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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

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| THE PEOPLE OF THE STATE | 11CF2575 |
| OF CALIFORNIA, | RULINGS ON MOTIONS IN LIMINE |
| Plaintiff, | Hon. WILLIAM R. FROEBERG |
| vs. | Dept. C40 |
| MANUEL ANTHONY RAMOS | |
| AND JAY PATRICK CICINELLI, | |
| Defendants. | |

On November 12, 2013, the parties in the above entitled action appeared for pretrial motions before the undersigned in the above entitled court. The Court made the following rulings.

People's Motions.

1. Sealing of Records. After considering the criteria set forth in California Rules of Court, Rule 2.550, the Court determined that there was no justification for keeping the moving and responding papers under seal and denies the request to keep them sealed.

2. Spectator Displays. The mother of Kelly Thomas, Cathy Thomas, made an informal request to wear t-shirts with distinctive writing on them. All parties moved to bar such

1 displays. The Court explained the reasons why such displays are inappropriate but pursuant
2 to the ruling in *Carey v Musladin*, 549 U.S. 70, the Court would not ban the wearing of
3 certain apparel unless such behavior became disruptive of both parties right to a fair trial.

4 3. Prior Contacts Between Ramos and Thomas. There being no objection to the
5 production of 7 recorded contacts between defendant Ramos and the decedent Thomas,
6 the People's request to introduce such recordings is granted.

7 4. A) Motion to Exclude the Testimony of Jeannette De Marco.

8 B) Motion to Allow the Testimony of Jeannette De Marco by the Defense.

9 Jeannette De Marco had seen Thomas carry a hatchet clutched to his chest but never
10 called the police because he never approached her with it. She said Thomas would sleep
11 on the patio of the Slidebar restaurant, relieve himself in the floor drains and bum cigarettes
12 off customers and employees. She never saw him be violent but she had seen him be
13 verbally aggressive. He kicked over a sign once when he was told not to bum cigarettes. In
14 May or June of 2011 she saw Thomas looking into cars which caused her to call the police.

15 De Marco's observations of Kelly Thomas immediately prior to her phone call to the
16 Fullerton Police Department are admissible and relevant to negate any suspicion that the
17 detention and investigation by the police was somehow manufactured or not legal. That she
18 had seen Crazy Kelly in the area for the past ten years is relevant as to her identification of
19 him to the dispatcher. Her observation of Mr. Thomas carrying a hatchet is not relevant on
20 his character for violence and her opinions of Mr. Thomas mental state are irrelevant and
21 are subject to exclusion under Evidence Code Section 352. Evidence of any fear she has in
22 testifying is proper.

23 5. Motion to Exclude Prior Criminal Conduct of Kelly Thomas Under Evidence Code
24 Section 1101.

25 The law: An accused claiming self-defense in a prosecution for homicide or assault
26 is entitled to prove the dangerous character of the victim. If this character was known to the
27 defendant, the evidence tends to show the defendant's apprehension of the danger. If it was
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1 not known, the evidence nevertheless tends to show that the victim probably was the
2 aggressor. Witkin Evidence 5th Edition, 1 Circumstantial Evidence Section 57. Whether a
3 person had a character for violence and whether he acted in conformity with such a
4 character are matters for the jury. P v Fuiava 53 C 4th 622. In determining the extent of the
5 evidence of character traits the court may exclude admissible evidence under E.C. 352. P v
6 Gutierrez 45 C 4th 789 @ 827. In this case, although it appears from the video recording that
7 Mr. Thomas attempted to flee from a physical confrontation, it does not show how he and
8 the defendants got to the ground and whether he or the defendants initiated or escalated
9 the violence. Consequently, evidence of past violence may be circumstantial evidence
10 tending to show Thomas was the aggressor.

11 Specific acts sought to be excluded by the People and admitted by the Defense.

- 12 1. June 8, 1996. Assault on Walter Diebal, Kelly Thomas' grandfather, with a fireplace poker.
13 When police officers approached Kelly Thomas after the incident he was told to stop.
14 Thomas replied that he had done nothing wrong and continued to walk. When the door to
15 the police unit was opened, Thomas took off running. When Thomas eventually stopped
16 running, he threw the fireplace poker into some bushes and laid down on the ground where
17 he was taken into custody at gunpoint. Said he had hit his grandfather defensively, that he
18 feels his grandfather is bi-sexual by the way he crosses his legs and has feelings for him and
is uncomfortable with the way he looks at his crotch. Thomas said he was heterosexual and
has nothing against bisexuals. Thomas was convicted of ADW in 95 NF1413.

19 Ramos offered the evidence for the following purposes: A) Evidence of character trait and
20 habit of fixating on crotch or groin area as a putative focus of attention from bi-sexual
21 individuals. B) He was compelled to violently resist a perceived advance. C) He crossed his
22 legs because he entertained a delusion that Ramos was focusing on his genitalia. D) Habit
23 of fleeing and absconding to avoid pursuit and apprehension by law enforcement and to
24 evade consequence of investigation, detection of crime, and arrest and incarceration. E)
25 Motive for flight was due to fear of extended incarceration. F) Impeachment of statements
26 made during the incident. G) Evidence of spontaneous psychosis following chronic
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1 methamphetamine use. H) Psychological fixation on his genitals. I) Evidence of organic
2 impairment of cognitive functioning.

3 The fact of this conviction is relevant and admissible for proof of a character trait for
4 violence. The balance of the offer of proof is pure speculation and would do nothing except
5 confuse the jury and is excluded under Evidence Code Section 352.

- 6 2. August 14, 1996. Reported theft of a guitar from his father. The evidence is offered by
7 Ramos to show Thomas' fear of incarceration and to impeach his hearsay statements. This
8 incident has no relevance. Mr. Thomas' statements are not hearsay as they are not offered
9 for the truth of what was said. The motion to exclude is granted.
- 10 3. December 19, 2004. Assault and battery on Dale Roberts by slapping a cell phone, pack of
11 cigarettes and canned energy drink out of his hand and then punching him in the cheek. This
12 incident is admissible and relevant on the issue of character for violence.
- 13 4. June 25, 2005. Trespass arrest. Thomas was told to leave Albertsons because he had been
14 told in the past not to come in because he begs for money from customers. He began yelling
15 and cussing, ripped a receipt from a cash register and knocked over a sign. He seemed to
16 believe that there was a pit of energy there in the store. Ramos offered the evidence to
17 prove Thomas' character for violence. This incident is marginally relevant at best; it is
18 excluded under E.C. Section 352 as being cumulative.
- 19 5. November 21, 2007. Thomas' mother reported to Anaheim PD that he suffers from
20 schizophrenia and ran away when they were on the way to the doctor; Mr. Thomas was off
21 his meds. She said that he has a tendency to be violent, carries a knife and is a danger to
22 himself and others. Thomas was cooperative and not armed when contacted. Ramos offered
23 the evidence to prove Thomas' character for violence. This incident is marginally relevant at
24 best; it is excluded under E.C. Section 352 as being cumulative.
- 25 6. December 11, 2007. Thomas' mother again called Anaheim PD and notified them he was
26 schizophrenic and off his meds. Mr. Thomas voluntarily consented to a W and I Code Section
27 5150 hold. She may or may not have reported he threatened her with a butcher knife. An
28 Evidence Code Section 402 hearing was conducted at which Ms. Thomas could not
remember telling the officer that Mr. Thomas threatened her with a butcher knife. Ruling is
reserved pending production of officer who took the statement from Ms. Thomas.
7. March 5, 2009. Thomas was observed loitering in Target parking lot and gave his name to
Fullerton Police as James Jr. Jesse. James, Thomas Kelly. Ramos offered this incident to prove
Thomas' habit of giving false names to avoid arrest. Habit of giving false names is irrelevant.
This evidence is excluded.
8. May 20, 2009. Thomas was asked to leave a 99 Cent Store; he became belligerent and
started cussing. He was subsequently convicted of misdemeanor trespassing. Ramos offered

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the evidence to prove Thomas' character trait for belligerence and aggressiveness, trespassing and defiance.

a. Character traits for trespassing and defiance are irrelevant to this case and the incident has only marginal relevance on character for violence; it is excluded under Evidence Code Section 352.

9. December 17, 2009. Thomas was observed by Placentia Police; an F.I. card indicated that he was observed wearing gloves and looking in vehicles near Rembrandt's restaurant. Ramos offered the evidence to prove Thomas' habit of looking into vehicles and fear of incarceration. That Thomas may have had a habit of looking into vehicles is irrelevant-an eyewitness will testify that he was looking into vehicles as her reason for calling 911. The incident has nothing to do with fear of incarceration; it is excluded.

10. December 26, 2009. Thomas kicked a cardboard box in the direction of and threw a watch toward an employee of Kelly's Corner restaurant in Placentia. He was arrested for assault but no charges were filed. This incident is admissible and relevant to prove a character trait for violence.

11. Starbucks, 2009. When told to leave while urinating in the water fountain, Thomas told an employee that he was going to kill her and was going to punch her in the fucking face. A no trespassing order was made but no further action was taken. Ramos offered this evidence to prove a prior threat of physical violence and evidence of character trait for violence. It is marginally relevant and will be excluded as cumulative under Evidence Code Section 352.

12. June 30, 2010. Thomas had trespassed on the premises of a fruit stand in Fullerton on several prior occasions. After being told to leave, he picked up a rock and threw it towards the employee and the stand but hit nothing. Thomas threw another rock that hit the side of the stand. He threw a third rock that missed. A customer who confronted Thomas observed him holding a 14" metal pipe, but never threatened the customer with the pipe. Thomas was convicted of trespass. This incident is admissible and relevant on his character for violence.

13. August 9, 2010. Contact with Fullerton Police wherein Thomas appeared to be talking to himself and pacing back and forth along a sidewalk. He was in possession of several matches. No action was taken. Ramos made the following offer: Matches may be used as a weapon and inflict great bodily injury and serious property damage; this is evidence of proclivity for violence. The evidence is excluded because it is speculative and irrelevant.

14. December 3, 2010. A male subject with red hair and a beard jumped from the patio area of a Starbucks and threw a metal chair at Maribel Rocha's car. No suspect was identified. Thomas denied involvement. Ramos offered the evidence of Thomas' character for violence. There is no relevance to this incident, it is excluded.

15. December 27, 2010. Ms. Thomas obtained a restraining order against her son. Thomas was sleeping on her front porch, would urinate and take off his clothes by the front door. On one

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occasion, he yelled very loudly at her. She also said he had held her by the neck once. After the conclusion of a 402 evidentiary hearing, the incident where Mr. Thomas held his mother by the neck is deemed to be relevant on Thomas' character trait for violence.

16. January 5, 2011. At a 7-11 store in Fullerton, Thomas was told to leave the store; he was followed by an employee outside of the store. Thomas picked up the handset of a payphone and pretended to throw it at the employee. He hit the handset on the payphone causing the handset to break and was convicted of vandalism. Violence against communication devices is not an issue in this case and this incident is excluded under Evidence Code Section 352 as cumulative.

17. 2011-Dance Depot. Thomas was seen to be sleeping behind the dance studio on a regular basis. He refused to leave and would raise his fists, scream and yell at the person who told him to leave. Police were called to remove him from the area. Ramos offered this evidence for Thomas' character for violence. It is marginally relevant on character for violence but is excluded as being cumulative under Evidence Code Section 352.

6. Motion to Exclude Evidence that Thomas Invoked His 5th Amendment Rights on June 8, 1995 and May 20, 2000. The Defense does not intend to introduce this evidence; the motion to exclude is granted.

7. Photographs. Counsel met and conferred and agreed to the admission of certain photographs with the following exceptions: Pre-trial exhibits numbered 3 A, B, C, P, Q and CC. The Court will reserve ruling on the photographs until foundation and relevancy are established and the Court has an opportunity to make a determination under Evidence Code Section 352. The photographs will not be displayed to the jury until the Court makes such a determination.

8. Witnesses Invoking the 5th Amendment. Any witness who may be subject to penal liability by testifying is to claim his or her Fifth Amendment rights outside the presence of the jury.

9. Other Participants. Evidence of why other individuals are not being prosecuted may not be produced without prior court order.

10. Loss of Use of Eye. Evidence of the reason why defendant Cicinelli has lost the use of his eye, specifically evidence of an on duty 1996 shooting incident, is excluded.

1 However his attorney may explain to the jury that Cicinelli has lost his eye to explain his
2 appearance.

3 Motions by Defense.

4 1. Testimony by Dr. Flores de Apocada. Dr. Flores de Apodaca prepared a report on
5 July 26, 1995 after he conducted a study to determine whether Mr. Thomas was competent
6 to stand trial.

7 Dr. Flores de Apodaca's opinion was: "Thus in summary, I think it likely that Mr. Thomas has
8 suffered organic impairment of cognitive functioning as a result of his chronic and
9 substantial abuse of various substances. Principally his abuse of hallucinogens,
10 methamphetamines and alcohol are likely to have caused neuropsychological damage of his
11 cognitive functioning. Despite his difficulties with memory, consequential detailing of history
12 and ability to process information cognitively, I am of the opinion that he is currently
13 competent to stand trial. He understands the nature of the charges against him, is motivated
14 to help himself through the legal process and can be expected to participate in his own
15 defense in a rational manner. His problems in memory and language are not so pronounced
16 as to prevent him from recalling the essential details, and more of his history."

17 Although the statements Mr. Thomas made to Dr. Flores de Apodaca are hearsay,
18 Evidence Code Section 1230 creates an exception for statements made by a declarant that
19 create a risk of making him an object of ridicule or social disgrace in the community that
20 would not have been made had they not been true. P v Wheeler 105 C.A. 4th 1423 @1426.
21 Consequently the statements Mr. Thomas made to Dr. Flores de Apodaca would be
22 admissible hearsay. Whether such statements are relevant depend on the statements the
23 parties seek to introduce.

24 Ramos contends that Dr. Apodaca's report shows that due to Kelly Thomas' settled
25 condition of brain injury resulting from long standing methamphetamine, hallucinogen and
26 other drug abuse over a number of years explains the limitations in the ability of Kelly
27 Thomas to perceive and mentally process the directions of the officers and to explain the
28 anomalous and virtually suicidal actions of Thomas that led to his death. That it is further
relevant on the objective reasonableness of the force used by Officer Ramos, whether
chronic and substantial abuse of various substances was a supervening cause of the death

1 of Kelly Thomas, whether it explains his flight from officers and his obsessive and irrational
2 combat against them.

3 These conclusions simply cannot be drawn from the diagnosis by Dr. Apodaca.
4 He had no history other than that given by Mr. Thomas and was provided with no other
5 records to review. The task was merely to determine if Mr. Thomas was competent to stand
6 trial.

7 Cicinelli contends that Dr. Apodaca's finding that Thomas was competent to stand
8 trial to refute prosecution argument that Thomas was clearly mentally ill and unable to follow
9 directions. The July 26, 1995 report is too remote in time to be of any relevance on this
10 issue.

11 Dr. Flores de Apodaca's opinion of Mr. Thomas' cognitive function may be relevant
12 if he is able to render an opinion that such impairment was permanent and irreversible. In
13 that case it might explain the demeanor of Mr. Thomas on the night of the incident. The only
14 other admissible evidence would be the statements made by Kelly Thomas' regarding his
15 use of drugs. The relevance is to serve as the basis for Dr. Karch's opinions as to the cause
16 of death and perhaps to justify asking hypotheticals about methamphetamine users in
17 general.

18 2. Interview of Ron and Kathy Thomas. Testimony by Ron Thomas, that he taught his
19 son self-defense moves, could be relevant on what techniques were taught and when.

20 3. Testimony of Dr. Steven B. Karch. The defendants submit that Dr. Karch will testify
21 that the cause of death was caused by a pre-existing methamphetamine-induced heart
22 disease, methamphetamine cardiomyopathy. Methamphetamine cardiomyopathy is
23 consistent with Thomas' abnormal behavior when confronted by police. Thomas is alleged
24 to have been a meth user and meth users are notorious for spontaneously developing
25 episodes of psychosis. Criminal conduct in the past tends to prove this theory. The history
26 given by Thomas is consistent with the theory.

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1 Assuming foundation is established, Dr. Karch would be able to render opinions on
2 the cause of death based on the materials he has examined. He may testify to a properly
3 phrased hypothetical question based on facts in evidence. He may not opine directly: a) on
4 Mr. Thomas' state of mind at the time of the incident, b) that he had disorganized thinking, c)
5 as to what the defendant was thinking, d) that Mr. Thomas' behavior when confronted by the
6 police was abnormal, e) that Mr. Thomas did not know what he was doing, nor, f) the extent
7 of Thomas' impairment at the time of the incident; these are questions for the jury. P v
8 Pearson 56 C 4th 393 @ 451.

9 3. Request for a Kelly Frye Hearing on Overlay Tracing. The People do not intend
10 to introduce this evidence so no hearing is required.

11 4. Character Reference for Cicinelli by Assistant District Attorney Tracy Rinauro.
12 The letter itself is hearsay and there is no exception. Ms. Rinauro is not a qualified use of
13 force expert and did not personally witness the prior incident which served as the basis for
14 the letter of recommendation. There is no foundation for her opinion; it is excluded.


15 5. Motion to Exclude Witnesses. The People joined in the motion to exclude all
16 testifying witnesses with three exceptions. The Court determines that Kelly Thomas' parents
17 are entitled to be present under Marsy's Law and that any testimony that they would provide
18 has been memorialized in police reports or prior testimony so that the risk that their
19 testimony would be tailored after hearing the rest of the trial is minimal. P v Griffin 33 C 4th
20 536 @ 574. P v Bradford 15 C 4th 1229 @ 1321. The People have designated Stan Berry
21 as their investigating officer. Expert witnesses retained by the People and Defense may
22 remain in the courtroom during the trial. All other witnesses are excluded from the courtroom
23 until they have been excused or until further order of the court.

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25 Dated: 11/26/2013

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WILLIAM R. FROEBERG
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
NOV 04 2013
ALAN CARLSON, Clerk of the Court
BY JOHN D. BARNETT, DEPUTY

Attorney for defendant Manuel Anthony Ramos

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

9
10 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO. 11CF2575
11)
12) Plaintiff,) TRIAL BRIEF OF DEFENDANT
13)) MANUEL ANTHONY RAMOS
14 vs.) RE OFFER OF PROOF
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MANUEL ANTHONY RAMOS,) Date: November 4, 2013
JAY PATRICK CICINELLI,) Time: 8:30 A.M.
Defendants.) Department: C40
CONDITIONALLY UNDER SEAL

18 The defendant Manuel Anthony Ramos, by and through his counsel of record, the Law
19 Office of Barnett & Barnett, and John D. Barnett, Esq., submits herewith, for filing under seal,
20 the trial brief of the defendant Manuel Anthony Ramos, regarding his offer of proof, and the
21 accompanying notebook of documents in support thereof, in the above-referenced case.

22 Respectfully submitted,

23 LAW OFFICE OF BARNETT & BARNETT

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26 DATED: 11/1/13


JOHN D. BARNETT
Attorney for defendant Manuel Anthony Ramos

OVERVIEW

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3 The People’s theory of this case is that when Officer Manuel Ramos and Officer Joseph
4 Wolfe, responding to a call regarding a person trying doors of cars, approached and detained
5 Kelly Thomas on the sidewalk near the Fullerton Transportation Center at about 8:30 P.M. on
6 July 5, 2011, Kelly Thomas, who described himself as homeless and was vaguely remembered
7 by Officer Ramos from previous admonishments, was obviously mentally ill and disoriented
8 and did not know his name, and so when engaged in a lengthy investigative detention
9 by Officer Ramos, in which Kelly Thomas, by the District Attorney’s own argument,
10 “was being a bit of a jerk to the police officer” (RT 416:22-23 (May 9, 2012)), and was
11 ordered to sit on the curb with his legs out in front, as his backpack was being searched, Kelly
12 Thomas, who was not a danger to himself or the community, but faced with the specter of
13 physical seizure preparatory to arrest, and a threat of unlawful use of force, reasonably fled on
14 foot from the officers, and used only reasonable force, in self-defense in the ensuing lethal
15 physical encounter. On the other hand, the defense submits that Kelly Thomas, who suffered
16 from cardiomyopathy, as well as a latent susceptibility to “spontaneous psychosis”, as a result of
17 chronic methamphetamine and other-drug abuse many years earlier (see reports by Dr. Apodaca
18 (accompanying **NOTEBOOK, Tab 2**) and Dr. Karch (accompanying **NOTEBOOK, Tab 21**),
19 *infra*), deliberately engaged the officers in a streetwise pattern of noncooperation and
20 disinformation, and obstruction of the investigation, in which he sought to disguise his true
21 identity, because, aware of his own history of violent conduct and run-ins with the law, he sought
22 to avoid going to jail at all costs, even as he lapsed into a delusion that his crotch and genitals
23 were being scrutinized by Officer Ramos, provoking the volatile Thomas to violently resist an
24 imagined “bi-sexual” advance (see Case No. 95NF1413 (accompanying **NOTEBOOK, Tab 1**),
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1 *infra*), and thus Kelly Thomas fled on foot and, ignoring repeated directions to comply, desist
2 and relax, was catapulted into a psychotic and ultimately terminal climax of physical combat
3 against the several officers on the scene.

4 SALIENT ISSUES

5 1. Did Officer Manuel Ramos engage in unlawful conduct which was operative at the
6 moment of death of Kelly Thomas, such that the death of Kelly Thomas would not have occurred
7 but for that conduct, and which was a substantial factor contributing to the death, or was the
8 death of Kelly Thomas the result of one or more supervening factors precipitating harm of a kind
9 and degree which Officer Ramos was not reasonably able to foresee, and which it was not
10 reasonably within his power to forestall at the time in question, to such a point that it would be
11 unjust to hold him criminally responsible for the death of Kelly Thomas?
12

13 Under fundamental Fourth Amendment and Due Process principles, Officer Manuel Ramos
14 was responsible for using only reasonable force, as judged objectively, from the perspective of a
15 reasonable officer on the scene, under the attendant circumstances, without regard to the officer's
16 subjective intentions or motivations. *Graham v. Connor*, 490 U.S. 386, 396-398, 109 S.Ct. 1865,
17 104 L.Ed.2d 443 (1989). The proper application of this test of reasonableness "requires careful
18 attention to the facts and circumstances of each particular case, including the severity of the
19 crime at issue, whether the suspect poses an immediate threat to the safety of the officers or
20 others, and whether he is actively resisting arrest or attempting to evade arrest by flight"
21 (*Graham v. Connor*, at 490 U.S. 396).
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23 2. What was the cause, or what were the causes, in fact, of the death of Kelly Thomas?
24 Medical evidence is admissible on this issue. Because death may have been caused by one or
25 more factors which an officer on the scene had no reason to perceive or to know, including an
26 ongoing or pre-existing infirmity, susceptibility, or other physical and/or mental condition of the
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1 alleged victim, the cause of death is a subject which is sufficiently beyond common experience,
2 training and education that the opinion of an expert would assist the trier of fact, within the
3 meaning of Evidence Code section 801.

4 3. Did Officer Manuel Ramos exert only reasonable force, in response to violent or other
5 unlawful conduct on the part of Kelly Thomas, or did he exert excessive force when Thomas was
6 acting in self-defense, or was Officer Ramos himself acting in self-defense?

7 In regard to this issue, the alleged victim's propensity for or tendency to violence, as
8 tending to show that he acted in a violent manner in the incident in question, is relevant.

9 Correspondingly, Evidence Code section 1103(a) provides:

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11 “(a) In a criminal action, evidence of the character or a trait of character (in the form
12 of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the
13 victim of the crime for which the defendant is being prosecuted is not made inadmissible
14 by Section 1011 if the evidence is:

15 “(1) Offered by the defendant to prove conduct of the victim in conformity with
16 the character or trait of character.

17 “(2) Offered by the prosecution to rebut evidence adduced by the defendant
18 under paragraph (1).”

19 In *Jackson v. Sauls*, 206 F.3d 1156, 1169 (11th Cir. 2000), the Court of Appeals
20 observed:

21 “. . . We first caution that a police officer cannot foresee all conduct occurring
22 after a stop or arrest, even if illegal. For example, when a uniformed officer, or an
23 undercover officer identifying himself as a policeman, draws his gun during an illegal
24 stop or arrest, third party civilians and detained persons do not normally begin shooting.
25 Thus, in those situations, an officer could not reasonably foresee a shooting in response
26 to a stop or arrest, even if illegal. . . .”

27 In *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593-594 (7th Cir. 1997), wherein a
28 corpulent man exhibiting mental health issues and disruptive and violent behavior, was, after
“intense” struggle, removed by police officers from a hotel from which he had been evicted, and
died of anoxic encephalopathy while police were attempting to take him into custody for hospital

1 observation, the Court of Appeals declared:

2 “Our holding that it was reasonable to place Mr. Phillips on the floor in a prone
3 position necessarily implies that the officers did not use ‘deadly’ force to restrain
4 Mr. Phillips. . . . Nor were his medical conditions (an enlarged heart, an enlarged
5 thyroid, Graves’ disease and a thyroid storm), which were contributing factors to
6 Mr. Phillips’ death, observable to the untrained eye. See *Frazell*, 102 F.3d at 885
7 (noting that officer’s conduct in the face of knowledge of suspect’s medical problems
8 may be objectively unreasonable, although some conduct might be reasonable absent
9 such knowledge). None of the plaintiffs’ materials supports that restraining an individ-
10 ual in a prone position ‘carries with it a substantial risk of causing death or serious
11 bodily harm.’ *Robinette*, 854 F.2d at 912 (internal quotation omitted). The officers
12 placed Mr. Phillips in a face down position to restrain him from injuring himself
13 and others. That force, it turned out, when combined with Mr. Phillips’ other health
14 problems, resulted in Mr. Phillips’ death. But the question is not whether the officers’
15 actions aggravated an undiscovered injury or condition, but whether their actions
16 were objectively reasonable under the circumstances. See *Brownell v. Figel*, 950
17 F.2d 1285, 1293 (7th Cir. 1991). Placing Mr. Phillips in a prone position was reason-
18 able under the circumstances and therefore comported with the Fourth Amendment.”

19 In *Estate of Phillips v. City of Milwaukee*, the subject had a ball point pen in each hand; an
20 officer grabbed a wrist of the subject holding a pen; the subject flailed violently as officers
21 struggled to handcuff him behind his back with two pairs of cuffs; the subject was held down in
22 a prone position for a few minutes before leg restraints were applied and the subject was taken
23 in an ambulance to a hospital for observation; about the time that the subject was placed in the
24 ambulance, it was discovered that he had stopped breathing; the autopsy showed a moderately
25 enlarged heart and a greatly enlarged thyroid. In the resulting civil rights action, the Court of
26 Appeals affirmed the grant of summary judgment for the defendants. *Id.* at 591-594.

27 In *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1096-1097 (9th Cir. 2006),
28 wherein the Ninth Circuit affirmed the District Court’s grant of summary judgment in a 42
U.S.C. Section 1983 case, after officers had acted to subdue an intransigent and a seemingly
intoxicated subject kicking the door of a police station, and the subject’s breathing became
shallow and stopped, and the subject was pronounced dead at the scene, the Court of Appeals
opined:

2 In the narrative follow-up to the Placentia Police Department Arrest/Detention Report, at
3 page 4 of 5 thereof (discovery page 002828), in Case No. 95-2439, it is stated, by the reporting
4 Officer Busse, No. 1137, in the first paragraph:

5 “. . . Kelly told me for the past year, his grandfather has made him feel very
6 uncomfortable to be around. Kelly said his grandfather glances over at him, looks
7 at his crotch and generally makes him feel weird. Kelly said Walter looked at him
8 and mumbled something. Kelly not knowing what was said was irritated with the
9 remark. . . . Kelly said he felt that he was defending himself against a ‘Bi-sexual.’
10 I asked Kelly what he meant because his statements were very weird in nature.
11 Kelly said that he believed Walter to be a bi-sexual. I asked him why he felt that
12 way but Kelly could not explain his assumptions to me. I asked Kelly to demon-
13 strate or describe a physical action or incident that he had witnessed and he was
14 unable to do that. Kelly did say he could tell he was bi-sexual by the way Walter
15 crosses his legs when he sits. . . .”

16 In the instant case, in the surveillance video, augmented with audio from the officers’ digital
17 audio recorders, of the confrontation in question, designated as **Exhibit 4** at the preliminary
18 hearing, Kelly Thomas, while seated during an investigatory detention, and when told to put his
19 feet out in front of him with his legs crossed, said, to Officer Manuel Ramos, at approximately
20 time 10:00 - 10:09: “Do you like my balls? Do you like my balls? Do you like my balls? Are
21 they too big for you? Do they scare you?” Apparently, unbeknownst to Officer Ramos, Kelly
22 Thomas had a mental fixation on his own scrotum and a hypersensitivity that someone might
23 view that part of his anatomy.

24 Admissibility: Evidence of the incident of assault on Walter Dieball with a deadly weapon
25 is relevant and admissible as:

26 (1) Evidence of a character trait for violence of the alleged victim at the time of the incident
27 in question, per Evidence Code section 1103(a).

28 (2) Evidence, under Evidence Code sections 1101(b) and 1105, of the habit of Kelly
Thomas in manifesting an obsession with and fixation upon his crotch or groin area as a

1 putative focus of attention from “bi-sexual” individuals.

2 (3) Evidence, per Evidence Code section 1101(b), that Kelly Thomas was in the grip of a
3 delusion that his crotch and genitalia, particularly in relation to sitting cross-legged, were the
4 focus of erotic attention by presumed “bi-sexual” individuals, compelling him to violently resist
5 a perceived advance, so that in the case at bar, when he sat and crossed his legs (*e.g.*,
6 **Preliminary Hearing Exhibit 4** (video), at times 6:36 - 10:14), he entertained a delusion that
7 his crotch and genitalia were the focus of prurient attention by Officer Manuel Ramos, triggering
8 violent resistance on the part of Kelly Thomas.

9 (4) Evidence, under Evidence Code sections 1101(b) and 1105, of the habit
10 of Kelly Thomas in fleeing and absconding to avoid pursuit and apprehension by law
11 enforcement officers and to evade consequent investigation, detection of crime committed by
12 him, and arrest and incarceration in jail.

13 (5) Evidence, under Evidence Code section 1101(b), of the motive and intent of Kelly
14 Thomas in resisting arrest and combating Officer Manuel Ramos and the other police officers in
15 the alleged incident of July 5, 2011, to show that Kelly Thomas fled and resisted not because he
16 was afraid of being beaten or handled roughly, and not because he was confused, but because
17 Kelly Thomas, conscious of his prior criminal record, was afraid of being taken to jail, criminally
18 prosecuted, and incarcerated for a lengthy period, and thus fled the scene because he wanted to
19 escape apprehension, and avoid detection, and imprisonment, and thus during the detention he
20 withheld cooperation with the officers.

21 This evidence also impeaches the hearsay statements of Kelly Thomas, including those
22 in (10), *infra*, made during the alleged confrontation of July 5, 2011. See Evidence Code section
23 780(f) (“The existence or nonexistence of a bias, interest, or other motive.”).

24 (6) Evidence of spontaneous psychosis following chronic methamphetamine abuse,
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1 referenced by Dr. Steven B. Karch, in his report of September 5, 2013, *infra*,

2 (7) Evidence that Kelly Thomas, as the detention progressed, had a psychological fixation
3 on his genitals, and a hypersensitivity to the notion that his crotch and genitals were the object of
4 scrutiny by “bi-sexual” individuals, notably Officer Ramos, inciting him to violent resistance.

5 (8) Evidence, in regard to Kelly Thomas, of “organic impairment of cognitive functioning
6 as a result of his chronic and substantial abuse of various substances”, principally
7 “hallucinogens, methamphetamines and alcohol”, as referenced in the report of July 26, 1995
8 by Dr. Roberto Flores de Apodaca, *infra*, in Case No. 95NF1413.

9
10 (9) Evidence, per Section 1101(b) of the Evidence Code, that in the alleged incident on
11 July 5, 2011, Kelly Thomas fled from the police and fought against them in an irrational and
12 obsessive fight to the finish because, as a result of many years of methamphetamine,
13 hallucinogen and alcohol abuse, and the consequent organic brain injury sustained by him
14 (see the Apodaca report, at pages 9-10), there was triggered in him a spontaneous episode of
15 psychosis that left him unable to control himself and uninhibited. (See the Karch report at
16 page 2).

17
18 (10) Evidence that Kelly Thomas, in the resulting Case No. 95NF1413, corresponding to
19 Placentia Police Department No. 95-2439, incurred a felony conviction, for a June 8, 1995
20 violation of Penal Code section 245(a)(1) (discovery pages 2848, 2860), and thus, inferentially,
21 committed the underlying assault with a deadly weapon and/or with force likely to produce great
22 bodily injury (see Evidence Code section 452.5(b) (official record of conviction admissible
23 under Section 1280 to prove commission of underlying offense); *People v. Duran*, 97
24 Cal.App.4th 1448, 1460 (2002)), a crime of moral turpitude (*People v. Elwell*, 206 Cal.App.3d
25 171, 175-177 (1988)), relevant for impeachment, under Evidence Code sections 788 and 1202, of
26 the hearsay statements of Kelly Thomas, including the following statements on July 5, 2011:
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1 (a) When asked about trying to open car doors, that “I don’t know what you are talking
2 about” (**Preliminary Hearing Exhibit 5**, page 5).

3 (b) That he did not know his name (**Preliminary Hearing Exhibit 5**, page 8).

4 (c) That he was unable to sit on the curb as directed (**Preliminary Hearing Exhibit 5**,
5 page 12).

6 (d) That, although his voice and resistance were prodigiously strong and ongoing, he could
7 not breathe (**Preliminary Hearing Exhibit 5**, pages 15-16).

8 See *People v. Wheeler*, 14 Cal.4th 284, 295-296, 14 Cal.Rptr.2d 418, 425, 841 P.2d 938
9 (1992) (“... Misconduct involving moral turpitude may suggest a willingness to lie”),
10 superseded in part by Evidence Code section 452.5(b), as explained in *People v. Duran*,
11 97 Cal.App.4th 1448, 1460, 119 Cal.Rptr.2d 272 (2002)).

12 (11) Evidence that Kelly Thomas, in being interviewed by Officer Busse, made
13 contradictory and demonstrably false statements, is admissible to show the character of Kelly
14 Thomas for mendacity, that is lack of honesty or veracity. See Evidence Code section 1100.
15 That evidence is admissible, per Evidence Code sections 780(e) and 786, to impeach the hearsay
16 statements by Kelly Thomas. Kelly Thomas, in being interviewed by Officer Busse, claimed
17 at first that his grandfather initially wielded the fireplace poker and yelled at Kelly, and that he,
18 Kelly, acted in a defensive manner in disarming Walter. Later in the interview, however, Kelly
19 acknowledged that Walter was not holding anything in his hands during the first, second, and
20 third hits, and that Kelly assaulted him in what Kelly demonstrated to be a baseball-batter-type
21 stance. Kelly at first said that after hitting Walter with the poker, he, Kelly, went into the
22 garage to try to hide the poker. Later, Kelly, numerous times, denied that he went into the garage
23 to hide the poker. (Discovery page 002828.)
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1 **2. Dr. Roberto de Apodaca's psychological report on Kelly Thomas - July 26, 1995**
2 **(discovery pages 4048 - 4057). See NOTEBOOK, Tab 2.**

3 In a 10-page report of July 26, 1995, prepared in connection with Orange County Superior
4 Court Case No. 95NF1413, forensic clinical psychologist Roberto Flores de Apodaca, Ph.D.,
5 prepared a "Comprehensive Psychological Evaluation" report on Kelly Thomas, finding that
6 he was competent to stand trial, but concluding, at pages 9-10 thereof:

7 "Thus, in summary, I think it likely that Mr. Thomas has suffered organic impairment
8 of cognitive functioning as a result of his chronic and substantial abuse of various
9 substances.

10 "Principally, his abuse of hallucinogens, methamphetamines and alcohol are likely
11 to have caused neuropsychological damage of his cognitive functioning. . . ."

12 Dr. Apodaca's evaluation of KELLY THOMAS was to the effect that: KELLY THOMAS
13 became upset because he had recently found out that Ron Thomas was not his biological father.
14 His parents divorced when he was in second grade. His mother had been in a serious relation-
15 ship, and was still friendly, with a coke dealer. He (Kelly Thomas) smoked marijuana and
16 methamphetamines. He used a lot of LSD including 8 tablets on one occasion. He used a lot of
17 alcohol. He also sold LSD. Dr. Apodaca concluded that KELLY THOMAS suffered from
18 organic impairment of cognitive functioning as a result of his chronic and substantial abuse of
19 hallucinogens, methamphetamines and alcohol. Yet KELLY THOMAS was able to understand
20 the nature of the proceedings per Penal Code Section 1368.

21 Admissibility: Dr. Apodaca's report evinces a pattern of impairment of the cognitive
22 functioning of Kelly Thomas as a result of a settled condition of brain injury resulting from
23 long-standing methamphetamine, hallucinogen and other-drug abuse over a number of years.
24 It is relevant and admissible to explain limitations in the ability of Kelly Thomas in the alleged
25 incident of July 5, 2011 to perceive and mentally process the directions of the officers, and to
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1 explain the anomalous and virtually suicidal actions of Thomas that led to his death. *People v.*
2 *Long*, 126 Cal.App.4th 865, 871-872, 24 Cal.Rptr.3d 654 (2005) (“Dr. Atwal also testified that
3 Clark is likely to have an impaired or faulty capacity to perceive the facts in a situation when she
4 perceives she is going to be abandoned or the relationship is ending. . . . [Para.] “This testimony
5 speaks to Clark’s capacity and her perception of reality,”)

6 The evaluation and report by Dr. Apodaca, while not cumulative, is relevant
7 for the same reasons that Dr. Karch’s report, *infra*, is relevant. Dr. Apodaca’s evaluation is
8 relevant both on the issue of the objective reasonableness of the force used by Officer Ramos,
9 and on the issue of whether an organic impairment of cognitive functioning of Kelly Thomas as a
10 result of his “chronic and substantial abuse of various substances” (Apodaca report, at page 9),
11 was a supervening cause of the death of Kelly Thomas. Dr. Apodaca’s evaluation is relevant to
12 explain the flight of Kelly Thomas from the police and his obsessive and irrational combat
13 against them.
14

15 **3. Cypress Police Department Case Inquiry Report re theft of guitar on**
16 **August 14, 1996 (discovery pages 4093-4095). See NOTEBOOK, Tab 3.**
17

18 According to a Cypress Police Department report, Frederick Ronald Thomas, KELLY
19 THOMAS’S father, had reported that Kelly Thomas stole a \$550 guitar from him on August 14,
20 1996.

21 Admissibility: This evidence is relevant and admissible, under Evidence Code section
22 1101(b), as evidence of the motive and intent of Kelly Thomas in resisting and combating
23 Officer Manuel Ramos and the other police officers in the alleged incident of July 5, 2011, to
24 show that Kelly Thomas resisted not because he was afraid of being beaten or handled roughly,
25 but because Kelly Thomas, conscious of his prior criminal record, was afraid of being taken to
26 jail, criminally prosecuted, and incarcerated.
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1 Additionally, the theft of the guitar was a grand theft, and grand theft is an offense of moral
2 turpitude (*People v. Boyd*, 167 Cal.App.3d 36, 45 (1985)), and thus evidence of the theft of the
3 guitar by Kelly Thomas is admissible to impeach the hearsay statements by Kelly Thomas,
4 *supra*, including his statements that he was unable to breathe, even though his voice and physical
5 endurance were stalwart. See *People v. Wheeler, supra*, 14 Cal.4th 284, 295-296 (1992).

6 **4. Orange County District Attorney's Office Interview Report of Jeannette DeMarco**
7 **re DeMarco's observations of Kelly Thomas in 2002-2003 and report to Fullerton Police**
8 **Department re Kelly Thomas on July 5, 2011 (discovery pages 693-698). See NOTEBOOK,**
9 **Tab 4.**

10 Jeannette DeMarco stated that: On July 5, 2011, at approximately 2000 to 2030 hours, she
11 was working as the manager at the Slidebar Restaurant and Bar, when it appeared that a person
12 she knew as "Crazy Kelly", later identified as KELLY THOMAS, was trying door handles of
13 vehicles in the parking lot, and she telephoned the Fullerton Police Department and reported the
14 matter. DeMarco had seen KELLY THOMAS being verbally aggressive and she had seen
15 KELLY THOMAS walking around carrying a hatchet around 2002 to 2003 (697). KELLY
16 THOMAS had become progressively "more crazy" (697).

17 Admissibility: This is relevant and admissible to show that Officer Manuel Ramos had
18 reasonable articulable suspicion to detain Kelly Thomas at the time in question, and probable
19 cause to arrest him, on July 5, 2011.

20 This is also relevant as evidence of the character of Kelly Thomas for violence and
21 aggressiveness, pursuant to Section 1103(a) of the Evidence Code.

22 **5. Report of Fullerton Police Department on alleged battery by Kelly Thomas on**
23 **December 19, 2004 (discovery pages 2626-2635). See NOTEBOOK, Tab 5.**

24 On December 19, 2004, Dale D. Roberts reported to the Fullerton Police Department that:
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1 On that date, he was attending a children's Christmas party at the Alano Center, at 218 N.
2 Malden, in Fullerton, when he was told by a female ("Kayla Phitzer") about 14 years of age that
3 a suspect, later identified as KELLY JAMES THOMAS, said "Hey Sexy" to her when he walked
4 by, and Roberts was aware that about two weeks previously, THOMAS had been told not to
5 return to the Alano Center. Roberts went to tell THOMAS to leave, and THOMAS used his left
6 hand to knock a cell phone, energy drink, and cigarettes out of Roberts' hand, and then used a
7 right fist to punch Roberts in the left cheek. KELLY THOMAS was arrested for assault and
8 battery per Penal Code sections 240-242.

9
10 Admissibility: This is admissible as evidence of the character or a trait of character of the
11 alleged victim Kelly Thomas for violence at the time in question, pursuant to Evidence Code
12 section 1103(a).

13 **6. Report of belligerence by Kelly Thomas at Albertson's grocery store on**
14 **June 25, 2005 (discovery pages 2453-2459). See NOTEBOOK, Tab 6.**

15 Manager Teresa Ramirez of Albertson's grocery store at 21500 Yorba Linda Boulevard
16 reported to Brea Police Department on June 25, 2005 that: A transient "Kelly", identified as
17 KELLY THOMAS, had continuously come to the store and scared customers away, and had
18 been told numerous times that he was not allowed in the store because he had shoplifted in the
19 past. On June 25, 2005, at approximately 2000 hours (8:00 P.M.), "Kelly" had come into the
20 store and attempted to purchase some items with money that she believed he had begged from
21 customers, and "Kelly" was told to leave the store and that he would not be rung up. "Kelly"
22 became extremely upset and began yelling and cussing at the cashiers at the store, and ripped a
23 receipt out of one of the cash registers and threw it on the ground, knocked over a sign that was
24 on a counter, and continued to yell and cuss as he walked out of the store. Ramirez advised that
25 some of her employees told her that they believed that he had drunk some soda inside the store
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1 without having purchased it, and that he had also urinated in a planter in front of the store.

2 Admissibility: This is admissible as evidence of the character or a trait of character of the
3 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

4 **7. November 21, 2007 report to Anaheim Police Department of violence of Kelly**
5 **Thomas (discovery pages 2311-2314, 4118-4121). See NOTEBOOK, Tab 7.**

6 KELLY THOMAS'S mother reported that KELLY THOMAS was off his medication,
7 tended to be violent, and carried a knife. (Discovery pages 004118, 004120.)

8 Admissibility: This is admissible as evidence of the character or a trait of character of the
9 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

10 **8. December 11, 2007 report to Anaheim Police Department of violence of Kelly**
11 **Thomas (discovery pages 2319-2321, 4122-4125). See NOTEBOOK, Tab 8.**

12 KELLY THOMAS'S mother reported that KELLY THOMAS was off his medication
13 and violent, and had threatened his mother with a butcher knife the night before. (Discovery
14 page 004124.)

15 Admissibility: This is admissible as evidence of the character or a trait of character of the
16 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

17 **9. March 5, 2009 report of Fullerton Police Department (discovery pages 2738-2739).**
18 **See NOTEBOOK, Tab 9.**

19 According to a Fullerton Police Department Street Check/Field Interview report of March 5,
20 2009, KELLY THOMAS was staring down customers who were entering a Target store and
21 when contacted by police gave several false names. (Discovery page 002739.)

22 Admissibility: This evidence is admissible under Evidence Code sections 1101(b) and 1105
23 to show that Kelly Thomas was in the habit of deliberately giving false names to law
24 enforcement officers to obstruct and frustrate their investigations of him and to avoid
25

1 detection and arrest.

2 This evidence is also relevant and admissible under Evidence Code sections 1103(a) and
3 1105 to show that Kelly Thomas had a character trait for lack of truth and veracity,
4 impeaching his hearsay statements on July 5, 2011. See Evidence Code sections 780(e), 786.

5 This evidence (opinion and specific-act) is admissible under Evidence Code section
6 1103(a), as evidence of a character trait of Kelly Thomas, as he stared down customers, for being
7 aggressive and obstructive, at the time of the alleged incident.

8 **10. Report of May 20, 2009 to Placentia Police Department on aggressiveness**
9 **and belligerence of Kelly Thomas (discovery pages 2870-2879). See NOTEBOOK ,**
10 **Tab 10.**

11 According to a Placentia Police Department report of May 20, 2009, in DR # 09-2168,
12 KELLY THOMAS was arrested for trespass for yelling at a store manager, Cynthia Valles,
13 at a 99 Cents Store in Placentia, “fuck you”, and refusing to leave the business.
14

15 Admissibility: This evidence is admissible under Evidence Code section 1103(a), as
16 evidence of a character trait of Kelly Thomas for belligerence and aggressiveness, at the time of
17 the alleged incident.
18

19 **11. May 20, 2009 (discovery pages 2870-2874), NOTEBOOK, Tab 11.**

20 Officer D. Keen, No. 1191, of the Placentia Police Department, in his narrative report of
21 May 20, 2009, in DR # 09-2168, at discovery page 2871, recounted:
22

23 “On 05-20-09 at approximately 1002 hrs, Sgt Alexander, Reserve Officer Odebiyi
24 and I were dispatched to 99 cent store at 1206 E. Yorba Linda in reference to a
25 trespassing violation. PPD Dispatch advised a male white transient with long hair
26 and beard was refusing to leave the store. ...

27 ...

28 “I transported Thomas to PPD for booking. I read Thomas his rights per Miranda
with my PPD Miranda Advisement card and asked him if he understood. Thomas
said, ‘Yes’. I asked him if he wanted to talk about the incident at the store and he

1 said, 'No'. This ended my interview. Thomas was then released on a citation
2 (#PL 291991) for PC 602(m) –trespassing with an appearance date of 6-29-09.”

3 Admissibility: This is evidence, under Evidence Code section 1105, of a habit of
4 trespassing and aggressiveness on the part of Kelly Thomas. It is also evidence, under Evidence
5 Code section 1101(b) and 1103(a), of a character trait for defiance and aggressiveness.

6 **12. Report of September 30, 2011 of interview of Wendy Karn on September 27, 2011**
7 **re conduct of Kelly Thomas in 2009-2011. See NOTEBOOK, Tab 12.**

8 Wendy Karn reported to investigator Valerie Romero of Southern California Private
9 Investigators, Inc., that she was one of the managers at the Starbucks located at 3362 Yorba
10 Linda Boulevard, in Fullerton, and that she had had numerous confrontations with KELLY
11 THOMAS as he loitered there on a regular basis, prompting numerous complaints from
12 customers. KELLY THOMAS would sit out in front of the Starbucks and tear his clothes
13 off and urinate in the water fountain and refuse to leave when asked by management.
14 Approximately two years prior to September 27, 2011 Thomas was urinating in the water
15 fountain and so Karn asked him to leave. When she approached KELLY THOMAS he
16 told her, “I’m going to kill you. I’m going to punch you in the fucking face.”
17

18 Admissibility: This evidence of a threat of physical violence on the part of Kelly Thomas
19 is evidence of a character trait of violence of the alleged victim Kelly Thomas, in the time period
20 in question, per Evidence Code section 1103(a).
21

22 **13. Placentia Police Department Field Interview Card of December 17, 2009**
23 **(discovery page 2963). See NOTEBOOK, Tab 13.**

24 According to a Placentia Police Department Field Interview Card, KELLY THOMAS
25 was contacted by the Placentia Police Department for wearing gloves and looking into vehicles.
26

27 Admissibility: This is evidence that Kelly Thomas had a habit, per Evidence Code section
28

1 1105, of surreptitiously looking into vehicles. It is relevant to show that Kelly Thomas, on July
2 5, 2011, resisted Officer Manuel Ramos and the other officers not because Thomas was afraid of
3 an assault or battery, but because Kelly Thomas was conscious of his own prior misconduct, as
4 in casing vehicles, and feared jailing, investigation, and incarceration as a result thereof.

5 **14. Report to Anaheim Police Department of violent conduct of Kelly Thomas at**
6 **fruit stand on June 30, 2010 (discovery pages 2354 – 2365). See NOTEBOOK, Tab 14.**

7 R. Manassero Farms fruit stand employee Samantha Pepin reported that KELLY THOMAS
8 was trespassing after having been told to leave, and throwing rocks at her fruit stand and thereby
9 endangering her and her customers and interfering with sales.

10
11 Witness Steven Prest, a customer, said that while he was trying to make a purchase,
12 THOMAS walked back toward the stand and picked up a large rock and threw it at the produce
13 stand, and the rock struck the side of the building and landed in the parking lot, and when
14 witness Prest approached THOMAS, THOMAS was holding in his hand a metal pipe,
15 approximately 14 inches in length. (Discovery page 002360.)

16
17 Admissibility: This is admissible as evidence of the character or a trait of character of the
18 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

19 **15. August 9, 2010 Fullerton Police Department Street Check report reflecting that**
20 **Kelly Thomas was seen exhibiting strange behavior on the sidewalk while holding matches**
21 **(discovery pages 2734-2735). See NOTEBOOK, Tab 15.**

22 A Fullerton Police Department pedestrian check revealed that KELLY THOMAS was
23 exhibiting bizarre behavior, pacing back and forth, and appeared to be talking to himself, and
24 was in possession of several matches, and appeared to have an infatuation with matches.

25
26 Admissibility: Matches may be used as a weapon and inflict great bodily injury and serious
27 property damage. This appears to be evidence of a proclivity of Kelly Thomas for violence, per
28

1 Evidence Code section 1103(a).

2 **16. September 26, 2011 Fullerton Police Department report of interview of Ron and**
3 **Kathy Thomas re Kelly Thomas on July 6, 2011 (discovery pages 75-77). See**
4 **NOTEBOOK, Tab 16.**

5 According to a Fullerton Police Department report by Officer James, No. 1069, in No.
6 GO 2011-41602, in an interview of Ron and Kathy Thomas on July 6, 2011, at the UCI Medical
7 Center:

8 “... RON said he had taught KELLY some basic stuff and said KELLY is not a
9 martial artist but he needed to be able to survive on the streets.”
10 (Discovery page 75)

11 This is admissible under Evidence Code section 1101(b) to show that Kelly Thomas had the
12 ability, on July 5, 2011, to vigorously and strenuously engage Officer Ramos and the other
13 officers in hand-to-hand combat, and indeed to engage multiple officers simultaneously, in
14 threatening physical combat, so as to confer upon Officer Ramos a right of self-defense.

15 According to the Fullerton Police Department report by Officer James, No. 1069, in No.
16 GO 2011-41602, Officer James, at approximately 1050 hours on July 6, 2011, called and spoke
17 with Ron Thomas, the father of Kelly Thomas, in a conversation that was recorded on Officer
18 James’ digital audio recorder, and, in the words of Officer James in the report, at discovery
19 page 77:

20
21 “... I told RON that this incident was a radio call describing KELLY as a person
22 who was attempting to gain entry into parked cars. I told RON the officers contacted
23 KELLY and during the contact KELLY attempted to flee at which time a struggle
24 began. ...

25 “RON said it started years ago when KELLY, ‘Fried’ his brain on drugs and he
26 and KELLYS’ [*sic*] mother got a divorce as he was starting the sheriff’s academy.
27 ... KELLY got into drugs heavily and fried himself and for ten straight years,
28 RON had KELLY in and out of board and cares and treatment facilities. RON
said he would have to drive to parks and forcefully pick KELLY up and take
him to a facility for his own good. ...”

1 Admissibility: This is admissible under Evidence Code section 1105 as evidence that Kelly
2 Thomas had a habit of resisting treatment for a settled mental condition resulting from chronic
3 drug abuse.

4 This is also admissible under Evidence Code section 1101(b) as circumstantial evidence
5 that Kelly Thomas, a previous chronic drug abuser, was subject to episodes of psychosis
6 as envisioned by Dr. Steven B. Karch in his report of September 5, 2013, in No. 21, *infra*.

7 This evidence is admissible under Evidence Code section 1101(b) to show that there was
8 triggered in the brain of Kelly Thomas in the incident in question a psychosis derived from brain
9 injury resulting from long drug abuse, so that Kelly Thomas acted irrationally and unpredictably
10 when he fled from Officer Ramos.

11 This is admissible under Evidence Code section 1101(b) to show that Kelly Thomas was
12 unable to reasonably perceive whether or not he was in imminent danger of suffering bodily
13 injury, and hence whether or not he had a need to engage in self-defense.

14 **17. Report to Fullerton Police Department of violent conduct of Kelly Thomas at**
15 **shopping center on December 3, 2010 (discovery pages 2692-2704). See NOTEBOOK,**
16 **Tab 17.**

17 Witness Maribel Rocha reported to the Fullerton Police Department that on December 3,
18 2010, at approximately 1800 hours (6:00 P.M.), she was turning into the shopping center on the
19 southwest corner of Yorba Linda and Bradford, when a subject jumped out of the Starbucks patio
20 area holding a metal chair, and the subject held the metal chair over his head and threw it at
21 Rocha's vehicle, striking the left taillight and causing it to crack. Rocha described the suspect
22 as a white male with red hair and a beard and possibly being a transient. Officer Bridges
23 confirmed from witnesses that the suspect, THOMAS, who was found at 1256 Galway in the
24 City of Placentia, was at the location near the time of the crime. (Discovery page 002703.)
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1 Admissibility: This is admissible as evidence of the character or a trait of character of the
2 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

3 **18. Cathy Thomas, in filing an application for a restraining order on December**
4 **27, 2010, reported that her son Kelly Thomas was belligerent and would not leave**
5 **and had grabbed her by the neck. See NOTEBOOK, Tab 18.**

6 KELLY THOMAS'S mother, Cathy Thomas, sought and received a Restraining Order, in
7 Orange County Superior Court Case No. 10V002916, because KELLY THOMAS was at her
8 front door, naked and urinating, and when she asked him to leave, he became verbally abusive
9 and yelled at her. Also, he previously had grabbed her by the neck.

10 Admissibility: This is admissible as evidence of the character or a trait of character of the
11 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

12 **19. Conduct of Kelly Thomas observed by Cynthia Herron in 2011. See**
13 **NOTEBOOK, Tab 19.**

14 Cynthia Herron reported to investigator Valerie Romero of Southern California Private
15 Investigators, Inc., on March 15, 2012, as recorded in a report of March 17, 2012, that: Her
16 daughter attended Dance Depot in the City of Placentia, and when Herron took her daughter to
17 dance practice in 2011, the seating was outdoors, and she saw KELLY THOMAS sleeping
18 behind the studio on a regular basis. KELLY THOMAS would sleep on an old couch in the back
19 alley. Herron approached KELLY THOMAS on numerous occasions and asked him to leave,
20 but KELLY THOMAS would scream and yell at her and he always raised his fists as if he
21 wanted to fight when she asked him to leave. When the police were called and forced KELLY
22 THOMAS to leave, he would walk behind the parents and brush his clothes against them in an
23 intimidating manner. Herron said she called the police on KELLY THOMAS "too many times
24 to count."
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1 Admissibility: This is admissible as evidence of the character or a trait of character of the
2 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

3 **20. Orange County District Attorney's Office Interview Report of Jeannette DeMarco**
4 **re DeMarco's observations of Kelly Thomas in June 2011 (discovery pages 693-698).**

5 **See NOTEBOOK, Tab 20.**

6 Jeannette DeMarco stated that on July 5, 2011, at approximately 2000 to 2030 hours, she
7 was working as the manager at the Slidebar Restaurant and Bar. Jeannette DeMarco recalled
8 that approximately one month earlier, KELLY THOMAS had kicked over the restaurant's
9 advertising sign when one of the managers told him he could not "bum" cigarettes from
10 customers (698). KELLY THOMAS became angry with Jeannette DeMarco when she would
11 not give him her telephone number when he asked (698).

12 Admissibility: This is admissible as evidence of the character or a trait of character of the
13 alleged victim Kelly Thomas for violence, pursuant to Evidence Code section 1103(a).

14 **21. Dr. Steven B. Karch's medical report on Kelly Thomas, dated September 5, 2013.**

15 **See NOTEBOOK, Tab 21.**

16 Steven B. Karch, M.D., in a report of September 5, 2013, based upon tapes of the police
17 encounter with the decedent, video of the decedent's cardiac arrest, audio tapes taken in the
18 ambulance, reports and medical records, official investigators' reports and time line, hospital
19 records, autopsy report and interpretation, and toxicology reports and interpretation, reported
20 his forensic evaluation, of the evidence related to the death of Mr. Thomas, and Dr. Karch's
21 finding of the following:

- 22 1. Thyroiditis.
- 23 2. Infiltration of the liver's portal triads (which represents either previously undiagnosed
24 Hepatitis C or intravenous drug abuse).
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1 3. Clear evidence of myocardial remodeling.

2 4. As a group, the many observable changes in the heart can only be classified as a
3 methamphetamine cardiomyopathy, which he (Dr. Karch) considers to be the cause of death.

4 Dr. Karch, in his report, observed, at page 2, in reference to the decedent:

5 “Methamphetamine cardiomyopathy is also consistent with the decedent’s
6 abnormal behavior when confronted by the police. Methamphetamine
7 abusers, and he is alleged to have been one, are notorious for spontaneously
8 developing episodes of psychosis even when they have been drug free for
9 several years [3] [4]. Hashimoto’s thyroiditis is also sometimes associated
with encephalopathy [5], although the clinical history suggests much more
strongly that methamphetamine-related disease is at work.”

10 The report by Dr. Karch and his proposed testimony thereon are relevant both to the
11 assessment of reasonableness of the use of force in the detention and arrest of Kelly Thomas,
12 per *Graham v. Connor, supra*, and whether a spontaneous episode of psychosis years after
13 methamphetamine abuse, in conjunction with methamphetamine cardiomyopathy and associated
14 histological remodeling, intervened in the chain of causation as a supervening cause of death,
15 and produced harm of a kind and degree so far beyond the risk that Officer Ramos should have
16 foreseen that it is unjust to hold him criminally responsible for the death of Kelly Thomas that
17 ultimately ensued. See *People v. Brady*, 129 Cal.App.4th 1314, 1325-1326, 29 Cal.Rptr.3d 286
18 (2005). The report by Dr. Karch was based upon putative history of Kelly Thomas as a
19 substance (*i.e.*, methamphetamine) abuser, which Officer Manuel Ramos, acting from the
20 perspective of a reasonable officer on the scene, evidently did not know or have any reason
21 to surmise, at the time in question, so that Officer Ramos had no reason to foresee that
22 Kelly Thomas, in the throes of a spontaneous episode of psychosis, would exhaust his already
23 enlarged and impaired heart and develop anoxic encephalopathy, and thus precipitate his demise.

24 The report and proposed testimony of the expert witness Dr. Steven Karch are medical
25 evidence of a syndrome which may have been a substantial factor in, and superseding cause of,
26
27
28

1 the death of Kelly Thomas.

2 In *Gregory v. County of Maui*, 523 F.3d 1103 (9th Cir. 2008), when an individual, holding a
3 pen, became belligerent and refused to leave a music studio, and officers were called, and an
4 officer grabbed his arm, and, though the subject claimed that he could not breathe, officers
5 pinned him to the ground and attempted to suppress his back and neck, as another officer used a
6 hold around his head and neck to restrain him, and the subject stopped breathing at the scene,
7 and could not be revived, and the estate sued the officers under 42 U.S.C. Section 1983, the
8 Court of Appeals, in holding that the force used was reasonable, and affirming the grant of the
9 motion for summary judgment for the officers, observed, at 1107, n.4: “. . . Likewise, it is
10 undisputed that Gregory was able to talk throughout the confrontation, and the estate presented
11 no evidence rebutting the autopsy’s conclusion that Gregory must have been able to breathe if he
12 could talk.” The trial court in *Gregory* entertained expert medical testimony on syndrome
13 evidence. At 523 F.3d 1105-1106, the Court of Appeals recounted:
14

15 “In opposition to the motion, the estate provided the deposition of Dr. Vincent
16 Di Maio, M.D., who stated that Gregory’s heart attack likely was triggered by
17 Excited Delirium Syndrome (‘EDS’). According to Dr. Di Maio, EDS involves
18 the sudden death of an individual in connection with an episode of excited
19 delirium, which in some occasions can be triggered by mental disease or the
20 ‘heavy use’ of marijuana. Dr. Di Maio stated that in virtually all cases of EDS,
21 the episode of excited delirium is terminated by a violent struggle with police
22 or medical personnel and the use of physical restraint, after which the individual
23 often suffers a heart attack. The estate argued that the officers should have
24 recognized that Gregory was in a state of excited delirium, and accordingly
25 that they used excessive force in physically restraining him.”

26 But the Court of Appeals in *Gregory*, at 1107-1108, concluded:

27 “Here, the evidence does not undermine the officers’ account of their
28 encounter with Gregory. To the contrary, the undisputed evidence supports
the officers’ contention that Gregory acted in an aggressive manner, and
that he stubbornly refused to comply with the requests of the officers,
Finazzo and Fuqua. Medical evidence shows that Gregory died of a
heart attack caused at least in part by severely narrowed arteries and
marijuana use, rather than from choking or a direct result of force.

...

1 “The estate argues that, because the officers knew that Gregory was
2 ‘possibly high on drugs,’ and that he was ‘talking loudly about God’
3 when they arrived, the officers were objectively unreasonable in failing
4 to recognize that Gregory was in a state of excited delirium. However,
5 even accepting that Gregory was in such a state and that the officers
6 should have recognized it, the officers’ response to the threat Gregory
7 posed – first confronting him verbally, and only then attempting to
8 disarm and to restrain him—still was objectively reasonable. . . .”

9
10 In the case at bar, in conjunction with testimony laying a foundation by relating facts
11 which make it probable that Kelly Thomas suffered, at the time of the incident in question,
12 from a settled mental condition and cognitive impairment as a result of many years of
13 methamphetamine and other-drug abuse, the testimony of Dr. Steven B. Karch would
14 assist the trier of fact by delineating the physiological operation of methamphetamine psychosis,
15 due to organic brain damage, and methamphetamine cardiomyopathy, which, operating
16 synergistically, were a likely supervening cause of the death of Kelly Thomas. See Evidence
17 Code, sections 801, 802; *People v. Long*, 126 Cal.App.4th 865, 871, 24 Cal.Rptr.3d 654 (2005)
18 (“Character evidence is ‘evidence regarding someone’s general personality traits; evidence of a
19 person’s moral standing in a community based on reputation or opinion.’ (Black’s Law Dict.
20 (7th ed. 1999) p. 576, col. 2. An expert’s opinion regarding a mental disorder, on the other hand,
21 is admitted only to inform the jury of the effect a certain medical condition may have on the
22 witness. (*People v. Russel* (1968) 69 Cal.2d 187, 196 [70 Cal.Rptr. 210, 443 P.2d 794].) . . .”)


23 In the instant case, the evidence of the analysis and assessment by Dr. Karch is relevant and
24 admissible to explain the frenzied flight of Kelly Thomas from the scene of the detention on July
25 5, 2011, and his self-destructive last-ditch hand-to-hand combat with the officers that ensued.

26 Respectfully submitted,

27 DATED: _____

4/1/13

LAW OFFICE OF BARNETT & BARNETT


JOHN D. BARNETT

Attorney for defendant Manuel Anthony Ramos

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, hereby declare:

I am over the age of eighteen (18) years, I am employed in the County of Orange, and I am not a party to the within action. My business address is: One City Boulevard West, Suite 500, Orange, California 92868.

On November 4, 2013, I served the attached document entitled

TRIAL BRIEF OF DEFENDANT MANUEL ANTHONY RAMOS RE
OFFER OF PROOF

and the accompanying NOTEBOOK of documents at Tabs 1 through 21, on the interested parties in the within case of *The People of the State of California vs. Manuel Anthony Ramos and Jay Patrick Cicinelli*, Orange County Superior Court, Central Justice Center, Case No. 11CF2575, by placing a true copy of the said document in a sealed envelope, and delivering the same by hand to the following addressee office:

Mr. Tony Rackauckas, District Attorney
Mr. Keith Bogardus, Deputy District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, California 92701

I thus served the said document by hand-delivery this 4th day of November, 2013, at Santa Ana, California.

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

Executed this 4th day of November, 2013, at Orange, California.



SLIMAN NAWABI

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, hereby declare:

I am over the age of eighteen (18) years, I am employed in the County of Orange, and I am not a party to the within action. My business address is: One City Boulevard West, Suite 500, Orange, California 92868.

On November 4, 2013, I served the attached document entitled

TRIAL BRIEF OF DEFENDANT MANUEL ANTHONY RAMOS RE
OFFER OF PROOF

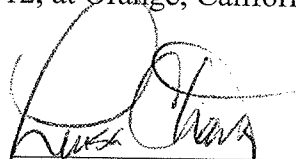
and the accompanying NOTEBOOK of documents at Tabs 1 through 21, on the interested parties in the within case of *The People of the State of California vs. Manuel Anthony Ramos and Jay Patrick Cicinelli*, Orange County Superior Court, Central Justice Center, Case No. 11CF2575, by placing a true copy of the said document in a sealed envelope, with postage thereon fully prepaid, First Class Mail or Priority Mail, and depositing the same in the United States Mail, at Orange, California, addressed as follows:

Michael D. Schwartz, Esq.
9701 W. Pico Boulevard, Suite 207
Los Angeles, California 90035

I thus served the said document by mail this 4th day of November, 2013, at Orange, California.

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

Executed this 4th day of November, 2012, at Orange, California.



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5 JAY P. CICINELLI

6 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

7 **IN AND FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

8 THE PEOPLE OF THE STATE OF CALIFORNIA

No. 11CF2575

9 Plaintiff,

10 v.

11 MANUAL ANTHONY RAMOS
12 JAY PATRICK CICINELLI,

13 Defendants.

DEFENDANT CICINELLI'S MOTIONS
IN LIMINE; DECLARATION OF
ZACHERY A. LOPES; ATTACHED
EXHIBITS A through E

[Cal. Evidence Code § 402]

14 Date: November 12, 2013
15 Time: 9:00 a.m.
Dept.: C-40

16 Defendant Jay Cicinelli respectfully requests that this Court grant the following motions,
17 pursuant to California Evidence Code § 402, in the above-entitled jury trial:

18 **1. ORDER KELLY THOMAS' VIOLENT HISTORY BE ADMISSIBLE.**

19 **A. Kelly Thomas' Violent Propensity Supports Defendant Cicinelli's Defense of "Self-
20 Defense," and Will Allow the Jury to Make a Reasonable Inference That Mr. Thomas
21 Violently Resisted Detainment.**

22 California Evidence Code § 1103(a)(1) allows a Defendant to introduce evidence of the victim's
23 character or a particular trait of character, to establish that the victim acted in conformity with that
24 character or particular trait at the time of the charged crime. This can be done through evidence of
25 opinion, reputation, or specific instances of conduct. Cal. Evid. Code § 1103(a)(1). In addition to the
statutory language, "[i]t has long been recognized that where self-defense is raised in a homicide

1 case, evidence of the aggressive and violent character of the victim is admissible.” People v. Wright,
2 39 Cal.3d 576, 587 (1985). “[S]uch character traits can be shown by evidence of specific acts of the
3 victim on third persons as well as by general reputation evidence.” Id.

4 Defendant Cicinelli seeks to introduce evidence of Kelly Thomas’ past incidents of violent
5 and aggressive character to demonstrate and supplement Mr. Thomas’ propensity to act as such
6 during the incident leading to the charges against Defendant Cicinelli. Mr. Thomas has a long history
7 of contentious, violent, and aggressive contact with police officers, innocent civilians, and his own
8 family members.

9 Defendant Cicinelli intends to introduce the following specific incidents of past conduct:

10 - Law enforcement dispatched in response to Mr. Thomas’ mother
11 reporting that he was displaying violent and mentally unstable
12 behavior, including: common carrying of a knife, an unwillingness to
13 take prescription psychiatric medication, and that he was a danger to
14 himself and others – Anaheim Police Department Street Check# 2007-
15 17134 and Complaint # 2007-177928 (**Exhibit A**; Bates Stamped page
16 002220);

17 - Law enforcement dispatched in response to reports of Mr. Thomas’
18 violent and mentally unstable behavior and tendencies, threatening his
19 mother bodily injury with a butcher knife – Anaheim Police
20 Department Complaint# 2007-187969 (**Exhibit A**; Bates Stamped page
21 002220-21);

22 - Law enforcement dispatched in response to reports of Mr. Thomas
23 throwing rocks at, and wielding a metal pipe and threatening, business
24 owners and patrons, unprompted – Anaheim Police Department
25 General Offense # 2010-90129, booking number 263057 (**Exhibit A**;
Bates Stamped pages 002354-002365);

- Mr. Thomas’ arrest for assault and battery, stemming from his
slapping and punching of a citizen in the face, unprompted - Fullerton
Police Department Case No. 04-19034 (**Exhibit A**, Bates Stamped
pages 002626-002631);

- Mr. Thomas’ arrest for throwing metal chair at passing car,
unprompted, causing property damage – Fullerton Police Department
General Offense # 2010-85172 (**Exhibit A**, Bates Stamped pages
002692-002704);

- Mr. Thomas’ attempt to violently throw a telephone receiver at a
business owner, and after being unsuccessful, bashing the telephone

1 with the receiver causing property damage –Fullerton General Offense
2 # 2011-805, (**Exhibit A**, Bates Stamped pages 002705-002717);

3 - Mr. Thomas’ conviction of assault with a deadly weapon, stemming
4 from him intentionally striking his grandfather in the head three times
5 with a fire poker, completely unprompted. Mr. Thomas himself admits
6 to this conduct and his purported reason for it, because he perceived his
7 grandfather having been “sexually harassing him for ‘pretty much my
8 whole life.’” – Placentia Police Department Case No. 95-2439, Orange
9 Co. D.A. Case No. 95NF1413; “Report of Robert Flores de Apodaca.”
10 (**Exhibit A**, Bates Stamped pages 002818-002834; and 003999-
11 004016.);

12 - Mr. Thomas’ arrest for assault, stemming from him throwing items at
13 restaurant staff – Placentia Police Department Case No. 09-5681
14 (**Exhibit A**, Bates Stamped pages 002893-002905);

15 - issuance of restraining order against Mr. Thomas, filed by his mother,
16 ordering Mr. Thomas to not harass, attack, strike, threaten, assault, hit,
17 follow, stalk, molest, destroy personal property, keep under
18 surveillance or block movements, nor contact; granted in part because
19 he cursed, took clothes off, and grabbed Mother by neck without letting
20 go – granted December 27, 2010, Orange Co. Case No. 10V002916.
21 (**Exhibit A**, Bates Stamped pages 002934-002949; 004122-004133).

22 All of these incidents, arrests, convictions, and court orders demonstrate Mr. Thomas’
23 extensive violent history and propensity for such violent and aggressive behavior. Most, if not all, of
24 the above incidents include violent conduct by Mr. Thomas which was completely unprompted;
25 violent outbursts with no warning, discernable cause or reason. It would certainly be a reasonable
inference to conclude he acted with this same propensity while confronted by Defendant Cicinelli’s
and the other officers’ efforts to detain him.

This evidence may properly be admitted as it is relevant to material issues in this case, among
them Defendant Cicinelli’s defense of “self-defense.” Defendant Cicinelli is charged with assault
under color of authority and manslaughter. He will argue “self-defense” in defending against the
charges, and again, “[i]t has long been recognized that where self-defense is raised in a homicide
case, evidence of the aggressive and violent character of the victim is admissible.” People v. Wright,
39 Cal.3d 576, 587 (1985).

Importantly, some details of the physical struggle between Defendant Cicinelli and Mr.
Thomas may not be viewable in the video of that confrontation. In some portions of the video, many
of Mr. Thomas’ movements obstructed from view. The video simply does not allow the viewer to see

1 all of Mr. Thomas' movements as he attempts to fight off the officers' attempts to detain him,
2 attempts Defendant Cicinelli will argue were justified given the totality of the circumstances.
3 Defendant Cicinelli's use of force in response to these attempts by Thomas to grab his weapon is a
4 central issue of this case. (*See*, the People's Opposition to Defendant Cicinelli's Motion to Set Aside
5 the Information, p. 8:5-6; "inexplicably, Defendant Cicinelli then resorted to using his taser as a
6 blunt-force instrument...")Towards that end, Defendant Cicinelli will ask the jury to make a
7 reasonable inference that Mr. Thomas did in fact make numerous attempts to resist being detained,
8 necessitating use-of-force efforts to overcome that resistance. The above evidence of his propensity
9 for violence and aggression supports the reasonable inference that Mr. Thomas violently fought the
10 officers to avoid detention.

11 Similarly, the video does not show, for a full twenty-five (25) seconds, the officers' attempts
12 to wrestle Mr. Thomas to the ground during the beginning of the confrontation. Defendants will argue
13 that during this time, Mr. Thomas escalated the situation, necessitating the force eventually used.
14 Again, the above evidence will support the reasonable inference that Mr. Thomas behaved in a way
15 warranting the force implemented.

16 Moreover, it is expected the People will argue that Mr. Thomas was simply "defending himself"
17 against the defendant officers' efforts to control and detain him. It is expected the People will argue,
18 either outright or by implication, that Mr. Thomas was a docile, peaceful individual, which they will
19 further argue allows the reasonable inference that Mr. Thomas acted in conformity with a docile,
20 peaceful nature. The above evidence of violent propensity weighs heavily against this expected
21 argument, and will demonstrate that his aggressive and violent demeanor and behavior was a causal
22 factor in the events that ensued.

23 Lastly, it is expected the People will argue some version of the theory that Mr. Thomas was
24 "clearly" mentally ill, and unable to follow direction as given by Defendant Officers. The Report of
25 Dr. Roberto Flores de Apodaca tends to demonstrate otherwise. There, Dr. Flores de Apodaca, a
psychologist retained by the Superior Court after Mr. Thomas' arrest for assault with a deadly
weapon, determined that Mr. Thomas "has a sufficient capacity to appreciate the nature of the
charges against him and be able to meaningfully participate in his own defense." (**Exhibit A**, BS
004007.) Mr. Thomas was found to have understood the charges, the role and authority of the Court,
and recalled specifically the violent act he perpetrated upon his grandfather. (*Id.*) Mr. Thomas also

1 understood the necessity of being “calm and normal” in Court, and otherwise respect proper decorum
2 while in a Courtroom, he also denied having any difficulty behaving in such a way in the past. (Id.)
3 Mr. Thomas was also found to likely be able to recall “essential details, and more, of his history.”
4 (**Exhibit A**, BS 004008.) These clinical findings tend to demonstrate that Mr. Thomas had the
5 capacity to understand and follow the officers’ orders, should he have so chosen. They also tend to
6 show that he was being untruthful with Defendant Officers’ questioning about his basic information.

7 Quite simply, this case requires the jury to find what factually occurred, action-for-reaction,
8 between Defendant Cicinelli, the other officers, and Mr. Thomas. Defendant Cicinelli’s criminal
9 liability essentially hinges upon whether the force he chose to use was reasonable given the
10 circumstances facing him, circumstances caused by Mr. Thomas’ actions. Any evidence tending to
11 prove or disprove Mr. Thomas’ actions in this regard is undoubtedly relevant and material to this
12 central issue.

13 **B. Kelly Thomas’ History of Violent, Unprompted Outbursts of Physical Aggression, and**
14 **His History of Drug Use, Support Defendant Cicinelli’s Theory for Cause of Death.**

15 The People have put forth, and presumably will attempt to demonstrate at trial, that Kelly
16 Thomas’ died of an anoxic injury to the brain, caused by defendant officers’ “compression” upon Mr.
17 Thomas and their alleged strikes causing “blunt force injuries to (Mr. Thomas’) face and head.”
18 (People’s Opposition to Defendant Cicinelli’s Motion to Set Aside the Information, p. 10: 18-21) An
19 “anoxic” brain injury is caused by a lack of adequate oxygen flow to the brain.

20 Defendant Cicinelli intends to put on evidence rebutting the People’s theory for Mr. Thomas’
21 cause of death. “Rebuttal evidence is relevant and admissible if it tends to disprove a fact of
22 consequence,” proffered by the opposing party. People v. Valdez, (2012) 55 Cal.4th 82, 170.
23 Defendant Cicinelli is charged with manslaughter. In homicide cases, if a victim’s death is not the
24 natural and probable consequence of a defendant’s act, then liability cannot attach. This is known as
25 “proximate cause.” People v. Nelson, (1960 2nd Dist.)185 Cal.App.2d 578, 580. If Defendant
Cicinelli’s acts did not “proximately” cause Mr. Thomas’ death, he cannot be criminally liable for
manslaughter.

The evidence Defendant Cicinelli intends to put on rebutting the People’s cause of death
theory largely derives from the expert testimony of Dr. Steven B. Karch. Dr. Karch will testify that,
in his expert opinion, Mr. Thomas’ death was caused by a pre-existing methamphetamine-induced

1 heart disease, methamphetamine cardiomyopathy. (See, **Exhibit B**, letter from Dr. Steven B. Karch to
2 Mr. Michael Schwartz, p. 2.) Among other bases for Dr. Karch’s expert opinion is his reliance upon
3 the Mr. Thomas’ methamphetamine abuse. Dr. Karch’s opinion observes that “[m]ethamphetamine
4 cardiomyopathy” is “consistent with the decedent’s abnormal behavior when confronted by the
5 police. Methamphetamine abusers, and [Mr. Thomas] is alleged to have been one, are notorious for
6 spontaneously developing episodes of psychosis...” (**Exhibit B**, p. 2.)

7 The above evidence for prior conduct incidents, demonstrating Mr. Thomas’ spontaneous
8 outbursts of violent and aggressive behavior, supports Dr. Karch’s opinion. It “tends to prove” his
9 alternative theory for Mr. Thomas’ cause of death, in rebuttal to the People’s proffered theory. All the
10 above prior conduct incidents involve “abnormal behavior” and “spontaneous” episodes of apparent
11 psychosis, including: Mr. Thomas’ violent attack of his grandfather seemingly without cause, to
12 which he gave confused and explicitly contradictory statements in explanation (including Mr.
13 Thomas claiming his grandfather was bi-sexual and his attacks were in defense of an
14 imagined/impending sexual assault; **Exhibit A**, Bates Stamped pages 02828-2829), wielding a
15 butcher knife to threaten his mother, without explanation (**Exhibit A**, Bates Stamped pages 00220-
16 221), ripping his clothes off outside of his mother’s front door, then grabbing her by the neck,
17 without explanation (**Exhibit A**, Bates Stamped pages 4122-4133), throwing metal chairs at passing
18 cars, without explanation (**Exhibit A**, Bates Stamped pages 2692-2704), wielding a metal pipe to
19 threaten business owners and customers, with no apparent explanation (**Exhibit A**, Bates Stamped
20 pages 2354-2365.)

21 These, and the other examples of prior conduct identified above, all demonstrate Mr. Thomas’
22 documented pattern of spontaneous, abnormal, and seemingly psychotic behavior. All support Dr.
23 Karch’s theory of cause of death, in rebuttal of the People’s theory. All also support the credibility of
24 both Dr. Karch himself, and of his offered opinion. (“The credibility of a witness may be attacked or
25 supported by any party, including the party calling him.” Cal. Evid. Code § 785.)

26 Additionally, Dr. Flores de Apodaca’s report, discussed above, specifically supports Dr.
27 Karch’s theory for cause of death. The report includes various findings, and admissions, of extensive
28 drug and tobacco use, tending to prove Dr. Karch’s premise for cardiomyopathy as a result of
29 methamphetamine use: methamphetamine abuse as early as tenth grade, and “drug use” as early as
30 fifth grade (**Exhibit A**, BS 004004), smoking up to two packs of cigarettes per day since tenth grand

1 (Exhibit A, BS 004004), and drinking on a “fairly regular basis” (Exhibit A, BS 004004), his use of
2 “a lot of LSD” (Exhibit A, BS 004005). This leads to Dr. Flores De Apodaca’s finding that Mr.
3 Thomas’s history includes “chronic and substantial abuse of various substances.” (Exhibit A, BS
4 004007.)

5 Defendant Cicinelli is entitled to put forth such evidence in support of his defense.

6 **2. THE COURT SHOULD PRECLUDE, OR IN THE ALTERNATIVE, REQUIRE THE**
7 **PEOPLE TO DEMONSTRATE THE RELIABILITY OF ANY TESTIMONY OR**
8 **OTHER EVIDENCE REGARDING “OVERLAY TRACING,” “IMPACT**
9 **PATTERNS,” OR “TRANSFER STAINS” SOUGHT TO BE INTRODUCED BY THE**
10 **PEOPLE**

11 Included in the People’s discovery are two one-page reports by a Mr. Kevin M. Andera,
12 identified as a “Forensic Scientist 3” for the Orange County Crime Lab, which makes reference to
13 “overlay tracings” made by Mr. Andera of the wounds on Mr. Thomas’ face, a “transfer stain” and
14 “impact patterns” on Defendant Cicinelli’s TASER, and an apparent conclusion that the TASER was
15 “in motion after the blood was deposited” upon it. (Exhibit C, BS 001017, and BS 001038.) It is
16 presumed, but not known, that the People will seek to introduce these “reports” by Mr. Andera in an
17 attempt to demonstrate that Defendant Cicinelli in fact struck Mr. Thomas in the face with the taser
18 itself, as a “blunt-force instrument,” and/or argue the TASER caused *particular* wounds found on Mr.
19 Thomas (People’s Opposition to Defendants’ Motion to Set Aside the Information, p. 8:5-6.)

20 These two one-page reports, as well as any testimony or other evidence relying upon the
21 information gleaned from the conclusions contained within them, and the theories to which they
22 presumably will be introduced to support, should not be admitted into evidence absent the People
23 fulfilling their discovery duty to provide the results of Mr. Andera’s tests to the defense, and their
24 obligation to demonstrate the foundational reliability required for scientific expert evidence.

25 **A. The People Have Not Provided Mr. Andera’s Noted “Overlay Tracings.”**

Mr. Andera’s report entitled, “Report of Evidence Collection at Autopsy,” dated July 10, 2011,
contains a note that he “made overlay tracings of the wounds on” Mr. Thomas’ face “and of the
possible TASER marks.” (Exhibit C, BS 001017.) No such “overlay tracings” have been provided by
the People. Accordingly, the People should be precluded from introducing them, or any conclusion

1 derived from them, via the report itself or testimony, unless and until they are timely provided to the
2 defense. (Thirty days prior to guilt phase of trial, Penal Code section 1054 et seq.)

3 **B. Mr. Andera’s Reports Are Subject to a “Kelly/Frye Test” Showing of Reliability.**

4 Even should the People provide the missing “overlay tracings,” the above reports, as well as
5 any evidence sought to be introduced arising from them, cannot be admitted without the People
6 demonstrating reliability under Kelly. People v. Kelly, (1976) 17 Cal.3d 24. California courts employ
7 what is known as the three-part “Kelly/Frye test,” to assess the foundational reliability of scientific
8 evidence based upon a “new” scientific technique. The decision to admit scientific evidence must be
9 “carefully considered,” because “[I]ay jurors tend to give considerable weight to ‘scientific’ evidence
10 when presented by ‘experts’ with impressive credentials...[there exists] a ‘... misleading aura of
11 certainty which often envelops a new scientific process, obscuring its currently experimental
12 nature.’” People v. Leahy, (1994) 8 Cal.4th 587, 595.

13 “[A] technique may be deemed ‘scientific’ for purposes of [Kelly],” and thus subject to it, if
14 “the unproven technique or procedure appears *in both name and description* to provide some
15 definitive truth which the expert need only accurately recognize and relay to the jury.” People v.
16 Mitchell, (2003) 110 Cal.App.4th 772, 793. As identified above, the reports the People presumably
17 will attempt to introduce contain references and conclusions based upon “overlay tracings,” “transfer
18 stains,” “impact patterns,” and “curved trails” of blood. As in Mitchell, all such terms appear on their
19 face, in both name and description, to provide a “definitive” truth as to the outcome of each
20 technique, subject only to Mr. Andera’s recognition upon analysis; presumably here, the matching of
21 the TASER to *particular* wounds found on Mr. Thomas. All will appear to a jury to carry the
22 identifiable certainty expected of a scientific analysis. The reports may be presented as if Mr.
23 Andera’s analysis of the results of these techniques have pinpointed exactly which wounds were
24 created by Defendant Cicinelli’s TASER. Accordingly, all are subject to a demonstration of their
25 general acceptance and reliability under Kelly.

26 The party attempting to introduce scientific evidence under Kelly must demonstrate that the
27 reliability of the technique underlying the scientific conclusions has been foundationally established.
28 This is done through a three-step analysis: “(1) The *reliability of the method* must be established,
29 usually by expert testimony... (2) the witness furnishing such testimony must be properly *qualified as*
30 *an expert to give an opinion* on the subject... [and (3)] the proponent of the evidence must

1 demonstrate that correct scientific procedures were used in the particular case. People v. Leahy,
2 (1994) 8 Cal.4th 587, 594.

3 The People have not provided any information suggesting the above elements are met here.
4 They have provided nothing indicating that the above techniques are generally accepted by the
5 scientific community, or that they can either reliably pinpoint Defendant Cicinelli's TASER to
6 particular markings on Mr. Thomas or tend to prove or disprove the TASER was in fact used as a
7 "blunt force instrument" at a particular location, or at all. Indeed, Defendant Cicinelli has been
8 unable to locate a single published case shedding light upon the reliability, or admissibility, of using
9 "overlay tracings," "transfer stains," or "impact patterns," to identify whether a particular TASER,
10 used as an alleged "blunt force instrument," caused particular wounds upon an alleged victim, or
11 whether particular wounds were created by the use of a TASER. From the limited information
12 Defendant Cicinelli has been provided on these issues, it does not appear these techniques are
13 generally accepted for the conclusions both found in the report and expected.

14 Kelly requires as a foundational matter that the reliability of a new scientific technique be
15 established by a properly qualified expert. "The expert witness must possess academic and
16 professional credentials that permit him to understand the scientific principles involved and any
17 differing viewpoints regarding reliability." People v. Morris, (1988) 199 Cal.App.3d 377, 387. The
18 people have not provided Mr. Andera's qualifications for performing these tests, or testifying as to
19 their reliability and general acceptance. Defendant Cicinelli has been given nothing on Mr. Andera.

20 The proponent of the evidence must demonstrate that correct scientific procedures were used
21 in the particular case. People v. Leahy, (1994) 8 Cal.4th 587, 667. Mr. Andera's report provides
22 nothing to explain how he came to the conclusion that the TASER in fact had a "transfer stain,"
23 "impact pattern," or how it was determined that it "was in motion after the blood was deposited." The
24 report doesn't even indicate where these apparent stains or patterns are located. Defendant Cicinelli
25 has no information as to how these tests were performed or how they should be performed. Absent a
Kelly showing, it doesn't appear the jury will either. The reports simply state that these
techniques/tests were done, and lists apparent "conclusions." That is not enough under Kelly.

In short, the two one-page reports produced by the People leave many questions unanswered
for a key factual inquiry: the use or non-use of the TASER as a "blunt force instrument." What
exactly are the techniques discussed and employed? Are they generally accepted in the scientific

1 community? Is it generally accepted that one can identify which wounds were made by a particular
2 TASER, or any TASER? Is Mr. Andera qualified to testify as an expert on such matters? Did he
3 perform these tests, or come to his conclusions, in the generally acceptable way?

4 Defendant Cicinelli, the Court, and the jury are unable to answer these questions. All are
5 entitled to such answers under Kelly. Accordingly, Defendant Cicinelli requests that these two
6 reports, and any other evidence, including testimony, relying upon them be excluded absent
7 compliance with Kelly and the production of the identified “overlay tracings.”

8 **3. ALLOW THE INTRODUCTION OF THE DISTRICT ATTORNEY’S PRIOR**
9 **COMMENDATIONS OF OFFICER CICINELLI’S CONDUCT IN SIMILAR**
10 **SITUATIONS.**

11 A defendant may introduce reputation or opinion evidence of his character or trait of character to
12 prove acting in conformity with such character. (Cal. Evidence Code § 1102(a).) Defendant Cicinelli
13 intends to introduce such evidence in the form of a letter written by Deputy District Attorney Ms.
14 Tracy Rinauro and a commendation from his command staff ,concerning an incident in which
15 Defendant Cicinelli displayed courageous restraint in the face of a highly stressful, and potentially
16 personally fatal, situation with a violent suspect.

17 In April of 2002, while employed as a police officer with Fullerton, Defendant Cicinelli was the
18 first officer to respond to the scene of an individual violently wielding a knife and threatening to kill
19 himself in the presence of family members. With the suspect’s family screaming and the family dog
20 biting at Defendant Cicinelli’s heels, the suspect charged at him with the knife in the air and
21 screamed “shoot me!” While he would have been justified in using deadly force, Defendant Cicinelli
22 instead “showed incredible restraint” and detained the suspect without the use of deadly force.

23 The prosecutor on the case, Ms. Tracy Rinauro, wrote a letter to the Chief of Police for the
24 Fullerton Police Department describing the situation and praised Defendant Cicinelli’s actions,
25 stating, among other praises, that “[t]he professional and trained manner in which he handled the
situation is heroic.” (**Exhibit D**, letter from Rinauro to Chief McKinley.) Defendant Cicinelli’s

1 sergeant supervisor separately noted that he displayed “incredible restraint and command
2 presence... This incident had a great potential to end tragically, but because of an excellent response
3 and professional actions by Officer Cicinelli, it ended in a positive manner.” (**Exhibit E**,
4 “Commendation Incident Report.”)

5 The above recounts of Defendant Cicineilli demonstrate his calm demeanor, professional
6 restraint, reluctance to use deadly force when not necessary, and attention to training under the most
7 stressful of circumstances. Such evidence speaks directly to the manner in which he chooses use of
8 force options, an issue at the center of this case. Defendant Cicinelli is entitled to admit such evidence
9 pursuant to section 1102(a).

10 **4. ORDER THE PEOPLE’S FULL COMPLIANCE WITH THEIR OBLIGATION**
11 **UNDER BRADY.**

12 “Due process of law requires the prosecution to divulge all evidence to the defense which is
13 both favorable to the accused and material either to guilt or to punishment (see Brady v.
14 Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215), including all information that could
15 impeach prosecution witnesses (U.S. v. Bagley (1985) 473 U.S. 667, 675–676, 105 S.Ct. 3375, 87
16 L.Ed.2d 481; In re Sassounian (1995) 9 Cal.4th 535, 543–544, fn. 5, 37 Cal.Rptr.2d 446, 887 P.2d
17 527), such as any current charges pending against them. (See People v. Coyer (1983) 142 Cal.App.3d
18 839, 842, 191 Cal.Rptr. 376.) Additionally, Penal Code section 1054.1, subdivisions (d) and (e),
19 mandate the disclosure of exculpatory evidence and any felony conviction of any “material witness
20 whose credibility is likely to be critical to the outcome of the trial.” Evidence is material if its
21 admission at trial would have created the reasonable probability of a different outcome (Kyles v.
22 Whitley (1995) 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490), or, stated in a different
23 way, if the absence of the evidence is sufficient to undermine confidence in the verdict. (See People
24 v. Ochoa (1998) 19 Cal.4th 353, 373, 79 Cal.Rptr.2d 408, 966 P.2d 442.)” People v. Martinez, (2002
25 4 Dist.) 103 Cal.App.4th 1071. 1078.

1 Penal Code § 1054.1(f) imposes a separate burden upon the People to disclose “[r]elevant
2 written or recorded statements of witnesses or reports of the statements of witnesses whom the
3 prosecutor intends to call at the trial, including any reports or statements of experts made in
4 conjunction with the case, including the results of physical or mental examinations, scientific tests,
5 experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.”

6 Defendant Cicinelli requests this Court order the People’s full compliance with their
7 obligations under Brady and section 1054.1. Particularly, Defendant Cicinelli has not received any
8 “statements,” as contemplated by subdivision (e) or (f), from Dr. Michael Lekawa (Chief trauma
9 surgeon for Mr. Thomas), Dr. Aruna Singhanian (forensic pathologist who conduct the autopsy of Mr.
10 Thomas), or John A. Wilson (the People’s presumed use of force expert), other than a report.
11 Specifically, Defendant Cicinelli understands that District Attorney Rackauckas and an Assistant DA
12 and DA investigator met with and spoke to Dr. Lewaka in or about April of 2012, and Dr. Singhanian
13 in or around August of 2011. Yet, the People have provided nothing reflecting these meetings and
14 conversations.

15 Accordingly, Defendant Cicinelli requests this Court order the People to provide any
16 information in its possession contemplated by section 1054.1 and Brady, for *all* their identified
17 witnesses, including specifically all reports, “statements,” and criminal histories.

18 Additionally, the People have not provided the “overlay tracings” made, and noted, by Mr.
19 Andera of the Orange County Crime Lab (discussed above in Section 3; **Exhibit C.**) These are
20 expressly contemplated by both Brady and section 1054.1(f) (“...results of physical or mental
21 examinations,...scientific tests, experiments, or comparisons...”), and as such Defendant Cicinelli
22 requests this Court to Order their production.

23 //

24 //

25 //

1 Dated: November 4, 2013

Respectfully submitted,

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RAINS LUCIA STERN, PC

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By _____

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Michael D. Schwartz

Zachery A. Lopes

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6 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7
8 **IN AND FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

9 THE PEOPLE OF THE STATE OF CALIFORNIA

No. 11CF2575

10 Plaintiff,

11 v.

DEFENDANT CICINELLI'S
OPPOSITION TO THE PEOPLE'S
MOTIONS *IN LIMINE* PURSUANT TO
EVIDENCE CODE § 402; EXHIBIT A

12 MANUAL ANTHONY RAMOS
JAY PATRICK CICINELLI,

13 Defendants.

14 Date: November 12, 2013
Time: 9:00 a.m.
Dept.: C-40

15
16 Defendant Jay Cicinelli opposes the following Motions *In Limine* submitted by the
17 People, pursuant to California Evidence Code § 402, in the above-entitled jury trial:

18 **1. THOMAS' PRIOR ACTS FOR VIOLENCE, AGGRESSION, AND**
19 **COMBATIVENESS MUST BE ADMITTED**

20 The People ask the Court to preclude the introduction of past acts of violence and aggression
21 by Mr. Thomas on the grounds that its probative value is slight and is outweighed by its likelihood of
22 undue prejudice, confusion, and time-consumption. This evidence is highly probative of perhaps the
23 two most important issues presented in this case: defendant officers' reasonable reactions to Mr.
24 Thomas' combative conduct and his cause of death. It also presents little to no danger of undue
25 prejudice.

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1 **A. Mr. Thomas Has a Demonstrated and Reoccurring Pattern of Violence, Aggression,**
2 **and Combativeness.**

3 Defendant Cicinelli has asked this Court to admit nine separate instances demonstrating Mr.
4 Thomas' propensity for violence, aggression, and combativeness. (Cicinelli's Motions *in Limine*,
5 section 1.) The People argue all nine of these instances, "collectively," should not be admitted
6 because "there is incontrovertible evidence of how the victim actually did behave on the occasion in
7 question," and thus, evidence showing mere propensity is unnecessary. (The People's Motions *in*
8 *Limine*, p. 32: 15-23.)

9 This argument ignores the actual video evidence and presupposes the People's own
10 presentation of the blurred images within it. As explained in Defendant Cicinelli's Motion, the video
11 does not show the manner in which, and how, Mr. Thomas and the officers found themselves on the
12 ground, nor does it clearly show every detail of the ensuing struggle. Mr. Thomas is almost entirely
13 hidden from view; for much of the time the officers are placed between him and the camera.

14 Even with the video evidence, the jury in this case must make factual determinations, based
15 upon reasonable inferences from both what is shown and what other facts they know of each person
16 involved, as to what actions were taken by the various individuals involved in the struggle, "action
17 for reaction." What the People will attempt to characterize as defensive acts by Mr. Thomas were in
18 fact offensive acts of noncompliance, combativeness, and violence. Defendant Cicinelli will argue
19 his actions were in self-defense to Mr. Thomas' acts, and "[i]t has long been recognized that where
20 self-defense is raised in a homicide case, evidence of the aggressive and violent character of the
21 victim is admissible." People v. Wright, 39 Cal.3d 576, 587 (1985). "[S]uch character traits can be
22 shown by evidence of specific acts of the victim on third persons as well as by general reputation
23 evidence." Id.

24 The People's take that "the video shows all that needs to be known" ignores the various gaps
25 within it and the necessary reasonable inferences a jury will make to accept any version of the facts
as they occurred. More importantly, it pre-supposes the People's version of events, and that the jury
must accept the People's presentation of their interpretation of the facts demonstrated by the video.
Defendant Cicinelli's defense is not limited to the People's presentation of the evidence. The
People's interpretation cannot limit, inhibit, or control Defendant Cicinelli's interpretation or
presentation of the evidence. This would be patently unfair.

1 The People’s assertion that “instances of Thomas being angry or argumentative has only a
2 weak tendency to prove a propensity for actual violence,” ignores the demonstrated pattern of such
3 conduct over many years. Again, Defendant Cicinelli seeks to introduce *nine* such instances, many of
4 which include extremely serious acts of violence (beating grandfather with fire-poker, choking
5 mother and threatening with butcher knife, etc.) A demonstrated pattern of reoccurring behavior is
6 exactly what such evidence is intended to prove; that an individual continued their demonstrated
7 pattern of reoccurring behavior during the moment in question.

8 Lastly, as explained in Defendant Cicinelli’s motion, these instances are also supportive of
9 Dr. Karch’s theory of cause of death, methamphetamine cardiomyopathy, which is caused by
10 extensive methamphetamine abuse, evidence by the erratic behavior shown in these past instances of
11 violence, aggression, and confusion.

12 **B. No Danger of Undue Prejudice Exists, and Evidence Cannot Be Precluded Based**
13 **Upon How the Other Party Threatens to React to it.**

14 This information will present no undue prejudice to the People. Defendant Cicinelli agrees
15 that the jury here cannot conclude that defendants’ force was justified based upon Mr. Thomas’ past
16 behavior. This evidence is only sought to prove a character trait and the inference that Mr. Thomas
17 acted in conformity with this trait while resisting the officers’ efforts to detain. Defendant Cicinelli
18 will agree to any reasonable jury instruction getting this across, and will not introduce this evidence,
19 or use it, for such a purpose.

20 Finally, Defendant Cicinelli’s intended evidence cannot be precluded simply because the
21 People will take a long time rebutting it. (The People’s Motion, p. 34: 19-28.) The People cannot base
22 an argument for this evidence’s exclusion on how it will react to it. If that’s the case, then Defendant
23 Cicinelli has an equally time-consuming amount of rebuttal evidence for the People’s admission of
24 Defendant Ramos’ prior contacts with Mr. Thomas. (The People’s Motion, section II.A.)

25 **2. JEANNETTE DeMARCO’S ENTIRE 9-11 CALL SHOULD BE ADMITTED**

The People object to the admission of Jeannette DeMarco’s call to the Fullerton Police
Department, where she identified Mr. Thomas as “looking in cars” and “pulling on handles...again,”
along with her observation that she “knew” Mr. Thomas as “Kelly,” the “scary” and “creepy
homeless guy,” who “used to walk around with a hatchet.” Ms. DeMarco made these statements
while observing Mr. Thomas in the parking lot of the “Slidebar” restaurant, where she worked. This

1 call prompted the contact between Mr. Thomas and the defendant officers. (People’s Motions *in*
2 *Limine*, p. 14-16.) The People’s argument that Ms. DeMarco’s statements are not relevant and are
3 unduly prejudicial ignores the facts of this case.

4 **A. Ms. DeMarco’s Observations of Mr. Thomas’s Behavior Are Relevant and**
5 **Probative.**

6 Ms. DeMarco’s statements while observing Mr. Thomas’ behavior are relevant to establishing
7 Mr. Thomas’ character and propensity for violence and aggression, Defendant Cicinelli’s cause of
8 death, and defendant officers’ proper and reasonable decision-making to investigate his involvement
9 in potential crimes, and the later decision to detain him.

10 As argued in Defendant Cicinelli’s Motions *in Limine*, defendants may properly put on
11 evidence of Mr. Thomas’ prior violent and aggressive acts towards demonstrating his propensity to
12 act accordingly when resisting detainment by defendant officers. (Defendant Cicinelli’s Motions *in*
13 *Limine*, section 1.A.; Evidence Code § 1103(a).) Defendant Cicinelli will not repeat his arguments
14 verbatim on this point here. But, it should be emphasized that section 1103(a) explicitly allows a
15 defendant to put forth evidence of an alleged victim’s character or trait of character “to prove
16 conformity with the character or trait of character.” Evidence Code § 1103(a)(1). Such evidence may
17 be in the form of “an opinion, evidence of reputation, or evidence of specific instances of conduct.”

18 Id.

19 Defendant Cicinelli intends to introduce evidence of Mr. Thomas’ character or trait of
20 character (for violence, aggression, combativeness with authority), to demonstrate he acted in
21 conformity therewith during his initial contact with defendant officers, and during and throughout
22 defendant officers’ struggle to detain him. Ms. DeMarco’s statements to the dispatcher are relevant to
23 demonstrating these character traits, and are in the form of her opinion, her knowledge of Mr.
24 Thomas’ reputation, and her observations of his specific conduct on the night she observed him.

25 Ms. DeMarco’s offered opinion that Mr. Thomas is “scary” and “creepy,” while not detailed,
provides a basis upon which to examine her reasons for having these opinions. It is evident that Ms.
DeMarco knows of Mr. Thomas and his reputation, as she identifies him by name and recalls past
conduct (carrying the hatchet and trying car doors in an effort break in; “looking in cars, pulling on
handles...again.”) She expresses fear of Mr. Thomas (“I just walked out to my car and he was
walking towards me. I’m like oh, god”), fear which likely stems from her knowledge of his reputation

1 for, and past conduct of, carrying a hatchet and attempting property crimes, and perhaps other fact not
2 revealed during the call. Not many individuals are known for openly carrying hatchets around town,
3 routinely, in a manner that causes people to fear. It would be reasonable for the jury to infer that
4 carrying a hatchet suggests, or tends to prove, a propensity for aggression or violence. It is not
5 unreasonable to infer that one who openly carries around a weapon is seeking violent confrontation in
6 an aggressive manner. Defendant Cicinelli is entitled to put forth this evidence and explore it.

7 Furthermore, evidence of such conduct tends to support Dr. Karch's theory that Mr. Thomas
8 died of methamphetamine cardiomyopathy, in rebuttal of the People's theory for cause of death. Dr.
9 Karch's theory partly relies upon methamphetamine abuse by Mr. Thomas. Methamphetamine
10 abusers, according to Dr. Karch, exhibit "abnormal" behavior. (Defendant Cicinelli's Motions *in*
11 *Limine*, section 1.B.) Carrying around a hatchet, and having a reputation for doing so, may certainly
12 be deemed "abnormal" behavior.

13 Lastly, Ms. Demarco's statements give context to the officers' decision to investigate and
14 ultimately detain Mr. Thomas. Ms. DeMarco's statements tend to prove that Mr. Thomas was in fact
15 seeking to commit property crimes, as apparently he had attempted to do so on prior occasions. This
16 supports the officers' decision to detain Mr. Thomas, after they had found property belonging to
17 another in his bag.

18 It should also be noted that the People are attempting to introduce evidence that Defendant
19 Ramos knew of Mr. Thomas' reputation prior to their contact on July 5, 2011. (People's Motions *in*
20 *Limine*, section II.) They seek to cherry-pick such prior contacts, in an effort to demonstrate Ramos'
21 knowledge of Mr. Thomas' alleged "demonstrated passivity, obedience, and a lack of danger."
22 (People's Motions *in Limine*, p. 10:14-15.) The above evidence, of Mr. Thomas' reputation for
23 openly carrying around weapons and committing property crimes, weighs against Mr. Thomas'
24 claimed passive and obedient demeanor, and certainly weighs against a reputation for not being
25 dangerous. A jury may reasonably conclude that passive, obedient, and non-dangerous individuals do
not openly carry edged weapons, and that a police officer may be as aware of an individual's
reputation for violence and criminal behavior as a lay member of the community.

The above evidence does not unduly prejudice the People. They offer no real argument that it
does, save the claim that Mr. Thomas' reputation for carrying around a hatchet is "inflammatory,"
that would "tend to invoke an emotional bias" against him. To the contrary, this statement is evidence

1 of his reputation and past behavior, relevant to material issues as discussed above. In reality, the
2 People’s argument here is that its introduction will weigh against their intended presentation of Mr.
3 Thomas’ character for passivity. “Contrary to our position” does not equate to “unduly prejudicial.”
4 Such evidence may properly be weighed by a jury without invoking “inflammatory” biases.

5 **B. Ms. DeMarco’s Statements Are Admissible As Excited Utterances.**

6 These statements fall under the “spontaneous utterance” exception of the hearsay rule. Cal.
7 Evid. Code § 1240. Under section 1240(b), a statement is not inadmissible under the hearsay rule if it
8 “Was made spontaneously while the declarant was under the stress of excitement caused by such
9 perception,” and they “purport to describe a condition perceived by the declarant.” (Cal. Evid. Code §
10 1240(a); People v. Roybal, (1998) 19 Cal.4th 481, 516.) Such is the case here, with Ms. DeMarco
11 making the above statements while observing Mr. Thomas’ apparent criminal and threatening
12 behavior and demeanor towards her. Her “stress” is demonstrated by her complaint that the “creepy”
13 guy, whom in her recollection carries around a hatchet, advanced towards her as she walked to her
14 car (presumably to check its contents after observing Mr. Thomas’ behavior), causing her to say “oh
15 god,” and hurriedly walk away.

16 The exception applies to statements made by third party witnesses, as is the case here. People
17 v. Gallego, (1990) 52 Cal.3d 115, 175.

18 **3. DENY THE ADMISSION OF SELECT HOSPITAL PHOTOS**

19 Defendant Cicinelli does not contest that some of the autopsy photographs of Mr. Thomas are
20 both relevant to the material issues in this case and admissible. The People are certainly entitled to
21 put forth such evidence as long as a particular photo’s probative value in demonstrating Mr. Thomas’
22 injuries is not substantially outweighed by prejudicial effects on defendants. (California Evidence
23 Code § 352.) In particular, Defendant Cicinelli does not argue against the People’s assertion that
24 some of the photographs are relevant to the reasonableness of the force used or the cause of death.
25 Both naturally allow for evidence of Mr. Thomas’ actual injuries.

Unfortunately, however, the People seek to admit a number of photographs having no
probative value at all, having no ability to impart facts concerning Mr. Thomas’ injuries, and appear
calculated to do exactly that which is barred by Evidence Code section 352: the presentation of
unduly prejudicial evidence in an attempt to elicit an emotional bias against Defendants.

1 Specifically, the People’s attempt to admit photographs marked 3a, 3b, 3c, 3p, 3cc, and 3q
2 have no tendency, or even ability, to identify Mr. Thomas’ injuries or anything else at issue in this
3 case. To be candid, these pictures simply portray Mr. Thomas as a “bloody mess” at the hospital. It is
4 impossible to identify particular wounds. It is impossible to discern where his injuries are located, or
5 what they in fact are. All that is imparted is a mash of blood, gauze, medical tubes and other
6 instruments. This is in sharp contrast to the other photos of Mr. Thomas to which Defendant Cicinelli
7 does not object, clearly showing his actual injuries, so a jury can actually identify them (and examine
8 them if need be.)

9 The People argue that such photos are necessary to establish defendants’ “malice” in allegedly
10 using their use of force. Remarkably, in support of this proposition, the People actually claim that Mr.
11 Thomas’ face would have looked this way “while they continued their use of force...” (People’s
12 Motions *in Limine*, p. 40:22-27.) This assertion is *entirely* speculative, meritless, and demonstrates
13 the People’s strain for a basis to present these images to the jury.

14 The People provide no argument to counter the obvious observation that Mr. Thomas could
15 not have appeared this way at any point *during the struggle*, considering these pictures highlight and
16 include the various and visible inserted tubes and other medical devices. It is actually likely that these
17 medical devices caused some, or much, of the swelling and bleeding depicted. *Most importantly*, Mr.
18 Thomas’ treating physician after the incident testified that the fluids injected into Mr. Thomas, along
19 with the body’s natural tendency to swell after time, “puffed up” his face to the state seen in the
20 hospital photos:

21 Q: What causes the – after an injury – well, what might cause Kelly
22 Thomas’ face to swell after he began treatment?

23 A: Anytime the body has a focal injury – I mean, we all see that in a
24 sprained ankle – you sprain your ankle and then the next day it swells.
25 And that can occur with any injury. So if you have facial fractures, for
instance, initially there will be some bleeding, but what happens is that
in the days afterwards the body reacts to that injury by swelling up. It is
part of the body’s response. And then we will give the patient a lot of
fluid to treat their low blood pressure.

This patient received blood products and fluids, liters and liters
of fluids, and that causes the entire body to swell. And in particular
you’ll have more swelling around the areas of a focal injury...

1 Q: What you told the D.A.'s investigator, though, was that the face
2 swelled up, was made to look overdramatic, and it was in that condition
3 because he had received huge resuscitation because of his blood
pressure, given a lot of volume liquids, right?

4 A: Yes. I thought that's what I just said. He had been given a lot of
5 blood product and a lot of I.V. fluid because of low pressure, and his
6 whole body would have swollen and in particular areas of injury.
(Exhibit A, transcript of Preliminary Examination, testimony of Dr.
Michael E. Lewaka; p. 165-166; emphasis added.)

7 Thus, these images could not have been what defendant officers witnessed during the
8 incident. The People's argument otherwise is baseless.

9 The People's cited case law does not support the introduction of these photos either. The
10 cases they rely upon stand only for the proposition that gruesome crime scene photos of victims are
11 admissible to demonstrate a particular fact in issue, such as how a suspect planned the alleged
12 violence or in what position the victim was placed when that violence occurred. None of this is
13 relevant, or in issue, here. The Lucas court allowed the introduction of gruesome photographs
14 because the particular injuries were relevant to demonstrate the accused tortured the victim. People v.
15 Lucas, (1995) 12 Cal.4th 415, 450. The Wilson court allowed the introduction of photographs
16 depicting the positioning of the victim's body and his clothes, *at the crime scene*, to demonstrate that
17 the accused had killed the victim while sleeping. People v. Wilson, (1992) 3 Cal.4th 926, 938. The
18 Murphy court allowed photographs depicting the placement of particular wounds to demonstrate the
19 killing was a planned execution. People v. Murphy, (1972) 8 Cal.3d 349, 364-365. The People's
20 marked exhibits 3a, 3b, 3c, 3p, 3cc, and 3q serve none of these purposes. These photographs do not
21 depict Mr. Thomas at the scene of the alleged crime. Defendant officers are not accused of a bizarre
method of homicide, no allegation of torture has been made. Most importantly, and again, these
photographs do not allow the viewer to identify particular injuries or wounds allege to have been
inflicted; they simply present a bloody mess for maximum emotional effect.

22 The photos are not easy to look at, no doubt. But they may only be introduced if their
23 probative value is worth the risk of undue prejudice. Being that these photos offer no probative value
24 for any material issue in dispute, and that the danger of undue prejudice is extremely high, they have
no place before a jury in this case.

1 **4. DEFER RULING ON WHETHER DEFENDANT CICINELLI MAY PUT FORTH**
2 **EVIDENCE OF HIS 1996 SHOOTING**

3 The People wish to preclude any explanation of Defendant Cicinelli’s noticeable injuries to
4 his face and eye. Defendant Cicinelli has a prosthetic left eye, which periodically tears. It is true that
5 his counsel wishes to explain such injuries, to let the jury know that tears from his left eye will likely
6 not be a show of emotion.

7 An explanation of the incident leading to these injuries may also be introduced to support
8 Defendant Cicinelli’s argument that he has a calm, cool demeanor under intense and pressure-filled
9 situations. The “incident” referred to involved Defendant Cicinelli getting shot multiple times, in the
10 line of duty, during a routine traffic stop while an officer for the LAPD. During this incident
11 Defendant Cicinelli displayed an uncommon calmness and focus. Such past acts may properly be
12 introduced to demonstrate such traits of character, and allow the reasonable inference that he acted in
13 conformity therewith during his efforts to detain Mr. Thomas. The People will argue that Defendant
14 Cicinelli acted with aggression and “malice” when selecting and applying use of force options on Mr.
15 Thomas. A past act evidencing Defendant Cicinelli’s character and propensity for acting in the
16 opposite way under similar circumstances is relevant to this issue.

17 That said, it is uncertain whether this 1996 incident needs to be mentioned at all. It depends
18 upon how the People attempt to portray Defendant Cicinelli. Accordingly, he requests that this Court
19 defer ruling on this matter until it actually arises, which is uncertain.

20 Dated: November 8, 2013

Respectfully submitted,

RAINS LUCIA STERN, PC

21 By _____
22 Michael D. Schwartz
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6 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7
8 **IN AND FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

9 THE PEOPLE OF THE STATE OF CALIFORNIA

No. 11CF2575

10 Plaintiff,

11 v.

12 MANUAL ANTHONY RAMOS
JAY PATRICK CICINELLI,

13 Defendants.

DEFENDANT CICINELLI'S MOTIONS
IN LIMINE; DECLARATION OF
ZACHERY A. LOPES; ATTACHED
EXHIBITS A through E

[Cal. Evidence Code § 402]

14 Date: November 12, 2013
15 Time: 9:00 a.m.
Dept.: C-40

16 Defendant Jay Cicinelli respectfully requests that this Court grant the following motions,
17 pursuant to California Evidence Code § 402, in the above-entitled jury trial:

18 **1. ORDER KELLY THOMAS' VIOLENT HISTORY BE ADMISSIBLE.**

19 **A. Kelly Thomas' Violent Propensity Supports Defendant Cicinelli's Defense of "Self-
20 Defense," and Will Allow the Jury to Make a Reasonable Inference That Mr. Thomas
21 Violently Resisted Detainment.**

22 California Evidence Code § 1103(a)(1) allows a Defendant to introduce evidence of the victim's
23 character or a particular trait of character, to establish that the victim acted in conformity with that
24 character or particular trait at the time of the charged crime. This can be done through evidence of
25 opinion, reputation, or specific instances of conduct. Cal. Evid. Code § 1103(a)(1). In addition to the
statutory language, "[i]t has long been recognized that where self-defense is raised in a homicide

1 case, evidence of the aggressive and violent character of the victim is admissible.” People v. Wright,
2 39 Cal.3d 576, 587 (1985). “[S]uch character traits can be shown by evidence of specific acts of the
3 victim on third persons as well as by general reputation evidence.” Id.

4 Defendant Cicinelli seeks to introduce evidence of Kelly Thomas’ past incidents of violent
5 and aggressive character to demonstrate and supplement Mr. Thomas’ propensity to act as such
6 during the incident leading to the charges against Defendant Cicinelli. Mr. Thomas has a long history
7 of contentious, violent, and aggressive contact with police officers, innocent civilians, and his own
8 family members.

9 Defendant Cicinelli intends to introduce the following specific incidents of past conduct:

10 - Law enforcement dispatched in response to Mr. Thomas’ mother
11 reporting that he was displaying violent and mentally unstable
12 behavior, including: common carrying of a knife, an unwillingness to
13 take prescription psychiatric medication, and that he was a danger to
14 himself and others – Anaheim Police Department Street Check# 2007-
15 17134 and Complaint # 2007-177928 (**Exhibit A**; Bates Stamped page
16 002220);

17 - Law enforcement dispatched in response to reports of Mr. Thomas’
18 violent and mentally unstable behavior and tendencies, threatening his
19 mother bodily injury with a butcher knife – Anaheim Police
20 Department Complaint# 2007-187969 (**Exhibit A**; Bates Stamped page
21 002220-21);

22 - Law enforcement dispatched in response to reports of Mr. Thomas
23 throwing rocks at, and wielding a metal pipe and threatening, business
24 owners and patrons, unprompted – Anaheim Police Department
25 General Offense # 2010-90129, booking number 263057 (**Exhibit A**;
Bates Stamped pages 002354-002365);

- Mr. Thomas’ arrest for assault and battery, stemming from his
slapping and punching of a citizen in the face, unprompted - Fullerton
Police Department Case No. 04-19034 (**Exhibit A**, Bates Stamped
pages 002626-002631);

- Mr. Thomas’ arrest for throwing metal chair at passing car,
unprompted, causing property damage – Fullerton Police Department
General Offense # 2010-85172 (**Exhibit A**, Bates Stamped pages
002692-002704);

- Mr. Thomas’ attempt to violently throw a telephone receiver at a
business owner, and after being unsuccessful, bashing the telephone

1 with the receiver causing property damage –Fullerton General Offense
2 # 2011-805, (**Exhibit A**, Bates Stamped pages 002705-002717);

3 - Mr. Thomas’ conviction of assault with a deadly weapon, stemming
4 from him intentionally striking his grandfather in the head three times
5 with a fire poker, completely unprompted. Mr. Thomas himself admits
6 to this conduct and his purported reason for it, because he perceived his
7 grandfather having been “sexually harassing him for ‘pretty much my
8 whole life.’” – Placentia Police Department Case No. 95-2439, Orange
9 Co. D.A. Case No. 95NF1413; “Report of Robert Flores de Apodaca.”
10 (**Exhibit A**, Bates Stamped pages 002818-002834; and 003999-
11 004016.);

12 - Mr. Thomas’ arrest for assault, stemming from him throwing items at
13 restaurant staff – Placentia Police Department Case No. 09-5681
14 (**Exhibit A**, Bates Stamped pages 002893-002905);

15 - issuance of restraining order against Mr. Thomas, filed by his mother,
16 ordering Mr. Thomas to not harass, attack, strike, threaten, assault, hit,
17 follow, stalk, molest, destroy personal property, keep under
18 surveillance or block movements, nor contact; granted in part because
19 he cursed, took clothes off, and grabbed Mother by neck without letting
20 go – granted December 27, 2010, Orange Co. Case No. 10V002916.
21 (**Exhibit A**, Bates Stamped pages 002934-002949; 004122-004133).

22 All of these incidents, arrests, convictions, and court orders demonstrate Mr. Thomas’
23 extensive violent history and propensity for such violent and aggressive behavior. Most, if not all, of
24 the above incidents include violent conduct by Mr. Thomas which was completely unprompted;
25 violent outbursts with no warning, discernable cause or reason. It would certainly be a reasonable
inference to conclude he acted with this same propensity while confronted by Defendant Cicinelli’s
and the other officers’ efforts to detain him.

This evidence may properly be admitted as it is relevant to material issues in this case, among
them Defendant Cicinelli’s defense of “self-defense.” Defendant Cicinelli is charged with assault
under color of authority and manslaughter. He will argue “self-defense” in defending against the
charges, and again, “[i]t has long been recognized that where self-defense is raised in a homicide
case, evidence of the aggressive and violent character of the victim is admissible.” People v. Wright,
39 Cal.3d 576, 587 (1985).

Importantly, some details of the physical struggle between Defendant Cicinelli and Mr.
Thomas may not be viewable in the video of that confrontation. In some portions of the video, many
of Mr. Thomas’ movements obstructed from view. The video simply does not allow the viewer to see

1 all of Mr. Thomas' movements as he attempts to fight off the officers' attempts to detain him,
2 attempts Defendant Cicinelli will argue were justified given the totality of the circumstances.
3 Defendant Cicinelli's use of force in response to these attempts by Thomas to grab his weapon is a
4 central issue of this case. (*See*, the People's Opposition to Defendant Cicinelli's Motion to Set Aside
5 the Information, p. 8:5-6; "inexplicably, Defendant Cicinelli then resorted to using his taser as a
6 blunt-force instrument...")Towards that end, Defendant Cicinelli will ask the jury to make a
7 reasonable inference that Mr. Thomas did in fact make numerous attempts to resist being detained,
8 necessitating use-of-force efforts to overcome that resistance. The above evidence of his propensity
9 for violence and aggression supports the reasonable inference that Mr. Thomas violently fought the
10 officers to avoid detention.

11 Similarly, the video does not show, for a full twenty-five (25) seconds, the officers' attempts
12 to wrestle Mr. Thomas to the ground during the beginning of the confrontation. Defendants will argue
13 that during this time, Mr. Thomas escalated the situation, necessitating the force eventually used.
14 Again, the above evidence will support the reasonable inference that Mr. Thomas behaved in a way
15 warranting the force implemented.

16 Moreover, it is expected the People will argue that Mr. Thomas was simply "defending himself"
17 against the defendant officers' efforts to control and detain him. It is expected the People will argue,
18 either outright or by implication, that Mr. Thomas was a docile, peaceful individual, which they will
19 further argue allows the reasonable inference that Mr. Thomas acted in conformity with a docile,
20 peaceful nature. The above evidence of violent propensity weighs heavily against this expected
21 argument, and will demonstrate that his aggressive and violent demeanor and behavior was a causal
22 factor in the events that ensued.

23 Lastly, it is expected the People will argue some version of the theory that Mr. Thomas was
24 "clearly" mentally ill, and unable to follow direction as given by Defendant Officers. The Report of
25 Dr. Roberto Flores de Apodaca tends to demonstrate otherwise. There, Dr. Flores de Apodaca, a
psychologist retained by the Superior Court after Mr. Thomas' arrest for assault with a deadly
weapon, determined that Mr. Thomas "has a sufficient capacity to appreciate the nature of the
charges against him and be able to meaningfully participate in his own defense." (**Exhibit A**, BS
004007.) Mr. Thomas was found to have understood the charges, the role and authority of the Court,
and recalled specifically the violent act he perpetrated upon his grandfather. (*Id.*) Mr. Thomas also

1 understood the necessity of being “calm and normal” in Court, and otherwise respect proper decorum
2 while in a Courtroom, he also denied having any difficulty behaving in such a way in the past. (Id.)
3 Mr. Thomas was also found to likely be able to recall “essential details, and more, of his history.”
4 (**Exhibit A**, BS 004008.) These clinical findings tend to demonstrate that Mr. Thomas had the
5 capacity to understand and follow the officers’ orders, should he have so chosen. They also tend to
6 show that he was being untruthful with Defendant Officers’ questioning about his basic information.

7 Quite simply, this case requires the jury to find what factually occurred, action-for-reaction,
8 between Defendant Cicinelli, the other officers, and Mr. Thomas. Defendant Cicinelli’s criminal
9 liability essentially hinges upon whether the force he chose to use was reasonable given the
10 circumstances facing him, circumstances caused by Mr. Thomas’ actions. Any evidence tending to
11 prove or disprove Mr. Thomas’ actions in this regard is undoubtedly relevant and material to this
12 central issue.

13 **B. Kelly Thomas’ History of Violent, Unprompted Outbursts of Physical Aggression, and**
14 **His History of Drug Use, Support Defendant Cicinelli’s Theory for Cause of Death.**

15 The People have put forth, and presumably will attempt to demonstrate at trial, that Kelly
16 Thomas’ died of an anoxic injury to the brain, caused by defendant officers’ “compression” upon Mr.
17 Thomas and their alleged strikes causing “blunt force injuries to (Mr. Thomas’) face and head.”
18 (People’s Opposition to Defendant Cicinelli’s Motion to Set Aside the Information, p. 10: 18-21) An
19 “anoxic” brain injury is caused by a lack of adequate oxygen flow to the brain.

20 Defendant Cicinelli intends to put on evidence rebutting the People’s theory for Mr. Thomas’
21 cause of death. “Rebuttal evidence is relevant and admissible if it tends to disprove a fact of
22 consequence,” proffered by the opposing party. People v. Valdez, (2012) 55 Cal.4th 82, 170.
23 Defendant Cicinelli is charged with manslaughter. In homicide cases, if a victim’s death is not the
24 natural and probable consequence of a defendant’s act, then liability cannot attach. This is known as
25 “proximate cause.” People v. Nelson, (1960 2nd Dist.)185 Cal.App.2d 578, 580. If Defendant
Cicinelli’s acts did not “proximately” cause Mr. Thomas’ death, he cannot be criminally liable for
manslaughter.

The evidence Defendant Cicinelli intends to put on rebutting the People’s cause of death
theory largely derives from the expert testimony of Dr. Steven B. Karch. Dr. Karch will testify that,
in his expert opinion, Mr. Thomas’ death was caused by a pre-existing methamphetamine-induced

1 heart disease, methamphetamine cardiomyopathy. (See, **Exhibit B**, letter from Dr. Steven B. Karch to
2 Mr. Michael Schwartz, p. 2.) Among other bases for Dr. Karch’s expert opinion is his reliance upon
3 the Mr. Thomas’ methamphetamine abuse. Dr. Karch’s opinion observes that “[m]ethamphetamine
4 cardiomyopathy” is “consistent with the decedent’s abnormal behavior when confronted by the
5 police. Methamphetamine abusers, and [Mr. Thomas] is alleged to have been one, are notorious for
6 spontaneously developing episodes of psychosis...” (**Exhibit B**, p. 2.)

7 The above evidence for prior conduct incidents, demonstrating Mr. Thomas’ spontaneous
8 outbursts of violent and aggressive behavior, supports Dr. Karch’s opinion. It “tends to prove” his
9 alternative theory for Mr. Thomas’ cause of death, in rebuttal to the People’s proffered theory. All the
10 above prior conduct incidents involve “abnormal behavior” and “spontaneous” episodes of apparent
11 psychosis, including: Mr. Thomas’ violent attack of his grandfather seemingly without cause, to
12 which he gave confused and explicitly contradictory statements in explanation (including Mr.
13 Thomas claiming his grandfather was bi-sexual and his attacks were in defense of an
14 imagined/impending sexual assault; **Exhibit A**, Bates Stamped pages 02828-2829), wielding a
15 butcher knife to threaten his mother, without explanation (**Exhibit A**, Bates Stamped pages 00220-
16 221), ripping his clothes off outside of his mother’s front door, then grabbing her by the neck,
17 without explanation (**Exhibit A**, Bates Stamped pages 4122-4133), throwing metal chairs at passing
18 cars, without explanation (**Exhibit A**, Bates Stamped pages 2692-2704), wielding a metal pipe to
19 threaten business owners and customers, with no apparent explanation (**Exhibit A**, Bates Stamped
20 pages 2354-2365.)

21 These, and the other examples of prior conduct identified above, all demonstrate Mr. Thomas’
22 documented pattern of spontaneous, abnormal, and seemingly psychotic behavior. All support Dr.
23 Karch’s theory of cause of death, in rebuttal of the People’s theory. All also support the credibility of
24 both Dr. Karch himself, and of his offered opinion. (“The credibility of a witness may be attacked or
25 supported by any party, including the party calling him.” Cal. Evid. Code § 785.)

26 Additionally, Dr. Flores de Apodaca’s report, discussed above, specifically supports Dr.
27 Karch’s theory for cause of death. The report includes various findings, and admissions, of extensive
28 drug and tobacco use, tending to prove Dr. Karch’s premise for cardiomyopathy as a result of
29 methamphetamine use: methamphetamine abuse as early as tenth grade, and “drug use” as early as
30 fifth grade (**Exhibit A**, BS 004004), smoking up to two packs of cigarettes per day since tenth grand

1 (Exhibit A, BS 004004), and drinking on a “fairly regular basis” (Exhibit A, BS 004004), his use of
2 “a lot of LSD” (Exhibit A, BS 004005). This leads to Dr. Flores De Apodaca’s finding that Mr.
3 Thomas’s history includes “chronic and substantial abuse of various substances.” (Exhibit A, BS
4 004007.)

5 Defendant Cicinelli is entitled to put forth such evidence in support of his defense.

6 **2. THE COURT SHOULD PRECLUDE, OR IN THE ALTERNATIVE, REQUIRE THE**
7 **PEOPLE TO DEMONSTRATE THE RELIABILITY OF ANY TESTIMONY OR**
8 **OTHER EVIDENCE REGARDING “OVERLAY TRACING,” “IMPACT**
9 **PATTERNS,” OR “TRANSFER STAINS” SOUGHT TO BE INTRODUCED BY THE**
10 **PEOPLE**

11 Included in the People’s discovery are two one-page reports by a Mr. Kevin M. Andera,
12 identified as a “Forensic Scientist 3” for the Orange County Crime Lab, which makes reference to
13 “overlay tracings” made by Mr. Andera of the wounds on Mr. Thomas’ face, a “transfer stain” and
14 “impact patterns” on Defendant Cicinelli’s TASER, and an apparent conclusion that the TASER was
15 “in motion after the blood was deposited” upon it. (Exhibit C, BS 001017, and BS 001038.) It is
16 presumed, but not known, that the People will seek to introduce these “reports” by Mr. Andera in an
17 attempt to demonstrate that Defendant Cicinelli in fact struck Mr. Thomas in the face with the taser
18 itself, as a “blunt-force instrument,” and/or argue the TASER caused *particular* wounds found on Mr.
19 Thomas (People’s Opposition to Defendants’ Motion to Set Aside the Information, p. 8:5-6.)

20 These two one-page reports, as well as any testimony or other evidence relying upon the
21 information gleaned from the conclusions contained within them, and the theories to which they
22 presumably will be introduced to support, should not be admitted into evidence absent the People
23 fulfilling their discovery duty to provide the results of Mr. Andera’s tests to the defense, and their
24 obligation to demonstrate the foundational reliability required for scientific expert evidence.

25 **A. The People Have Not Provided Mr. Andera’s Noted “Overlay Tracings.”**

Mr. Andera’s report entitled, “Report of Evidence Collection at Autopsy,” dated July 10, 2011,
contains a note that he “made overlay tracings of the wounds on” Mr. Thomas’ face “and of the
possible TASER marks.” (Exhibit C, BS 001017.) No such “overlay tracings” have been provided by
the People. Accordingly, the People should be precluded from introducing them, or any conclusion

1 derived from them, via the report itself or testimony, unless and until they are timely provided to the
2 defense. (Thirty days prior to guilt phase of trial, Penal Code section 1054 et seq.)

3 **B. Mr. Andera’s Reports Are Subject to a “Kelly/Frye Test” Showing of Reliability.**

4 Even should the People provide the missing “overlay tracings,” the above reports, as well as
5 any evidence sought to be introduced arising from them, cannot be admitted without the People
6 demonstrating reliability under Kelly. People v. Kelly, (1976) 17 Cal.3d 24. California courts employ
7 what is known as the three-part “Kelly/Frye test,” to assess the foundational reliability of scientific
8 evidence based upon a “new” scientific technique. The decision to admit scientific evidence must be
9 “carefully considered,” because “[I]ay jurors tend to give considerable weight to ‘scientific’ evidence
10 when presented by ‘experts’ with impressive credentials...[there exists] a ‘... misleading aura of
11 certainty which often envelops a new scientific process, obscuring its currently experimental
12 nature.’” People v. Leahy, (1994) 8 Cal.4th 587, 595.

13 “[A] technique may be deemed ‘scientific’ for purposes of [Kelly],” and thus subject to it, if
14 “the unproven technique or procedure appears *in both name and description* to provide some
15 definitive truth which the expert need only accurately recognize and relay to the jury.” People v.
16 Mitchell, (2003) 110 Cal.App.4th 772, 793. As identified above, the reports the People presumably
17 will attempt to introduce contain references and conclusions based upon “overlay tracings,” “transfer
18 stains,” “impact patterns,” and “curved trails” of blood. As in Mitchell, all such terms appear on their
19 face, in both name and description, to provide a “definitive” truth as to the outcome of each
20 technique, subject only to Mr. Andera’s recognition upon analysis; presumably here, the matching of
21 the TASER to *particular* wounds found on Mr. Thomas. All will appear to a jury to carry the
22 identifiable certainty expected of a scientific analysis. The reports may be presented as if Mr.
23 Andera’s analysis of the results of these techniques have pinpointed exactly which wounds were
24 created by Defendant Cicinelli’s TASER. Accordingly, all are subject to a demonstration of their
25 general acceptance and reliability under Kelly.

26 The party attempting to introduce scientific evidence under Kelly must demonstrate that the
27 reliability of the technique underlying the scientific conclusions has been foundationally established.
28 This is done through a three-step analysis: “(1) The *reliability of the method* must be established,
29 usually by expert testimony... (2) the witness furnishing such testimony must be properly *qualified as*
30 *an expert to give an opinion* on the subject... [and (3)] the proponent of the evidence must

1 demonstrate that correct scientific procedures were used in the particular case. People v. Leahy,
2 (1994) 8 Cal.4th 587, 594.

3 The People have not provided any information suggesting the above elements are met here.
4 They have provided nothing indicating that the above techniques are generally accepted by the
5 scientific community, or that they can either reliably pinpoint Defendant Cicinelli's TASER to
6 particular markings on Mr. Thomas or tend to prove or disprove the TASER was in fact used as a
7 "blunt force instrument" at a particular location, or at all. Indeed, Defendant Cicinelli has been
8 unable to locate a single published case shedding light upon the reliability, or admissibility, of using
9 "overlay tracings," "transfer stains," or "impact patterns," to identify whether a particular TASER,
10 used as an alleged "blunt force instrument," caused particular wounds upon an alleged victim, or
11 whether particular wounds were created by the use of a TASER. From the limited information
12 Defendant Cicinelli has been provided on these issues, it does not appear these techniques are
13 generally accepted for the conclusions both found in the report and expected.

14 Kelly requires as a foundational matter that the reliability of a new scientific technique be
15 established by a properly qualified expert. "The expert witness must possess academic and
16 professional credentials that permit him to understand the scientific principles involved and any
17 differing viewpoints regarding reliability." People v. Morris, (1988) 199 Cal.App.3d 377, 387. The
18 people have not provided Mr. Andera's qualifications for performing these tests, or testifying as to
19 their reliability and general acceptance. Defendant Cicinelli has been given nothing on Mr. Andera.

20 The proponent of the evidence must demonstrate that correct scientific procedures were used
21 in the particular case. People v. Leahy, (1994) 8 Cal.4th 587, 667. Mr. Andera's report provides
22 nothing to explain how he came to the conclusion that the TASER in fact had a "transfer stain,"
23 "impact pattern," or how it was determined that it "was in motion after the blood was deposited." The
24 report doesn't even indicate where these apparent stains or patterns are located. Defendant Cicinelli
25 has no information as to how these tests were performed or how they should be performed. Absent a
Kelly showing, it doesn't appear the jury will either. The reports simply state that these
techniques/tests were done, and lists apparent "conclusions." That is not enough under Kelly.

In short, the two one-page reports produced by the People leave many questions unanswered
for a key factual inquiry: the use or non-use of the TASER as a "blunt force instrument." What
exactly are the techniques discussed and employed? Are they generally accepted in the scientific

1 community? Is it generally accepted that one can identify which wounds were made by a particular
2 TASER, or any TASER? Is Mr. Andera qualified to testify as an expert on such matters? Did he
3 perform these tests, or come to his conclusions, in the generally acceptable way?

4 Defendant Cicinelli, the Court, and the jury are unable to answer these questions. All are
5 entitled to such answers under Kelly. Accordingly, Defendant Cicinelli requests that these two
6 reports, and any other evidence, including testimony, relying upon them be excluded absent
7 compliance with Kelly and the production of the identified “overlay tracings.”

8 **3. ALLOW THE INTRODUCTION OF THE DISTRICT ATTORNEY’S PRIOR**
9 **COMMENDATIONS OF OFFICER CICINELLI’S CONDUCT IN SIMILAR**
10 **SITUATIONS.**

11 A defendant may introduce reputation or opinion evidence of his character or trait of character to
12 prove acting in conformity with such character. (Cal. Evidence Code § 1102(a).) Defendant Cicinelli
13 intends to introduce such evidence in the form of a letter written by Deputy District Attorney Ms.
14 Tracy Rinauro and a commendation from his command staff ,concerning an incident in which
15 Defendant Cicinelli displayed courageous restraint in the face of a highly stressful, and potentially
16 personally fatal, situation with a violent suspect.

17 In April of 2002, while employed as a police officer with Fullerton, Defendant Cicinelli was the
18 first officer to respond to the scene of an individual violently wielding a knife and threatening to kill
19 himself in the presence of family members. With the suspect’s family screaming and the family dog
20 biting at Defendant Cicinelli’s heels, the suspect charged at him with the knife in the air and
21 screamed “shoot me!” While he would have been justified in using deadly force, Defendant Cicinelli
22 instead “showed incredible restraint” and detained the suspect without the use of deadly force.

23 The prosecutor on the case, Ms. Tracy Rinauro, wrote a letter to the Chief of Police for the
24 Fullerton Police Department describing the situation and praised Defendant Cicinelli’s actions,
25 stating, among other praises, that “[t]he professional and trained manner in which he handled the
situation is heroic.” (**Exhibit D**, letter from Rinauro to Chief McKinley.) Defendant Cicinelli’s

1 sergeant supervisor separately noted that he displayed “incredible restraint and command
2 presence... This incident had a great potential to end tragically, but because of an excellent response
3 and professional actions by Officer Cicinelli, it ended in a positive manner.” (**Exhibit E**,
4 “Commendation Incident Report.”)

5 The above recounts of Defendant Cicineilli demonstrate his calm demeanor, professional
6 restraint, reluctance to use deadly force when not necessary, and attention to training under the most
7 stressful of circumstances. Such evidence speaks directly to the manner in which he chooses use of
8 force options, an issue at the center of this case. Defendant Cicinelli is entitled to admit such evidence
9 pursuant to section 1102(a).

10 **4. ORDER THE PEOPLE’S FULL COMPLIANCE WITH THEIR OBLIGATION**
11 **UNDER BRADY.**

12 “Due process of law requires the prosecution to divulge all evidence to the defense which is
13 both favorable to the accused and material either to guilt or to punishment (see Brady v.
14 Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215), including all information that could
15 impeach prosecution witnesses (U.S. v. Bagley (1985) 473 U.S. 667, 675–676, 105 S.Ct. 3375, 87
16 L.Ed.2d 481; In re Sassounian (1995) 9 Cal.4th 535, 543–544, fn. 5, 37 Cal.Rptr.2d 446, 887 P.2d
17 527), such as any current charges pending against them. (See People v. Coyer (1983) 142 Cal.App.3d
18 839, 842, 191 Cal.Rptr. 376.) Additionally, Penal Code section 1054.1, subdivisions (d) and (e),
19 mandate the disclosure of exculpatory evidence and any felony conviction of any “material witness
20 whose credibility is likely to be critical to the outcome of the trial.” Evidence is material if its
21 admission at trial would have created the reasonable probability of a different outcome (Kyles v.
22 Whitley (1995) 514 U.S. 419, 433–434, 115 S.Ct. 1555, 131 L.Ed.2d 490), or, stated in a different
23 way, if the absence of the evidence is sufficient to undermine confidence in the verdict. (See People
24 v. Ochoa (1998) 19 Cal.4th 353, 373, 79 Cal.Rptr.2d 408, 966 P.2d 442.)” People v. Martinez, (2002
25 4 Dist.) 103 Cal.App.4th 1071. 1078.

1 Penal Code § 1054.1(f) imposes a separate burden upon the People to disclose “[r]elevant
2 written or recorded statements of witnesses or reports of the statements of witnesses whom the
3 prosecutor intends to call at the trial, including any reports or statements of experts made in
4 conjunction with the case, including the results of physical or mental examinations, scientific tests,
5 experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.”

6 Defendant Cicinelli requests this Court order the People’s full compliance with their
7 obligations under Brady and section 1054.1. Particularly, Defendant Cicinelli has not received any
8 “statements,” as contemplated by subdivision (e) or (f), from Dr. Michael Lekawa (Chief trauma
9 surgeon for Mr. Thomas), Dr. Aruna Singhanian (forensic pathologist who conduct the autopsy of Mr.
10 Thomas), or John A. Wilson (the People’s presumed use of force expert), other than a report.
11 Specifically, Defendant Cicinelli understands that District Attorney Rackauckas and an Assistant DA
12 and DA investigator met with and spoke to Dr. Lewaka in or about April of 2012, and Dr. Singhanian
13 in or around August of 2011. Yet, the People have provided nothing reflecting these meetings and
14 conversations.

15 Accordingly, Defendant Cicinelli requests this Court order the People to provide any
16 information in its possession contemplated by section 1054.1 and Brady, for *all* their identified
17 witnesses, including specifically all reports, “statements,” and criminal histories.

18 Additionally, the People have not provided the “overlay tracings” made, and noted, by Mr.
19 Andera of the Orange County Crime Lab (discussed above in Section 3; **Exhibit C.**) These are
20 expressly contemplated by both Brady and section 1054.1(f) (“...results of physical or mental
21 examinations,...scientific tests, experiments, or comparisons...”), and as such Defendant Cicinelli
22 requests this Court to Order their production.

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1 Dated: November 4, 2013

Respectfully submitted,

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RAINS LUCIA STERN, PC

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By _____

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Michael D. Schwartz

Zachery A. Lopes

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