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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

Plaintiff,

12
13 v.

14 MARK BATES,

15 Defendant(s).
16

NO. SCD178300
DA ABB614

**IN LIMINE MOTION TO
EXCLUDE AND LIMIT DEFENSE
PSYCHIATRIC EVIDENCE AND
TO CONDUCT PRE-TESTIMONY
HEARING PURSUANT TO
EVIDENCE CODE SECTION 402
AND 403**

17 Comes now the plaintiff, the People of the State of California, by and through
18 their attorneys, BONNIE M. DUMANIS, District Attorney, and, WENDY L. PATRICK,
19 Deputy District Attorney, and respectfully submits the following In Limine Motion to Exclude
20 and Limit Defense Psychiatric evidence and to Conduct Pre-Testimony Hearing Pursuant to
21 Evidence Code section 402 and 403.

22 **STATEMENT OF THE CASE**

23 It is clear that psychological aspects of this defendant will be brought out during some
24 part of this case and therefore the People are requesting that the evidence be limited by the
25 following arguments.

26
27 **ARGUMENT**

28 **I**

29 **THE SCOPE AND ADMISSIBILITY OF DEFENSE PSYCHIATRIC**

30 1

1 **EVIDENCE IN CRIMINAL CASES IS LIMITED BY STATUTE.**

2 With the abolition of the diminished capacity defense, the scope of psychiatric
3 testimony during the guilt phase of a criminal trial has been greatly curtailed.
4

5 "The defense of diminished capacity is hereby abolished. In a
6 criminal action, as well as any juvenile court proceeding, evidence
7 concerning an accused person's intoxication, trauma, mental illness,
8 disease, or defect shall not be admissible to show or negate capacity
9 to form the particular purpose, intent, motive, malice aforethought,
10 knowledge, or other mental state required for the commission of the
11 crime charged." (Pen. Code, § 25(a).)

12 Penal Code, section 21, subdivision (b), provides:

13 "In the guilt phase of a criminal action or a juvenile adjudication
14 hearing, evidence that the accused lacked the capacity or ability to
15 control his conduct for any reason shall not be admissible on the
16 issue of whether the accused actually had any mental state with
17 respect to the commission of any crime."

18 Penal Code, section 28, subdivision (a), provides in pertinent part that evidence of
19 mental illness "shall not be admitted to show or negate the capacity to form any mental state,"
20 but is "admissible solely on the issue of whether or not the accused actually formed a required
21 specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific
22 intent crime is charged." (Emphasis added.) Subdivision (b) of Penal Code section 28 abolishes
23 the defenses of diminished capacity, diminished responsibility, and irresistible impulse "as a
24 matter of public policy."

25 Penal Code section 29 provides:

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

1
2 Penal Code section 22 was amended to reflect the abolition of diminished
3 capacity. It provides that evidence of voluntary intoxication is not admissible to negate the
4 capacity to form any mental state, but it is admissible "solely on the issue of whether or not the
5 defendant actually formed a required specific intent, premeditated, deliberated, or harbored
6 malice aforethought, when a specific intent crime is charged."

7 Although there was initially some confusion about the interaction between Penal
8 Code section 25, subdivision (a), and Penal Code section 28 (*People v. Spurlin* (1984) 156
9 Cal.App.3d 119, 128), courts and commentators now appear to agree that the two sections are
10 complementary and that both statutes remain operative. (See 1 Witkin & Epstein, *California*
11 *Criminal Law* (2d ed. 1988) "Defenses," § 211, pp. 241-243; *People v. Young* (1987) 189
12 Cal.App.3d 891, 904-905; *People v. McCowan* (1986) 182 Cal.App.3d 1, 11-13.)

13 These sections, by their plain language, indicate an unambiguous intent to
14 preclude a defendant from offering any evidence in the guilt phase of a trial regarding his or her
15 lack of capacity or ability to control his or her conduct, irrespective of the reasons for such
16 alleged lack of capacity or control. This limitation applies to any such evidence, whether or not
17 offered through a psychiatric "expert." These sections have been repeatedly upheld on appeal.
18 (*People v. Young, supra*, 189 Cal.App.3d at p. 905 and cases cited therein.)

19 "Over defense objections, the trial court ruled the defense could not
20 'ask any psychiatrists or other expert on mental condition a question
21 as to whether or not the defendant had the capacity to form a mental
22 state in issue here on the date of the alleged commission of the
23 offense.' The court also barred expert testimony 'as to whether or
24 not the defendant did or did not form the required mental state at the
time of the alleged commission of the act, . . .' The court expressly
relied on sections 25, 28, and 29 for its rulings." (*People v.*
McCowan, supra, 182 Cal.App.3d at p. 11.)

25
26 The appellate court affirmed the trial court ruling. (*Id.*, 182 Cal.App.3d at p. 14.)

27 The defense may not elicit testimony that in any way indicates the defendant's
28 mental illness interfered with his or her having the required mental state at the time of the crime.
29 The defense may elicit testimony regarding manifestations of the defendant's mental illness, but

1 it may not elicit testimony that in any way connects these manifestations to the mental states in
2 issue in the case. (*People v. Young, supra*, 189 Cal.App.3d 891.)

3 This is true for voluntary intoxication as well as mental illness. (Pen. Code, § 22;
4 see Argument II, *infra*.)

5 This type of evidence, then, may not be admitted to negate the capacity to form a
6 requisite mental state. Diminished capacity, diminished responsibility, and irresistible impulse
7 are abolished. Therefore, any evidence of defendant's ability to control himself or herself, or of
8 defendant's ability to form any mental state with which he or she committed the charged acts, is
9 inadmissible.

10 The only basis for admitting this type of evidence, mental illness or intoxication, is
11 where it is relevant to the question of whether the defendant actually formed specific intent,
12 harbored malice aforethought, premeditated, or deliberated, and where such evidence does not
13 in any way relate to defendant's lack of ability or capacity to control himself or herself.

14 It should be noted that since the words "diminished" and "impulse" have been
15 excised from California law, meaningless and intellectually dishonest phrases like "diminished
16 actuality" are improper descriptions of current law.

17 Assuming a defense psychiatric witness is duly qualified as an expert under
18 Evidence Code sections 720 and 801, such expert might testify as to defendant's diagnosis (if it
19 is relevant) and the symptoms of any disorder, if such symptoms are unrelated to defendant's
20 ability to form a mental state, and the expert may characterize a defendant's general state of
21 mind if it is unrelated to defendant's mental state at the time of the crime. Thus a defendant
22 might be characterized as "suspicious" or "depressed" because these features may relate to the
23 defendant's knowledge and understanding of his or her environment. But the defendant may not
24 be characterized as lacking ability or capacity to form a mental state. For example, the
25 defendant may not be characterized as "impulsive" or "disorganized" because these features
26 relate to his or her ability to control conduct.

27 Of course, an expert may not in any event testify about the mental states required
28 for the charged offenses. (Pen. Code, § 29.) Furthermore, the court still retains discretion to
29 exclude evidence of mental disease, defect, or mental disorder if one or more of the

1 requirements of the Evidence Code are not met. (Pen. Code, § 28(d).)

2 Hence, these sections, by their plain language, preclude the introduction of two
3 types of evidence as it relates to mental abnormality in the guilt phase of a criminal trial:

4 1) Evidence (of any sort) that the defendant lacked the capacity or ability to
5 control his/her conduct, and

6 2) Evidence (of any sort) that the defendant lacked the capacity or ability to form
7 any required mental state, i.e., intent to kill, premeditation, deliberation and malice aforethought.

8 These limitations have been repeatedly upheld on appeal. (See *People v. Young*,
9 *supra*, 189 Cal.App.3d at p. 905; *People v. McCowan*, *supra*, 182 Cal.App.3d at p. 14; *People v.*
10 *Whitler* (1985) 171 Cal.App.3d 337, 340.)

11 II

12 **PENAL CODE SECTION 29 PROHIBITS EXPERT TESTIMONY** 13 **THAT THE DEFENDANT DID NOT HAVE THE REQUIRED** 14 **MENTAL STATES DUE TO VOLUNTARY INTOXICATION.**

15 In *People v. Rangel* (1992) 11 Cal.App.4th 291, the defendant was convicted of
16 first degree murder. A psychiatrist testified at the in camera hearing that his opinion regarding
17 defendant's actual mental state was premised upon his opinion that defendant lacked the capacity
18 to form the mental state due to the level of his intoxication. The court held such testimony was
19 properly excluded at trial under Penal Code sections 25 and 28. (*Id.*, at p. 300.)

20 The court in *Rangel* also held that the trial court did not violate defendant's due
21 process rights by striking the defense expert's opinion that given defendant's voluntary
22 intoxication, he did not deliberate, premeditate, or harbor the requisite intent to kill. The court
23 held that under Penal Code section 29, an expert may not testify as to whether an accused had
24 the required mental states for murder; rather, the issue is for the trier of fact. (*Id.*, at pp. 300-
25 303.)

26 III

27 **EVIDENCE OF A DEFENDANT'S MENTAL ILLNESS, DISORDER** 28 **OR DEFECT ALONE DOES NOT REDUCE THE DEFENDANT'S** 29 **CULPABILITY FOR THE CRIME OF MURDER AND IS INADMISSIBLE.**

1 Presently, the only basis for admitting evidence of mental abnormality in the guilt
2 phase of a criminal trial is where such evidence is relevant to prove whether the accused actually
3 formed a required mental state. Clearly, the mens rea element of a crime must be proved by the
4 People beyond a reasonable doubt. Thus any evidence which has "any tendency in reason to
5 prove or disprove any disputed fact . . ." must be admitted. (Evid. Code, § 210.) However, in a
6 murder case the specific issue usually is whether the defendant did in fact form an intent to kill
7 at the time of the killing (or did premeditate and deliberate, or did have the state of mind which
8 qualifies for a finding of implied malice, etc.). Thus only evidence which logically tends to
9 prove that the defendant did not actually have these required mental states is admissible.

10 For example, evidence that a defendant suffers from mental or emotional
11 disturbance which makes him or her more suspicious, distrustful, dependent, depressed, etc.,
12 does not necessarily suggest the defendant did not, despite these symptoms, form a specific
13 intent to kill (or any other particular mental state).

14 A good example of the interplay (or lack thereof) of a person's mental disturbance
15 and the ability to actually form a required specific mental state is found in *People v. Stress*
16 (1988) 205 Cal.App.3d 1259. While *Stress* deals with an insanity plea it is also instructive on
17 the intent issues in the guilt phase of a trial.

18 In *Stress* the defendant apparently believed a conspiracy existed among the
19 professional athletic leagues, the television networks and the federal government to insure that
20 professional athletes were not drafted for service in the war. Making the public aware of this
21 conspiracy became a crusade for him and included writing over a quarter million letters to the
22 public and threatening letters to President Reagan. Because his crusade was not receiving the
23 public attention he desired, he decided to kill his wife by hitting her in the head with an ax.
24 This, he believed, would ensure him a public platform to promulgate his message.

25 Despite numerous psychological evaluations determining the defendant suffered
26 from significant mental disorders ranging from "classic paranoia" to psychosis, the trial court,
27 after a jury waiver, found the defendant harbored malice aforethought and was thus guilty of
28 murder. Division One of the Fourth Appellate District upheld this finding, noting:

1 "In finding malice aforethought, the court noted there was strong
2 evidence appellant intended to kill his wife. The court reviewed
3 appellant's mental state and found that while appellant's motive for
4 the killing was bizarre and delusional, he clearly intended to kill
without lawful justification. Its ruling was correct.

5 "Appellant's avowed goal was to commit an act of such importance
6 and visibility the courts and the public would be forced to listen to
7 his theories of conspiracy. The plan he designed to accomplish that
8 goal was to kill his wife. There was no justification, excuse or
9 mitigation for the killing offered by appellant that is recognized by
10 the law. The evidence shows an intent unlawfully to kill. The trial
court correctly found appellant harbored malice aforethought."
(*People v. Stress, supra*, 205 Cal.App.3d at p. 1268.)

11 In addition, the trial court in *Stress* found defendant had premeditated and
12 deliberated the murder and thus was guilty of first degree murder. The trial court again
13 concluded that even though the motivation for the act was "crazy," the premeditative and
14 deliberative requirements of first degree murder were present. (*Id.*, at p. 1268) Despite
15 defendant's significant mental illness, the finding was upheld. (*Id.*, at p. 1269.)

16 The Court of Appeal stated:

17 "A finding of deliberation and premeditation is not negated by
18 evidence a defendant's mental condition was abnormal or his
19 perception of reality delusional unless those conditions resulted in
20 the defendant's inability to plan or weigh considerations for and
21 against the proposed course of action. The mental process
22 necessary for a finding of deliberation and premeditation is not
23 dependent on the motivation for the act. Nor is the necessary
24 mental process lacking when the considerations reflected on by the
25 defendant were the product of mental disease or defect." (*Id.*, at p.
1270.)

26 Thus, evidence of a defendant's alleged mental or emotional abnormality is not
27 relevant to the issues presented in the guilt phase of a trial unless this evidence is such that a
28 reasonable trier of fact could conclude therefrom that the defendant did not in fact form any of
29 the specific required mental states. The defendant's alleged mental or emotional disturbance,
and the symptoms attendant thereto, must be such as to logically relate to an inability to plan,
deliberate, intend to kill, etc. If not, then the proposed evidence of mental illness is simply

1 irrelevant and should be excluded. This type of evidence is often simply a ploy for sympathy
2 with limited, if any, true relevance to the precise issues to be decided by the jury.

3 **IV**

4 **EVIDENCE OF A DEFENDANT'S MENTAL DISEASE, DEFECT OR DISORDER,**
5 **OR OF A DEFENDANT'S VOLUNTARY INTOXICATION, CANNOT REDUCE**
6 **THE DEFENDANT'S CULPABILITY FOR MURDER TO VOLUNTARY**
7 **MANSLAUGHTER AND IS INADMISSIBLE.**

8 In *People v. Saille* (1991) 54 Cal.3d 1103, the California Supreme Court held that
9 the law no longer permits a reduction of what would otherwise be murder to nonstatutory
10 voluntary manslaughter due to voluntary intoxication or mental disorder, or both. The court
11 held that the trial court did not err in failing to instruct that intoxication could negate express
12 malice so as to reduce a murder to voluntary manslaughter, in view of statutes abolishing the
13 defense of diminished capacity and the amendment to Penal Code section 188 equating express
14 malice with an intent to kill.

15 A defendant is still free to show that because of mental illness or voluntary
16 intoxication, he or she did not in fact form the intent unlawfully to kill (i.e., did not have malice
17 afore-thought). (*People v. Jackson* (1984) 152 Cal.App.3d 961, 968.) In a murder case, if this
18 evidence is believed, the only supportable verdict would be involuntary manslaughter or an
19 acquittal. If such a showing gives rise to a reasonable doubt, the killing (assuming there is no
20 implied malice) can be no greater than involuntary manslaughter. (See *People v. Bobo* (1990)
21 229 Cal.App.3d 1417.)

22
23
24 **V**

25 **ALL DEFENSE EXPERT PSYCHIATRIC TESTIMONY**
26 **IS IRRELEVANT UNTIL DEFENDANT'S "REDUCED"**
27 **MENTAL STATE IS PUT IN ISSUE.**

1 Before expert testimony relevant to defendant's "reduced" mental state is admitted,
2 independent evidence must indicate both that defendant did not intend to kill (i.e., had express
3 malice) and that he or she did not harbor implied malice.

4 When a killing is proven to be committed by the defendant, nothing further need
5 be shown to establish malice and it is presumed that it is at least second degree murder. (*People*
6 *v. Craig* (1957) 49 Cal.2d 313, 319; *People v. Washington* (1976) 58 Cal.App.3d 620, 624; cf.
7 *People v. Wharton* (1991) 53 Cal.3d 522, 570; *People v. Thompkins* (1987) 195 Cal.App.3d
8 244, 256-257.)

9 Further, Penal Code section 189.5 states that:

10 "Upon a trial for murder, the commission of the homicide by the
11 defendant being proved, the burden of proving circumstances of
12 mitigation, or that justify or excuse it, devolves upon the defendant,
13 unless proof on the part of the prosecution tends to show that the
14 crime committed only amounts to manslaughter, or that the
15 defendant was justifiable or excusable."

16 It is expected that the People's proof will not only establish that the defendant
17 committed the killing, it will affirmatively point to the existence of both express and implied
18 malice on defendant's part. Therefore, before the defendant can call expert psychiatric
19 testimony regarding mental state, defendant must first, through defendant's own testimony or
20 other competent proof, offer some evidence that when defendant killed, defendant possessed
21 some mental state less than that of express or implied malice. Hypothetically this could be
22 accomplished through defendant testifying that neither was there an intent to kill nor was the
23 defendant aware of the dangerousness of the conduct.

24 Until such proof is introduced, there is nothing relevant for a defense psychiatric
25 expert to opine. This is especially so since all experts are precluded by Penal Code section 29
26 from giving an opinion as to whether or not defendant possessed a mental state requisite for
27 murder.

28 Any defense expert psychiatric testimony on the issue of whether defendant's
29 mental state mitigated culpability to something less than murder is properly excluded until some

1 independent proof is admitted that defendant possessed a mental state "less" than express or
2 implied malice.

3 **VI**

4 **A DEFENSE EXPERT CANNOT EXPRESS AN OPINION**
5 **ON WHETHER A DEFENDANT'S ACTION OR**
6 **BELIEF WAS REASONABLE.**

7 Evidence Code section 801, subdivision (a), allows an expert to testify in the form
8 of an opinion only if the opinion is: "Related to a subject that is sufficiently beyond common
9 experience that the opinion of an expert would assist the trier of fact. . . ."¹

10 In *People v. Czahara* (1988) 203 Cal.App.3d 1468, the defendant in a murder case
11 sought to produce expert psychiatric testimony "(1) that the defendant was acting in a heat of
12 passion, and (2) that the ordinary reasonable person in the same circumstances would also have
13 acted in passion." (*Id.* at p. 1476.) In affirming the trial court's denial of these offers of proof,
14 the appellate court held that the expert testimony as the defendant's mental state was prohibited
15 by Penal Code section 29. As to the second point the court wrote:

16 "However, psychiatric testimony on adequacy of provocation is
17 inadmissible for a different reason: the adequacy of provocation is
18 not a subject sufficiently beyond common experience that the
19 opinion of an expert would assist the trier of fact. (Evid. Code, §
20 801, subd. (a).) Rather, the reasonableness of a reaction is left to the
21 jurors precisely so that they may bring their common experience and
22 their own values to bear on the question of whether the provocation
23 partially excused the violence." (Emphasis added. *Id.*, at p. 1478.)

24 _____
25 ¹ This rule was perhaps more artfully put in *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125
26 Cal.App.3d 155 where the plaintiff sought to prove negligence without expert testimony. The
27 court found: "The correct rule on the necessity of expert testimony has been summarized by
28 Bob Dylan: 'You don't need a weatherman to know which way the wind blows.' The California
29 courts, although in harmony, express the rule somewhat less colorfully and hold expert
30 testimony is not required where a question is 'resolvable by common knowledge.' [Citations.]"
(Footnote omitted. *Id.*, at p. 163.)

1 In finding that the opinions of social scientists on the issue of reasonableness was
2 of little or no assistance to the trier of fact, the court noted:

3 "Psychologists, psychiatrists or sociologists may have specialized
4 empirical knowledge regarding the range of reactions to a given
5 provocation, or the reaction of the statistically average individual in
6 a given community. But this information would not materially assist
7 the jury in its task; the jury must determine not only if the reaction is
8 ordinary but if it is reasonable, and that determination depends more
9 on (perhaps unarticulated) community norms than on empirically
10 discoverable averages." (*Ibid.*; accord *People v. Aris* (1989) 215
11 Cal.App.3d 1178, 1197.)

12 VII

13 THE DEFENSE CANNOT USE AN EXPERT AS A 14 VEHICLE TO GAIN INTRODUCTION OF OTHERWISE 15 INADMISSIBLE HEARSAY STATEMENTS.

16 Evidence Code section 801 provides:

17 "If a witness is testifying as an expert, his testimony in the form of
18 an opinion is limited to such an opinion as is:

19 "(a) Related to a subject that is sufficiently beyond common
20 experience that the opinion of an expert would assist the trier of fact;
21 and

22 "(b) Based on the matter (including his special knowledge, skill,
23 experience, training and education) perceived by or personally
24 known to him at or before the hearing, whether or not admissible,
25 that is of a type reasonably may be relied upon by an expert in
26 forming an opinion upon the subject to which his testimony relates,
27 unless an expert is precluded by law from using such matter as a
28 basis for his opinion."

29 Evidence Code section 802 provides:

30 "A witness testifying in the form of an opinion may state on direct
31 examination the reasons for his opinion and the matter (including his
32 special knowledge, skill, experience, training and education) upon
33 which it is based, unless he is precluded by law from using such
34 reasons or matter as a basis for his opinion. The court in its
35 discretion may require that a witness before testifying in the form of

1 an opinion be first examined concerning the matter upon which his
2 opinion is based."

3 Thus, Evidence Code section 801 provides that an expert's opinion may be based
4 on matter otherwise independently inadmissible so long as the matter may be reasonably relied
5 upon by an expert in forming such an opinion. Further, Evidence Code section 802 allows a
6 witness giving opinion testimony to state on direct examination the matter upon which that
7 opinion is based. There are, however, important limitations on the use of these provisions. An
8 expert cannot be utilized to testify to otherwise inadmissible hearsay under the rationale that the
9 hearsay serves as a "basis" for the expert's opinion.

10 In *People v. Coleman* (1985) 38 Cal.3d 69, our Supreme Court, citing a number of
11 prior supporting cases, recognized that:

12 "In *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757 .
13 . . ., the Court of Appeal explained the current state of the law.
14 'While an expert may state on direct examination the matters on
15 which he relied in forming his opinion, he may not testify to the
16 details of such matters if they are otherwise inadmissible.
17 [Citations.] The rule rests on the rationale that while an expert may
18 give reasons on direct examination for his opinions, including the
19 matters he considered in forming them, he may not under the guise
20 of reasons bring before the jury incompetent hearsay evidence.
21 [Citation.] Ordinarily, the use of a limiting instruction that matters
22 on which an expert based his opinion are admitted only to show the
23 basis of the opinion and not for the truth of the matter cures any
24 hearsay problem involved, but in aggravated situations, where
25 hearsay evidence is recited in detail, a limiting instruction may not
26 remedy the problem. (Evid. Code, §§ 352, 355 [Citations].)' (119
27 Cal.App.3d at pp. 788-789)." (Emphasis added. *Id.*, 38 Cal.3d at p.
28 92.)

29 Included in the long string of precedent relied upon by Coleman for its holding
30 was *People v. Nahabedian* (1959) 171 Cal.App.2d 302. There, the appellate court stated that:

31 ""[T]here is no right to put in evidence of matters which are
32 incompetent as substantive evidence for the purpose of fortifying the
33 opinion of an expert witness, even though they are offered under the
34 guise of reasons for his opinion, and even though they might
35 properly have been admitted on cross-examination to test and
36 diminish the weight to be given to his opinion." [Citation.] . . .

1
2 "The general rule which permits a witness to state the reasons upon
3 which his opinion is premised may not be used as a vehicle to bring
4 before the jury incompetent evidence. To so open up the inquiry
5 would create a disastrous break in the dike which stands against a
6 flood of interminable investigation.' (Emphasis added.)" (*Id.*, at pp.
310-311.)

7 In *People v. Nicolaus* (1991) 54 Cal.3d 551, the defense called a psychiatric expert
8 in the penalty phase. In preparing his opinion in the case, the expert in part relied on
9 professional articles on the "psychiatric mechanisms of child murderers." Defense counsel
10 sought to have admitted into evidence copies of these articles and several letters written by the
11 defendant. The trial court refused to formally admit the documents into evidence. The
12 California Supreme Court upheld the exclusion finding that it did not prevent the defense from
13 presenting evidence relevant to his defense. (*Id.*, at pp. 582-583.)

14 "We have observed that "[w]here expert opinion evidence is
15 offered, much must be left to the discretion of the trial court"
16 [Citation].' (*People v. McDonald* (1984) 37 Cal.3d 351, 373) It
17 is well established that the court may, within its sound discretion,
18 exclude the hearsay basis of an expert's opinion. (Evid. Code, § 352;
19 . . . *People v. Odom* (1980) 108 Cal.App.3d 100, 115-116
[exclusion of reports relied on by expert witness proper where expert
testified about the reports].)" (*Ibid.*)

20 In *People v. Price* (1991) 1 Cal.4th 324, the defense introduced the testimony of a
21 psychiatrist that the killing appeared to be a "classic crime of passion" committed by a person
22 with a close emotional attachment to the victim. The purpose of this evidence was to show that
23 the victim's boyfriend committed the murder. The trial court ruled that the expert could offer
24 such an opinion only in response to a hypothetical question based solely on the admissible
25 evidence the jury had received. The trial court excluded any hearsay evidence not already
26 before the jury. This ruling was upheld by the California Supreme Court. (*Id.*, at pp. 415-416.)

27 "On direct examination, an expert may give the reasons for an
28 opinion, including the materials the expert considered in forming the
29 opinion, but an expert may not under the guise of stating reasons for
an opinion bring before the jury incompetent hearsay evidence.

1 (People v. Coleman (1985) 38 Cal.3d 69, 82) A trial court has
2 considerable discretion to control the form in which the expert is
3 questioned to prevent the jury from learning of incompetent hearsay.
4 (Ibid.) Here, the restrictions imposed on counsel's examination by
5 the trial court's rulings, which permitted the main features of the case
6 to be presented in the form of hypothetical questions, were
7 reasonable and within the court's discretion." (Id., at p. 416.)

8 Thus case law thus set forth the permissible parameters of Evidence Code sections
9 801 and 802. Defendant's experts can properly testify, if applicable, that their opinions were
10 based on out-of-court statements, written reports, or other material that might be hearsay if its
11 admission was sought independently. However, it is error to allow defendant's experts to testify
12 about the details of these matters if they constitute otherwise inadmissible hearsay. The court
13 can also restrict questioning of the expert about out-of-court materials relied on in forming an
14 opinion to hypothetical questions. Finally, the court should give limiting instructions if
15 otherwise inadmissible material is referred to by the expert as the basis of the expert's opinion.

16 VIII

17 A DEFENSE PSYCHIATRIC WITNESS MUST BE A QUALIFIED 18 EXPERT ON THE PARTICULAR SUBJECT TO WHICH 19 HIS OR HER TESTIMONY RELATES.

20 Evidence Code section 720 provides:

21 "(a) A person is qualified to testify as an expert if he has special
22 knowledge, skill, experience, training or education sufficient to
23 qualify him as an expert on the subject to which his testimony
24 relates. Against the objection of a party, such special knowledge,
25 skill, experience, training, or education must be shown before the
26 witness may testify as an expert.

27 "(b) A witness's special knowledge, skill, experience, training or
28 education may be shown by any otherwise admissible evidence,
29 including his own testimony." (Emphasis added.)

30 "Although the weight to be given the expert's testimony is for the trier of fact to
31 determine, the court makes a ruling as to whether or not a proffered witness qualifies as an
32 expert." (People v. Busch (1961) 56 Cal.2d 868, 878.)

1 "Whether a person qualifies as an expert in a particular field in a
2 particular case depends upon the facts of that case and the witness's
3 peculiar qualifications. . . . [¶] The competency of an expert is
4 relative to the topic and fields of knowledge about which the person
5 is asked to make a statement. In considering whether a person
6 qualifies as an expert, the field of expertise must be carefully
7 distinguished and limited." (*People v. King* (1968) 266 Cal.App.2d
8 437, 445.)

9 The People object to the qualifications of any psychiatric witness proffered by the
10 defendant. Pursuant to Evidence Code section 720 the court must hold to a hearing to determine
11 the subject area to be covered by the witness' testimony and whether the witness is a qualified
12 expert in those areas. If the field of expertise is not carefully distinguished and limited the
13 witness should not be allowed to testify.

14 IX

15 **THE PEOPLE ARE ENTITLED TO A HEARING PURSUANT TO EVIDENCE 16 CODE SECTIONS 402 AND 403 BEFORE ANY PSYCHIATRIC EVIDENCE 17 PROFFERED BY THE DEFENSE IS ALLOWED BEFORE THE JURY.**

18 The People request that any proffered psychiatric evidence be subject to review
19 for relevance by way of hearing pursuant to Evidence Code sections 402 and 403 before a ruling
20 on admissibility is made.

21 Evidence Code section 402 provides that when the existence of a "preliminary
22 fact"¹ is disputed, the issue should be determined in a hearing before the court. Evidence Code
23 section 403 states that:

24 "The proponent of the proffered evidence has the burden of
25 producing evidence as to the existence of the preliminary fact, and
26 the proffered evidence is inadmissible unless the court finds that
27 there is evidence sufficient to sustain a finding of the existence of
28 the preliminary fact, when:

29 ¹ "Preliminary fact is defined by Evidence Code section 400 as "a fact upon the existence or
30 nonexistence of which depends the admissibility or inadmissibility of evidence." Section 400
31 defines "admissibility or inadmissibility" as including the qualification or disqualification of a
32 person to be a witness.

1
2 "(1) The relevance of the proffered evidence depends on the
3 existence of the preliminary fact;" (Emphasis added.)

4 The correct procedure is described in 3 Witkin, *California Evidence*
5 (3d ed. 1986) "Introduction of Evidence at Trial," section 1712, at page 1671:

6 "In many situations, the qualification of a witness to testify . . . or the
7 admissibility of a particular item of evidence, is conditional upon the
8 showing of preliminary facts as a foundation. Although fact
9 questions are ordinarily for the jury . . . , this preliminary issue of
10 admissibility is decided by the trial judge." (Citations omitted;
11 emphasis in original.)

12 Before the defendant can present any psychiatric or psychological evidence to the
13 jury over the People's objection, the defense has the burden of proof to establish, in a pre-
14 testimonial hearing pursuant to Evidence Code section 402, that such evidence is relevant to the
15 defense. To successfully meet the burden, defendant must show the "preliminary fact" that the
16 proffered evidence supports a relevant "reduced" mental state at the time of the homicide.¹

17 As has been previously explored at length, the area of expert psychiatric testimony
18 as it relates to defendant's mental state is fraught with the dangers of impermissible inquiry
19 under Penal Code sections 21, 25, 28, and 29. It is much more prudent for both parties to fully
20 explore the ramifications of an expert's proposed testimony in the relative safety of a "section
21 402 hearing" prior to letting the expert loose on the jury. Using this procedure, the court will be
22 able to enter appropriate limitation orders on both the expert witness and counsel prior to the
23 jury hearing the testimony.

24 For the reasons shown above, the People are entitled to have the court conduct a
25 hearing pursuant to Evidence Code sections 402 and 403 prior to the admission of any defense

26 ¹ Admittedly, this might include asking questions of an expert that would be impermissible to
27 ask in front of the jury under Penal Code sections 28 and 29. For instance, at the pre-testimonial
28 hearing, the expert could be allowed to explain exactly how his or her opinions relate to the
29 existence of express or implied malice.

1 psychiatric or psychological testimony or other evidence before the jury. During this hearing
2 both parties can comprehensively examine each defense psychiatric witness out of the jury's
3 presence. This will allow the court to make a fully informed decision on the admissibility of
4 any or all of the witness' testimony. It will also relieve both counsel of the difficult burden of
5 accurately predicting what the relevant impact of the testimony might be. If the court
6 determines that the evidence or testimony is totally inadmissible, the jury will be spared the time
7 and harmful influence of having numerous objections made and sidebar conferences conducted
8 in their presence. If the court finds that at least a portion of the evidence or testimony is
9 admissible, it can then make such limitation orders as will ensure that justice is done for all
10 parties if and when the evidence is ultimately presented to the jury by the defense.

11 **X**

12 **ON DIRECT EXAMINATION OF DEFENSE EXPERT**
13 **WITNESSES, DEFENSE COUNSEL MAY NOT ASK**
14 **QUESTIONS WHICH ARE UNDULY SUGGESTIVE.**

15 The general rule is that an attorney cannot ask leading questions during direct
16 examination. (Evid. Code, §§ 764, 767.) There is a rarely followed exception for expert
17 witnesses. (*People v. Campbell* (1965) 233 Cal.App.2d 38, 44.) But as Justice Jefferson points
18 out:

19 "The justification for this variance is that an expert witness is not
20 likely to bow to the suggestion contained in a leading question asked
21 on direct examination, even though he is called as a witness by the
22 direct examiner. Many believe, however, that expert witnesses are
23 as partisan in their views as are lay witnesses and are just as likely to
24 succumb to false suggestions of the examiner. Thus, many trial
25 judges refuse to permit expert witnesses to be asked leading
26 questions on direct examination." (1 Jefferson, *California Evidence*
27 *Benchbook* (2d ed. 1982) § 27.8, p. 762; emphasis added.)

28 The People urge this court to prohibit unduly suggestive questioning of defense
29 experts on direct examination in order to prevent defense counsel from testifying through such
30 experts.

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XI

**THE PERMISSIBLE SCOPE OF CROSS-
EXAMINATION OF EXPERTS IS BROAD.**

Like any witness, an expert witness can be subjected to rigorous cross-examination regarding bias or motive, prior inconsistent statements, lack of recall, or any other matter touching on credibility. (Evid. Code, § 780.) In addition, Evidence Code section 721(a) allows full cross-examination of an expert as to (1) qualifications, (2) the subject to which the testimony relates, and (3) the matter upon which the expert's opinion is based and the reasons for such opinion.

Such cross-examination serves multiple purposes. It reflects the credibility and weight of the expert and his opinion. Further, such witness, before giving his opinion, may be questioned on *voir dire* by opposing counsel as to his qualifications (Evid. Code, § 720(a)) and as to whether his opinion is based on proper matter (Evid. Code, §§ 801(b), 802, and 803; see also 2 Jefferson, *Cal. Evidence Benchbook, supra*, §§ 29.4, 29.5.)

When a defendant in a criminal case tenders expert testimony regarding his or her mental state, such expert may be fully cross-examined regarding defendant's statements to the expert, and may be questioned about the defendant's history, including prior offenses, as it relates to the expert's opinion. (See *People v. Nye* (1969) 71 Cal.2d 356, 373-377; *People v. Whitmore* (1967) 251 Cal.App.2d 359, 366.)

Further, if relevant, the expert witness may be cross-examined with regard to photographs depicting the manner in which the crimes were committed. (*People v. Nye, supra*, at p. 377.)

Finally, the expert may be fully cross-examined with respect to his compensation and payment of expenses. (Evid. Code, § 722(b).) As Justice Jefferson points out:

"Even without Evid C § 722(b), evidence of the amount of compensation that an expert charges a party for preparing a report and testifying would be admissible to attack the witness' credibility, as relating to his 'bias,' 'interest,' or 'motive' to testify, pursuant to Evid C § 780(f). Evidence Code § 722(b), although unnecessary, was enacted out of an abundance of caution that a judge might consider as not a proper impeaching fact the amount of

1 compensation that an expert witness charges a calling party." (2
2 Jefferson, *California Evidence Benchbook, supra*, § 29.8, at p. 1035;
3 emphasis in original.)

4 In *People v. Price* (1991) 1 Cal.4th 324, the prosecution questioned the defense
5 expert about the fee he was receiving for his testimony.

6 "The compensation and expenses paid or to be paid to an expert
7 witness by the party calling him or her is a proper subject of inquiry
8 by any adverse party as relevant to the credibility of the witness and
9 the weight of his or her testimony. (Evid. Code, § 722, subd. (b);
10 *People v. Rich* (1988) 45 Cal.3d 1036, 1100-1102.)" (*Price, supra*,
11 1 Cal.4th at p. 457.)

12 Also in Price, the prosecutor questioned the expert witness about the fact that he
13 had been retained and testified for the defense in the Dan White ("Twinkie Defense") case. The
14 prosecutor also commented on the expert's connection to the Dan White case in argument. The
15 court rejected the defense contention of error, finding no misconduct. "[A]n expert's testimony
16 in prior cases involving similar issues is a legitimate subject of cross-examination." (*Id.*, 1
17 Cal.4th at p. 457.)

18 In *People v. Rich, supra*, 45 Cal.3d at page 1088, the California Supreme Court
19 upheld a prosecutor cross-examining a psychiatrist called by the defense regarding the number
20 of times he testified for the defense. (C.f. Evid. Code, § 780(f).) Also the court allowed a
21 doctor to comment on another doctor's report, opinions and findings. (*Ibid.*)

22 In *People v. Hendricks* (1988) 44 Cal.3d 635, 641-642, the defendant was on trial
23 for the murder of two homosexuals and was pending murder charges of three more homosexuals
24 in another county. The defense sought to put on a psychiatrist to testify that defendant was
25 acting out a "homosexual rage." The trial court ruled that the doctor could then be cross-
26 examined on the other pending murders. The defense then decided not to call the doctor and the
27 convictions were upheld on appeal.

28 "Other crimes evidence may be used to impeach the testimony of an
29 expert witness. *People v. Nye* (1969) 71 Cal.2d 356, 373; *People v.*
30 *Jones* (1964) 225 Cal.App.2d 598, 610-613. Because an expert
may be cross-examined more extensively and searchingly than a lay

1 witness, the court has broad discretion to admit such evidence for
2 impeachment." (*Hendricks, supra*, 44 Cal.3d at p. 642.)

3 In *People v. Caro* (1988) 46 Cal.3d 1035, defense counsel indicated a desire to
4 call as a witness a psychiatrist who had examined the defendant. The defense wanted the expert
5 to testify regarding his diagnosis. However, the defense wanted an order preventing the
6 prosecutor from cross-examining the expert about any statements by the defendant other than
7 those specifically relied on by the expert in forming his diagnosis. The defense relied on
8 Evidence Code section 721, subdivision (a) and the attorney-client privilege. The trial court
9 declined to limit cross-examination and defense counsel determined not to call the expert. The
10 California Supreme Court affirmed.

11 "Defendant's arguments are unpersuasive. Dr. Benson did not
12 testify, and . . . we cannot conclude from the record precisely which
13 of defendant's statements the witness actually referred to in
14 reaching his diagnosis. . . . [¶] If Dr. Benson had testified and had
15 asserted that his opinion was based in no part on statements by the
16 defendant about the events surrounding the crimes, the prosecution
17 might have been foreclosed from cross-examining him about such
18 statements. [Citation.]" (Emphasis added. *Id.*, at p. 1060.)

18 The court also overruled the claim of privilege. (*Ibid.*) By permitting the expert
19 to testify to some of the defendant's statements there would likely have been disclosure of a
20 "significant part" of the communication, thus waiving the privilege. (Evid. Code, §912(a).)

21 Finally, the court in *Caro* found the trial court was within its discretion in refusing
22 to make a pre-testimonial commitment as to the scope of permissible cross-examination by the
23 prosecutor. (*Id.*, at pp. 1060-1061.)

24 **CONCLUSION**

25 Based on the foregoing, the People respectfully request the court to exclude and
26 limit defense psychiatric evidence as required by law. In addition, the People respectfully
27 request that the court conduct hearings outside the presence of the jury pursuant to Evidence
28 Code sections 402 and 403 before any defense psychiatric expert is permit to testify.

29 Dated: June 24, 2004

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Respectfully submitted,
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