiction and alcoholism in the family. Ms. Stendel speant a lot of time with Ryan while he was growing up and witnessed first hand his day-to-day life and the struggles he went through with the abuse and the chaotic family setting that he was forced to deal with on daily basis. (See exhibit D, Declaration of Anne Stendel.)

Ms. Stendel would have told the jury that Ryan was a loving and caring person adored and loved by his brothers, sister, nieces and nephews. (See exhibit D, Declaration of Anne Stendel.)

**B. Duty to Find Necessary Experts and Provide Them with Relevant Information**

Counsel in a death penalty case has also a duty to find any necessary experts and provide them with the relevant information:

> "Counsel has an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." *(Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1225.)

"Failure to investigate a defendant's organic brain damage or other mental impairment may constitute ineffective assistance of counsel." *(Caro v. Calderon*, supra, at 1226).

The defendant in *Caro* had a history of head injuries[1], parental abuse, and neurotoxic chemical exposure. *(Caro v. Calderon, supra*, at 1226.) He was examined by four experts, including a medical doctor, a psychologist and a psychiatrist, prior to trial. However, even though counsel was aware of the defendant's exposure to chemicals, he failed to consult a neurologist or a toxicologist. In addition, he failed to provide the information necessary to the experts who did examine the defendant to make an accurate evaluation of the defendant's neurological system. *(Caro v. Calderon, supra*, at 1226-1227.) The court found that it was ineffective assistance of counsel and held that if the evidentiary hearing established that the defendant suffered from brain damage, his attorney's failure to investigate will have rendered the death penalty phase unreliable. *Caro v. Calderon, supra*, at 1227-1228.)

Counsel did not follow up and obtain records with regard to the three major medical problems of Mr. Hoyt. Counsel did not develop Mr. Hoyt's school history nor did they develop his social history. Had this information been collected and reviewed counsel should have known that a doctor was needed to review the information and present to the jury the impact Mr. Hoyt's background would have on him.

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[1]The Court describes the defendant's history of heard injuries as follows:

> "Caro suffered severe head injuries as a child. His mother reports that he was born with a three inch lump on his head due to the use of forceps during his difficult delivery. At the age of three, Caro was struck by a car and fell back and hit his head. A water cooler fell on his head that year as well." (*Caro v. Calderon*, supra, at 1225.)

Although, counsel employed a psychologist to review Mr. Hoyt's alleged confession they did not investigate the fact that Mr. Hoyt may have some underlying mental health issues. Either a neurologist or a psychiatrist should have evaluated Mr. Hoyt on behalf of the defense, especially given his early childhood illnesses and head injury.

**C. Duty to Present Expert Testimony Explaining the Significance of the Mitigating Evidence**

Finally, counsel has an obligation to present expert testimony explaining the significance of the mitigating evidence. ( *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227.) In *Caro*, the jury was presented with mitigating evidence jury aware he was beaten and suffered head injuries as a child, knew that he was exposed to chemicals. "The jury did not, however, had the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone. *(Caro v. Calderon*, *supra*, at 1227.)

The Court in *Caro* held that if the defendant suffered from brain damage, the failure to present that mitigating factor to the jury considering the death penalty was ineffective assistance of counsel, rendering the penalty phase unreliable. ( *Caro v. Calderon*, *supra*, at 1228.)

No one was called to explain the significance of the mitigating evidence and the jury was left withe the anecdotal stories of unprepared and unsettled witnesses.

As set forth in the Declaration of Wendy Saxon (exhibit L), extensive preparation is required for the penalty phase of a capital case. Importantly, in this case, experts should have been called to explain the significance of the family's anecdotal testimony. (See exhibit K, Declaration of Steve Balash and Declaration of Wendy Saxon, exhibit L.) Instead, the jury was left with the anecdotal stories which the prosecutor actually twisted in argument to be aggravating rather than mitigating.

## VI.

## DEPUTY DISTRICT ATTORNEY RON ZONEN COMMITTED DURING THE GUILT AND PENALTY PHASES OF THE TRIAL

**A. Prosecutor's Attempts to Have the Juror's Pre-judge a Death Verdict in this Case**

During voir dire of the jury, the prosecutor asked several jurors if they could impose death in this case. He did not phrase this in terms of "a given case" but in terms of this case and this defendant. This

is impermissibly asking the jurors to prejudge the case or to try to predispose them to render a death verdict. For instance, he said, ". . . and if you decide that he should [get the death penalty], based on all of the evidence, the law and the instructions given to you, you would be able to come back into court and face the Defendant and be able to do that, is that right?" (RT 250). Another time: "Do you feel, if selected on this jury, that you would be able to return a verdict of death if you believed that was the appropriate verdict?" (RT 251)

He goes further to try to persuade a juror that he or she cannot allow sympathy for the defendant to enter into the deliberations (true for guilt phase but unconstitutional to so limit the jurors in the penalty phase): ". . . nor can you make the decision in this case based on the fact that as he sits before you he has a very human face to him . . ." (RT 252) Another time: "And if you believe that once again we meet the standard required by law, and required by the jury, you're the ones who make the ultimate call, you would be prepared to return a death verdict in this case?" (RT 319) Again: "If the 12 of you decide that it is [death is the appropriate penalty], would you be able to deliver that verdict?" (RT 343) And once again, asking the juror to consider the appearance of Mr. Hoyt: "And as you sit here, you see the Defendant sitting at the table, do you feel that you could return a death penalty if the case warrants it?" (RT 366)

**B. The Prosecutor Attempted to Curry Favor with the Jurors**

Throughout the trial, from voir dire of the jury to closing argument, the prosecutor tried to endear himself to the jury and curry favor. For instance, in closing argument in the penalty phase, he attempts to link the jury's service to his role as prosecutor. He thanks them for their service, saying, "We are certainly appreciative of your efforts. This case is rapidly coming to a conclusion and following our arguments to you today you'll be in deliberation and then your services for the State of California and for the County of Santa Barbara will have concluded." (RT 2134) From the beginning of the trial, he has made a point of saying that he is representing the State and is an employee of the County. (See, e.g., in voir dire, ""So you work for the County as well?" (RT 253) Then he closes by saying, "It is an honor to have represented the State of California and appear before you in this matter." (RT 2152).

The prosecutor refers to matters outside the record, which is impermissible in and of itself, but, in addition, the clear purpose was to curry favor with the jurors. For instance, he says, "We're not going to

show you autopsy photographs. That's happened on some prior murder cases, and I'm going to spare you that in this particular case, it's not necessary." (RT 248) Another time he says: "I once handled a case involving a train wreck case where there was some criminality involved, and interviewing everybody working for the railroad at th time, it was Santa Fe, I found nobody leaves when they get a job, they really enjoy their work . . ." (RT 297) In this case the juror was a long time employee of the railroad.

**C. Penalty Argument That 190.3(i) (The Age Mitigating Factor) Was Designed to Apply to 17 Year Olds**

During the Penalty phase argument, in addition to the issues raised in the Motion presently on file, the prosecutor made an argument that was completely misleading and contrary to the law. He argued to the jury that they could not find the Defendant's age to be a mitigating factor or only one of minimal significance. Part of the argument was politically charged, comparing Mr. Hoyt's age to that of soldiers fighting in Afghanistan or going to college while saying that Mr. Hoyt was "a dope dealer, an alcoholic, and a drug addict, and a slacker." This was a non-sequitur, at best and an appeal to prejudice, uncharged conduct, fear and false patriotism, at worst.

However, the misconduct is highlighted by the patently false argument that the jury should not give weight to Mr. Hoyt's age because he was 20 years old. He argues that at that age the factor should have little if any weight. He says to the jury, " . . . if he had been 17 at the time of the offense, as was one of the co-defendants, Mr. Pressley, then maybe that would be a factor to give a lot of consideration to." (RT 2142)

Of course, the prosecutor knew that had he been 17, as Mr. Pressley was, that by California statute, he would not have been eligible for the death penalty. Penal Code Section 190.5(a) states: "Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime." The legislature enacting Penal Code 190.3(i), allowing the jury to take age into account as a mitigating factor, could not have intended it to be limited to 17 year olds. By misleading the jury as to the meaning of the law, the prosecutor attempted to persuade them that the law intended 190.3(i) to apply primarily to 17 year olds when, in fact, that could not have been the intent.

## CONCLUSION

For the reasons stated herein[2] the defendant respectfully requests the Court grant a new guilt and panalty phase trials.

Dated: September 5, 2002

Respectfully submitted,

SANGER & SWYSEN

Robert M. Sanger
Attorney for Ryan Hoyt

[2]And for the reasons stated in any supplemental papers or arguments the Court may allow.

WAIVER OF ATTORNEY-CLIENT PRIVILEGE

I, Ryan James Hoyt, hereby waive the attorney-client privilege I hold with my attorney, Cheri A. Owen. I waive my privilege so that Ms. Cheri Owen, in any capacity, as my attorney or not as my attorney, may speak and write about my entire personal background and my criminal case in Santa Barbara. The case name is People v. Ryan James Hoyt, Case No. 1014465.

Dated: February 12, 2002

Printed Name: Ryan James Hoyt

Signature: _____

Witness: Gloria Pernell

Signature of Witness: _____

T. MARTINEZ

01686

# UNCONDITIONAL GRANT OF RIGHTS

I, Ryan James Hoyt, do hereby unconditionally grant to Cheri A. Owen any and all of my rights involving my entire personal background and any and all rights involving and stemming from my criminal matters from my case in Santa Barbara, People v. Ryan James Hoyt, Case No. 1014465.

I, Ryan James Hoyt, do hereby unconditionally grant to Cheri A. Owen, as stated above all of my rights. By the unconditional granting of any and all of my rights, Ms. Cheri A. Owen owns my rights. Further, I unconditionally grant to Cheri A. Owen any and all of my rights regarding any and all literary and media individuals or entity's.

Dated: February 12, 2002

Printed Name: Ryan James Hoyt

Signature: _____

Witness: Gloria Pernell

Signature of Witness: _____

T. MARTINEZ

01685

## DECLARATION OF GEORGE ZELIFF

I, George Zeliff, declare the following:

I was hired by Cheri Owen to work as an investigator in the case of *People v. Ryan Hoyt.* I worked on this case for approximately 4 months. I believe that Ms. Owen as stated by her was provided $30,000 as an initial retainer to represent Mr. Hoyt. Of that 30,000 I was paid $4500 as a retainer for my services.

It is my understanding that this case was Ms. Owen's first murder case.

On several occasions, I told Ms. Owen that I needed to go to Santa Barbara to discuss the case with Mr. Hoyt. Ms. Owen instructed me to not talk with Mr. Hoyt and told me that she did not want me speaking with him or contacting him in any way.

In my experience in dealing with capital cases one of the first and most important steps of investigation is to contact the client for complete details.

As I reviewed what discovery I received in the case, I developed a list of witnesses that I believed should be interviewed. I was instructed by Ms. Owen as to whom should be interviewed. .

During the 4 months that I worked on the case I asked Ms. Owen what to do with the unused retainer fees. Ms. Owen instructed me to apply the remaining funds received in the Hoyt case to other cases I was or had been working on for her. I did apply these funds to other cases and sent back approximately three binders of information to Ms. Owen.

After approximately 4 months of being retained Ms. Owen stopped returning my phone calls, letters and emails. Approximately 3 months later, and after my attempts to contact Ms. Owen, I gave up trying to contact her and returned the complete discovery files to her.

I was unaware that any other investigator was working on the case. I was never contacted by Danny Davis with regard to my investigation.

I have not spoken to Ms. Owen since that time.

I have provided Sanger & Swysen with the documents I retrieved from my computer. I am attempting to retrieve other documents from my file and will send them to Sanger & Swysen as soon as possible.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct at Lancaster, California. Executed this 5th day of September, 2002.

George Zaffi

ORIGINAL

MARIE M. MOFFAT, No. 62167
COLIN P. WONG No. 130033
RACHEL S. GRUNBERG, No. 197080
OFFICE OF GENERAL COUNSEL
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Attorneys for Non-Party,
The State Bar of California

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY OF SANTA BARBARA

JUL 24 2002

GARY M. BLAIR, EXEC. OFFICER
By _____ Deputy Clerk
L LAINA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, ANACAPA DIVISION

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br>v.<br>RYAN HOYT,<br>Defendant. | CASE NO. 1014465<br><br>NON-PARTY THE STATE BAR OF CALIFORNIA'S OBJECTION TO DEFENDANT'S SUBPOENA DECUS TECUM FOR THE PRODUCTION OF STATE BAR DOCUMENTS<br><br>Date: July 30, 2002<br>Time: 8:30am<br>Anacapa Division: Dept. 6 |

TO DEFENDANT AND HIS ATTORNEY(S) OF RECORD:

Non-party witness The State Bar of California (hereinafter the "State Bar") submits the following in support of its objection to Defendant's request for personal appearance and production of any and all State Bar records pertaining to Cheri. A. Owen. The State Bar's objection is made on the following grounds: (1) the subpoena is unreasonably burdensome and overly broad in that it does not define with any degree of specificity the documents that are necessary, and therefore, it cannot be determined who, on behalf of the State Bar, would be the appropriate custodian of records; and (2) the subpoena seeks information that is privileged and confidential under California law and protected by the qualified privilege for official information.

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## I. INTRODUCTION AND SUMMARY OF FACTS

On or about Friday, July 18, 2002, the State Bar received a subpoena duces tecum calling for personal appearance and production of State Bar records on Tuesday, July 30, 2002, in Santa Barbara County Superior Court. The subpoena requests production of the following:

> "Any and all documents pertaining to attorney CHERI A. OWEN, who was admitted to the California State Bar on June 9, 1999, with state bar number 201893. The documents should include but are not limited to all notes, reports, complaints, and investigative notes and reports."

At or about Monday, July 22, 2002, the State Bar attempted to contact Defendant's attorney by telephone regarding the appearance date and content of the subpoena. The State Bar has yet to receive a response from Defendant's attorney.

## II. ARGUMENT

### A. Defendant's Subpoena Is Overly Broad.

The subpoena fails to identify with reasonable particularity which documents are required to be produced (see Code Civ. Proc., § 2020(d); *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222), but rather requests any and all documents pertaining to Cheri A. Owen. This request is over-broad and oppressive and overburdens a non-party whose institutional interests in maintaining a fair, efficient and cost effective disciplinary system significantly outweighs any private interest that may be at stake in the litigation. Moreover, since the subpoena fails to define with any degree of specificity the documents that are necessary, the State Bar cannot determine who, on behalf of the State Bar, would be the appropriate custodian of records.

### B. To The Extent The State Bar Has The Requested Records, Such Records Are Privileged And Confidential Under California Law.

It is the position of the State Bar that any documents which are not part of formal disciplinary proceedings and contained in the public files of the State Bar Court are privileged and confidential and therefore not subject to disclosure. Therefore, the State Bar claims its privilege as to these documents and is unable to comply with the subpoena.

In support of this position, the State Bar relies on California Business and Professions Code sections 6086.1 and 6094; California Evidence Code section 1040; Rules 2301 and 2302(a) of the Rules of Procedure of the State Bar; *Chronicle Publishing Company v. Superior Court* (1960) 54 Cal.2d 548; and the California Constitution, article I, section 1.

First, Business and Professions Code section 6094 provides that communications to the State Bar, given in investigations or proceedings conducted by it, from complainants, informants and witnesses are privileged. In addition, Business and Professions Code section 6086.1 provides that ". . . except as otherwise provided by law, hearings and records of original disciplinary proceedings in the State Bar Court shall be public, following a notice to show cause." The statute specifically provides that certain records may be made available for public inspection, but only after a Notice to Show Cause has been issued. With respect to Ms. Owen, the State Bar has not issued a Notice to Show Cause.

Second, Evidence Code section 1040 addresses the privilege for official information, which privilege is held by the State Bar, and may not be waived by the action of other parties. Evidence Code section 1040 provides in relevant part that:

> (a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
>
> (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> > (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
> >
> > (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

Thus for purposes of determining the scope of the official information privilege, Evidence Code section 1040 classifies information into two categories: (1) section 1040, subdivision (b)(1) is official information which is absolutely privileged because disclosure is forbidden by an act of Congress or a statute of this state; and (2) section 1040, subdivision (b)(2) is official information which is conditionally privileged because disclosure is against the public interest, in that the necessity for disclosure is not in the interest of justice.

Complaints against attorneys made to the State Bar and preliminary investigation of complaints which do not result in discipline meet all requirements for being "official information." Therefore, under Evidence Code sections 1040(b)(1), the State Bar has a privilege to refuse to disclose such information because of the prohibition contained in Business and Professions Code section 6094 and the implicit prohibition contained in Business and Professions Code 6086.1. Moreover, under Evidence Code section 1040(b)(2), even assuming that the documents alleged to be in the possession of the State Bar may further your interest in this particular litigation, the State Bar contends that the overall public interest in maintaining the integrity and efficiency of the State Bar attorney disciplinary process outweighs such private needs.

Third, pursuant to Business and Professions Code sections 6025 and 6086, the Board of Governors of the State Bar is empowered to formulate Rules of Procedures of the State Bar. Among such rules adopted by the Board of Governors are rules 2301 and 2302(a) of the Rules of Procedure of the State Bar, dealing with the confidentiality of State Bar records.

Rule 2301 provides that:

> "Except as otherwise provided by law or by these rules, the files and records of the Office of the Chief Trial Counsel are confidential."

Rule 2302(a) provides that:

> "Except as otherwise provide by law or these rules, information concerning inquiries, complaints or investigations is confidential."

Fourth, in *Chronicle Publishing Company v. Superior Court* (1960) 54 Cal.2d 548,

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the California Supreme Court held that where no discipline is imposed, the public interest requires that the State Bar maintain the confidentiality of its disciplinary files and that such information is therefore privileged and confidential.

In *Chronicle, supra,* Victor E. Cappa, an attorney at law, brought a libel action against the Chronicle Publishing Company, alleging the publication of a false and libelous article resulting in injury to Cappa's professional reputation and standing. Thereafter, the Chronicle, in connection with its defense, gave notice of the taking of a deposition upon written interrogatories addressed to the State Bar and its Secretary seeking confidential information concerning Cappa's disciplinary "history." The State Bar made a motion for an order excluding inquiry into information contained in its confidential files, the order was granted and, thereafter, the Chronicle sought mandamus.

The court in *Chronicle* made a number of observations about the nature and functions of the State Bar disciplinary process which point to the continued viability of the claim of confidentiality under Evidence Code section 1040 and the Rules of Procedure of the State Bar[1]:

> (a) The court noted that the State Bar accepts any and all complaints (many of which have absolutely no factual basis whatsoever). (*Chronicle* at p. 570.)
>
> (b) The Court specifically recognized the rule making authority of the State Bar regarding the privileged and confidential nature of the records, noting that:
>
> > "Pursuant to the powers conferred by sections 6086 and 6025, the State Bar adopted rules of procedure. Among these is rule 8[2] which provides, in effect, that the preliminary investigation shall not be made public and that all files, records and proceedings of the board are confidential and no information concerning them can be given

---

[1] The Court's analysis of the evidentiary privilege was based upon Code of Civil Procedure section 1881, subdivision 5. Section 1881 was repealed by Statutes 1965, chapter 299, section 72. However, the provisions of Code of Civil Procedure section 1881, subdivision 5 are now embodied in Evidence Code sections 1040-1042 (see Law Revision Commission Comment, Code Civ. Proc., § 1881 (Deerings 1973)).

[2] Chronicle specifically considered the provisions of former rule 8, the provisions of which are now embodied in Rules 2301 et seq. of the Rules of Procedure of the State Bar.

> without order of the board or unless disciplinary action is taken against the attorney accused. Rule 8 is not an absolute bar but permits disclosure upon order of the Board of Governors. It would appear that as hereinbefore pointed out both the public and the members of the State Bar benefit from privilege attaching to disciplinary proceedings."
>
> "Rule 8, in effect, reserves to the Board of Governors the right to release its information when it deems such release to be in the public interest. This limitation in nowise [sic] affects the right of the Board of Governors to make its information privileged." (*Chronicle* at pp. 571-572; emp. added.)

(c) The court found that the privilege is that of the State Bar. (*Chronicle* at p. 573.) The court's language emphasizes that it is the integrity of the disciplinary process and the protection of informants which is essentially at issue when the subject of opening State Bar disciplinary files is raised. It is of secondary importance that the affected attorney is also "shielded" from disclosure of complaints against him or her.

Thus, regardless of the benefit that a third party may gain by the release of the State Bar's disciplinary information, such benefit can hardly outweigh the importance of preserving the integrity of the disciplinary system which encourages members of the public to come forward and reveal information concerning alleged dishonest or incompetent practices by members of the Bar.

Finally, production by the State Bar of the type of documents sought would violate a member's state constitutional right to privacy. Article I, section 1 of the California Constitution creates a constitutional right of privacy. This right was first construed by the California Supreme Court in *White v. Davis* (1975) 13 Cal.3d 757, 765. In *White,* the Court held that the constitutional provision was self-executing, and hence conferred a judicial right of action on all Californians. (*Id.* at p. 775.) The Court went on to delineate the four principle "mischiefs" at which the privacy provision was directed. (*Ibid.*) One of these "mischiefs" is ". . . improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party. . . ." (*Ibid.*) Subsequently, a California Court of Appeal held that a student's complaint stated a cause of action for constitutional invasion of privacy, where a university, without consent, transmitted the student's transcript to the State Scholarship and Loan Commission. (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d

825, 830-832.)

The type of documents sought by the subpoena would include information provided in confidence to the State Bar for a specific purpose, i.e., for investigation of possible disciplinary offenses. Disclosure of this information to a third party for an unrelated purpose is prohibited as an invasion of privacy under the case authority which appears above. In addition to the foregoing, disciplinary records and investigatory records relating thereto are also protected by the right to privacy because they often contain highly personal information, the disclosure of which could cause great harm to the reputation of the attorneys against whom the charges are alleged.

## III. CONCLUSION

In conclusion, the State Bar is not a party to this action and has no interest in the proceeding now pending before the Superior Court. The State Bar, however, maintains a legal obligation to protect its confidential documents from unwarranted disclosures. Accordingly, the State Bar's sole interest is to assert appropriate objections to the production and disclosure of non-public information and privileged official information. Disclosure of such information would infringe upon the State Bar's official information interests in its own confidential files as well as information otherwise protected by the work-product doctrine and the right of privacy. Should the State Bar be compelled by the Court to disclose such information, the State Bar requests that the Court conduct an in camera review of the documents prior to ordering that any such documents be made public.

DATED: July 23, 2002

Respectfully submitted,

MARIE M. MOFFAT
COLIN P. WONG
RACHEL S. GRUNBERG

By: Rachel S. Grunberg
Rachel S. Grunberg

Attorneys for Non-Party,
The State Bar of California

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PROOF OF SERVICE BY MAIL

I, Joan Sundt, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, CA 94105.

On July 23, 2002 following ordinary business practice, I placed for collection and overnight mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, CA 94105, one copy of NON-PARTY THE STATE BAR OF CALIFORNIA'S OBJECTION TO DEFENDANT'S SUBPOENA FOR THE PRODUCTION OF STATE BAR RECORDS with postage thereof fully prepaid in an envelope addressed as follows:

| | |
|---|---|
| Robert M. Sanger, Esq.<br>Sanger & Swysen<br>233 East Carrillo Street<br>Suite C<br>Santa Barbara, CA 93101 | Ronald J. Zonen, Esq.<br>Senior Deputy District Attorney<br>Office of the District Attorney<br>1105 Santa Barbara Street<br>Santa Barbara, CA 93101 |

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for overnight mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. Postal Service on the day on which it is collected at the business.

On this date I also served via facsimile the above document to Robert M. Sanger, Esq. at (805) 963-7311.

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

Executed at San Francisco, California this 23rd day of July, 2002.

Joan Sundt

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>-vs-<br>RYAN JAMES HOYT,<br>Defendant and Appellant. | SUPERIOR COURT<br>No. S113653<br>**(Death Penalty)** |

**APPEAL FROM THE SUPERIOR COURT OF SANTA BARBARA COUNTY**
**HONORABLE WILLIAM L. GORDON, JUDGE**

**REPORTERS TRANSCRIPT ON APPEAL**

Appearances:

For the Appellant:

For the Respondent:

STATE ATTORNEY GENERAL
300 South Spring Street
Los Angeles, California 90013

Reported By:

SHARON E. REINHOLD, CSR #7794
SANDRA A. FLYNN, CSR #4794
LESLIE L. HEINTZ, CSR #4079
JANE A. CIACIO, CSR #9064
ELIZABETH JONES, CSR #4327
Official Court Reporters
Superior Courthouse, Department 6
WILLIAM S. STEPHENS, CSR #10033
LISA LEMUS, CSR #11484
Reporters Pro Tempore
Santa Barbara, California 93101

VOLUME XI (of XI Volumes)
Pages 2334 through 2600, inclusive

COPY

SANTA BARBARA, CALIFORNIA, WEDNESDAY, FEBRUARY 27, 2002
DEPARTMENT NO. 6 HON. WILLIAM L. GORDON, JUDGE
10:00 AM

APPEARANCES:

The defendant with his Counsel, RICHARD CROUTER, Attorney at Law; Senior Deputy District Attorney RONALD ZONEN, for the County of Santa Barbara representing the People of the State of California; SHARON E. REINHOLD, Official Court Reporter.

THE COURT: All right. We'll call the matter of the People versus Ryan James Hoyt. Mr. Hoyt is present with his counsel, Mr. Crouter.

This case was originally on calendar for sentencing on February 25th, apparently Miss Owen, for purposes which are not relevant, is not actively practicing, or is in the process of not practicing, Mr. Crouter, who is also of record in the case, will be representing Mr. Hoyt.

Mr. Crouter, what is the situation regarding going forward with sentencing and with other motions which may be appropriate in this case?

MR. CROUTER: Yes. First, I'll inquire of Mr. Hoyt, if I might.

Mr. Hoyt, is it all right with you, acceptable to you that I alone continue to represent you in this

matter?

THE DEFENDANT: Yes, sir.

MR. CROUTER: What I would like to do at this time, then, your Honor, is to request a continuance of the motions that are pending before the Court, both the automatic application and the motion for new trial, and sentencing, to March the 25th in this department at a time set by the Court.

THE COURT: Now, are you satisfied that that will give you ample time?

MR. CROUTER: I am.

THE COURT: I don't know whether you need any of the -- you need to communicate with any of the jurors or not, but nothing has been done regarding that process.

MR. CROUTER: No. At this point, I'm not aware of any need to request anything regarding the jury.

THE COURT: All right.

MR. CROUTER: I'll take a waiver.

THE COURT: Just a minute. I want to set a date here.

What date did you have in mind?

MR. CROUTER: I had in mind March 25th. I believe that's a -- I believe it's a Monday.

THE COURT: All right. Is that all right with you, Mr. Zonen?

MR. ZONEN: Yes, that's fine.

THE COURT: All right. Sentencing, Monday,

March 25th at 10:00.

MR. ZONEN: Judge, is this sentencing or is it hearing on the motions, the 190.4?

THE COURT: Well, hearing on the motions, and then there's that automatic review. But I see no reason not to go forward with sentencing.

MR. ZONEN: Does it not have to be referred to probation?

THE COURT: I don't believe so. Maybe it does.

MR. ZONEN: Do they have to submit a report that follows him through?

MR. CROUTER: I believe they should, yes.

THE COURT: I think that can all be done, and we can do a 1203(c) anyway, if we need to, we don't need a report. But that was what we planned to do last time is --

MR. CROUTER: Yes.

MR. ZONEN: It wasn't clear to me, actually, I wasn't certain that we were going to do sentencing and hearing on the motion.

It's a motion for modification, I'm assuming a motion for new trial as well will be filed, I haven't received either yet.

MR. CROUTER: Yes.

THE COURT: And that's another thing. By what date will the new trial motions be filed?

MR. CROUTER: By the date you tell me to, sir.

THE COURT: Well, Mr. Zonen, do you need a