No. S073823

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DORA BUENROSTRO

Defendant and Appellant.

(Riverside County
Sup. Ct. No. CR59617)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	(Riverside County Superior Court
DORA BUENROSTRO	)	No. CR59617)
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment of death. (Pen. Code, § 1239, subd. (b).)[1]

STATEMENT OF THE CASE

On October 31, 1994, a complaint was filed in the Riverside County Consolidated Municipal/Superior Court charging appellant, Dora Buenrostro, with the murder (§ 187) of her three children. Count I alleged

[1] All statutory references are to the Penal Code unless stated otherwise.

the murder of Susana Buenrostro; Count II alleged the murder of Vicente Buenrostro; and Count III alleged the murder of Deidra Buenrostro. Each count also alleged multiple-murder special circumstances (§ 190.2, subd. (a)(3)); the personal use of a deadly and dangerous weapon during the commission of the offense (§ 12022, subd. (b)); and that the offense was a serious felony (§ 1192.7, subd. (c)(23)). (1 CT 1-3.)[2]

On the same day, the Riverside County Public Defender, by deputy public defender Frank Scott, was appointed to represent Buenrostro (1 CT 4), and on December 21, 1994, Buenrostro entered pleas of not guilty and denied all the special circumstance and enhancement allegations. (1 CT 9.)

On March 14, 1995, the trial court declared a doubt about Buenrostro's competence to stand trial, suspended the criminal proceedings, and appointed two mental health experts to conduct an examination of Buenrostro under section 1368. (1 CT 16; Sealed 5 SCT 1-2; 1 P-RT 35.)[3]

The competency trial before a jury began on October 26, 1995, and continued through November 13, 1995, when the jury returned a verdict finding Buenrostro mentally competent to stand trial. (Sealed 5 SCT 60,

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[2] Citations to the record are abbreviated as follows: "CT" is the clerk's transcript on appeal and "SCT" is the supplemental clerk's transcript on appeal. The reporter's transcript consists of three sets of transcripts, and each set is separately paginated. The reporter's transcript for the competency trial is abbreviated "C-RT;" the reporter's transcript for the pretrial proceedings is abbreviated "P-RT;" and the reporter's transcript for the trial is abbreviated "RT." For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1 CT 1-3, is the first volume to the clerk's transcript at pages 1-3. The reporter's transcripts of sealed hearings are identified by their date followed by the page numbers, e.g., "Sealed RT July 20, 1998: 695-706."

[3] The clerk of the Riverside County Superior Court filed this transcript under seal.

128.)

On November 21, 1995, a preliminary hearing was held, and Buenrostro was held to answer on all the counts and the special circumstance and enhancement allegations. (1 CT 22, 48.)

On December 4, 1995, an information was filed in Riverside County Superior Court alleging the same offenses, special circumstances and enhancements as charged in the complaint. (1 CT 51-53.)

On December 27, 1995, the prosecution filed its Notice of People's Intention to Seek Capital Punishment. (1 CT 59-60.)

On January 3, 1996, Buenrostro pleaded not guilty to all the charges and denied all the allegations in the information. (1 CT 65.)

On that same day, the trial court granted defense counsel's request for a renewed competency evaluation, but on January 5, 1996, the court vacated its order. (1 CT 63; 1 P-RT 51-55.)

On May 13, 1996, the trial court granted Buenrostro's *Marsden* motion and relieved the Riverside County Public Defender of its appointment, and on May 20, 1996, appointed the Conflict Defense Panel in the persons of Jay Grossman and Frank Peasley to represent Buenrostro. (1 CT 107-109.) David Macher later substituted for Frank Peasley as cocounsel for Buenrostro. (1 CT 112.)

On May 13, 1998, an amended information was filed in Riverside County Superior Court alleging the same charges and sentencing enhancements as in the prior charging documents, but alleging only one multiple-murder special circumstance allegation. (4 CT 831-833.) Buenrostro again entered pleas of not guilty to all the charges and denied all the enhancement and special circumstance allegations. (4 CT 834.)

On June 1, 1998, after pretrial motions had been heard and decided

and the jurors but not the alternates had been selected but not sworn, Buenrostro filed a request to disqualify the trial judge alleging that she was biased against defense counsel Grossman. (21 CT 5790-5811; 10 P-RT 1784-1785.) On June 16, 1998, the judge recused herself. (21 CT 5869-5871.) On June 18, 1998, the case was assigned to a new judge, and on June 29, 1998, the trial court granted the request of defense counsel and Buenrostro, which the prosecutor joined, to dismiss the jury panel and begin selection anew. The parties also stipulated to all the pretrial rulings made by the previous judge, except those relating to jury selection. (21 CT 5919, 5954; 1 RT 1-2.)

On June 29, 1998, the trial began with jury selection (21 CT 5953), and after five court days, on July 14, 1998, the jurors and alternates were selected and sworn to try the case (35 CT 9831).

On July 16, 1998, the guilt phase began with the prosecution's presentation of its case-in-chief (35 CT 9832), and the next court day, July 20, 1998, Buenrostro made a motion to represent herself, which the trial court denied (35 CT 9852).

On July 22, 1998, the prosecution rested. (35 CT 9871.)

On July 23, 1998, Buenrostro testified as the only defense witness, both parties presented their closing arguments, the jury was instructed, deliberated and returned its verdict convicting Buenrostro of three counts of murder and finding true the special circumstance allegations and the sentencing enhancements. (35 CT 9968.)

On July 27, 1998, the trial court considered and denied Buenrostro's motions to exclude victim impact evidence and evidence of criminal activity under section 190.3, factor (b). (36 CT 10079, 10075.) On that same day, the prosecution presented its case in aggravation. (36 CT 10081-10081A.)

On July 28, 1998, the defense presented its case in mitigation, both parties presented their arguments, the jury was instructed and began its deliberations. (36 CT 10016-10017.)

On July 29, 1998, the jury continued its deliberations, sent a note to the trial court inquiring about Buenrostro's competence to stand trial, and later that same day returned a verdict of death. (36 CT 10128-10130.)

On October 2, 1998, the trial court denied Buenrostro's motion for a new trial, denied the automatic motion for modification of the sentence (§ 190.4, subd. (e)), and entered the judgment of death. (36 CT 10178-10187.)

STATEMENT OF FACTS

I. COMPETENCY TRIAL

After the trial court ordered a competency determination on March 14, 1995, a jury trial was held from October 26, 1995, until November 13, 1995, on whether Dora Buenrostro was competent to stand trial.[4] There was a clear conflict in the evidence on the issue. Both lay people and professionals testified about Dora's odd behavior before and after her arrest. The three defense experts and the two court-appointed experts roundly disagreed about whether Dora suffered from a mental disorder and whether she was able to assist counsel in a rational manner in the conduct of a defense. Meanwhile, all but one of the experts concluded that she understood the nature of the criminal proceedings against her. In brief, the defense experts, psychologists Michael Perrotti (2 C-RT 361) and Michael Kania (2 C-RT 494, 502, 508) and psychiatrist Mark Mills (4 C-RT 755, 781, 782-783), found that Dora was incompetent, while the court-appointed experts, who testified as prosecution witnesses, psychiatrist Jose Moral (4 C-RT 858, 861, 875-876) and psychologist Craig Rath (4 C-RT 952-953), concluded that she was competent to stand trial.

A. There Was A Sharp Dispute About Whether Dora Buenrostro Suffered From A Mental Disorder

Mental health professionals who worked in the Riverside County Jail described Dora's psychotic crisis and disturbed behavior in jail, and her relatives reported Dora's delusions and bizarre conduct both before and after her arrest. The defense experts all concluded that Dora suffered from

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[4] In the Statement of Facts, appellant, Dora Buenrostro, is referred to as "Dora" to avoid confusion with relatives with the same surname. In the remainder of this brief, her surname "Buenrostro" is used.

a mental disorder, but they differed in their diagnoses, which included both schizophrenia (2 C-RT 312 [Dr. Perrotti]), and a psychotic delusional disorder but not schizophrenia (2 C-RT 491-492, 546 [Dr. Kania]) and 4 C-RT 755, 763 [Dr. Mills]). In contrast, the two court-appointed experts concluded that Dora was free from a psychotic disorder including delusions (4 C-RT 846 [Dr. Moral]) and that she did not have a severe major mental illness (4 C-RT 952 [Dr. Rath]). Two defense experts found that Dora was not malingering, i.e., faking mental illness or incompetence (2 C-RT 280 [Dr. Perrotti], 2 C-RT 485-486, 3 C-RT 515-516 [Dr. Kania]), and the third defense expert did not assess Dora for malingering because, in his view, the issue was not present in her case (4 C-RT 799 [Dr. Mills]. Meanwhile, one court-appointed expert opined that Dora feigned mental illness on a partial MMPI (Minnesota Multiphasic Personality Inventory) he administered immediately after her arrest, but did not malinger during the contemporaneous post-arrest interview he conducted (4 C-RT 983 [Dr. Rath]), and the other court-appointed expert did not offer an opinion about whether Dora was malingering (see 4 C-RT 823-866, 868-944 [Dr. Moral]).

1. Jail Mental Health Professionals Described Dora's Psychotic Crisis and Her Strange Behavior in Jail

On October 28, 1994, after Dora was arrested on charges of murdering her children, she was placed on suicide watch within the Riverside County jail. (5 C-RT 1057.) Romeo Villar, a staff psychiatrist in the jail, evaluated her. (5 C-RT 1055-1056.) At that time, Dora denied experiencing hallucinations and paranoia, and Dr. Villar observed no major mental illness. (5 C-RT 1058-1059.) He decided to remove Dora from suicide watch. (5 C-RT 1060.) At follow-up evaluations in November 1994, she denied hallucinating. (5 C-RT 1062-1063.)

On February 26, 1995, Rose Terrill, a registered nurse employed in the jail by the Riverside County Department of Mental Health, saw Dora after Dora purportedly had attacked a nurse who was trying to give her medication. (3 C-RT 668-669, 671.) According to Terrill, Dora said people were trying to hurt her, which accounted for her reaction. (3 C-RT 673.) Dora repeatedly stated that people were not what they appeared to be and referred to a Catholic nun who spoke in a language that Dora did not understand. (3 C-RT 673-674, 693.) Dora also reported a very strange smell in her cell which frightened her. (3 C-RT 675-676.) Jail personnel checked Dora's cell. (3 C-RT 676-677.) After her examination, Terrill referred Dora for a psychiatric evaluation. (3 C-RT 678.)

On February 26, 1995, Dr. Herminio Academia, a staff psychiatrist in the jail, conducted this evaluation. (2 C-RT 461-463.) Dora had been placed in a safety cell, which is a solitary cell for disturbed inmates. (2 C-RT 464.) Dora told him that her cell was too hot; that gas was being put into her cell; and that when she tried to get out of her cell, she was placed in the safety cell. (2 C-RT 465.) Buenrostro stated, "Somebody wants to heat and cook me," but she could not specify who wanted to hurt her. (*Ibid.*) Dora also reported that she had been attacked by a deputy sheriff, although Dr. Academia had been told that she had attacked the deputy. (*Ibid.*)

According to Dr. Academia, Dora had a blunting of affect, i.e., of her emotional expression, which is a criteria of schizophrenia or psychosis. (2 C-RT 465.) He diagnosed Dora with a nonspecific psychotic disorder. (*Ibid.*) He prescribed medications, including Haldol, because Dora's thinking was out of touch with reality, and the medication would relieve her delusions and her paranoia. (2 C-RT 465-466.) However, Dora refused to sign the consent form required for the anti-psychotic medication Haldol.

(2 C-RT 466-467.)

On February 27, 1995, Dr. Austin Anthony, a psychiatrist employed by the Riverside County Department of Mental Health, observed Dora. (3 C-RT 726, 728.) Dora spoke in a rambling manner about the room being hot and about the smell of gas. (3 C-RT 729.) She appeared friendly, cooperative, and had good eye contact, but at times she appeared confused and bewildered. (*Ibid.*) She refused as unnecessary the medication prescribed for her. (*Ibid.*)

On February 28, 1995, Dr. Anthony again examined Dora. (3 C-RT 733.) She was in an observation cell because she was suicidal. (3 C-RT 736.) She was friendly and cooperative, but complained of aches, pains and weakness all over her body. (*Ibid.*) She did not report smelling gas anymore. (3 C-RT 734.) She gave vague answers and laughed inappropriately when asked about her suicidal feelings. (*Ibid.*)

On March 1, 1995, Dr. Villar again saw Dora. (5 C-RT 1063.) He noted that she was not taking the Haldol that previously had been prescribed. (*Ibid.*) Dora complained of body aches stating, "I'm sick of my body." (5 C-RT 1063-1064.) She also stated that there was a gas leak on the seventh floor of the jail. (5 C-RT 1064.) Dora denied auditory hallucinations. (*Ibid.*)

On March 2, 1995, George William Groth, a mental health clinician in the jail, evaluated Dora because jail nurses had observed that her behavior had become very bizarre. (5 C-RT 1164.) Dora told Groth, "Someone's trying to hurt me by sending poison gas in my room. It's making my skin and bones hurt. My hands are getting deformed. My flesh is melting. I can taste and smell the gas." (*Ibid.*) Dora's posture was hunched, her mouth was dry, her grooming was haphazard, and her mood

was pained, paranoid and anxious. (5 C-RT 1165.)

Groth wrote in his report that Dora was "floridly paranoid" which meant that her paranoia was overtly noticeable. (*Ibid.*) She was suspicious, fearful, and guarded, but coherent, i.e., she did not speak gibberish. (5 C-RT 1165-1166.) Dora was experiencing many persecutory delusions, which indicated she had an altered perception of reality; her insight, her ability to concentrate, and both her short-term memory and long-term memory were impaired. (5 C-RT 1166.) In Groth's opinion, she was clearly psychotic. (*Ibid.*)

Approximately five weeks later, on April 8, 1995, nurse Terrill again evaluated Dora at the request of the staff at the jail infirmary. (3 C-RT 678-679.) The staff was concerned for Dora's safety because she had removed her jail jumpsuit, was sitting under the table, and had a sheet tied around the legs of the table. (3 C-RT 679.) Dora told Terrill that she was hot and that there was a lack of air circulating in her cell, but Terrill did not observe this problem. (3 C-RT 680.) Dora complained that there were bad smells in her cell, and, for that reason, she had stuffed toilet paper in the air vents. (3 C-RT 681.)

A week later, on April 15, 1995, Dora asked to see the mental health nurse on duty, and Terrill responded. (3 C-RT 682.) Dora was pleasant, but depressed. (*Ibid.*) Dora was able to say what she thought, but her thoughts were not connected and did not always make sense. (*Ibid.*) In Terrill's opinion, Dora had a distorted perception of reality. (*Ibid.*) Dora again expressed many physical complaints such as pain in her body, a feeling that her body was swelling and that she was hot. (3 C-RT 683.) Dora placed unspecified items that she made on her body because she thought they would relieve the distress of her body. (*Ibid.*) Dora slept on

the bare floor because her bed was too hot. (3 C-RT 684.)

On October 27, 1995, Groth saw Dora at her request. (5 C-RT 1157.) She reported feeling uncomfortable and anxious about her upcoming trial. (*Ibid.*) Although anxious, Dora's thinking was clear; her speech was understandable, and she exhibited no signs of mental illness. (5 C-RT 1157-1158.) This was the only time that Dora was seen by the jail's Forensic Mental Health unit between September 1, 1995, and the time of the competency trial. (5 C-RT 1154.)

2. Dora's Family Members and Friends Described Her Delusions and Bizarre Behavior Before and After Her Arrest

Angela Montenegro, Dora's sister, described various delusions she observed Dora experience prior to her arrest. (2 C-RT 441.) Montenegro and her two children lived with Dora and her three children in the summer of 1994. (2 C-RT 443.) One night in July, Dora started crying and told Montenegro that while bathing her daughter, Deidra, their mother appeared with a monkey face. (2 C-RT 448-449.) Montenegro, who was upset and unsure she could deal with the situation, considered telling Dora there was something wrong with her, but instead, at Dora's suggestion, the women prayed together for their mother. (2 C-RT 449.)

On another day in July 1994, Dora came home and saw that Montenegro was feeding tacos to her children and Dora's children. Dora grabbed the tacos from her own children and threw them into the trash. (2 C-RT 445.) Dora told Montenegro to move out. (*Ibid.*) Over the next couple of weeks, Dora came to Montenegro's apartment first to accuse Montenegro of trying to poison Dora's children with tacos and to warn that Montenegro's son would die from eating the tacos (*ibid.*), and then to say that she did not like Montenegro because Montenegro was a witch and that

"'God is going to come and cut up the head' -- 'starting cutting off the head.'" (2 C-RT 446.)

About a month later, Dora again came to Montenegro's apartment. (2 C-RT 446-447.) Montenegro was really scared and did not answer the door. (2 C-RT 447.) Dora continued to knock loudly on the window and door. (*Ibid.*) When Montenegro finally opened the door, Dora yelled obscenities at her. Dora asked, "'Why did you turn into a snake and you bite me?'" (*Ibid.*) Montenegro thought Dora was crazy and asked how she could have turned into a snake. Dora repeated her accusation and showed the place on her leg where Montenegro purportedly had bitten her. (*Ibid.*) Screaming and running from the apartment, Dora accused her sister of being a witch rather than a Christian. (*Ibid.*)

Maria Perez, another of Dora's sisters, witnessed Dora's disturbed behavior in jail. On one occasion, Dora called Perez by telephone from the jail crying and screaming that she had been shot and then that she had been stabbed. (3 C-RT 700-701, 706.) Dora sounded scared. (3 C-RT 706.) Dora said she saw no wound on her body, but she could feel the pain. (3 C-RT 701.) Perez advised Dora to call a guard, a doctor, or her attorney, but Dora said they would not believe her and hung up the phone. (*Ibid.*) Dora told Perez that many people were evil, but when Perez asked who was evil, Dora simply stated "them." (3 C-RT 702.)

On another occasion, Dora called Perez from the jail and asked why she did not stop by to say hello when Perez and Perez's children were down the hall. (*Ibid.*) Perez tried to explain that this was impossible, because Perez was at home, but Dora insisted that she had heard Perez and her children's voices down the hall from her cell. (*Ibid.*)

On yet another occasion, Dora called Perez by telephone from the

jail and told her she believed Perez was in the jail with her and that Dora could see her. (3 C-RT 703.) Dora asked why Perez was looking at her a certain way. (*Ibid.*)

During a visit at the jail, Dora told Perez that when she got onto the floor of her cell and listened, she could hear her own children playing and talking among themselves. (3 C-RT 711.) During another visit, Perez, who knew the children were dead, asked Dora if she had heard from her children; she asked the question because Dora used to hallucinate. (3 C-RT 708.) Dora replied, "No. Thank God. They left me alone." (3 C-RT 709.) Despite these incidents, Dora told Perez that she was "competent" and "normal." (3 C-RT 703, 709.)

Regena Acosta befriended Dora after her arrest in order to minister to her. (3 C-RT 713, 716.) Acosta visited Dora four or five times between October or November 1994 and February 1995. (3 C-RT 713, 718, 720.) Dora told Acosta that the jail guards were putting things in her food to make her sick, that she did not understand what was going on in court and did not know if she had pled guilty or not guilty to the charges, and that she was slowly dying in jail. (3 C-RT 714.) Towards the end of Acosta's series of visits, Dora seemed more confused and distraught. (*Ibid.*) Acosta had not seen Dora in the ten months prior to testifying at the competency trial and had no idea how Dora had been during that time. (*Ibid.*)

3. The Mental Health Experts Disagreed About Whether Dora Suffered from a Psychotic Disorder

The expert witnesses reached disparate conclusions about whether Dora suffered from a mental disorder: the defense experts found that she did, while the court-appointed experts found that she did not.

a. Psychologist Michael Perrotti found that Dora suffered from paranoid schizophrenia

Psychologist Michael Perrotti, Ph.D., based his opinion about Dora on his review of the police interviews of Dora, interviews of professionals and relatives, the MMPI tests given by Dr. Craig Rath and Dr. Michael Kania, and 10 hours of interviews of Dora in March and July 1995, which included a session of psychological testing. (2 C-RT 258, 266, 269-270, 313, 332-335.) His last interview was on July 28, 1995, three months before his testimony at the competency trial. (2 C-RT 372-373.)

Dr. Perrotti diagnosed Buenrostro as suffering from paranoid schizophrenia. (2 C-RT 347.) She displayed the most disorganized thought process on the continuum of personality disorders, and she suffered from a major split with reality. (2 C-RT 311-313.) Although Dora denied hallucinations (2 C-RT 293), Dr. Perrotti concluded that Dora had delusions of persecution as evidenced by, inter alia, her expressed beliefs that there was a plot against her, including a conspiracy against her among the jail deputies and an attempt to poison her (2 C-RT 287, 288, 291), her report of hearing voices and acting aggressively to the point where she had to be handcuffed (*ibid.*), her concern that her body was physically deteriorating and she was going to die (2 C-RT 288, 291), and her statements that a doctor visited her who was investigating whether she was dying and was going to use her as a research subject in an experiment (2 C-RT 289).

Dora's conversation was difficult to follow, jumped from one topic to another, and mixed several ideas in one sentence. (2 C-RT 292-293, 403-405.) She was quite distractible; her answers frequently had nothing to do with Dr. Perrotti's questions, and a single sentence would contain several ideas. (2 C-RT 293, 308.) As Dora grew more agitated, her speech became

more pressured, disorganized and tangential. (2 C-RT 294.) Dora appeared to hallucinate in Dr. Perrotti's presence, and at times she lost contact with him as if responding to some internal stimuli, but she never definitively confirmed these facts. (2 C-RT 352.)[5]

b. Psychologist Michael Kania found that Dora suffered from a psychotic delusional disorder

Psychologist Michael Kania, Ph.D., was retained by the defense initially to monitor Dora's condition and eventually to assess her competence. (2 C-RT 472-473.) He saw Dora six or seven times before meeting with her in March and April of 1995, specifically for the purpose of assessing her competence. (2 C-RT 475-476.) Dr. Kania based his opinion on his multiple interviews and his own testing of Dora as well as on information from deputies at the jail, the jail mental health files, and reports of interviews with Angela Montenegro, Maria Perez, and Dora's mother. (2 C-RT 476-477, 488-489; 3 C-RT 513-514, 516, 643-645.)

Dr. Kania found that Dora suffered from a psychotic delusional disorder in which she had paranoid beliefs, unbounded to reality, that she was being persecuted or harmed. (2 C-RT 491-492.) Her thought processes were disorganized, which is a psychological disorder that interferes with the ability to think in rational manner and is different from confusion which results from misinformation or misunderstanding. (2 C-RT 490.) Dr. Kania had difficulty being more specific about Dora's disorder because she was extremely guarded about the information she would share. (2 C-RT 491.) At times she was uncooperative, but at other times she tried hard to be

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[5] Dr. Perrotti did not include his diagnosis of schizophrenia in his written report because he believed a description of Dora's behavior and an understanding of her symptoms was more useful than the label attached to them. (2 C-RT 373.)

cooperative. (2 C-RT 493-494.)

Although suspicious and distrustful, Dora disclosed her delusions to Dr. Kania. For example, she believed that her sister spoke a different language and had been influencing Dora's kids against her in this language. (2 C-RT 487.) Dora also believed that gas was being pumped into her cell to kill her and caused her physical problems. (2 C-RT 487-488.) She suffered from olfactory hallucinations in smelling the gas. (3 C-RT 562). She further believed that experiments were being done on her in jail. (3 C-RT 507.)[6]

Dr. Kania gave Dora an MMPI test in December 1995. (Defense Exhibit B; 2 C-RT 538.) Dr. Craig Rath had given Dora the same MMPI test six weeks earlier immediately after her arrest. (Defense Exhibit C; 3 C-RT 549, 584-586.) Although the two tests showed different elevated scales, both test results were valid and showed that Dora suffered from a psychotic disorder. (3 C-RT 547-550, 646-648.) Although the severity of her symptoms varied, even on her best day, Dora suffered from a delusional psychotic disorder. (3 C-RT 507-508.)

c. Psychiatrist Mark Mills also found that Dora suffered from a psychotic delusional disorder

Mark Mills, a licensed physician with board certification in forensic psychiatry and a law degree, also was hired by the defense to evaluate Dora's competence. (4 C-RT 740-741, 773-774.) He based his opinion on his interviews of Dora and his review of reports of interviews with Dora's family members as well as other people. (4 C-RT 761-762.) Dr. Mills

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[6] Dr. Kania did not think that Dora was necessarily schizophrenic because she had some symptoms of the disease, but not others. (3 C-RT 566.)

interviewed Dora on November 16, 1994, and April 27, 1995, for a total of two hours. (4 C-RT 742, 770.) At the first interview, Dora initially refused to see him. (4 C-RT 743.) When she eventually came out of her cell, Dora appeared disheveled and frightened, said that her attorney, Frank Scott, did not know what he was doing, told Dr. Mills to get out, and threw a box of Kleenex at him. (4 C-RT 743-744.) Scott joined the interview, but Dora remained uncooperative. (4 C-RT 745.) At the second interview, Dora still did not want to be interviewed and still was grossly disheveled, but she was calmer and, in the presence of paralegal Cathy Moreno, was strikingly cooperative. (4 C-RT 751, 804-805.)

In Dr. Mills's opinion, Dora was not schizophrenic (4 C-RT 763) and showed no signs of hallucinations (4 C-RT 779, 805), but suffered from a significant psychotic disorder, probably a delusional disorder (4 C-RT 755). Although in her second interview with Dr. Mills, Dora did not appear to have a major thought disorder (4 C-RT 752), in the presence of others she exhibited classic delusions, e.g., that someone was trying to poison her and that her flesh was rotting (4 C-RT 751-753). She expressed her delusions – which are a type of disordered thinking – to her family and to defense paralegal Moreno, although she denied them to Dr. Mills. (4 C-RT 751-752, 754.) When she let her guard down, Dora revealed portions of her illness. (4 C-RT 762.) Dora's jail mental health records also supported Dr. Mills's opinion that she was delusional, although he did not review them until after he rendered his opinion. (4 C-RT 761-762, 794.)

d. Psychiatrist Jose Moral found that Dora exhibited no psychosis

Dr. Jose Moral, a physician with a specialty in child psychiatry and legal forensic psychiatry, was appointed by the trial court to assess Dora's

competence. (4 C-RT 823, 829.) Dr. Moral interviewed Dora on March 25, 1995, for about an hour, and on July 26, 1995. (4 C-RT 831, 853, 896.) He also interviewed her in the courtroom during the lunch break on the day he testified. (4 C-RT 875-876.) Dr. Moral interviewed Dora mostly in Spanish. (4 C-RT 833, 876.) When discussing difficult issues or when emotional, Dora did better in Spanish than English. (4 C-RT 861.) Prior to the second interview, Dr. Moral reviewed police reports, reports from three psychologists and one psychiatrist, and the jail mental health reports. (4 C-RT 859.)

During Dr. Moral's March interview, Dora showed no thought disorder, denied delusions and hallucinations and was free of psychotic symptoms. (4 C-RT 846.) She was able to converse without difficulty. (4 C-RT 847.) Dr. Moral thought Dora was rational in both interviews. (4 C-RT 857.)

During the July interview, Dr. Moral informed Dora of the psychotic symptoms described by the psychologists, psychiatrist, and jail medical records, but she denied them. (4 C-RT 863.) According to Dr. Moral, Dora explained that her preoccupation with gas leaks stemmed from news reports about deaths in Riverside caused by gas fumes. It was a matter of poor ventilation, rather than hallucinations. (4 C-RT 900-901.) And she explained as other people's misinterpretations the reports that she accused her sister of being a witch, changed herself into a snake, and saw a monkey face in place of her mother's face. (4 C-RT 929.) In the second interview, Dora was much better organized intellectually and emotionally. (4 C-RT 873.) She was "goal directed," meaning that she could carry out the interview without difficulty and be purposeful in her answers. (4 C-RT 874.) Dr. Moral observed no thought disorder. (*Ibid.*) However, he

considered Dora to be a suicide risk who had to be watched closely at all times. (4 C-RT 860.) Dr. Moral noted that as he was testifying, Dora was laughing. (4 C-RT 927.)

e. Psychologist Craig Rath also found that Dora exhibited no psychosis

Psychologist Craig Rath, Ph.D., had conducted over 4,500 evaluations and had testified over 400 times in Riverside and San Bernardino Counties. (4 C-RT 947.) He interviewed Dora for an hour and ten minutes soon after her arrest on October 28, 1994. (4 C-RT 948-949, 980.) He was hired by the Riverside County District Attorney to conduct the interview for investigative purposes. (4 C-RT 949, 962, 987-988, 994.) At that time, he had not been appointed by the trial court to assess Dora's competence. (4 C-RT 949.)

During the interview, Dora's demeanor was appropriate, and she did not show any signs of loosening of associations or mental illness. (4 C-RT 974-975.) Her long-term and short-term memory were unimpaired. (*Ibid.*) Dr. Rath attributed her trouble remembering numbers and dates to her social and economic status. (4 C-RT 976.) Dora communicated very well, protecting information she did not want to share and volunteering other information. (*Ibid.*) The tape of the entire interview (People's Exhibits 3-4) was played for, and a transcript (People's Exhibits 5-6) was given to, the jury. (4 C-RT 973-974.) Dr. Rath also gave Dora an MMPI test. (4 C-RT 949, 977, 980.) Although Dora did not complete the test, she finished the ten clinical scales and three validity scales which was sufficient for Dr. Rath's purposes. (4 C-RT 953-954.)

After the trial court appointed him to assess Dora's competency, Dr. Rath tried to see Dora on March 24, 1995, and again on April 3, 1995.

(4 C-RT 949.) However, according to the jail staff, in March, Dora refused to be handcuffed, as required for her transport to the interview room, and in April she refused to meet with Dr. Rath. (4 C-RT 950-951, 5 C-RT 1002.) Dr. Rath opined that Dora's decision not to see him, like all of her behavior, was volitional. (4 C-RT 953.) Dr. Rath did not contact defense counsel for assistance in seeing Dora because he had enough information from his single interview and the incomplete MMPI testing conducted the night of her arrest on which to base his conclusion. (5 C-RT 951-954, 1003, 1050.)[7] In Dr. Rath's opinion, Dora did not have a major mental illness that put her out of contact with reality. (4 C-RT 952, 962.) Nor did she suffer from hallucinations and delusions since she consistently had denied them in the jail, but then told some doctors about them. (4 C-RT 960.)[8]

4. There Was a Clear Difference of Opinion Between the Defense Experts and One Prosecution Expert About Whether Dora Was Malingering

All the experts except Dr. Moral addressed the question whether Dora was malingering, i.e., "faking mental symptoms to obtain a way out of a legal situation." (2 C-RT 271, 280-281.) Defense experts Drs. Perrotti, Kania and Mills concluded that she was not. Court-appointed expert Dr.

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[7] In rebuttal, Sherry Skidmore, Ph.D., testified that it would not be appropriate and would fall below the professional standard of care for a psychologist to give an opinion about a defendant's competence when the interview the psychologist conducted was not a particularized interview for competence. (5 C-RT 1120.)

[8] In addition to the expert testimony, the prosecution introduced writings in Spanish by Dora, which had been confiscated from her jail cell and translated into English, which were introduced to show Dora's intelligence and her ability to write. (5 C-RT 1170-1171; P.Exhs. 11, 11-A, 12, 12-A, and 13.)

Rath found that Dora purposefully feigned mental illness on the MMPI. In rebuttal, defense psychologist Sherry Skidmore challenged Dr. Rath's reliance on the MMPI results in reaching his conclusion that Dora was malingering.

a. The defense experts concluded that Dora was not malingering

All three defense experts found no evidence that Dora was malingering. (2 C-RT 271, 280-281 [Perrotti]; 3 C-RT 507 [Kania]; 4 C-RT 754 [Mills].) Dr. Mills, who co-authored an article on malingering, saw no circumstances that indicated malingering was an issue with Dora, and therefore he did not give or request a test for malingering. (4 C-RT 799.) Several factors were significant to the defense experts' assessments that Dora was not faking her symptoms.

First, both Dr. Perrotti and Dr. Kania relied on Dora's behavior, as observed by them and reported by others. Dr. Perrotti cautioned that psychological tests, such as the MMPI, alone were not adequate to assess a person or identify malingering. (2 C-RT 314-315.)[9] In his view, a test was not a substitute for behavior and observation. (*Ibid.*) In fact, Dora's behavior confirmed that she was not faking mental illness or incompetence. Both Dr. Mills and Dr. Perrotti noted that unlike malingerers, who express

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[9] Dr. Perrotti testified that an analysis of Dora's correct and incorrect responses to the MMPI test questions indicated that she was not faking mental illness. (2 C-RT 271-272, 280, 4102 C-RT 271-272, 280, 410.) A person who is faking mental illness makes an exaggerated attempt to fail certain items, fails fairly easy items, and makes mistakes early in the test. (2 C-RT 409.) A person who is not malingering will answer questions correctly at the beginning of the test and then will make mistakes as the test progresses. (Ibid.) Dora's performance pattern – making mistakes on the tests as they grew harder – indicated that she was not malingering. (2 C-RT 280.)

symptoms to the evaluator but not to close family, Dora did just the opposite: she denied her symptoms to the experts, but revealed them to her family. (4 C-RT 754 [Mills]; 2 C-RT 415-416 [Perrotti].) Dr. Kania concurred that Dora's behavior, especially her insistence on her own competence and the number of bizarre symptoms she had reported to him, was evidence that she was not malingering. (2 C-RT 485-487; 3 C-RT 525-526.)[10]

Second, as Dr. Perrotti explained, Dora's disorganized thinking and her severe problems in her ability to concentrate, her ability to process and recall information, and in her auditory memory also indicated she was not malingering. (2 C-RT 406-413.) Disorganized thinking is difficult to manufacture and feigned attempts are not difficult to detect. (2 C-RT 405.) The test results showing cognitive deficits, which were valid and reliable and consistent with the patterns of other people with her problems, showed no evidence of malingering whatsoever. (2 C-RT 409, 412-413.)

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[10] Dr. Kania explained that the MMPI, although neither a test of competence (3 C-RT 536) nor malingering (2 C-RT 499), has three scales which may give some idea of whether the subject is malingering. (*Ibid.*, 3 C-RT 523-524.) The high scores on the "fake bad" or "dissimulation" scale on both of Dora's MMPI tests suggested that she may have exaggerated some symptoms. (3 C-RT 595, 616-618, 624.) However, this elevation could have resulted from anxiety or distress rather than from dishonesty. (3 C-RT 594-595.) Dora's MMPI profile on the test Dr. Kania administered was not consistent with the saw-toothed pattern generally exhibited by malingerers, which shows elevations on scales 2, 4, 6, and 8 with lower scores on the alternating scales. (3 C-RT 542.) Moreover, like Dr. Perrotti, Dr. Kania explained that the pattern of Dora's mistakes on the test – appearing as the test grew harder – indicated that she was not malingering. (1 C-RT 280; see 2 C-RT 409.)

Finally, other facts about Dora's behavior indicated she was not feigning mental illness. She reported hallucinations to multiple sources, namely her sister, jail personnel and jail mental health staff. (2 C-RT 426, 434-435; 3 C-RT 514-517, 525-526, 642-645.) And she revealed her symptoms to her sister prior to her arrest when she had nothing to gain. (2 C-RT 416-417, 433.) The jail reports about Dora's delusions were written by people who were experienced in observing symptoms of mental illness and were independent of the court and the parties. (2 C-RT 435.) Moreover, the prescription of Haldol, a medication typically prescribed for schizophrenic and psychotic patients, for Dora reflected a medical determination that she needed it. (2 C-RT 436.)

b. Dr. Craig Rath concluded that Dora malingered on the MMPI, but did not malinger in her interview

Dr. Rath was the only expert who opined that Dora was malingering. During Dr. Rath's interview the night of her arrest, Dora did not malinger. (4 C-RT 981, 983, 979.) Malingerers often exaggerate their symptomology to doctors, but Dora did not report delusions, hallucinations or paranoid thoughts. (5 C-RT 1029-1030.) Nevertheless, Dr. Rath believed Dora purposefully feigned mental illness on the MMPI, although he did not state this opinion in his report. (4 C-RT 983, 985.) Dr. Rath based his opinion on the validity scales which measure whether a person is lying or being defensive and on which Dora endorsed a large number of questions that indicated pathology or sickness. (4 C-RT 954-955.) Her MMPI also showed a saw-tooth profile which was a classic sign of malingering (4 C-RT 954-956; 5 C-RT 1037.)

c. In rebuttal, Dr. Sherry Skidmore testified that a valid opinion about malingering cannot be based on an MMPI

Sherry Skidmore, Ph.D., a defense rebuttal witness, was a clinical and forensic psychologist who, for the prior 18 years, had served on local, state and/or national psychological ethics committees. (5 C-RT 1103-1106.) She reviewed the MMPI test Dr. Rath administered to Dora. (5 C-RT 1109-1115, 1122.) Based on the test, Dr. Skidmore absolutely could not render an opinion as to whether or not Dora was malingering. (5 C-RT 1115.) In her opinion, no psychologist would stretch to determine malingering from MMPI data alone. (*Ibid.*) An assessment of malingering depends on a number of objective measures combined with an interview and occurs throughout the entire evaluation. (5 C-RT 1116.) The key to malingering is that it has to be deliberate. (5 C-RT 1132.) In Dr. Skidmore's opinion, she ethically could not, and therefore would not, form an opinion about malingering based on the limited information provided by the MMPI. (5 C-RT 1120.)

B. The Evidence Established That Dora Buenrostro Was Able To Understand The Nature Of The Criminal Proceedings And Her Own Status In Relation To Them

All the experts, except for Dr. Perrotti, found or assumed that Dora had at least a rudimentary understanding of the nature of the criminal proceedings against her, i.e., that she was charged with the murder of her children. (2 C-RT 483-484 [Kania]; 4 C-RT 779-781, 815-816 [Mills]; 4 C-RT 833, 840-844 [Moral]; 4 C-RT 952 [Rath].)[11] Dr. Perrotti

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[11] Dr. Rath did not test Dora's understanding of the court proceedings because he had no question about her competency when he

concluded that Dora did not understand the nature of the proceedings based on her disorganized thought process, her repeated wrong answers to questions about the participants in the prosecution against her, and her expectation that she would go home. (2 C-RT 292-298.)

C. There Was A Sharp Dispute About Whether Dora Buenrostro Was Able To Assist Counsel In A Rational Manner In The Conduct Of A Defense

The evidence diverged once more on whether Dora was able to assist her counsel in the conduct of a defense in a rational manner – the defense evidence indicated she was not, while the court-appointed experts concluded she was.

1. The Defense Experts Concluded That as a Result of Her Mental Disorder, Dora Was Unable to Cooperate Rationally with Her Counsel

All three defense experts found that due to Dora's delusional thinking or paranoid schizophrenia, she was unable to assist her attorney in a rational manner. (2 C-RT 361 [Perrotti]; 2 C-RT 494, 502, 3 C-RT 616 [Kania]; 4 C-RT 754, 795-796 [Mills].) They explained that Dora's mental disorder interfered with her ability to cooperate in her own defense in three ways.

First, as Dr. Perrotti explained, as a result of Dora's delusional system, her interactions and relationships were contaminated by suspicion, and the delusion that everyone, even the defense attorney, was against her. (2 C-RT 299, 303-304, 308.) Dr. Perrotti acknowledged that being

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interviewed her immediately after her arrest on October 28, 1994. (4 C-RT 987.) He assumed that Dora understood the nature of the proceedings against her based on her prior experience as a criminal defendant and as an employee in a civil law firm. (4 C-RT 952.)

paranoid schizophrenic did not necessarily make someone incompetent, but in Dora's case, her illness interfered with her ability to collaborate and communicate with counsel. (2 C-RT 305, 361.) She did not understand how her attorney could help her, felt angry and frustrated, and wanted to handle things herself. (2 C-RT 298.) She held a delusion that her attorney was against her and was plotting with the prosecutor and the judge to do something to her. (2 C-RT 349.)

Second, as Dr. Perrotti further explained, Dora was unable to give credence to her attorney's advice and grew angry with anyone whose views differed from her own. (2 C-RT 306-307, 309.)[12] Dr. Perrotti observed this impediment firsthand. He was concerned that Dora's problems in the areas of concentration and memory resulted from not only a mental disease but also from a neuro-psychological problem which he needed to evaluate. (2 C-RT 413.) Dora, however, refused to cooperate. (2 C-RT 277, 279, 302.) Even though Dr. Perrotti explained to Dora that he was an expert hired by her lawyers to assist in her defense, Dora continued to be agitated and refused to take the tests. (2 C-RT 279.) Dora did not seem to have any insight into her own problems, which aggravated the situation by making it less likely that she would listen to her attorney's advice. (2 C-RT 306-307.)

Dr. Kania also explained that Dora would become more distrustful and angry when confronted with any information that diverged from her delusional belief system. (2 C-RT 493.) Dr. Kania encountered this problem directly. During one interview, Dr. Kania had Dora answer a questionnaire. (2 C-RT 494.) She became very hostile because she

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[12] Dr. Perrotti's prediction proved right. At both the guilt phase and the penalty phase, Dora defied her attorney's advice and testified in her own defense, both times delivering a tirade that she was being framed.

believed she had not answered the questions as Dr. Kania indicated that she had. (*Ibid.*) She reached over and grabbed the test paper from Dr. Kania's hand, wadded it up, and stuck it in her pocket. (*Ibid.*) Similarly, Dora grew angry, distrustful and paranoid when forced to deal with issues in the case. (2 C-RT 502.)

Third, as all three defense experts concluded, Dora's complaints about her defense attorney, Frank Scott, reflected her psychological disorder rather than a particular problem with Scott. According to Dr. Perrotti, Dora's attitude towards defense attorney Scott was based on her suspicion of the process in general and not of Scott personally. (2 C-RT 307.) Dr. Perrotti acknowledged that a defendant's complaint that a defense lawyer seeks too many continuances could be a sign of mental illness or could be a legitimate objection. (2 C-RT 339.) However, Dr. Perrotti spoke to defense counsel Scott and determined that Scott was acting in Dora's best interest. (2 C-RT 340-341.)

In a similar vein, Dr. Mills found that Dora's delusional disorder made it very difficult, if not impossible, for Dora to work with counsel, whether Scott or someone else. (4 C-RT 754.) Dr. Mills observed Dora with both attorney Scott and paralegal Moreno. (4 C-RT 790, 811.) The problem was not simply a personality conflict. (4 C-RT 812.) Both Scott and Moreno reported that Dora was regularly very erratic. Sometimes she appeared superficially cooperative, but other times she was angry, paranoid or frightened. (*Ibid.*) As a result of Dora's volatility, the defense team had difficulty in establishing a dialogue with her. (*Ibid.*)[13] Dr. Mills

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[13] Dr. Mills explained that Dora's ability to cooperate with paralegal Moreno was not inconsistent with the conclusion that she was incompetent. Moreno did not try to communicate with Dora about difficult matters, and

experienced this problem firsthand during his second interview. Although cooperative, Dora's disjointed and diffused conversation yielded no clear idea of the substance of her complaints about Scott or what information she wanted from him. (4 C-RT 748, 750, 805-806, 812-813.)

In Dr. Kania's opinion, Dora expressed dissatisfaction with defense counsel's handling of her case, but she could not be more specific as to the source of her unhappiness. (2 C-RT 495.) Dora's dissatisfaction was based on the irrational belief that if she went to court in an expedited manner, her case would be dismissed and she would be released. (3 C-RT 517.)

2. The Defense Paralegal and a Sister Documented Dora's Inability to Cooperate with Counsel

Martha Gudino, Dora's sister, observed Dora's irrationally uncooperative behavior in relation to her attorney, Frank Scott. (2 C-RT 456.) About four or five months before she testified, Gudino, along with Scott, Dora's mother, and her sister Maria Perez, visited Dora in jail. (2 C-RT 458.) They talked to Dora for nearly two hours, much of the time in Spanish, about signing an authorization to release medical and other records that defense counsel needed. (2 C-RT 459.) Gudino tried to explain to Dora the importance of signing the authorization, but Dora did not seem to understand and refused to sign. (2 C-RT 460.) Gudino testified that Dora told them, "You guys are against me. You guys are like everyone else." They grew frustrated and ended the visit. (*Ibid.*)

Catherine Moreno, called as a defense rebuttal witness, was employed by the Public Defender's Office as a paralegal and was assigned to assist in gaining Dora's cooperation in the case. (5 C-RT 1082-1083,

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when Moreno broached the subject of Dora's delusions, Dora refused to answer. (4 C-RT 817-818.)

1086.) Moreno, who was Hispanic and bilingual, saw Dora at least 10 times; she visited Dora both with and without defense counsel, Frank Scott. (5 C-RT 1083.) Moreno spoke to Dora in English, although Moreno was fluent in Spanish. (5 C-RT 1096.)

Moreno had four or five conversations with Dora about potential witnesses. During these conversations, Dora was not coherent and did not give Moreno the names of any witnesses. (5 C-RT 1083-1084.) Moreno attempted to get Dora to sign an authorization to release information on eight occasions. (5 C-RT 1084.) Dora refused. (5 C-RT 1085.) Moreno also observed defense counsel try to get a signed release, but Dora refused. (*Ibid.*) Dora did not have a coherent explanation for refusing to sign the release. (*Ibid.*) In her meetings with Dora, Moreno observed that Dora would begin to answer questions but then would jump to a different subject. (*Ibid.*)

Dora would not discuss her involvement in the killings with Moreno. (5 C-RT 1095-1096.) According to Moreno, Dora's unwillingness to give information had not changed since the beginning of the year. (5 C-RT 1099-1100.) Dora wanted to get a new defense team because she was dissatisfied with the handling of her case. (5 C-RT 1100.)

3. The Court-Appointed Experts Concluded That Dora Was or Would be Able to Cooperate with Counsel

Dr. Moral suggested that in the future Dora would be able to cooperate with her attorney (4 C-RT 857), while Dr. Rath observed that Dora already was cooperating with Scott by following his directions (4 C-RT 849-851, 857, 952). During Dr. Moral's first interview, Dora said she was angry with her attorney and wanted to fire him. (4 C-RT 853, 912.)

She complained that (1) her attorney did not let her run her case and (2) the case was going too slowly. (4 C-RT 854.) In Dr. Moral's opinion, Dora's concerns about her attorney were not irrational and were quite like those of many people in similar circumstances. (4 C-RT 855.) However, Dr. Moral never attempted to contact defense counsel Scott to ascertain whether Dora's concerns were warranted. (4 C-RT 914.)

At the second interview, Dora was still ambivalent about Scott, but did not intend to fire him, and she was favorably impressed by the paralegal that Scott had sent to visit her. (4 C-RT 853.) Dora also had changed her mind about her case moving too slowly; she now preferred two years to prepare for trial. (4 C-RT 854.) She explained that she wanted to discuss how she should plead with her attorney and that she would rely on her attorney's judgment in making decisions for her case. (4 C-RT 871-872.) Again, Dr. Moral did not contact Scott to verify Dora's statement that she was cooperating with him (4 C-RT 930-931), even though other basic information Dora provided about herself turned out to be inaccurate (4 C-RT 890-895). In short, Dr. Moral opined that once Dora became reasonably comfortable with her attorney, she would be able to cooperate with him. (4 C-RT 857.)

Dr. Rath believed that Dora was cooperating with her attorney because he saw records indicating that she had followed her attorney's advice not to talk to certain people. (4 C-RT 952.)[14] In Dr. Rath's opinion,

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[14] Dr. Rath assumed her attorney had advised her not to talk to certain people. However, defense paralegal Moreno testified that she never told Dora not to talk to doctors, and she never observed defense counsel tell Dora not to talk to doctors. (5 C-RT 1084.) On the contrary, Moreno advised Dora to talk to all the doctors involved, and Moreno heard defense counsel tell her the same thing. (*Ibid.*)

Dora had demonstrated an ability to censor information, sharing it with some people, but not others. (4 C-RT 953.) He opined that all Dora's behavior was volitional, citing her choice not to see him on two occasions. (4 C-RT 953.)

II. CRIMINAL TRIAL

In July 1998, approximately two and a half years after Dora Buenrostro was found competent to stand trial, she was tried, convicted and sentenced to death for the murder of her children.

A. Guilt Phase

1. The Buenrostro Family: Dora, Alex, Susana, Vicente and Deidra

Dora and Alejandro Buenrostro married in 1982, when Dora was 22 and Alejandro, known as "Alex," was 24 . (10 RT 1031.) They lived in Los Angeles and had three children, Susana, Vicente, and Deidra. (8 RT 821-822.)[15] Alex worked as an auto refinisher painter, and Dora worked as a clerk in a law office. (8 RT 822; 10 RT 1049.) Their marriage had problems including Alex's infidelity and domestic violence between Alex and Dora. (8 RT 793, 845-846). In 1990, Dora and Alex separated, and Dora moved with the children to San Jacinto in Riverside County. (10 RT 1033.) At some point, Dora filed for a restraining order against Alex. (8 RT 823-824.) Dora and Alex repeatedly tried to reconcile only to separate again. (8 RT 823.) After the final separation, Alex continued to see his children twice a month and to help support them financially. (8 RT 824-825.) According to Alex, Dora was a "very caring" mother. (8 RT

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[15] Their son is referred to as "Vicente," as his name appears in the Information (1 CT 51) and as both Alex and Dora called him (8 RT 822; 10 RT 1032), although some witnesses referred to him as "Vincent."

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On Sunday, October 23, 1994, Alex went to San Jacinto to see his children. (8 RT 827.) Susana was 9; Vicente was 8; and Deidra was 4 years old.[16] He took the children and Dora to see a movie. (8 RT 829.) On Monday morning, October 24, Dora went to the San Jacinto Police Department to report vandalism to her car. (6 RT 600, 8 RT 755, 10 RT 1064-1065.) On Monday, October 24, or Tuesday, October 25, Dora called Alex insisting that he had to come to San Jacinto because she needed to see him. (8 RT 830.) Alex did not go.

2. Tuesday, October 25, 1994: Dora Assaults Alex

On Tuesday afternoon, October 25, 1994, Dora Buenrostro and her three children were seen together twice in San Jacinto – at about 3:00 p.m. in a McDonald's restaurant (8 RT 865-866) and about 5:30-6:00 p.m. driving in her car (8 RT 766-772). At about 6:00 p.m., Dora borrowed $10 from her neighbor, David Tijerina. She told him that she needed the money to buy gasoline so she could drive from San Jacinto to Los Angeles to talk to her ex-husband with whom she was upset. (8 RT 884.) Tijerina saw Dora drive out of their apartment complex. He believed, but could not swear, that Deidra was in the car with Dora. (8 RT 885.)

On Tuesday night, October 25, at about 10:30-11:00 p.m., Dora arrived at Alex's house and woke him up by knocking on his window. (8 RT 832.) Alex let Dora in. (*Ibid.*) She told Alex the children were at home with a lady. (8 RT 854.) According to Alex, Dora appeared to have

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[16] The only evidence in the record about the precise ages of the children appears in the videotaped tribute to them played at the penalty phase. (P.Exh. 186 [videotape ends with a view of the gravestone containing the children's dates of birth].)

just showered; her hair was still damp. (8 RT 833.) She looked weird – "[l]ike her eyes were just lost." (8 RT 832-833, 848.) She was not the person Alex knew. (8 RT 848.) The look on her face was different and very scary. (8 RT 849.)

Dora stayed for about two hours. She asked to see Alex's gun. He removed the bullets, showed the gun to Dora, and then put it away. (8 RT 857-860.) Alex kept asking Dora about the babies because he "knew that she will never live without the babies." (8 RT 860.) Dora told him not to worry stating, "'[t]hey are fine.'" (*Ibid.*)

Dora wanted to be with Alex, so they had sex in his bedroom. (8 RT 833.) Afterward, Alex heard Dora in the kitchen. She came back to the bed holding a steak knife and, as Alex vaguely recalled, wearing a red glove. (8 RT 834, 853.) She made a stabbing motion at him and kept asking "how come" he was afraid of dying. (8 RT 853, 855.) Dora said she was going to hit Alex where it hurts the most. (8 RT 850, 855.)

Jumping out of bed, Alex called 911 to report that his wife was trying to kill him. (8 RT 834-835.) Dora swung at Alex as he ran out of the bedroom, but she did not chase him. (8 RT 835- 836.) Dora just stood on the stairs to the house with the knife in her hand. (*Ibid.*; 7 RT 713.) Alex waited on the sidewalk for the police, who arrived at about 1:15 a.m. (7 RT 712; 8 RT 836.) Dora either dropped the knife when she saw the responding police officers or when they ordered her to do so. (7 RT 713, 717-718, 725.)

Dora initially was upset when talking with the officers, but mostly she was calm and quiet. (7 RT 718, 721, 727.) Neither she nor Alex appeared to be under the influence of alcohol or narcotics. (7 RT 729.) Dora said that her husband had not returned their child after picking her up

to buy some shoes and that she had come to get the child. (7 RT 714, 727-728.) Dora also told the officers that she had a restraining order against her husband in the trunk of her car. (7 RT 715, 728.) However, she was unable to produce it. (*Ibid.*) The officers did not see a child anywhere, and there was no car seat in Dora's car. (7 RT 714-716, 719, 726.) The officers told Dora to leave, and she did. (8 RT 837.)

3. Wednesday, October 26, 1994: Deidra Is Missing

On Wednesday, October 26, 1994, at mid-morning, Dora went to the San Jacinto Police Department. (6 RT 601.) She asked the officer on duty what she could do if her husband took their children and did not return them. (6 RT 601.) Dora was referred to Officer Blane Dillon. (6 RT 602.) Dora told Dillon that on Monday her estranged husband had taken her youngest daughter and had not brought back the child. (6 RT 613.) Dora, who appeared calm, wanted to know what she could do about the situation. (6 RT 651, 659.) Dillon explained that there was nothing law enforcement could do since Dora had no court documents stating that she had sole custody of the child and that the father was not entitled to take her. (6 RT 614-615, 651.)

Later on Wednesday at about 2:00 p.m., Dora's sister, Angela Montenegro, saw Dora at a gas station in San Jacinto. Dora was driving her black Oldsmobile, which had been washed and had water dripping from the back bumper. (8 RT 869-870.) Dora was by herself. Neither Deidra nor a child's car seat was in the car. (8 RT 871-872.) A little later, Dora's next-door neighbor, Velia Cabanila, saw Susana and Vicente when they stopped briefly to play at her apartment after school. (8 RT 805.) They told Cabanila that, according to their mother, Deidra was with their father. (9 RT 881-882.) At about 7:00 p.m., David Tijerina saw Dora looking over

the wall of her apartment. (9 RT 887, 891.) During the night, at about 3:00 a.m., Cabanila heard a loud thump, but nothing else, come from the living room next door which was Dora's apartment. (8 RT 801.)[17]

4. Thursday, October 27, 1994: The Children Are Found Dead

On Thursday morning, October 27, 1994, at about 6:30 a.m., Dora went to the police station in San Jacinto. She appeared agitated and nervous. She was barefoot. (7 RT 603, 608.) She told the officer on duty, "He's here." By questioning Dora, the officer determined that Dora's husband was at her home with a knife. (6 RT 603, 608.)

Officer Dillon, followed by another officer, went to Dora's apartment, which was about a mile from the police station. (6 RT 616, 623.) Dora gave the officers the key to the locked front door. (6 RT 617, 654.) The apartment was dark because the lights did not work. (6 RT 617, 655.) Using a flashlight, the officers found two children – Susana and Vicente – lying covered on separate sofas in the living room. (6 RT 617.) Both were dead with stab wounds to their necks. (6 RT 617-618.) Another sofa was in the hallway blocking the path to the bedrooms and the bathroom. (6 RT 629-630.)

After discovering the children's bodies, Officer Dillon left the apartment and told Dora that her children were dead. (6 RT 656.) She was

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[17] According to Cabanila, Dora yelled angrily at her children probably daily, and her children would come to Cabanila's apartment and would report that they were locked out of their apartment and at times that they were hungry. (9 RT 803.) On Wednesday, October 26, or possibly Tuesday, October 25, Deidra came to Cabanila's apartment to use her bathroom; she said that her mother was inside their apartment and had locked the door. (9 RT 803-804.) Dora vehemently denied the truth of these accusations. (10 RT 1069.)

visibly upset and started to cry. (*Ibid.*) Dillon asked Dora to describe what had happened. (6 RT 620.) She said that Alex, her estranged husband, showed up at the apartment and went into the bathroom after she let him in. (6 RT 622.) Because she believed Alex was acting strangely, Dora left to notify the police. (*Ibid.*) Dora denied that she ever said anything about Alex having a knife. (*Ibid.*)

Meanwhile, on Thursday morning, October 27, Alex arrived at work at the Colortone Lacquer Co. in Hollywood as usual between 7:30 and 7:50 a.m. (8 RT 812, 817.) A news station called the store asking whether Alex was at work. (8 RT 812.) Television crews and police began to congregate near the store. (8 RT 812-813.) Worried that something was wrong, Alex walked out of the store. (8 RT 813.) Police handcuffed him and took him into custody. (8 RT 816, 838-839; 7 RT 685.) After questioning Alex for hours, the police told him that Susana and Vicente were dead and that Deidra was missing. (8 RT 841-842.) Alex was released the next day. (8 RT 842-843.)

On Thursday evening, October 27, at about 6:00 p.m., Deidra was found dead in an abandoned post office about eight or nine miles from Dora's apartment. (7 RT 732, 744.) She was strapped into a car seat with blood and wounds visible around her mouth and neck. (7 RT 737-738.) Something like a pen was stuck in her throat. (7 RT 739.) Her body was decomposing primarily from the activity of maggots which were in her eyes, mouth and hair. (9 RT 1004-1005.)

5. The Cause of the Children's Deaths

All three children bled to death from multiple stab wounds to the neck. (9 RT 989, 1000, 1005.) Susana had four stab wounds to the front of her neck, two of which went into the bone of her spine, as well as

superficial cuts to her neck, defensive wounds to her right hand, and a perforation of her left chest cavity. (9 RT 980-981, 987, 993, 1003.) One stab wound severed the left subclavian artery, which is the large artery that comes from the heart and passes the base of the neck to the left arm. (9 RT 981-982.) Another stab wound cut halfway through the external jugular vein. (9 RT 982.) These two injuries caused exceedingly rapid bleeding and likely rendered Susana unconsciousness in less than a minute, possibly in less than 30 seconds. (9 RT 983.)

Vicente had two stab wounds to the front of his neck, abrasions and contusions on his neck and right clavicle, and defensive wounds on his hands. (9 RT 990, 995-1000.) One of the stab wounds cut almost completely through the right common carotid artery, which comes from the heart. Like Susana, Vicente died from rapid bleeding that likely rendered him unconsciousness in 30 seconds to a minute. (9 RT 993.)

Deidra had four stab wounds to the front of her neck. A two or three inch piece of knife was embedded in her neck bone indicating that the killing was done with such force that the knife went through her neck into the bone and the blade broke off. (9 RT 1002.) The metallic tip of a ballpoint pen was stuck in the soft tissue of her neck. (*Ibid.*) Deidra had a perforation of the chest cavity as well as blunt force trauma to her skull, which was consistent with her head being slammed against the car seat while being attacked. (9 RT 1003-1004.) Unlike the injuries to her siblings, Deidra had no sharp force injuries to major arteries or veins and no defensive wounds. (9 RT 1005-1006.) The time of her death could not be determined. (9 RT 1005.)

6. The Physical Evidence

Physical evidence linked Dora to the homicide of Deidra. Hairs found on Deidra's leg and hand were determined to be Dora's. (9 RT 898-900, 920-923.) Tire impressions found in the dirt outside the abandoned post office were identical in tread design to the four tires on Dora's Oldsmobile, which had one brand of tire on the front driver's-side wheel, another brand of tire on the front passenger's-side wheel, and a third brand of tire on both rear wheels. (9 RT 902-906.) In addition, DNA testing showed that six blood stains found in Dora's car matched Deidra's DNA profile and excluded Alex, Vicente, Susana and Dora as a source of the blood. (9 RT 907-915, 944.) The frequency that Deidra's DNA profile would occur in the population was once in every 120,000 people of Hispanic descent. (9 RT 945-946.)[18]

7. Alex Buenrostro's Alibi

According to Alex, he was not in San Jacinto after his visit on Sunday October 23. (8 RT 827.) Others confirmed his presence in Los Angeles that next week. His employer verified that Alex worked at various locations in Los Angeles on Tuesday October 25. (8 RT 819.) The couple who rented the back portion of Alex's house saw or heard him several times between 6 p.m. and 10 p.m. on Wednesday evening, October 26, and also saw Alex around 7:20 a.m. on Thursday morning, October 27, as he left for work. (8 RT 778-781, 790-792.) Driving fast at 7:00 a.m., San Jacinto

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[18] Blood tests showed that Dora was not under the influence of alcohol in the 48 hours between Tuesday, October 25, 1994, and Thursday, October 27, 1994 (9 RT 953-954) and had not taken drugs including methamphetamines, cocaine, barbiturates or opiates in the 24 hours before she was tested on October 28, 1994 at 2:26 a.m. (9 RT 972-975.)

Police Officer Frederick Rodriguez clocked the drive from San Jacinto to Alex's house in Los Angeles at a little over two hours. (8 RT 744, 757.)

8. Dora Buenrostro's Custodial Statements

After the bodies of Susana and Vicente were discovered, Officer Rodriguez interviewed Dora at the police station. (7 RT 686-687.) The taped interview began at 10:25 a.m. (People's Exhibit ["P.Exh."] P. Exh. 166, 1st transcript, p. 1.)[19] Rodriguez initially questioned Dora as the mother of the victims, not as a suspect. (7 RT 686-687.) Rodriguez's concern was to find Deidra. (7 RT 745.) However, as the interview progressed, Rodriguez saw inconsistencies in Dora's statements which caused him to focus on her as a suspect. (*Ibid.*) At some point in the afternoon, Rodriguez read Dora a *Miranda* warning, and she agreed to

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[19] People's Exhibit 166 is not contained in the Clerk's Transcript, but concurrently with the filing of this brief, Buenrostro is filing a motion to augment to include this exhibit in the certified record on appeal. The exhibit includes the transcripts of the interview of Dora by officer Rodriguez, officer Ballard and deputy district attorney Bentley on October 27, 1994, the tapes of which were played for the jury. The transcript of that interview was given to the jury. (7 RT 688.) People's Exhibit 166 also includes a transcript of the interview of Dora by officer Rodriguez on October 30, 1994, the tapes of which were not introduced into evidence and played for the jury. The transcript of that interview was not given to the jury. (9 RT 1009.) People's Exhibit 167 A-D are the tape recordings. Buenrostro cites to the transcripts contained in People's Exhibit 166.

Two of the transcripts of the October 27, 1994 interview are part of the Clerk's Transcript as exhibits to defense motions: the transcript of the second tape of the October 27, 1994 appears at 3 CT 479-524 (transcripts pages 1-47) and 3 CT 526-577 (transcript pages 1-52). The version of this transcript in the Clerk's Transcript is missing page 42 (see 3 CT 519-520), and this page portion apparently was transcribed and inserted into Exhibit 166 (see page 42). The 41-page transcript of the first portion of the interview is not in the Clerk's Transcript.

speak to the assembled law enforcement officials who, at various times, included two police officers and two deputy district attorneys. (*Ibid.*; see P.Exh. 166, 1st transcript, pp. 2, 27.) The interview continued intermittently until 12:40 a.m. on October 28, 1994. (P.Exh. 166, 2nd transcript, p. 52; 7 RT 745.) A tape of the entire recorded interview was played for, and a transcript of the recording was given to, the jury. (7 RT 689, 693; P.Exh. 166; P. Exh. 167 A-D; 9 RT 1007-1010.) By Officer Rodriguez's own assessment, some of her interrogators were "a little rough" on Dora. (P.Exh. 166, 3rd transcript, at p. 47.)

In the interrogation, Dora displayed a range of reactions to the interrogation – being noticeably confused, upset, and angry. (See, e.g., P. Exh. 167-B (tape 2) and P.Exh. 166, 2nd transcript, p. 28; P.Exh. 167-D (tape 3) and P.Exh. 166, 3rd transcript, pp. 27-28, 49-50.) But she absolutely denied that she killed her children. (P.Exh. 166, 3rd transcript, pp. 16-18, 25, 27, 28, 29, 32, 34-35, 43.) She cared that her children were dead. (*Id.* at p. 41.) And she steadfastly insisted she was innocent of their murders. (*Id.* at p. 46.)

Dora explained that Alex had picked up Deidra to take her to buy shoes and that after waiting three hours, Dora came to the San Jacinto police station to report that Alex had not returned their daughter. (P. Exh. 166, 1st transcript, pp. 3-4, 6; P.Exh. 166, 2nd transcript, pp. 8-9, 11, 14, 17.) However, Dora insisted these events happened on Tuesday, not on Wednesday despite police records to the contrary. (P.Exh. 166, 1st transcript, pp. 16-17; P.Exh. 166, 2nd transcript, pp. 14-16, 29-31; P.Exh. 166, 3rd transcript, pp. 28-29.) And she asserted that Deidra was not with her on Wednesday and that people who reported seeing her with all three children at McDonald's on Tuesday were lying. (P.Exh. 166, 2nd

transcript, pp. 12-13.)

Dora acknowledged leaving Susana and Vicente at home by themselves in San Jacinto and going to Alex's house in Los Angeles to ask about Deidra on Tuesday night. (P.Exh. 166, 1st transcript, pp. 7-11; P. Exh. 166, 2nd transcript, p. 21.) However, Dora denied having sex with her husband during that encounter. (P.Exh. 166, 2nd transcript, p. 23.) At first, Dora did not mention threatening Alex with a knife (P.Exh. 166, 1st transcript, pp. 11-14), but she later admitted having done so (P.Exh. 166, 2nd transcript, p. 22). According to Dora, when she asked where Deidra was, Alex became verbally abusive and tried to hit her. He had been physically abusive toward her in the past. (*Id.* at p. 27.) Alex "got his temper up like most of the time he does," so Dora tried to defend herself. (*Id.* at p. 26.) She "just play[ed] with him" but "wasn't going to do nothing." (*Ibid.*)

On Thursday morning, Alex came to Dora's house. (P.Exh. 166, 1st transcript, pp. 4, 19-20; P.Exh. 166, 2nd transcript, p. 20.) Thinking that he was bringing Deidra, Dora let him in. (P.Exh. 166, 2nd transcript, p. 20.) Alex did not have Deidra. (P.Exh. 166, 1st transcript, p. 4.) Alex said he needed to talk to Dora. From the expression on Alex's face, Dora thought he was not going to be friendly and that they were going to fight. (P.Exh. 166, 1st transcript, p. 20; P.Exh. 166, 2nd transcript, p. 20.) His look scared her. (P.Exh. 166, 2nd transcript, pp. 43, 45.) Alex went into the restroom, and Dora left the apartment. (*Id.* at pp. 20, 45.) She came to the police station for protection. (*Id.* at p. 45.) Although Vicente and Susana were sleeping on the couches, Dora was not afraid that Alex would take them.

(*Id.* at p. 46.)[20] Dora denied telling the police that Alex had a knife. (P.Exh. 166, 3rd transcript, p. 6.) At the police station, Dora was asked if Alex had a knife, and she replied that she did not know. (*Id.* at pp. 6, 7.)

During the interrogation, Dora acknowledged that she recently had a dispute with, and was mad at, her mother and her younger sister. (P.Exh. 166, 2nd transcript, pp. 36-37; P.Exh. 166, 3rd transcript, pp. 7-8.) They came to Dora's house upset that she was dating a man. Her family expected her to be pure and stay by herself with her children. After her mother called Dora names, Dora slammed the door on her mother and sister. (P.Exh. 166, 2nd transcript, pp. 36-37.) With regard to Alex, Dora denied being jealous of, or mad at, him and denied wanting him back. (P.Exh. 166, 2nd transcript, p. 4; P.Exh. 166, 3rd transcript, pp. 2-3, 6.) Dora denied wanting to blame Alex for the children's deaths (P.Exh. 166, 3rd transcript, p. 6), although she believed he killed them (*Id.* at p. 27). Asked how Alex could be at her apartment in San Jacinto at 6:40 a.m. on Thursday, October 27, and then be at his house in Los Angeles at 7:10 a.m. that same day, Dora explained, "he's fast." (P.Exh. 166, 2nd transcript, p. 41; see also P.Exh. 166, 3rd transcript, pp. 31-32.)

9. Dora Buenrostro's Testimony

Dora testified in her own defense. She admitted having a prior conviction for grand theft. Her testimony about the events at Alex's house on Tuesday night and at her apartment and at the San Jacinto police station on Thursday morning (10 RT 1041-1042) generally was consistent with her interrogation statements and contained some additional information, but

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[20] Dora explained the position of the third couch: she was moving it by herself from her living room to the children's bedroom. (P.Exh. 166, 1st transcript, pp. 26-27.)

was inconsistent with the testimony of prosecution witnesses. Thus, according to Dora, on Tuesday night, she did not attempt to stab Alex with the knife and did not have a red glove on her hand. (10 RT 1036-1037, 1039.) She went to the San Jacinto Police Department on both Tuesday, October 24 and Wednesday, October 25. (10 RT 1039-1040.) She washed her car on Tuesday, not on Wednesday as Montenegro had testified. (10 RT 1076-1077; 8 RT 869-870.) She did not have all her children with her on Tuesday afternoon. (10 RT 1067.) And Alex came to her apartment at 5:30 a.m. on Thursday. (10 RT 1078.)

With regard to the incriminating physical evidence, Dora believed somebody put the blood in her car (10 RT 1045), had no idea how blood got onto her purse (10 RT 1046), could not explain why a red glove, which belonged to someone else, was found in her car (10 RT 1070), and suggested that the evidence of her tire tracks at the old post office were related to her car having been vandalized (10 RT 1046).[21]

Finally, Dora denied that she felt trapped in San Jacinto with her children and that it was hard to raise her children and not date, although she felt her family expected too much of her. (10 RT 1062.) She also denied that she was trying to frame Alex for the murders. (10 RT 1074.) She was emphatic that she did not kill any of her children and believed that "someone wants me in jail and they went to any sort of means to acquire that, get that . . . . I am not guilty." (10 RT 1047.)

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[21] The prosecution's evidence established that on Monday, October 24, 1994, Dora came to the San Jacinto police station to report vandalism to her car. (8 RT 601.)

B. Penalty Phase

1. Evidence in Aggravation

In addition to the facts and circumstances of the murders, the prosecution's case in aggravation consisted of Dora's prior conviction for grand theft, two alleged unadjudicated offenses involving the use or threat to use force in the county jail, and victim impact evidence.

a. Prior conviction

The parties stipulated that on September 11, 1988, in the Los Angeles County Superior Court, Dora pled guilty to grand theft, a felony, in violation of Penal Code section 487.1. (12 RT 1301-1302.)

b. Other crimes of force or violence

On February 26, 1995, Johnnie Anaya was a deputy sheriff working on the medical floor of the Robert Presley Detention Center. (11 RT 1253.) He accompanied the nurse on a "pill run" to dispense medication to inmates. (*Ibid.*) They opened Dora's cell door to give her medication, and she stepped outside the door which was not permitted. (*Ibid.*) Anaya told Dora to move back. She did not. (*Ibid.*) Instead, Dora raised her hand coming toward him. (11 RT 1254.) Anaya grabbed Dora's hands which were slippery with ointment. (*Ibid.*) Dora grabbed the nurse's sleeve. The nurse did not fall. (11 RT 1255.) Anaya struggled with Dora to get her hand off the nurse, and then he pushed her back into her cell. (*Ibid.*) Struggling inside the cell, both Anaya and Dora went to the floor. (11 RT 1256.) Dora tried unsuccessfully to free her hands from Anaya's. Other correctional officers arrived and subdued her. No one – not Anaya, the nurse or any other correctional officer – was hurt. (*Ibid.*)

On May 18, 1996, while Dora was confined pretrial at the Robert Presley Detention Center in Riverside, deputy sheriff Stephanie Rigby let

Dora out of the day room for a visit. (11 RT 1245.) After the visit, instead of returning to the day room, Dora grabbed the metal wringer from the mop bucket in the sally port area. (*Ibid.*) Dora held the wringer like a baseball bat over her right shoulder with both her hands on the handle. (11 RT 1246.) No one was near Dora. (*Ibid.*) Rigby, who was separated from Dora by a floor-to-ceiling metal and glass enclosure (11 RT 1248), told Dora to drop the wringer (11 RT 1246). Dora refused, and Rigby called for help. (*Ibid.*) Between three and five deputies responded. (11 RT 1247.) The deputies talked to Dora who continued to hold the wringer in the same position. (*Ibid.*) Dora did not hit or make any aggressive movements toward anybody, although she had the opportunity to do so. (11 RT 1247, 1249.) The deputies took the wringer from her. (11 RT 1247.)

c. Victim impact evidence

The prosecution presented evidence about the effect of the children's deaths on the students at the elementary school which Susanna and Vicente attended, their older half-sister, Alejandra Buenrostro, and their father, Alex Buenrostro. The principal of Hyatt Elementary School, Deborah De Forge, testified about the impact of the murders on the students at her school. The deaths affected everyone. (11 RT 1239.) On their way to school, students had to walk by the apartment complex where the Buenrostro children were killed. (*Ibid.*) They were afraid. Having heard that the father was the suspect, the students were concerned that the same thing could happen to them. (11 RT 1240.) De Forge and the school district organized a crisis response for both students and staff. (11 RT 1239-1240.) Mental health counselors were available for children who needed individual counseling, and some did. De Forge personally spoke to students which was a difficult task. (11 RT 1242.) The children were looking for a reason for the killings,

and there was no real way to explain or justify what had happened. (*Ibid.*) Susana's classmates decided to keep her desk set apart with her things in it for a while, and Vicente's class reacted similarly. (*Ibid.*) Both classes sent stories and pictures to Susana's and Vicente's father. (*Ibid.*)

Alejandra Buenrostro, who was 19 at the time of the trial, was six years older than her half-sister, Susana. Alejandra had lived with Dora and her father, Alex, when she was about five or six years old, and she again lived with the family, including Susana, Vicente, and Deidra, when she was about 12 or 13. (11 RT 1259.) Although Alejandra was not in contact with her brother and sisters when she was not living with them, she felt close to them and last them saw in 1993, the year before their deaths. (11 RT 1259-1260.) She lived with her boyfriend in 1994, when her siblings were killed, but at trial she lived only with her father. (11 RT 1261.) She and her father were just trying to make it without Susana, Vicente and Deidra. (*Ibid.*) She thought of her siblings all the time, missed them and wished they were with her. (11 RT 1262-1263.)

Alex testified that when Dora held the knife over him on Tuesday night, she asked if he was afraid of dying. (11 RT 1265.) He also described the ordeal of being wrongfully accused of killing his children. (11 RT 1265-1268.) It was painful, but he knew the police would let him go because he did not have the heart to hurt any of his children. (11 RT 1268.) The news that his children were dead destroyed him. (11 RT 1267.) The pain will never be over. (*Ibid.*) Alex made the funeral arrangements and obtained special permission to bury all three children in the same grave. (11 RT 1268-1269.)

His children did not deserve to die. (11 RT 1269.) The hardest part of their deaths was wondering who they would be and what they would do.

He will never find out. (11 RT 1270.) Alex thinks of his children most in August because his birthday, Deidra's birthday, and Vicente's birthday fell within five days of each other. (11 RT 1270.) There was no Christmas after his children died, and Alex did not think there would ever be another Christmas for him. (*Ibid.*) The death of his children affected his ability to have a relationship with other people. (11 RT 1271.) He is uncomfortable going out and having fun like a regular person. (*Ibid.*) He copes by taking life day by day. (11 RT 1271-1272.) He gets up in the morning thinking about his children, and he goes to bed at night thinking about them. All he can do for them is place fresh flowers next to their pictures. (*Ibid.*) He wants Dora punished for what she did. (*Ibid.*)

The prosecutor played a two-minute segment of a video tape, People's Exhibit 185, of a police interview with Alex in which he was told that Susana and Vicente were dead. (14 RT 1448-1449 [stipulation that P. Exh. 185 was played from 4:45:20-4:47:24].) The police tell Alex that something happened to two of his kids. (*Id.* at 4:45:27.) Alex deduces the two are Susana and Vicente, since he knows that Deidra is missing. (*Id.* at 4:45:30.) He then asks if they are dead and is told "yes." (*Id.* at 4:45:43-44.) The video then shows Alex crying and sobbing, holding his head in his hands, pulling his hair, and saying "Oh, my God." (*Id.* at 4:45:44 - 4:47:12.) The police then ask Alex to help them find Deidra. (*Id.* 4:47:12-4:47:24.)

The prosecutor also played a four-minute-plus video tape montage, accompanied by an instrumental sound track, of photographs of Susana, Vicente and Deidra when they were alive, their apartment with flowers and notes on the doorstep and three white crosses under a window, and of their tombstone containing their names and dates of birth and death. (P.Exh.

186.)

2. Evidence in Mitigation

At the penalty phase, Dora testified on her own behalf. In addition, four relatives and a neighbor offered mitigating evidence in support of a life-without-parole sentence.

a. Dora Buenrostro's testimony

Dora testified against the advice of her attorneys. (12 RT 1303.) According to Dora, she was framed by police officer Dillon, who she believed probably put all of the evidence in her car. (*Ibid.*, 12 RT 1309.) Dora pointed out that Dillon was the first at the scene, collected the items, made the dispatch calls, and arrested her. (*Ibid.*) Dora repeatedly insisted she was innocent. (12 RT 1308-1309.) She asserted she could go home free if the police searched deeper into, and found the errors made in, their reports. (*Ibid.*) She wanted a life-without-possibility-of-parole sentence because she was framed. (12 RT 1306.) She was convinced that police reports, all of which were not provided to the jury, proved that she was innocent. (12 RT 1307-1308.) She was not blaming the jury or the defense attorneys for her predicament. (12 RT 1308-1309.) And she could not say that Alex framed her. (12 RT 1309.) However, she thought that officer Dillon probably did. (*Ibid.*) All the evidence came from Dillon's hands, and he was in every place where the incident occurred. (12 RT 1314, 1315.)

Dora believed someone placed her tire tracks at the location where Deidra's body was found, especially since the tire tracks were not tested until two days after her arrest and during this time officer Dillon had her car. (12 RT 1310-1311.) With regard to the evidence that Dora's hair or a similar hair was found on Deidra, Dora understood the expert to testify that

the hair could have belonged to anyone. (12 RT 1313.) And the blood found in her car belonged to Deidra, not to her. (12 RT 1314.) Dora further asserted that Martin Cardenas, who testified at the guilt phase, was a known drug addict. (12 RT 1316.)

Dora denied being mentally ill. (12 RT 1316.) On cross-examination, she also denied lying to the jury (12 RT 1317), making up facts to escape punishment (*ibid.*), trying to frame Alex (12 RT 1319), being angry (12 RT 1320, 1326), being jealous of how Alex is treated (12 RT 1326), stating that she wanted to seek revenge against Alex for all of life's humiliations (12 RT 1323), crying when the video of her children was shown to the jury, but not crying when the video was shown without the jury present (12 RT 1325), and hearing voices on October 27, 1994 (12 RT 1328.)

Dora flatly denied the prosecutor's assertion that she did not cry or show anger that her children were dead. (12 RT 1326.) "Why," she replied, "because I don't get up and scream and do all that, do you want me to?" (12 RT 1326.) She already had cried for three years. (*Ibid.*)

Dora rejected the prosecutor's accusation that she killed her children because they were in her way. (*Ibid.*) As she responded, "What way?" She explained that she had dated a man, went to coffee with him a few times, but ended the relationship because his mother wanted him to marry a woman who had not been married and did not have children. (12 RT 1323-1324.) She took this news okay and was not sad. (12 RT 1324.) Dora's own family may have objected to any relationship she would have, but no one told her she should not date because she had three children. (*Ibid.*)

Dora maintained that Alex came to her apartment, took Deidra, did not return her, and then came again to her apartment on October 27, 1994,

as she told police. (12 RT 1326.) This was not a lie. (*Ibid.*)

According to Dora, the killing of her children was one of the worst things a person could do. (12 RT 1329.) The person who killed her children deserved to be punished severely. (*Ibid.*) However, Dora did not kill them, and she was not present when they were killed. (*Ibid.*)

b. Testimony of sisters, mother, niece and neighbor

Dora's sisters, Martha Gudino and Maria Perez, her mother, Arcelia Zamudio, her niece, Brenda Davalos, and her neighbor, David Tijerina testified in mitigation. They presented a brief sketch of her family background, described her as a loving mother, and related a disturbing change in Dora in the months preceding the homicides.

i. Dora as a child

Dora's sisters and mother provided some rudimentary information about Dora's background. Dora was born in Mexico to a family that ultimately had nine daughters and one son. (12 RT 1365, 1373.) Dora's father died when she was young, and her mother raised all ten children on her own. (12 RT 1365, 1373.) The family moved to the United States in 1970, and settled in Los Angeles. (12 RT 1346.) Growing up, Dora was very kind and very nice; she would help anyone who needed help. (12 RT 1346.) She took care of her younger sisters. (12 RT 1347.) If Martha could not sleep because she had a pain in her leg, neither could Dora. (*Ibid.*) The first rule in the family was to respect their mother, even when they disagreed with her, and Dora was respectful. (12 RT 1364-1365, 1373.) Dora's mother had no problems with her. (12 RT 1373.)

ii. Dora as a loving mother

According to neighbor David Tijerina and niece Brenda Davalos, Dora was a good, loving mother. Tijerina lived next door to Dora for a year

and a half to two years and observed her with her children. (12 RT 1330.) She was a very good mother. To his knowledge, she did not abuse her children, and they did not appear underfed or neglected. (12 RT 1331.) Dora bought Vicente a bicycle for his birthday a few months before the murders. (*Ibid.*) Tijerina put the bicycle together and saw Dora give the gift to her son. (12 RT 1332.) There was "[n]othing but love, hugs" between Dora and Vicente. (*Ibid.*)

Davalos, who was 24 years old at the time of trial, was the daughter of Dora's sister Rose. (12 RT 1339-1340.) Davalos lived with Dora and the children from 1991-1993. (*Ibid.*) Dora treated her children "with lots of love." (12 RT 1341.) She did not leave them outside the house. She kept the children clean, fed them, and bought them presents. (*Ibid.*) Dora treated Davalos like a daughter and was over-protective with her. (*Ibid.*) Dora had a particularly close relationship with Deidra: "Deidra was always with her like a gum, attached." (12 RT 1342.) Davalos did not see Dora do anything mean, cruel or violent to the children. (12 RT 1343.)

Dora's sister, Maria Perez, concurred that Dora was a loving and caring mother, describing her as "wonderful with . . . her kids." (12 RT 1363.) She also knew Dora as a loving and caring sister and aunt. In 1990, before Deidra was born, Perez and her three young children lived with Dora for a year in Los Angeles. (12 RT 1362-1363.) Dora took care of Perez's children in addition to her own. (12 RT 1363.) Dora was like a mother to Perez's children; she was never cruel. (12 RT 1362.) Perez went to work without any worry that her children were well cared for. (*Ibid.*)

iii. Changes in Dora in the months just before the homicides

Echoing some of the testimony at the competency trial, Dora's mother and sisters described a dramatic and inexplicable change in Dora beginning about two or three months before the children's deaths. During this period, Dora's behavior was bizarre and changed from moment to moment. (12 RT 1350, 1375.) "Something unexplainable . . . happened with her." (12 RT 1375.) Dora "just wasn't herself." (12 RT 1348.) Her attitude changed; she was more aggressive. (12 RT 1365.) A conflict arose between Dora and her sister Angela Montenegro. (*Ibid.*; 12 RT 1351.) Dora accused Angela of trying to kill her and said weird things that did not make sense. (12 RT 1348.) Dora told her sister, Martha Gudino, that she was seeing things. Dora said that Angela was standing near her when all of a sudden Angela became a huge snake and bit Dora's leg. (12 RT 1349, 1357.) When Gudino suggested that this was impossible, Dora insisted that Angela had transposed herself into a snake. (12 RT 1350.) Dora acted like she believed Angela had become a snake (*ibid.*), and she would not let Angela into her apartment (12 RT 1357).

Around the same time, Dora reported seeing other strange transformations. Dora said that there was a knock on the door, and a lion came in. (12 RT 1349.) Dora also reported that their mother had a monkey's face. (12 RT 1354, 1366, 1369.) Her sisters told Dora their mother could not be a monkey (12 RT 1354, 1366), but Dora insisted their mother looked "black . . . and like a monkey" (12 RT 1354-1355). Dora was unable to explain what she was seeing. (12 RT 1366.) Dora told Perez that she saw Alex as a tiger or black panther in the house in Los Angeles (12 RT 1366-1367) and that she was chased by a man on the freeway

(12 RT 1367-1368). Both incidents struck Perez as "totally odd." (12 RT 1368.)

On the Saturday before the children were killed, Dora's sister, Martha Gudino, and her mother, Arcelia Zamudio, went to visit Dora. The conflict with Angela made them wonder what was wrong with Dora. (12 RT 1349-1350.) In her mother's view, Dora was "not normal . . . [s]omething was happening to her." (12 RT 1376.) They arrived to find that Dora had closed all the windows and curtains. (12 RT 1376.) At first, Dora would not open the door to her apartment. When she finally opened the door, Dora called them "'evil people.'" (12 RT 1350.) Dora cursed her mother with foul and disrespectful language saying "You son-of-a-bitch, get the hell out of here. You have a lot of evil in you. Don't come around me." (12 RT 1351.) This shocking behavior was so unlike Dora, who believed in God, read the Bible and went to church. (12 RT 1350-1351, 1359.) Zamudio signaled to her smallest grandchild to come to her, but the little girl shook her head "no." (12 RT 1377.) Dora slammed the door shut almost catching her mother's hand. (12 RT 1351, 1377-1378.) During this incident, which lasted about 10 minutes, Dora looked different than her mother had ever seen her: she looked evil and mean. (13 RT 1353.)

Gudino and Zamudio believed that something was wrong, but they decided to give Dora some time to cool off and to go back the next week. (12 RT 1353.) The children were killed before they could return. (*Ibid.*)[22]

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[22] Maria Perez also described Dora's apparent delusions after her arrest. She called Perez and asked why Perez had been in the jail but had not stopped to see her. (12 RT 1370-1371.) Dora insisted she heard Perez inside the jail. Perez, however, had not been there. (12 RT 1371.)

iv. Family's pleas for mercy

Dora's family asked the jury to be merciful. (12 RT 1339, 1347, 1363, 1378.) Her mother directly told the jury, "I don't want you to give her the death penalty. . . . [b]ecause she is my daughter, and I don't think she was . . . in her senses . . . when she did this." (12 RT 1378.) Her sisters expressed the horror and pain of losing their nieces and nephew, their disbelief that Dora was capable of committing such a crime, and their pleas for her life. (12 RT 1347-1348, 1363-1364.) As Perez explained, "the family already lost three kids, and we don't want to lose any more family members as it is very hard, very difficult for the whole family . . . ." (12 RT 1363.)

ARGUMENT

CLAIMS REGARDING COMPETENCE TO STAND TRIAL

I. THE DEFINITIONS OF COMPETENCE AND INCOMPETENCE TO STAND TRIAL IN PENAL CODE SECTION 1367, WHICH WERE APPLIED AT BUENROSTRO'S COMPETENCY TRIAL, ARE UNCONSTITUTIONAL

The prohibition against trying an incompetent person is fundamental to the American system of justice. A defendant has a substantive due process right not to be tried unless competent and a procedural due process right to an adequate hearing on competence. The failure to employ adequate procedures to protect against the trial of an incompetent person violates the defendant's Fifth or Fourteenth Amendment right to a fair trial under the United States Constitution, and article I, section 15 of the California Constitution, is prejudicial per se, and requires reversal of conviction. (*Pate v. Robinson* (1996) 383 U.S. 375, 386-387); *In re Dennis* (1959) 51 Cal.2d 666, 674.)

The requirement of competence at trial is the foundation upon which the other constitutional rights afforded the accused at trial gain meaning. (*Riggins v. Nevada* (1992) 504 U.S. 127, 139-140 (conc. opn. of Kennedy, J.).) Without a proper adjudication of competence, these other rights are merely hollow promises of justice. For this reason, the right to be competent when tried must be "jealously guard[ed]" by the state courts. (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 363; *Pate v. Robinson, supra*, 383 U.S. at p. 385.) A state's definition of competence or incompetence thus is crucial. In this case, the competency verdict violated Buenrostro's substantive due process right not to be tried unless competent because the

jury was instructed on the definitions of competence and incompetence under Penal Code section 1367 which, diverging from well-established United States Supreme Court law, were unconstitutional. As a result, the entire judgment must be reversed.

A. California's Definition Of Incompetence To Stand Trial, Which Requires Proof That The Defendant Suffers From A Mental Disorder Or Developmental Disability, Departs From Longstanding United States Supreme Court Decisions, Which Define Competence Solely In Terms Of The Defendant's Functional Abilities And Do Not Predicate Incompetence Upon Proof Of A Medical Condition

Penal Code section 1367, at the time of Buenrostro's trial and at present, provides:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

Reciting CALJIC No. 4.10, which implements section 1367, the trial court instructed the jury at Buenrostro's competency trial as follows:

> Although on some subjects her mind may be deranged or unsound, a person charged with a criminal offense is deemed mentally competent to be tried for the crime charged against her if, one, she is capable of understanding the nature and purpose of the proceedings against her; two, she comprehends her own status and condition in reference to such proceedings; and three, she is able to assist her attorney in conducting her defense in a rational manner. The defendant is presumed to be mentally competent. The effect of this presumption is to place upon the defendant the burden of proving by a preponderance of the evidence that she is mentally

incompetent as a result of a mental disorder.

(5 C-RT 1219.) This definition is a change from the prior law which defined competence to stand trial in terms of legal "sanity." Consistent with the common law, section 1367, as it was originally enacted in 1872, stated that "a person cannot be tried while he is insane." (Stats. 1872, ch. VI § 1367.) However, a century later, the Legislature departed from this long-standing definition of incompetence to stand trial. In 1974, it amended section 1367 to replace the word "insane" in the first sentence of the section with the phrase "while that person is mentally incompetent," and added the second sentence of the first paragraph to define mental incompetence as resulting from a "mental disorder." And in 1977, the Legislature again amended section 1367 and added the words "or developmental disability" immediately after "mental disorder."[23]

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[23] The impetus for the 1974 amendment was this Court's decision in *In Re Davis* (1973) 8 Cal.3d 798. Until 1974, the California Penal Code, like other state statutes, permitted a criminal defendant who had been found incompetent to stand trial to be committed indefinitely to a state mental hospital. (See former § 1370.) This Court invalidated the practice of indefinite commitment in *Davis*, *supra*, at p. 801, after the high court in *Jackson v. Indiana* (1972) 406 U.S. 715 had struck down a similar state law. In response to *Davis*, the Legislature amended the competency provisions of the Penal Code. (*Hale v. Superior Court* (1975) 15 Cal.3d 221, 223-226; Parker, *California's New Scheme For The Commitment Of Individuals Found Incompetent To Stand Trial* (1975) 6 Pacific L.J., 484-507; Smith, *From Insanity to Incompetence: Fitness to Stand Trial* (January 1976) Los Angeles Bar J. 340-346.)

During the amendment process, the words "mental disorder" and later "developmental disability" were inserted into the Penal Code definition of incompetence to stand trial. They echo the terms used in the Lanterman-Petris-Short Act's provisions for a maximum 90-day commitment for persons who are a danger as a result of a "mental disorder" or because "gravely disabled." (Welf. & Inst. Code, §§ 5150, 5200, 5213.)

The definition of incompetence prior to 1974, based on the term "insanity," was a purely legal concept, which defined incompetence to stand trial in functional terms. Significantly, "insanity" as used with regard to competence to stand trial, was a legal term which meant "incompetent," but "mental disorder and developmental disability" which replaced the word "insane" in section 1367, are medical, and not legal terms, and are not functional equivalents of the term "incompetent." (*James v. Superior Court* (1978) 77 Cal. App.3d 169, 177 ["the legal pigeonhole of 'mentally disordered' is not identical with the test of mental competency to aid counsel"].) The shift from legal to medical terms fundamentally altered the definition of incompetence to stand trial. The definitions in section 1367 and CALJIC No. 4.10 departed not only from the prior state law definition of incompetence, but also departed from the long-standing common law definitions and well-settled United States Supreme Court rules about competence.

The prohibition against trying a person who lacks the ability to understand the nature of the proceedings against him and to assist in the preparation of his own defense dates back to at least the early eighteenth century. Sir William Blackstone advised that one who is "mad" should not be arraigned or tried because "how can he make his defense?" (4 Blackstone's Commentaries 24.) In 1790, in *Frith's Case* (1790) 22 How. St. Tr. 307, the English court found that the trial must be postponed until the defendant "by collecting together his intellects, and having them entire,

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Despite the laudatory motives behind the amendments to section 1367, the result was a fundamental change in the definition of incompetence to stand trial which, as explained more fully below, deprives a subset of defendants of the right not to be tried while incompetent.

he shall be able so to model his defense and to ward off the punishment of the law." Almost a half a century later, in *King v. Pritchard* (1836) 173 Eng. Rep. 135, 304, the court mandated that it must be inquired whether the defendant was

> of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence.... Upon this issue, therefore, if you find there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able to properly make his defense to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters.[24]

And in 1899, the United States Court of Appeals, reviewing common law precedent, similarly held that it was "fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial receive judgment, or, after judgment undergo punishment . . .. It is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life." (*Youtsey v. United States* (6th Cir. 1899) 97 F. 937, 940.) In this way, from the Enlightenment to the mid-twentieth century, English and then American law prohibited the trial of an incompetent person and defined competence in terms of "sanity." (See *People v. Westbrook* (1964) 62 Cal.2d 197, 200; *People v. Perry* (1939) 14 Cal.2d 387, 397-399.)

As a preliminary matter, it is important to recognize that the legal definition of "sanity" and "insanity" varies from its psychiatric counterpart,

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[24] This very test of competence to stand trial recently has been approved by the English Court of Appeal in *Regina v. M* [2003] EWCA Crim 3452, where the common law definition of competence still applies.

and that the California courts consistently have held that "sanity" for competency determinations relates solely to a defendant's ability to participate meaningfully in his trial. (See *People v. Pennington* (1967) 66 Cal.2d 508, 515 [defendant is "sane" within the meaning of section 1368 "if he is able to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner"]; *People v. Laudermilk* (1967) 67 Cal. 2d 272, 282 [same]; *People v. Westbrook, supra,* 62 Cal.2d at p. 200 [the type of "insanity" which bars trial is the inability to understand the nature and purpose of proceedings or aid attorney in conducting defense]; *People v. Brock* (1962) 57 Cal. 2d 644, 648-649 [if the defendant could assist in his defense, then he was "sane" within the meaning of section 1368].)

The United States Supreme Court also has emphasized the distinction between the legal requirements of a competency determination and "insanity" in other contexts. (See *Dusky v. United States* (1960) 362 U.S. 402, 403 [noting that the entry of a plea of insanity presupposes that the defendant is competent to stand trial and to enter a plea, but that if the defendant is incompetent, due process requires suspension of the trial]; *Pate v. Robinson, supra*, 383 U.S. at p. 384, fn.6 ["Although defense counsel phrased his questions and argument in terms of Robinson's present insanity, we interpret his language as necessarily placing in issue the question of Robinson's mental competence to stand trial"]; *Medina v. California* (1992) 505 U.S. 437, 448 [in a competency hearing, the "emphasis is on the defendant's capacity to consult with his counsel and to comprehend the proceedings, and . . . this is by no means the same test as those which determine criminal responsibility at the time of the crime"]; *Godinez v.*

Moran (1993) 509 U.S. 389, 403 [distinguishing "competence to take part in a criminal proceeding and make the decision throughout its course" and "whether a defendant is absolved of criminal responsibility due to his mental state at the time he committed criminal acts" (conc. opn. of Kennedy, J.)].) Thus, the courts have been clear that "insanity" for competency purposes is separate and distinct from both the medical definition of insanity and the mental states that may provide a defense to criminal liability, and have emphasized that for competency determinations "insanity" is a legal term which relates solely to the defendant's ability to understand and participate meaningfully in his trial.[25]

The United States Supreme Court, in harmony with the common law, has established a legal definition of competence to stand trial that focuses solely on the defendant's trial-related functioning abilities. In *Dusky v. United States*, *supra,* 362 U.S. 402, the Court announced that the standard to determine a defendant's competence to stand trial must be whether the defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational

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[25] While the United States Supreme Court has defined incompetence to be executed in terms of mental illness (see *Panetti v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 2842, 2861; *Ford v. Wainwright* (1986) 477 U.S. 399, 406-411), the requirement of competence to stand trial protects different rights. Competence to stand trial is designed to ensure that a defendant can participate in his or her own defense and to ensure the reliability of the conviction and sentence and thus is essential to the accuracy of the trial process. On the other hand, competence to be executed is required by the retribution rationale for capital punishment and is irrelevant to the reliability of the guilt adjudication or the penalty decision. Since the goals of a trial and an execution are different, the standards for competence in those contexts are necessarily different.

as well as factual understanding of the proceedings against him." In *Pate v. Robinson, supra*, 383 U.S. 375, the Court had no occasion to cite to the *Dusky* test for competence in holding that the defendant, whose competence was in doubt, could not be deemed to have waived his right to a competency hearing and had been denied a meaningful hearing on the question of his competence to stand trial. The dissenting justices, however, confirmed that *Dusky* was the controlling standard even though they disagreed with the majority's decision. (*Id.* at pp. 388-399 (dis. opn. of Harlan, J.)[26] Reaffirming the *Dusky* test in *Drope v. Missouri* (1975) 420 U.S. 162, 171, the Court added a fourth prong to the test of competence: that the defendant must be able to assist in preparing his defense. Therefore, under the due process clauses of the Fifth and Fourteenth Amendments, to be competent to be tried a defendant must have a present ability to (1) consult with his lawyer with a reasonable degree of rational understanding; (2) assist in preparing his defense; (3) have a rational understanding of the

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[26] In his dissenting opinion, Justice Harlan, joined by Justice Black, stated:

> In language this Court adopted on the one occasion it faced the issue, "the 'test must be whether * * * (the defendant) has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.'' *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824. In short, emphasis is on capacity to consult with counsel and to comprehend the proceedings, and lower courts have recognized that this is by no means the same test as those which determine criminal responsibility at the [time] of the crime.

(*Pate v. Robinson, supra*, 383 U.S. at pp. 388-389.)

proceedings; and (4) have a factual understanding of the proceedings.[27]

In more recent times, the United States Supreme Court has continued to apply the *Dusky* standard. In *Medina v. California*, *supra*, 505 U.S. at p. 449, the Court again endorsed the *Dusky* test in holding that the burden of proving incompetence rests with the defendant under the "preponderance of the evidence" standard. In so doing, the Court focused on defining incompetence by the defendant's lack of capacity for the mental functioning required in a criminal prosecution: "Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Id.* at p. 450.)

In *Godinez v. Moran* (1993) 509 U.S. 389, the Court also applied the *Dusky* test to hold that the standard for competence to plead guilty or waive the right to counsel is the same as the standard for competence to stand trial, i.e., "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" (*Id.* at p. 396, quoting *Dusky v. United States*, *supra*, 362 U.S. at p. 402.) The Court, however, went further. It explained that a competency determination requires that the defendant's capacity for mental functioning be assessed in the context of the actual decisions that the defendant will be

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[27] For the sake of simplicity, Buenrostro refers to this as the "*Dusky*" test, although it is the *Dusky* test as elaborated by the high court in *Drope v. Missouri, supra*, 420 U.S. at p. 171.

called upon to make before and during trial. (*Godinez v. Moran*, *supra*, 509 U.S. at pp. 398-399.) As the Court noted, the ability to consult with counsel in a rational manner entails the ability to make important decisions about fundamental trial rights and basic trial tactics, such as whether to assert or waive the privilege against self-incrimination by testifying; whether to assert or waive the right to a jury trial; whether to assert or waive the right to confront and cross-examine prosecution witnesses; whether and how to present a defense including whether to assert any affirmative defenses. (*Ibid.*) In this way, the Court in *Moran* highlighted how the concept of competence to stand trial operates in the specific context of the defendant's particular prosecution.[28]

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[28] In his concurring opinion, Justice Kennedy, joined by Justice Scalia, questions some of the Court's analysis but concurs with its "operationalized" approach to competence. Explaining his view that the *Dusky* standard applies from the time of arraignment through the return of a verdict, Justice Kennedy asserted:

> Although the *Dusky* standard refers to "ability to consult with [a] lawyer," the crucial component of the inquiry is the defendant's possession of "a reasonable degree of rational understanding." In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify.

(*Godinez v. Moran*, *supra*, 509 U.S. at pp. 403-404 (conc. opn. of Kennedy, J.) The high court reasserted the *Dusky* test three years after *Moran* in *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354. Of course, the level of ability necessary to understand and assist may vary with the charges. The defendant's functional abilities must be considered in the context of the particular case or proceedings. (See Sadock & Sadock, eds., Kaplan & Sadock's Comprehensive Textbook of Psychiatry (8th ed. 2005) Vol. II, p. 3983 [an individual who is incompetent to stand trial in a complicated tax fraud case may not be incompetent for to stand trial on a simple misdemeanor charge].)

Although *Moran* may have offered the Court's fullest explication of competence, the decision is entirely consonant with its prior cases. Since *Dusky*, the constitutional concern in a competency determination has been on the defendant's mental capacity to understand and participate meaningfully in the trial. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 401, fn. 12.) The inquiry focuses not on cause but on effect: it asks *whether* the defendant has the trial-related abilities required under the due process clause to stand trial, but does not ask *why* the defendant lacks those requisite present abilities. To be sure, medical evidence is relevant to the question of competence. It may illuminate the history and/or etiology of a defendant's functional incapacity and therefore may help identify possible treatments to help restore competence. (See *Ake v. Oklahoma* (1985) 470 U.S. 68, 71-72.) But under the due process clause, a medical diagnosis is not, and never has been, a requirement for proving incompetence.[29] In short, under well-settled precedent, the question of whether or not the defendant suffers from a mental disorder is not decisive in a competency determination. Rather, competence to stand trial rests only on whether the defendant is *able* or *unable* – for whatever reason – to understand the

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[29] This is true even though both the federal statute at issue in *Dusky* and the Missouri statute at issue in *Drope* required that the defendant's incompetence result from a "mental disease or defect." (*Dusky v. United States*, *supra*, 362 U.S. at p. 402 [citing 18 U.S.C. § 4244 ("Hospitalization of Convicted Person Suffering From Mental Disease or Defect") which like 18 U.S.C. § 4241(d) ("Determination of Mental Competency to Stand Trial") predicates a finding of incompetence on proof that "the defendant is presently suffering from a mental disease or defect"]; *Drope v. Missouri*, *supra*, 420 U.S. at p. 173 [Missouri Rev. Stat. § 552.020(1) prohibited the trial of a "person who as a result of mental disease or defect" was incompetent.].)

proceedings and to assist defense counsel in a rational manner.[30]

The United States Supreme Court recently reiterated the *Dusky* test. In *Indiana v. Edwards* (2008) __ U.S. __, 128 S.Ct. 2379, the Court decided that a defendant who was competent to stand trial could be denied the constitutional right of self-representation when, due to severe mental illness, he lacked the mental capacity to conduct his trial defense unless represented. (*Id.* at pp. 2385-2388.) In so ruling, the Court explicitly endorsed the *Dusky* and *Drope* formulations, taken together, as establishing the constitutional competency standard. (*Id.* at p. 2383.) And in upholding the restriction of the self-representation right in limited circumstances involving severe mental illness, the Court focused on the defendant's functional trial incapacities – his inability "to carry out the basic tasks needed to present his own defense without the help of counsel." (*Id.* at p. 2386.)

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[30] Since the focus of a competency determination is exclusively on the defendant's trial-related abilities and not on a medical diagnosis, i.e., the cause of his incapacity, even conclusive evidence of serious mental illness does not necessarily compel an incompetence finding; the defendant still must meet the functional test of being unable to understand the proceedings or unable to assist counsel in a rational manner. (See *Sell v. United States* (2003) 539 U.S. 166, 181 [involuntary administration of antipsychotic drugs to a mentally ill defendant in order to render him competent to stand trial must not interfere significantly with his ability to assist counsel in conducting a trial defense]; see also *People v. Dunkle* (2005) 36 Cal.4th 861,890 [whether defendant was mentally ill, and if so, his precise diagnosis, was not determinative of competence]; *People v. Kurbegovic* (1982) 138 Cal.App.3d 731, 743 [defense expert testified that a paranoid schizophrenic can be competent to stand trial].)

Not surprisingly, the contours of the constitutional definition of competence to stand trial are followed in treatises and professional standards addressing competency evaluations. In 1984, after *Dusky* and *Drope* were decided, the American Bar Association adopted standards to guide competency litigation which expressly state that incompetence is not predicated upon a mental disorder. After setting out the *Dusky* test in Standard 7-4.1(b), the Standards then state:

> A finding of mental incompetence may arise from mental illness, *physical illness*, or disability; mental retardation or other developmental disability; *or other etiology so long as* it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

(ABA Criminal Justice Mental Health Standards, Standard 7-4.1(c) (1986, 1989), italics added.)

Psychological and psychiatric texts similarly recognize that the diagnosis of a mental disorder is not necessary to establish incompetence to stand trial. Kaplan & Sadock's Comprehensive Textbook of Psychiatry, upon which the United States Supreme Court relied for the definition of mental retardation in *Atkins v. Virginia* (2002) 536 U.S. 304, 309, is explicit on this point:

> An impairment that puts into question a defendant's competence is usually associated with a mental disorder or defect. However, *persons may be found incompetent to stand trial even if they do not have a mental disease or defect. The presence or absence of a mental illness is irrelevant* if the defendant can meet competency requirements. Legal criteria, not medical or psychiatric diagnoses, govern competency. Diagnosis is only relevant to the question of restoring, with treatment, the defendant's competency to stand trial.

(Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. II, p. 3983, italics added.)

The authors of Psychological Evaluations for the Courts agree. Applying the common law definition of competence and the test for competency set out in *Dusky*, they explain that "[i]t is important to remember that competency to stand trial is concerned primarily with present levels of functioning; that a finding of mental illness or need for treatment *is not analogous to, or necessarily even relevant to*, a finding of incompetence to stand trial." (Melton, et al., Psychological Evaluations for the Courts (3rd ed. 2007), p. 131, italics added.) They warn that a conclusive reliance on diagnosis will ill-serve defendants who deserve a legal and not a clinical determination. (*Id.* at p. 136.) Because a competency determination should focus on the defendant's trial-related functioning abilities, the authors emphasize the limited value of diagnostic categories, advise clinicians against making conclusions about competency, and instead instruct clinicians to detail in their reports evidence of the defendant's *present functioning* by correlating specific symptoms with specific competency-ability requirements, which will help enable the court (or jury) to reach its opinion. (*Id.* at pp. 135-136, 144; see also Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. II, p. 3983.)

Not only is a medical diagnosis not part of the test for competency as clearly established in the common law and by federal constitutional law, but the United States Supreme Court has warned against placing undue emphasis on medical opinion in competency determinations. In *Drope v. Missouri*, *supra*, 420 U.S. 162, the Court noted that a defendant's mental condition may be relevant to the legal issues involved in competency cases,

but recognized "'the uncertainty of diagnosis" and "the tentativeness of professional judgment" in the psychiatric field. (*Id.* at p. 176, quoting *Greenwood v. United States* (1956) 350 U.S. 366, 375.) The high court also has noted that numerous psychiatric conclusions may be reached on the same facts. (See *Ake v. Oklahoma* (1985) 470 U.S. 68, 81 [psychiatrists "disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms"]; see also *Drope v. Missouri*, *supra* at p. 176 ["it is not surprising that . . . the dispute centers on the inferences that could or should properly have been dawn from the [psychiatrist's] report"]; *Addington v. Texas* (1979) 441 U.S. 418, 430 ["the subtleties and nuances of psychiatric diagnoses are drawn from "subjective analysis"].) More recently in *Indiana v. Edwards*, *supra*, 128 S.Ct. 2379, the high court emphasized the inconstant nature of mental illness:

> Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.

(*Id.* at p. 2386.) Given that mental illness is variable and its diagnosis is often uncertain, it is not surprising that the United States Supreme Court consistently has ruled that the functional criteria alone, as laid down in *Dusky,* govern the competency decision.

B. In Requiring Proof Of A Mental Disorder Or Developmental Disability In Section 1367, The Legislature Materially Altered And Unconstitutionally Narrowed The Definition Of Incompetence To Stand Trial

Notwithstanding the United States Supreme Court's unwavering and unequivocal rule that a competency determination depends solely on

whether a defendant has the present ability to understand the proceedings against him and consult with counsel and assist in his defense, in 1974, the California Legislature enacted a requirement that the defendant be diagnosed with a recognized mental disorder or developmental disability in order to prove his incompetence. As discussed above, the term "sane" for competency purposes in the pre-1974 version of the Penal Code and in the common law, was the legal equivalent of the term "competent." However, the terms "mental disorder" or "developmental disability" are not equivalent terms for legal "incompetence." They are an added element to the definition of incompetence. As a result of the insertion of the words "mental disorder or developmental disability" into Penal Code section 1367, competency determinations in California in large part turn on the existence or nonexistence of a specific medical diagnosis, rather than on the trial-related functional capabilities as required by the Due Process Clause. By injecting this constitutionally extraneous element into the competency equation, a defendant in California can be found competent to stand trial even though he or she is unable to understand and assist as required by *Dusky*.[31]

Buenrostro acknowledges that the States have latitude, within the constraints of procedural due process, to establish their own procedures for making a competency determination. Thus, in *Medina v. California*, *supra*, 505 U.S. 437, the high court, affirming this Court, held that California's

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[31] In contrast to section 1367, a person is "not mentally competent to make a will" if he or she *either* lacks one of three specified functional abilities *or* suffers from a mental disorder with symptoms of delusions or hallucinations that affect his or her devising property. (Prob. Code, § 6100.5, subd. (a).)

procedural provisions regarding the presumption of competence and the requirement that the defendant carry the burden of proving his incompetence by a preponderance of the evidence, as set forth in section 1369, subdivision (f), did not violate due process. (*Id.* at pp. 445-453.) However, unlike the burden of proof or the presumption of competence, the requirement of a mental disorder or developmental disability is not a procedural provision. It is a substantive element of the definition of incompetence as the structure of the Penal Code's competency provisions make clear. Section 1367 sets forth the prohibition against trying a person who is incompetent and the definition of incompetence with its predicate of a mental disorder or developmental disability. Section 1368 establishes the procedure for appointing counsel, suspending the trial, ordering a competency hearing and discharging the jury when a doubt about the defendant's competence is declared. And section 1369 provides the procedure for a competency trial including the appointment of experts, the presentation of evidence, the order of final arguments, and the burden of proof and presumption of competence.[32] A State may not be constitutionally required "to adopt one procedure over another on the basis that it may produce results more favorable to the accused." (*Medina v.*

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[32] Pursuant to CALJIC No. 4.10, the final sentence of the instruction given to Buenrostro's jury contained both the substantive element of a "mental disorder" and the procedural provision regarding the burden of proof: "The effect of this presumption is to place upon the defendant the burden of proving by a preponderance of the evidence that she is mentally incompetent as a result of a mental disorder." (5 C-RT 1219.). The mixing of substantive and procedural provision in this sentence does not somehow convert the former into the latter. Section 1367 clearly delineates the substantive definition of incompetence that governs California competency trials.

California, *supra*, at p. 451.) However, it is not free to constrict the constitutional definition of incompetence as the Legislature did in 1974.

The 1974 amendment inserted "mental disorder" into section 1367, but did not define the term.[33] Consequently, it is impossible to know what definition of "mental disorder" courts are relying upon in competency determinations. Although the term is used elsewhere in the Penal Code, those provisions also fail to provide a definition.[34] The main source on mental disorders is The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR (2000) [hereafter "DSM"]), which both the United States Supreme Court and this Court have recognized as authoritative. (*Atkins v. Virginia*, *supra*, 536 U.S. 304, 308, fn.2; *In re Hawthorne* (2005)

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[33] In contrast, "developmental disability" is statutorily defined. (See § 1367, subd. (b) and § 1370.1, subd. (a)(1)(H).)

[34] For example, a "mental disorder" appears without definition in sections 28 and 29 (prohibiting evidence and expert testimony about "mental illness, mental disorder or mental defect" to show or negate the accused's capacity to form any mental state), section 261, subdivision (a)(1) (referring to "mental disorder or developmental disability" of victim in definition of rape), section 286, subdivisions (g)-(h) (referring to "mental disorder or developmental disability" of victim in definition of sodomy), and section 289, subdivisions (b)-(c) (referring to "mental disorder or physical or developmental disability" of victim in definition of forcible sexual penetration).

The only Penal Code provision with a definition appears to be section 2962, which addresses the treatment of mentally disordered prisoners upon their parole. The section employs the term "severe mental disorder" which obviously differs from "mental disorder" used in section 1367. This term is defined as an "illness, or disease or condition... that does not include epilepsy... or addiction to or abuse of intoxicating substances." This unique definition is limited to section 2962, which was enacted after the 1974 amendments to section 1367, and thus is inapplicable to the definition of "mental disorder" for purposes of incompetence to stand trial.

35 Cal. 4th 40, 48.) The DSM defines a "mental disorder" as:

> a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress...or disability...or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one.

(DSM-IV-TR, pp. xxxi.) However, even a brief survey of the DSM's classification of mental disorders shows that, in departing from the test for competence established by the United States Supreme Court, the 1974 version of section 1367 includes as "competent" defendants who would be "incompetent" under *Dusky* and its progeny.

First, the DSM contains a candid disclaimer that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.'" (DSM-IV-TR, pp. xxx.) The DSM recognizes that its classification of mental disorders excludes some "conditions for which people may be treated or that may be appropriate topics for research efforts." (*Id.* at p. xxxvii.) And it further cautions that the "clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination and competency." (*Ibid.*) In adopting a legal standard for competence in *Dusky* that looks only at the defendant's trial-related functioning abilities, the United States Supreme Court avoided these problems.

Second, the DSM and its commentators acknowledge problems in its classification system in which persons with clinically significant mental dysfunction or impairment are not considered to have a "mental disorder." Preliminarily, there is a basic problem with the very term "mental disorder," because it excludes mental dysfunction that is primarily caused by a physical medical condition. (DSM-IV-TR, pp. xxx, xxxv; see also Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. I, p. 1110.) In addition, the variability of mental illness and unknowns in the field of psychiatry and medicine at times prevent accurate diagnosis. As a result, the DSM provides for a diagnosis of "Not Otherwise Specified" which denotes significant distress or impairment, but does meet the criteria for any specific disorder. Like mental dysfunction caused primarily by a medical condition, this diagnosis does not amount to a mental disorder. (DSM-IV-TR, p. 4; see Kaplan & Sadock's Comprehensive Textbook of Psychiatry, *supra*, Vol. I, p. 1031.) Similarly, the DSM provides other diagnoses developed to account for conditions which are not "mental disorders," such as "Unspecified Mental Disorder," where diagnosis of a disorder not included in the DSM can be made, and "Other Conditions That May Be A Focus Of Clinical Attention," which includes conditions such as age-related cognitive decline, identity problems, drug-induced disorders, relational problems and problems related to abuse or neglect. (DSM-IV-TR, p. 731, 743, and Ch. 17.) These conditions, which may produce significant mental symptoms and require clinical attention, are not considered mental disorders.

Third, what is considered a mental disorder is in constant flux, and the DSM runs the risk of becoming increasingly out-of-pace with current

knowledge as reflected in the large volume of research published each year. (DSM-IV-TR, Introduction, pp. xxx.) Currently, numerous conditions with significant symptoms that could impair a defendant's functioning at trial are not included as mental disorders in the DSM. (DSM-IV-TR, Appendix B, "Criteria Sets and Axes Provided for Further Study," pp. 759-760.)[35] This reality poses a substantial problem if "mental disorder" in section 1367 is pegged to the DSM, and there does not seem to be an alternative definitional source. The DSM's ever-evolving definition of mental disorder renders section 1367's threshold element arbitrary and likely may result in inaccurate competency determinations. A defendant's symptoms of mental distress or dysfunction may not amount to a recognized mental disorder today, and thus regardless of a clear inability to understand and assist, he or she would be found competent and tried. But those very same symptoms may be an accepted mental disorder when the next edition of the DSM is published, and with the same inability to understand and assist, the defendant would be found incompetent. Only the psychiatric definition of "mental disorder" and nothing about the defendant would have changed. Such arbitrariness certainly would offend the due process clause of the Fourteenth Amendment.

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[35] Some of the symptoms associated with these conditions include, but are not limited to: impairment in cognitive functioning, unconsciousness, deficits in attention, deficits in concentration and memory, vertigo, aggression, depression, social inappropriateness, fatigue, hallucinations, delusions, disorganized speech and behavior, blunted emotional response, impoverished speech, change in "personality," loss of interest, insomnia, trance, narrowing of awareness of immediate surroundings, replacement of customary sense of personal identity by a new identity. (DSM-IV-TR, pp. 760-807.)

The problem posed by the mental-disorder element in section 1367 is real. Although many incompetent defendants may suffer from a recognized mental disorder or developmental disability, some do not. And still others may have impaired trial-related functioning for wholly unidentified reasons. In deciding that irrespective of a defendant's inability to understand and assist in his case, medical conditions not identified as mental disorders or developmental disabilities and unknown causes cannot render a defendant legally incompetent to stand trial, the Legislature allows for the trial of a subset of defendants who, in fact, may be incompetent.

In addition, this Court already has held that certain conditions – such as eye problems, dizziness, migraines and epileptic seizures – are not a mental disorder or developmental disability for purposes of proving incompetence. In *People v. Rodriguez* (1994) 8 Cal. 4th 1060, this Court ruled that the defendant did not present substantial evidence of incompetence so as to require a competency hearing. (*Id.* at p. 1109-1112.) Reciting section 1367's definition of incompetence, the Court gave emphasis to the threshold requirement of a "mental disorder or developmental disability." (*Id.* at p. 1109.) The Court found, inter alia, that the evidence that the defendant had suffered from migraine headaches all his life and had an epileptic seizure as a child, which one expert reportedly opined caused brain damage, did not suggest "a mental disorder or developmental disability." (*Ibid.*) Similarly, in *People v. Howard* (1992) 1 Cal.4th 1132, 1163, the Court highlighted the requirement of a "mental disorder" and ruled that nothing about the defendant's report of suffering from uveitis, an inflammation of the eyes which compromised his vision and caused headaches and dizziness, suggested that he was mentally incompetent.

Moreover, rather than focus on *Dusky*'s functional criteria, courts have become entangled in discussing the difference between a mental disorder and a developmental disability or deciding whether the evidence supported a diagnosis of either one. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1392; *People v. Castro* (2002) 78 Cal. App.4th 1402, 1418 (2002); *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 487.) Under *Dusky* and its progeny, this medical-classification discussion should not play a decisive role in a competency determination.

The only purpose of a competency hearing is to guarantee that a defendant who is unable to participate meaningfully in his or her defense is not tried. (*Godinez v. Moran, supra*, 509 U.S. at p, 402 ["Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel"]; *Huu Thanh Nguyen v. Garcia* (9th Cir. 2007) 477 F.3d 716, 724, quoting *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 469 [the sole purpose of the competency hearing is the "'humanitarian desire to assure one who is mentally unable to defend himself not be tried upon a criminal charge'"].) A State must give effect to this goal, but generally has the power to establish its own procedures to satisfy constitutional mandates for criminal prosecutions. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 317 [the high court left to the States "the task of developing appropriate ways to enforce the constitutional restriction" on executing people with mental retardation]; *Ford v. Wainwright* (1986) 477 U.S. 399, 416-417 [the high court left to leave to the States "the task of developing appropriate ways to enforce the constitutional restriction" on executing people who have become insane].) Certainly, the States are free to adopt competency standards that

are more protective of the defendant's right not to be tried when incompetent than the *Dusky* formulation (*Godinez v. Moran, supra,* 509 U.S. at p. 402), but they may not enact standards that are less protective. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 174 (conc. opn. of Souter, J.).)

Section 1367 does just that. Its requirement of a "mental disorder or developmental disability" as a threshold for proving incompetence excludes from protection defendants whom the United States Supreme Court in *Dusky* and its progeny has declared cannot be tried. This narrowed definition of incompetence increases the risk of an erroneous determination of competence which not only has dire consequences for the defendant, but also "threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself." (*Cooper v. Oklahoma*, *supra*, 517 U.S. at pp. 364, 369 [state rule requiring defendant to prove incompetence by clear and convincing evidence is incompatible with due process].) Instructing Buenrostro's jury with the section 1367 definition of incompetence, which unconstitutionally requires proof of a mental disorder, resulted in a fundamentally flawed competency determination in violation of the due process clause of the Fourteenth Amendment.

C. The Definition of Competence to Stand Trial In Section 1367 Omits Key Elements Which Are Clearly Established and Required By The United States Supreme Court

Like its definition of incompetence, California's definition of competence to stand trial is unconstitutional. Section 1367 and CALJIC No. 4.10, as applied in Buenrostro's trial, omit two key elements of the definition of competence enunciated in *Dusky* and reiterated in subsequent United States Supreme Court decisions: (1) they do not require "a rational as well

as factual" understanding of the proceedings, and (2) they do not specify that the requirement is a sufficient "present" ability to understand the proceedings and consult with counsel and assist in the defense. (See *Dusky v. United States*, *supra*, 362 U.S. at p. 402; *Cooper v. Oklahoma*, *supra*, 517 U.S. at p. 354.)[36] Each of these parts of the *Dusky* formulation is significant and must be adjudicated in a competency determination. But they are not included in a competency decision under 1367, which requires only that the defendant "is capable of understanding the nature and purpose of the proceedings against her" and "is able to assist her attorney in conducting her defense in a rational manner." (5 C-RT 1219; CALJIC No. 4.10.)

In its decisions, this Court has recited both the California standard and the *Dusky* test for competence. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 401; *People v. Young* (2005) 34 Cal.4th 1149, 1216; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364].) While noting the separate standards, the Court has treated them as substantially the same:

> We have previously observed that the language of section 1367, from which CALJIC No. 4.10 is drawn, does not match, word for word, that of *Dusky*. But as the Court of Appeal noted in *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 177 [143 Cal.Rptr. 398], "To anyone but a hairsplitting semanticist, the two tests are identical."

(*People v. Stanley*, *supra*, 10 Cal.4th at p. 816; accord, *People v. Jablonski*, *supra*, 37 Cal.4th at p. 808; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 893.)

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[36] This Court has heard and rejected other challenges to the statutory language and jury instructions (see, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 807-808; *People v. Dunkle, supra*, 36 Cal.4th at p. 864; *People v. Stanley* (1995) 10 Cal.4th 764, 816-817), but to Buenrostro's knowledge, it has not addressed the claims she presents here.

This conclusion is not warranted with regard to the "mental disorder or developmental disability" requirement, as shown above, or with regard to the defects in section 1367 that Buenrostro raises here – the "rational as well as factual understanding" showing and the defendant's "present ability" showing that *Dusky* demands. These components of the *Dusky* standard are substantive, and their omission cannot be brushed aside as de minimis.

The requirement of both a "rational" and "factual" understanding of the proceedings serves two different purposes. To be competent, a defendant's understanding of the proceedings must be based on reason, as opposed to delusion, fantasy or some other non-reality based perception, and the defendant must be able to grasp the facts. As the authors of Psychological Evaluations for the Courts explain, "understanding must be factual *and* rational; factual understanding alone is not enough." (Melton et al., Psychological Evaluations for the Courts, *supra*, p.128.) "Rational" and "factual" have discrete meanings, and the California definition of incompetence given to Buenrostro's jury is constitutionally deficient in not requiring both with regard to her understanding of the proceedings.

Moreover, the requirement the defendant have a "present" ability to consult with and assist her lawyer is significant because, unlike the test for criminal responsibility with its retrospective inquiry and civil commitment proceedings with its predictive inquiry, competence to stand trial is firmly grounded in the present.[37] The competency determination must turn only on

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[37] As discussed in the next section of this argument, prosecution witness, Dr. Moral, offered his prediction that once Buenrostro became reasonably comfortable with her attorney, she would be able to cooperate with him, but he did not testify that she was presently able to do so. (4 C-RT 857.)

the defendant's present ability to function at her trial. (See *In re Ricky S.* (2008) __ Cal.App.4th __, 82 Cal.Rptr.3d 432, 435 [reversing finding of competence because "the question is not can the [defendant] become competent in the future with assistance; rather the question is whether he is presently competent"].) The lack of the "present ability" language in CALJIC 4.10 as given at Buenrostro's trial is all the more problematic given the erroneous requirement of the medical diagnosis of a mental disorder in the instruction's definition of incompetence. Such a diagnosis may imply a static condition which, given the variability and episodic nature of mental illness, often is simply not the case. Whether the defendant suffers from a mental disorder, permanent or otherwise, is irrelevant because the pertinent inquiry under *Dusky* is whether *at present* the defendant possesses adequate functioning abilities to participate effectively in her trial. Thus, omitting the temporal aspect of the defendant's capability was a significant, constitutional defect in the definition of competence given to Buenrostro's jury.

D. Use Of The Unconstitutional Competency Instruction Requires Reversal Of The Entire Judgment

As shown above, the instruction given pursuant to section 1367 and CALJIC 4.10, which predicates a finding of incompetence to stand trial upon proof of a "mental disorder or developmental disability" and omits key elements of the *Dusky* definition of competence, departed from the standards laid down by the United States Supreme Court and resulted in a flawed competency determination in violation of Buenrostro's Fourteenth Amendment due process rights. The unconstitutional instruction requires reversal of all the verdicts. Most constitutional errors can be subject to harmless-error review under *Chapman v. California* (1967) 386 U.S. 18.

(*Arizona v. Fulminante* (1991) 499 U.S. 279, 306.) Some, albeit a limited class of constitutional errors, defy harmless-error analysis. (*Id.* at p. 309.) These "structural" errors affect "the framework within which the trial proceeds" (*id.* at p. 310) and therefore require automatic reversal. Instructional errors that omit, misdescribe or presume one element of an offense are not considered structural because they do "not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder v. United States* (1999) 527 U.S. 1, 9, citing *Rose v. Clark* (1993) 478 U.S. 570, 577-578, original italics.) Their harm can be judged by harmless-error review. (*Ibid.*)[38] In addition, reversal is required when a case is submitted to the jury on both constitutional and unconstitutional theories, and the reviewing court cannot determine with certainty which theory the jury selected. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526; *Yates v. United States* (1957) 354 U.S. 298, 312, overruled on other grounds, *Burks v. United States* (1978) 437 U.S. 1; *Stromberg v.*

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[38] See, e.g., *Washington v. Recuenco* (2006) 548 U.S. 212, 219-222 (failure to submit "armed with a firearm" sentencing factor to jury was not structural error but was subject to harmless-error review); *Neder v. United States* (1999) 527 U.S. 1, 9-10 (erroneous instruction omitting element of materiality in fraud prosecution held subject to harmless-error review); *California v. Roy* (1996) 519 U.S. 2, 5 (erroneous instruction misdescribing mens rea requirement for aiding and abetting in robbery felony murder prosecution held subject to harmless-error review); *Yates v. Evatt* (1991) 500 U.S. 391, 407-411 (applying harmless-error standard to reverse accomplice murder conviction where jury instruction on malice contained unconstitutional presumption); *Pope v. Illinois* (1987) 481 U.S. 497, 504 (remanding for harmless-error review in an obscenity prosecution after finding constitutional error in using a community-standards test rather than the First Amendment's reasonable-person test for determining whether the allegedly obscene material lacked serious value).

California (1931) 283 U.S. 359, 368.)

The instructional errors here require automatic reversal. Preliminarily, the competency instruction contained not just a single error, as in the United States Supreme Court decisions applying harmless-error analysis to instructional error (see *ante* page 82, footnote 38), but rather had multiple defects. The erroneous requirement of a "mental disorder or developmental disability," together with the failure to require a "rational as well as factual" understanding of the proceedings and to specify that it is the defendant's "present" ability to consult with her lawyer that must be determined, corrupted the basic legal guidance given to the jury. The consequences of these combined errors are "unquantifiable and indeterminate, unquestionably qualify[ing] as 'structural error.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [defective reasonable-doubt instruction was structural error].) Unlike a single misdescribed or omitted element, the cumulative instructional errors rendered the trial fundamentally unfair and an unreliable vehicle for determining Buenrostro's competence. (Cf. *Neder v. United States*, *supra*, 527 U.S. at p. 9.)

Moreover, the erroneous requirement of "a mental disorder or developmental disability" was not akin to an omission, misdescription or presumption of an element of an offense, but rather provided the jury with an unconstitutional theory for finding Buenrostro competent. This threshold requirement for a verdict of incompetence permitted the jury to truncate the entire competency inquiry without ever reaching the constitutionally-mandated questions. If the jury concluded that Buenrostro did not suffer from a mental disorder, then its task was finished. It had to return a verdict of competence because she had failed to prove the statutory prerequisite for

incompetence and thus had failed to carry her burden of proof, *even* if the jury had believed the evidence proved her unable to understand the proceedings and to assist her attorney in a rational manner. Indeed, if the jury found against Buenrostro on the predicate mental-disorder element, there was no reason for the jury even to consider the elements required under *Dusky*. To paraphrase the high court in *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 526, the mental-disorder requirement enabled the jury to deliver a general verdict that could have rested on different theories of competence, one of which was constitutionally invalid. Because the jury returned a general verdict without findings as to each element, there is no way to determine whether or not the unconstitutional mental-disorder element short-circuited the constitutional competency determination or otherwise influenced the verdict.[39]

The evidence and argument here preclude this Court from concluding with certainty that the jury did not rest its verdict on the unconstitutional mental-disorder element. (See *Zant v. Stephens* (1983) 462 U.S. 862, 881 [cases applying *Stromberg* rule of reversal "all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested"]; *Lara v. Ryan* (9th Cir. 2006)

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[39] The verdict form returned by the jury simply stated, "We, the jury in the above-entitled action, find the defendant, DORA BUENROSTRO, is legally competent to be tried for a criminal offense." (Sealed 5 SCT 173.) Had there been a special verdict form with specific affirmative findings on the constitutional criteria for competence as set forth in *Dusky* and *Drope*, then the erroneous "mental disorder or developmental disability" element could be deemed harmless beyond a reasonable doubt. But no assurance can be drawn from the general verdict that the jury, in fact, satisfied the dictates of due process in finding Buenrostro competent to stand trial.

455 F.3d 1080, 1085-1087 [recognizing and applying limited exception to *Stromberg* rule of reversal when the reviewing court is "absolutely certain" that the jury relied on the legally correct theory].) As set forth in the Statement of Facts, Section I.A., both the defense and the prosecution placed heavy emphasis on the question of whether Buenrostro suffered from a mental disorder. In fact, the vast majority of evidence addressed this threshold issue. The defense presented testimony from mental health professionals from the Riverside County Jail about Buenrostro's irrational and psychotic behavior after her arrest and from her relatives about her bizarre behavior both before and after the homicides. In response, the prosecution offered testimony from a mental heath professional at the jail showing that whatever symptoms Buenrostro may have displayed previously, she showed no signs of mental illness shortly before the competency trial.

In addition, five expert witnesses offered their opinions, which presented a sharp dispute, about whether Buenrostro had a mental disorder. The defense experts, Dr. Perrotti, Dr. Kania, and Dr. Mills, concluded that Buenrostro had a recognized psychotic disorder, but disagreed about the diagnosis. They found variously that she suffered from paranoid schizophrenia (2 C-RT 312 [Dr. Perrotti]); that she did not necessarily suffer from schizophrenia, but did suffer from a psychotic delusional disorder (2 C-RT 491-492, 546 [Dr. Kania]); and that she did not have schizophrenia, but did have a significant psychotic, most likely delusional, disorder (4 C-RT 755, 763 [Dr. Mills]). Meanwhile, the court-appointed experts, Dr. Moral and Dr. Rath, who testified as prosecution witnesses, concluded that Buenrostro had no mental disorder. Dr. Moral observed that Buenrostro showed no signs, and denied symptoms, of a psychotic disorder (4 C-RT

846), while Dr. Rath opined that Buenrostro did not have a major mental illness, but rather deliberately feigned mental illness on her MMPI test (4 C-RT 983, 952), a finding that the defense experts vigorously disputed (2 C-RT 280, 485-486; 3 C-RT 515-516).

Consistent with the importance of the "mental disorder or developmental disability" element in the California definition of incompetence, the attorneys focused on this issue in their arguments to the jury. Arguing first, the prosecutor spent much of his time attacking the notion that Buenrostro suffered from a mental illness at all or, in the alternative, had a mental disorder at the time of the competency trial, and he highlighted Dr. Rath's opinion that she was malingering. (See 5 C-RT 1175-1177, 1180, 1182, 1183, 1884, 1185-1186, 1187, 1188.) Approximately 12 transcript pages of his less than 18-page argument focused or touched on the mental disorder issue. (See *ibid.*; 5 C-RT 1172-1190.) Responding, defense counsel underscored the evidence of Buenrostro's mental illness, repeatedly referring to her hallucinations, delusions and paranoia, refuting the evidence of malingering, and arguing that her psychosis prevented Buenrostro from being able to cooperate and participate meaningfully in her trial. (See 5 C-RT 1193, 1994, 1995-1196, 1197, 1198, 1200, 1201, 1203, 1204, 1205, 1207.) Approximately 13 transcript pages of his 16-page argument addressed the mental disorder question. (See *ibid.*; 5 C-RT 1191-1207.) In this way, the mental-disorder question dominated and shaped the competency trial.

The prosecutor's closing argument increased the likelihood that the mental-disorder element distorted the inquiry into Buenrostro's competence. The prosecutor first assessed the evidence regarding whether Buenrostro had

a mental disorder: "You heard other doctors say there was [sic] psychotic symptoms, you heard others say no symptoms; so, what are you left with as jurors? [¶] Let's talk about what is real here. Doctors appear to get conflicting information and give confused diagnoses." (5 C-RT 1182-1183.) As the prosecutor discussed and the jury later was instructed, Buenrostro was presumed competent and had the burden of proving her incompetence by a preponderance of the evidence (5 C-RT 1188-1189, 1214, 1219.) The prosecutor then explained the significance of these instructions: "If the evidence is so evenly balanced that you were unable to find that the evidence on either side of an issue preponderates, your finding on the issue must be against the party who had the burden of proving it, the Defense." (5 C-RT 1189.)

Under the instructions, as discussed by the prosecutor, if the jury found the mental disorder evidence evenly balanced, then it had to find against Buenrostro on that issue. In effect, the prosecutor told the jury that the mental-disorder requirement could render the other criteria for competence irrelevant. Following his argument and the instructions pursuant to section 1367, the jury could have returned a verdict that Buenrostro was competent to stand trial without reaching decisions on her ability to understand and her ability to assist. Indeed, this was precisely Dr. Rath's position. Because he concluded that Buenrostro did not suffer from mental illness, he believed he did not need to evaluate her ability to understand the nature of the proceedings or her ability to assist her attorney in a rational manner. (4 C-RT 987.) At the same time, under the instructions and the prosecutor's argument, the jury could have rendered a verdict of competence, even though it unanimously concluded that

Buenrostro was unable to understand the proceedings or unable to assist her attorney in a rational manner. Thus, there is no basis for concluding, let alone grounds for certainty, that the jury affirmatively found the ability-to-understand and the ability-to-assist components of the competency standard and thus rested its verdict on a constitutionally valid theory.

In short, the extraneous "mental disorder or developmental disability" element inserted an unconstitutional theory into the competency equation (see *Dusky v. U.S.* (1960) 362 U.S. 402), undermined the framework within which the competency determination was to occur (see *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310) and thus vitiates the jury's entire verdict (see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p 281). Under the circumstances here, reversal per se is required.

Even assuming, arguendo, that the *Chapman* harmless error standard governed this error, reversal still would be required. The evidence simply does not permit the conclusion that the erroneous mental-disorder requirement "did not contribute to the verdict obtained" (*Chapman v. California*, *supra*, 386 U.S. at p. 24), let alone that the combination of instructional errors was harmless beyond a reasonable doubt. The harmless-error inquiry must be: Is it clear beyond a reasonable doubt that a rational jury would have found Buenrostro competent absent the error? (See *Neder v. United States*, *supra*, 527 U.S. at p. 18 [stating inquiry in criminal trial].) But even assuming that a rational jury reached the ability-to-understand and the ability-to-assist criteria, the State cannot prove beyond a reasonable doubt that a rational jury would have found Buenrostro competent. These elements plainly received far less attention at trial than the mental disorder requirement for incompetence. Certainly, the parties addressed these

elements, but compared with the mental disorder issue, they were given less evidentiary emphasis.

The evidence – four of the five expert witnesses – established that Buenrostro had a basic understanding of the nature of the proceedings against her, although, in accordance with the instruction given to the jury, the experts did not address whether Buenrostro's understanding was both rational and factual as *Dusky* requires. But the weight of the evidence showed that Buenrostro knew she was charged with the murders of her children. The prosecutor argued that the defense had conceded this element (5 C-RT 1178-1180), while defense counsel did not press the "ability to understand" issue with the jury (5 C-RT 1206).

The real dispute was whether Buenrostro was "able to assist her attorney in conducting her defense in a rational manner." (5 C-RT 1218.) And on this critical point, the weight of the evidence did not point overwhelmingly toward competence. On the contrary, the defense evidence was substantial, particularly in light of the governing preponderance-of-the-evidence standard. Buenrostro's sister, Martha Gudino, and the defense paralegal, Catherine Moreno, both testified about Buenrostro's irrational and unexplained refusal to sign authorizations for the release of information her attorney needed. (2 C-RT 456-460; 5 C-RT 1084-1085.) Gudino testified that Buenrostro thought her attorney and her family were against her. (2 C-RT 460.) According to Moreno, Buenrostro would not discuss her involvement in the killings with Moreno, nor would Buenrostro give information about her case to her attorney. (5 C-RT 1099-1100.)

The defense experts explained that Buenrostro's mental illness, especially her delusion that her attorney was plotting with the prosecutor and

judge against her, prevented her from being able to cooperate with and assist her attorney. (2 C-RT 277, 279, 298-299, 302, 303-305, 308, 349, 361.) According to the defense experts, who had spent much more time interviewing Buenrostro than had the court-appointed experts, she was unable to listen to her attorney's advice, angrily rejected views that diverged from her own views, and grew angry and paranoid when pressed to deal with issues in the case. (2 C-RT 306-307, 309, 502.) Plainly put, she was unable to work with her attorney if she had to confront information that diverged from her own delusional belief system. (2 C-RT 492; 4 C-RT 817-818.)

Countering this evidence, Dr. Moral believed that Buenrostro "would be able to rationally cooperate" once she became reasonably comfortable with her attorney (4 C-RT 857), and Dr. Rath assumed that Buenrostro already was cooperating with her attorney (4 C-RT 829-851, 857, 952). But the bases for their opinions were open to serious question. Dr. Moral based his predictive view, which did not speak to Buenrostro's then-present ability to assist counsel, on two factors: (1) his unverified assumption that Buenrostro's initial complaints about her attorney were not irrational since he had heard similar complaints from defendants in other cases and (2) Buenrostro's unverified representations to him that she was cooperating with her attorney. (4 C-RT 930-932.) Dr. Moral never called attorney Frank Scott or paralegal Catherine Moreno to check whether Buenrostro's assertions were true. (4 C-RT 931.) In this way, Dr. Moral did not address the pertinent question about Buenrostro's present ability to assist. Instead, he simply offered the jury his own speculation about Buenrostro's future capabilities, which was based solely on his experience with other defendants and Buenrostro's unconfirmed reports that were entirely in keeping with her

repeated assertions of her own competence.

Dr. Rath's testimony also was unenlightening. Dr. Rath, who only interviewed Buenrostro the night of her arrest as part of the prosecution's investigation team, opined that Buenrostro already was cooperating with her attorney. He based his conclusion on records purportedly indicating that she had followed her lawyer's advice not to talk to some people (4 C-RT 952), an assertion that was directly contradicted by paralegal Moreno (5 C-RT 1084). And Dr. Rath believed that Buenrostro's conduct was volitional because she twice refused to be interviewed by him. (4 C-RT 953.) Not only was Dr. Rath's opinion about Buenrostro's capacity for cooperation, like that of Dr. Moral, unsupported, but neither court-appointed expert fully addressed the constitutional question, i.e., her present ability to assist her attorney in a *rational* manner in conducting her defense.

The totality of this evidence demonstrates prejudice under the *Chapman* test. The defense evidence that Buenrostro was unable to assist her attorney was stronger than the prosecution's evidence to the contrary. This balance precludes a finding that California's requirement of a mental disorder as a prerequisite for proving incompetence was harmless beyond a reasonable doubt. Indeed, the evidentiary picture here does not remotely approach the "uncontroverted evidence" deemed sufficient to establish harmlessness when the error was the omission of an element of a criminal offense (*Neder v. United States*, *supra*, 527 U.S. at p. 18), or the substantial evidence deemed sufficient to establish harmlessness when the error was an unconstitutional presumption (*Clark v. Rose* (6th Cir. 1987) 822 F.2d 596, 600 [on remand from the United States Supreme Court]). The State cannot carry its burden of proving the error was not prejudicial, and therefore the

entire judgment must be reversed.

E. The Claim Is Cognizable On Appeal, Even Though There Was No Objection To The Competency Instruction At Trial

Buenrostro's claim is cognizable on appeal, although she did not raise it in the trial court. To be sure, the forfeiture doctrine holds that "'an appellate court will not consider claims of error that could have been – but were not – raised in the trial court.'" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113, quoting *People v. Vera* (1997) 15 Cal.4th 269, 275.) However, there are two exceptions to this general rule that permit Buenrostro to assert, and allow this Court to adjudicate, her constitutional challenge to the competency instruction given at her trial.

First, section 1259 specifically provides that a legally erroneous instruction affecting the defendant's substantial rights is reviewable without the requirement of objection at trial, and this Court regularly has decided the merits of such claims. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Buenrostro's claim clearly qualifies for consideration under section 1259. Because she "had the right to *correct* instructions on the elements of" competence and incompetence to stand trial, and because the instructional errors affected her substantial rights, she did not forfeit the errors by failing to object to the use of CALJIC No. 4.10. (*People v. Prieto* (2003) 30 Cal.4th 226, 268; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 [defendant's due process challenge to instruction that two individuals were "peace officers" in prosecution for fleeing or attempting to allude pursuing officers was cognizable on appeal under section 1259 despite failure to object to instruction at trial]; *People v.*

Hernandez (1991) 231 Cal.App.3d 1376, 1383 [defendant's due process and First Amendment challenge to instruction defining the word "obscene" in prosecution for making telephone calls with intent to annoy was reviewable under 1259 without a trial objection].)[40]

Second, this Court has discretion to review legal claims in the absence of an objection at trial, even when an objection usually is required to preserve an issue for appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [an appellate court is "generally not prohibited from reaching a question that has not been preserved for review by a party"].) The Court has held "that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts" and has recognized that California courts have "examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved . . ., the asserted error fundamentally affects the validity of the judgment . . ., or important issues of public policy are at issue . . .." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, citations omitted; see *People v. Vera* (1997) 15 Cal.4th 269, 276 ["[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights"], abrogated in part on other grounds, *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985; *People v. Marchand* (2002) 98

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[40] This claim is cognizable without an objection at trial because it asserts that the competency instruction was *erroneous*, not that it was correct as a matter of law but was too general or incomplete in which case the defendant is obligated to request a clarifying instruction at trial to preserve the issue for appeal. (*People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

Cal.App.4th 1056, 1061; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29 [all adjudicating a constitutional challenge that the defendant did not raise in the trial court].)

Buenrostro's constitutional challenge to section 1367 and CALJIC No. 4.10 meets this test. It presents a pure question of law that requires no additional factual development below, involves enforcement of a penal statute, and affects both the validity of a capital judgment and significant policy concerns. Not only can an appellate court always review a question of law that arises on undisputed facts (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742), but the court should do so when the issue involves an important question (*Fisher v. City of Berkeley* (1984) 37 Cal.App.3d 644, 654). The definition of incompetence to stand trial goes to the heart of California's authority to prosecute those accused of committing crimes. As discussed previously, the due process right not to be tried unless competent is one of the most important protections in the criminal justice system, which the state courts must "jealously guard[]." (*Pate v. Robinson, supra*, 383 U.S. at p. 385; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1277.) Consequently, the trial judge has an ever-present duty to protect that right which includes the sua sponte duty – which cannot be waived by the defendant – to hold a competency hearing whenever substantial evidence is raised of incompetency (*Pate v. Robinson, supra*, 383 U.S. at p. 385; *People v. Blair* (2005) 36 Cal.4th 686, 711) and a sua sponte duty to instruct, and instruct correctly, on competency (see CALJIC No. 4.10; see also CALCRIM 3451, Bench Notes, p. 1022 "Present Mental Competence of Defendant.") And as the state's highest court, it is the responsibility of this

Court to ensure that the trial courts carry out their sua sponte duties in accordance with not only California law, but the federal Constitution. (U.S. Const., art. VI, cl. 2; see *Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 510 ["the federal Constitution's supremacy clause makes that law 'the supreme Law of the Land' and as binding on the citizens and courts as state laws"].) Thus, both the fundamental importance of a constitutional determination of Buenrostro's competence to the reliability of the capital judgment against her and the overriding importance of using constitutional definitions of competence and incompetence in criminal trials throughout California warrant this Court's review of Buenrostro's challenge to the instruction given in her case pursuant to section 1367 and CALJIC No. 4.10.

F. Conclusion

For all the foregoing reasons, this Court should adjudicate Buenrostro's claim on the merits; should hold that (1) section 1367's requirement of proof of a mental disorder or developmental disability to establish incompetence to stand trial is unconstitutional; (2) that section 1367's failure to require both a rational as well as factual understanding of the proceedings and a present ability to assist counsel in a rational manner to establish competence to stand trial is unconstitutional; (3) that these defects, individually and together, violated Buenrostro's right to due process under the Fourteenth Amendment; and (4) that these errors require reversal of the entire judgment.

II. THE TRIAL COURT ERRONEOUSLY PRECLUDED REBUTTAL TESTIMONY BY PSYCHOLOGIST SHERRY SKIDMORE CHALLENGING THE VALIDITY OF THE OPINION OF COURT-APPOINTED EXPERT, CRAIG RATH, THAT BUENROSTRO WAS COMPETENT TO STAND TRIAL

At the request of the prosecutor, Craig Rath, Ph.D., was appointed by the trial court to conduct a competency evaluation of Buenrostro. Dr. Rath previously had been hired by the district attorney's office to conduct an investigative interview of Buenrostro within a day of the killings. After he was appointed by the trial court, Buenrostro refused to meet with Dr. Rath, and he was unable to conduct a competency evaluation. To substitute for his lack of a formal competency assessment, Dr. Rath used his prior investigative interview of Buenrostro as the basis for his opinion that she was competent to stand trial a full year later.

Defense counsel attempted to impeach Dr. Rath by establishing that his interview of Buenrostro, as well as his assessment of her competence, violated the ethical standards governing forensic psychologists. Dr. Rath insisted that some of the ethical rules cited by defense counsel did not apply to him and that he violated no professional standards. In rebuttal, defense counsel sought to present the testimony of Sherry Skidmore, Ph.D., a forensic psychologist, to refute Dr. Rath's testimony about his professional, ethical obligations. The trial court excluded Dr. Skidmore's testimony as collateral. The trial court's ruling was an abuse of discretion (see *People v. Raley* (1992) 2 Cal.4th 870, 912 [stating standard for review]), and resulted in a violation of Buenrostro's state and federal constitutional rights to due process, a fair trial, confrontation, compulsory process, and to present evidence in support of her case. (Cal. Const., art. I, §§ 15, 16; U.S. Const.,

6th & 14th Amends.) Because Dr. Rath's testimony – and thus his credibility – was crucial to the prosecution's case, the erroneous exclusion of Dr. Skidmore's impeachment evidence was prejudicial and requires reversal of the entire judgment.

A. Defense Counsel Sought To Introduce, And The Trial Court Excluded, The Testimony Of Dr. Skidmore To Impeach Dr. Rath's Assertions That His Competency Evaluation Of Buenrostro Complied With Governing Professional Standards

During the competency trial in October-November 1995, clinical psychologist Craig Rath, Ph.D., testified as a prosecution witness. Dr. Rath interviewed Buenrostro at the request of the Riverside County District Attorney on October 28, 1994, the day after two of the killings and the day of her arrest. (4 C-RT 948-949, 987-988.) She had waived her *Miranda* rights and had agreed to speak to a doctor. (*Ibid.*) Dr. Rath interviewed Buenrostro for approximately an hour and a quarter and administered a partial MMPI, which took another two and a half hours. (*Ibid.*; 4 C-RT 977, 980.) The purpose of the interview was primarily to gather information for use in court. (5 C-RT 999.) Dr. Rath told Buenrostro that his report would go to the District Attorney's office "to consider what they're going to do about the case, whether they will file it, how they will file it." (4 C-RT 994.)[41]

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[41] According to Dr. Rath, the district attorney also asked him to evaluate Buenrostro's suicide potential. (4 C-RT 998.) He told Buenrostro that "the authorities" had asked him to make that assessment. (4 C-RT 994.) However, as Dr. Rath admitted, the jail's mental health unit had psychologists and psychiatrists who provided 24-hour coverage to assess the suicide potential of its detainees. (4 C-RT 995, 998.) Dr. Rath asked Buenrostro only three questions relating to her risk of suicide, and her

On March 14, 1995, the Riverside County Superior Court appointed Dr. Rath to assess Buenrostro's competency to stand trial. (5 C-RT 1042.)[42] The prosecutor had recommended Dr. Rath to the trial court. Dr. Rath twice attempted to speak to Buenrostro in the Riverside County Jail, but he was unable to interview her. (4 C-RT 950-951.) On March 24, 1995, a jail employee explained that Buenrostro refused to be handcuffed as required for her transport to the interview, and on April 3, 1995, a jail employee reported that Buenrostro refused to meet with Dr. Rath. (4 C-RT 949-951; 5 C-RT 1002.) Dr. Rath did not seek assistance from defense attorney Scott in securing an interview with Buenrostro. (5 C-RT 1002.) At the competency trial, Dr. Rath testified that, based on his October 1994 interview and MMPI testing, Buenrostro was competent to stand trial. (4 C-RT 951-954.)

On cross-examination, defense counsel attempted to impeach Dr. Rath in part by establishing that his competency assessment violated ethical standards for forensic psychologists. (See 4 C-RT 988-1000; 5 C-RT 1001-1006, 1039-1040, 1049.) As a general matter, Dr. Rath agreed that the standards contained the Ethical Handbook of the American Psychological Association (hereafter "APA standards") governed his professional

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answers apparently negated the concern about suicide. (4 C-RT 995.) Nevertheless, he continued to question her for over an hour about her background, family, work, and marital history.

[42] After the trial court granted defense counsel's motion for a competency evaluation, the prosecutor requested that the court appoint "Dr. Rath for the People." (1 C-RT 4.) He did not tell the court that he already had retained Dr. Rath to work on the case for the prosecution. (See 1 P-RT 35.) Defense counsel Scott was present at this hearing and did not object to Dr. Rath's appointment. (5 C-RT 1043-1044.)

conduct. (4 C-RT 988; 5 C-RT 1039-1040.) However, Dr. Rath testified that the Division 41, Guidelines for Forensic Psychologists (hereafter "Division 41 guidelines") had been rejected by the APA and the California licensing board as unclear and ambiguous. (4 C-RT 990-991, 996, 997.) Defense counsel questioned Dr. Rath about several different professional standards including those about obtaining the subject's informed consent, placing the subject in contact with his or her attorney, not providing forensic services to a defendant prior to his or her representation by counsel, and testing different hypotheses. (4 C-RT 991-992, 995-997, 999-1000.) Dr. Rath testified that he had complied with these ethical standards or that they did not apply to his work in this case. (4 C-RT 992, 996-999.)

More specifically, defense counsel questioned whether Dr. Rath ethically could render an opinion about Buenrostro's competence when he had not interviewed her specifically for that purpose (5 C-RT 1003-1006), and whether his agreement to interview Buenrostro after her arrest for the District Attorney's office created a potential conflict of interest which he was required to disclose (4 C-RT 988-991). Dr. Rath saw no ethical problem with either issue.

First, Dr. Rath disagreed with defense counsel's suggestion that he did not actually conduct a competency evaluation. (4 C-RT 987.) Dr. Rath testified that he assessed Buenrostro's competence during the post-arrest interview on October 28, 1994. (*Ibid.*) Dr. Rath explained that in doing a competency evaluation, if the person does not demonstrate mental illness and all of his or her behavior appears volitional, he does not ask questions about the court proceedings and what the person knows and understands. (*Ibid.*) Because Dr. Rath had no question about Buenrostro's competence

during his interview, he did not pursue these topics further. (*Ibid.*)

Defense counsel later returned to this point. He asked Dr. Rath what impact his inability to interview Buenrostro after his appointment had on the reliability of his opinion that Buenrostro was competent. (5 C-RT 1003.) Dr. Rath responded that if he had seen Buenrostro again, he would have been able to elaborate more, but his opinion would have been the same. (*Ibid.*) Defense counsel asked Dr. Rath about the ethical standard prohibiting a psychologist from offering evidence about an individual's psychological characteristics when the psychologist has not had "an opportunity to conduct an examination of the individual adequate to the scope of the statements, opinions or conclusions to be issued" and requiring that when such examinations are not feasible, psychologists make "clear the impact of such limitations on the reliability and validity of their professional products, evidence or testimony." (5 C-RT 1004.) Dr. Rath agreed that no expert should go beyond the scope of his database and claimed that he satisfied this ethical requirement by stating "how much I had seen her and when I had not seen her. . .." and outlining "precisely what the data base was." (5 C-RT 1004-1005.) Having fulfilled this requirement, Dr. Rath did not believe he had to include "a verbal disclaimer" in his report about the fact that he did not see Buenrostro in March or April. (5 C-RT 1005.) Dr. Rath further testified that he did not know the meaning of the requirement that forensic psychologists make clear the limitations on the reliability and validity of their evidence. (5 C-RT 1006.)

Second, Dr. Rath disagreed with defense counsel's suggestion that his prior employment by the District Attorney's office created a potential conflict of interest and therefore, in his view, he had no disclosure

obligations to any of the parties. (4 C-RT 988-989.) According to Dr. Rath, the Board of Medical Quality Assurance Ethics Committee helped him make that determination. (4 C-RT 989.)[43] Even if he had a disclosure obligation, Dr. Rath assumed all parties would be aware of his involvement in the case through the discovery process. (*Ibid.*) Dr. Rath further testified that the APA had rejected the Division 41 guideline that forensic psychologists "avoid providing professional services to parties in a legal proceeding with whom they have personal or professional relationships that are inconsistent with the anticipated relationship," because its meaning was unclear. (4 C-RT 990-991.)

Finally, Dr. Rath testified on cross-examination that on the question of ethics, he had called the Ethics Committee of the Board of Medical Quality Assurance, which is a licensing board for the State of California. He was "simply told that in these conditions to say that anything I did was unethical was, quote, absolutely ridiculous, close quote." (5 C-RT 1039-1040.)

Defense counsel sought to introduce the testimony of forensic psychologist Sherry Skidmore, Ph.D., to contradict some of Dr. Rath's testimony.[44] According to defense counsel's proffer, Dr. Skidmore would have testified that (1) Dr. Rath's competency evaluation was governed by

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[43] The record is unclear whether Dr. Rath contacted the Board of Medical Quality Assurance Ethics with regard to this case or other similar cases in the past.

[44] Defense counsel also sought and was permitted to introduce Dr. Skidmore's testimony to refute some of Dr. Rath's testimony about the MMPI and his scientific interpretation of the test. (5 C-RT 1075-1076, 1077.) That ruling is separate and distinct from the claim Buenrostro presents here.

ethical principles that he contended did not apply; (2) Dr. Rath's competency conclusion was unethical and scientifically invalid because he never actually performed a specific competency evaluation; and (3) he had a conflict of interest which should have precluded him from accepting the appointment and, in the alternative, required that he make certain disclosures. (5 C-RT 1075-1076.)

The prosecutor objected that the proffered testimony was collateral and, in the alternative, sought its exclusion under Evidence Code section 352. (5 C-RT 1074.). The trial court agreed that Dr. Skidmore's testimony on ethics was collateral and not relevant to the proceedings, and it sustained the prosecutor's objection. (5 C-RT 1076-1077.) Pressing further, defense counsel argued that he had laid the foundation for impeaching Dr. Rath on this subject. (5 C-RT 1077.) The trial court stated that "Dr. Rath is not on trial[,]" and defense counsel pointed out "that Dr. Rath's credibility is in issue." (*Ibid.*) The trial court told defense counsel, "I allowed you to inquire into the ethical situation as Dr. Rath understood it, and you did and now we are done with that." (5 C-RT 1077.) Emphasizing that Dr. Skidmore's proposed testimony went to Dr. Rath's credibility, defense counsel explained that "there is no testimony other than Dr. Rath's testimony, that what he did is ethically proper, when, in fact, it is not . . .." (5 C-RT 1078.)

The trial court stood by its ruling that the interpretation of ethical considerations was a collateral issue. (5 C-RT 1077-1078.)

B. The Trial Court Abused Its Discretion In Excluding Dr. Skidmore's Testimony Which Was Relevant To Impeach Dr. Rath's Testimony About His Compliance With The Professional Standards Governing His Evaluation of Buenrostro's Competence To Stand Trial

All relevant evidence is admissible at trial unless excluded by statute. (Cal. Const. Art. I, § 28, subd. (d); Evid. Code, § 351.) Section 1369, which governs competency trials, contains no such exclusion. Rather, envisioning the broad admission of evidence, it explicitly grants that '[e]ach party may offer rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention." (§ 1369, subd. (d).) "'Relevant evidence' means evidence, *including evidence relevant to the credibility of a witness*, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) A collateral matter is "'one that has no relevancy to prove or disprove any issue in the action,'" but nevertheless may "be relevant to the credibility of a witness who presents evidence on an issue." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, citation omitted.) Under Evidence Code section 780, the existence or nonexistence of a witness's bias, interest, or other motive, and the existence of nonexistence of any fact testified to by the witness, are always relevant for impeachment purposes. (Evid. Code, § 780, subds. (f), (i); see *People v. Rodriguez*, *supra*, at p. 9.) As the Law Review Commission explained in regard to this provision, "[t]here is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is 'collateral.'" (Evid. Code, § 780, Law Review Commission Comment.) As with all relevant evidence, the trial court

retains discretion to admit or exclude impeachment evidence, and its relevance determination is reviewed for an abuse of discretion. (*People v. Rodriguez*, *supra*, at p. 9.)

Dr. Rath's opinion that Buenrostro was competent to stand trial went to the ultimate issue at trial, and thus the credibility of his opinion was highly pertinent. Dr. Skidmore's proffered testimony was clearly relevant for impeachment. First, her testimony would have tended to disprove the existence of facts to which Dr. Rath testified. (Evid. Code, § 780, subd. (i).) As a general matter, Dr. Rath asserted that the Division 41 guidelines, or at least some of them, did not apply to his work in this case, and that he had complied with professional standards. (4 C-RT 990-991, 995-997; 5 C-RT 1003-1006.) Dr. Rath's knowledge of the professional rules that govern his work, and his adherence (or failure to adhere) to these standards in rendering his opinion, were fundamental to his credibility. (See Evid. Code, § 801, subd. (b), § 802 [expert may testify to his opinion based, inter alia, on his "special knowledge" of the subject].) Dr. Skidmore would have directly countered Dr. Rath's testimony on this key subject. (5 C-RT 1074-1076.)

More specifically, Dr. Skidmore's proffered testimony would have tended to disprove Dr. Rath's insistence that he conducted a professionally-valid competency evaluation of Buenrostro. Dr. Rath contended that the post-arrest investigative interview at the behest of the District Attorney's office constituted a competency evaluation. Dr. Skidmore would have explained that under the professional standards for forensic psychologists, a competency evaluation is valid only if it is conducted specifically for the purposes of assessing competence, i.e. the defendant's *present* trial-related

functioning abilities as required by section 1367 and *Dusky v. United States, supra*, 362 U.S. at p. 402, and that Dr. Rath's interview was not. Her testimony would have tended to discredit Dr. Rath's excuse that, because he concluded that Buenrostro was not mentally ill on October 28, 1994, he did not need to ask her any questions related to her ability to understand the nature of the (uninitiated) proceeding and her ability to assist her (non-existent) attorney in order to conclude that she was competent to stand trial a year later. (See 4 C-RT 987.) In short, Dr. Skidmore's testimony would have given the jury the evidence necessary to conclude that Dr. Rath's purported competency evaluation was a sham.

Second, Dr. Skidmore's testimony would have tended to prove that Dr. Rath was biased in favor of the prosecution. (Evid. Code, § 780, subd. (f).) Dr. Rath testified that he had no conflict of interest arising from employment by the District Attorney's office in this case. (4 C-RT 988-991.) Disputing this contention, Dr. Skidmore would have testified that under the applicable professional standards, the fact that Dr. Rath had been retained by the prosecution before he became a court-appointed expert did create a potential conflict of interest. This conflict of interest would tend to prove that Dr. Rath's investigative role in this ongoing case resulted in a pro-prosecution bias which certainly would be relevant to the weight that the jury attached to his opinion about Buenrostro's competence as a purportedly independent court-appointed expert.

Dr. Rath undeniably was crucial to the prosecution's case. He was the only expert to record his interview, and the audio tape was played in its entirety for the jury. (4 C-RT 971-974.) In addition, he was the only expert to testify that Buenrostro was malingering or feigning symptoms of mental

illness (4 C-RT 955-956, 979, 982-983; 5 C-RT 1026-1029), a theme the prosecutor emphasized in his closing argument (see 5 C-RT 1185-1186). Dr. Rath's opinion, however, was based on the single interview, lasting no longer than an hour and a quarter, and the partial MMPI testing he conducted the night of Buenrostro's arrest. On cross-examination, Dr. Rath insisted that his evaluation comported with his profession's ethical standards and went so far as to invoke the imprimatur of the state licensing board by testifying that he called the Ethics Committee of the Board of Medical Quality Assurance, and was told that the assertion that he did anything unethical was "absolutely ridiculous." (5 C-RT 1039-1040.) In this case where Dr. Rath's credibility was key, the jury was left, as defense counsel pointed out, with just one side of the dispute – Dr. Rath's insistence in his own ethical conduct. (5 C-RT 1078.) Buenrostro was entitled to present the jury with the other side and impeach Dr. Rath's claim with Dr. Skidmore's testimony. (See *People v. Cooper* (1991) 53 Cal.3d 771, 814, citing *People v. Farmer* (1989) 47 Cal.3d 888, 913 [careless testing by expert witness affects the weight of the evidence and may be challenged by the testimony of other experts]; see *O'Neill v. Novartis Consumer Health Inc.* (2007) 147 Cal.App.4th 1388, 1396-1398 [no error in admitting defense evidence challenging scientific study upon which plaintiff relied in product liability action against drug manufacturer].)

The trial court abused its discretion in excluding as collateral Dr. Skidmore's testimony that Dr. Rath was bound by and violated certain ethical standards, labored under a conflict of interest, and did not conduct a valid competency evaluation. Her proffered testimony was not collateral. The collateral matter rule bars a party from eliciting "otherwise irrelevant

testimony on cross-examination merely for the purpose of contradicting it." (*People v. Mayfield* (1997) 14 Cal.4th 668,748.) Buenrostro did not do that. The questions about the applicable professional standards went to Dr. Rath's veracity about the validity of his expert opinion. Defense counsel explored the topics on cross-examination without objection, which suggests at least a tacit acknowledgment by the prosecutor that they were relevant for impeachment. Defense counsel did not artificially manufacture irrelevant rebuttal about, for example, whether Dr. Rath had outstanding parking tickets. This is not a case where the impeachment evidence "would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's question." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744 [fact that accomplice drove a stolen car during the robbery was properly excluded where the status of the car had no bearing on the guilt of the defendant, who allegedly drove a separate car, and furnished no motive for falsely implicating the defendant, which was the defense at trial].) Here, Dr. Rath's compliance with the ethical standards of his profession in evaluating Buenrostro went to the reliability of his opinion that at the time of trial she was able to understand the nature of the proceedings and able to assist defense counsel in a rational manner. As such, this subject was independently relevant and admissible apart from whether Dr. Rath was truthful in his cross-examination testimony.

Moreover, Dr. Skidmore would have directly answered Dr. Rath's claims that he had no conflict of interest and that he conducted a valid competency evaluation. This fact readily distinguishes this Court's decision in *People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10. In *Rodriguez*, the Court held that the trial court did not abuse its discretion in excluding

testimony of the co-manager of an apartment building purportedly to challenge an eyewitness's testimony. The witness testified that he had observed the crime while walking his dog on the roof of the apartment building, and that he previously had obtained permission to walk his dog on the roof from the other apartment manager. This Court found that the proffered impeachment – that the co-manager had not given the eyewitness permission to use the roof – "had little, if any tendency in reason to prove that [the eyewitness] in fact had not gone on the roof, and, hence, that he testified untruthfully." (*Id.* at p.10.) In short, the proffered evidence was irrelevant.

That problem does not exist here. Both the cross-examination of Dr. Rath and the proffered rebuttal bore directly on the validity of his opinion, and thus his credibility, on the ultimate issue in the case – whether Buenrostro was competent to stand trial. As such, Dr. Skidmore's testimony should have been admitted. (See *People v. Price* (1991) 1 Cal.4th 324, 436-437 [prosecutor's cross-examination of witness about alleged acts of misconduct in prison was not collateral to his direct testimony that prison officials had used his alleged membership in the Aryan Brotherhood to justify restrictions imposed on him, because the alleged misconduct was relevant to explain the restrictions and to undermine his claim that the Aryan Brotherhood did not exist]. In any event, "[e]vidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment." (*People v. Lang* (1989) 49 Cal.3d 991, 1017 [rebuttal witness's testimony that defendant had displayed no anger at his homosexual proposition did not violate the rule against impeachment on collateral matters where defendant had testified that the

victim's homosexual conduct made him angry]; see *People v. Mayfield* (1997) 14 Cal.4th 668, 748 [videotape of crime scene was properly admitted under Evidence Code section 780, subdivision (i) to impeach defendant's testimony about height of wall].) Dr. Skidmore would have contradicted Dr. Rath on key points touching on the validity and reliability of his expert opinion.[45]

Finally, even assuming that Dr. Skidmore's testimony were not proper rebuttal, the trial court abused its discretion in not admitting her evidence as "other evidence in support of the original contention." (§ 1369, subd. (d).) Her proposed testimony addressed the requirements for a valid competency evaluation which certainly were germane to the issue of Buenrostro's present. Because the constitutional requirement of competence to stand trial is so fundamental (see Argument I, *ante*, at page 55), and because Buenrostro had the burden of proving her incompetence by a preponderance of the evidence (*Medina v. California*, *supra*, 505 U.S. at p. 446), she should have been allowed "in furtherance of justice" to present Dr. Skidmore's testimony in support of her case. (§ 1369, subd. (d).)

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[45] In addition to objecting that Dr. Skidmore's testimony was collateral, the prosecutor asserted, but made no argument, that the evidence should be excluded under Evidence Code section 352. (5 C-RT 1074.) In the hearing on the motion and its ruling, the trial court expressed no concern about the factors addressed in section 352. Nor would Dr. Skidmore's testimony have been prejudicial, cumulative, confusing, or unduly time-consuming. (*People v. Price*, *supra,* 1 Cal.4th at p. 412.) The trial court permitted her to testify in rebuttal on another issue (5 C-RT 1077), and the questions she would have addressed with regard to the application of the professional standards to Dr. Rath's evaluation were focused and discrete.

C. The Exclusion Of Dr. Skidmore's Testimony Violated Buenrostro's Federal Constitutional Rights To Due Process, To A Fair Competency Hearing And To Present Evidence To Support Her Case

The exclusion of Dr. Skidmore's testimony violated not only state evidentiary law, but the federal Constitution as well. The compulsory process and confrontation clauses of the Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution guarantee every criminal defendant "'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485; see *Holmes v. South Carolina* (2006) 547 U.S. 319, 324; *Washington v. Texas* (1967) 388 U.S. 14, 19.) Few rights are as fundamental as this one (*Rock v. Arkansas* (1987) 483 U.S. 44, 51, fn. 8), which is "among the minimum essentials of a fair trial." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Similarly, a criminal defendant's right to confront witnesses who testify against her is a bedrock constitutional requirement for a fair trial. (*Pointer v. Texas* (1965) 380 U.S. 400, 404.) As this Court has recognized, state rules of evidence "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999, original italics.)

These basic, constitutional rights apply to a competency hearing, since it is "'an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant.'" (*Evitts v. Lucey* (1985) 469 U.S. 387, 393, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 18 [procedures used in deciding appeals must comport with due process under the Fourteenth

Amendment]; see also *People v. Jablonski, supra*, 37 Cal.4th at p. 807, *People v. Lawley* (2002) 27 Cal.4th 102, 133-136 and *People v. Stanley* (1995) 10 Cal.4th 764, 805 [rejecting merits of claims but assuming that the federal rights to due process and effective assistance of counsel apply to a competency trial].) In the context of a competency trial, confrontation and compulsory process rights, like the due process principle and right to a fair trial, guarantee a criminal defendant the right to present evidence in support of her own incompetence and to contest the prosecution evidence of her competence. Because Dr. Skidmore's rebuttal testimony went to the very reliability of Dr. Rath, upon whom the prosecution's case relied heavily, it was significant, and its exclusion denied Buenrostro those rights.

As discussed above, the trial court's ruling left the jury with Dr. Rath's misleading, one-sided account that his competency evaluation comported with his profession's ethical standards in a case in which his credibility was of upmost importance to the prosecution. In analogous cases, federal courts have found that the exclusion of impeachment or rebuttal evidence has violated the federal Constitution. (See *Olden v. Kentucky* (1988) 488 U.S. 227, 231-232 [trial court's refusal to permit cross-examination of the victim regarding her motive to lie, and its exclusion of evidence proffered by the defendant on the same issue, violated the Sixth Amendment right of confrontation]; *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114, 131-132 [trial court's exclusion of a defense expert to rebut state medical examiner's opinion about cause of death to prevent opening the door to the admission of the codefendant's inadmissible "*Bruton* infected" hearsay statement violated defendant's Sixth Amendment compulsory process and Fourteenth Amendment due process

right to present a defense]; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1005-1006 [trial court's exclusion of reliable evidence of defendant's innocence – the codefendant's hearsay statements to police that Chia was not involved in the offense – violated the due process right to present evidence in his defense]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 877-878 [exclusion of expert testimony regarding whether the key prosecution witness had been hypnotically influenced in various interviews with police investigators violated petitioner's due process right to a fundamentally fair trial and to present witnesses in his defense]; *United States v. Adamson* (9th Cir. 2002) 291 F.3d 606, 612-613 [trial court violated defendant's Sixth Amendment right of confrontation by precluding impeachment of his brother, a prosecution witness, with his silence during the portions of joint interview where brother's silence implicitly adopted defendant's statements and was inconsistent with brother's trial testimony]; *Lindh v. Murphy* (7th Cir. 1997) 124 F.3d 899, 901-902 [trial court's refusal to permit the impeachment of the prosecution's expert with evidence that the psychiatrist had sexually abused some of his patients, was about to lose his license and faculty positions, and might be sent to prison violated defendant's Sixth Amendment right of confrontation]; *Justice v. Hoke* (2nd Cir. 1996) 90 F.3d 43, 49 [exclusion of competent evidence that prosecution's only witness had a motive to fabricate violated petitioner's right to present a defense].)

The trial court's ruling here, which precluded Buenrostro from impeaching a key prosecution witness on matters going to the credibility and thus reliability of his expert opinion on the ultimate issue in the case, similarly resulted in federal constitutional error.

Furthermore, Buenrostro's federal constitutional claims are cognizable on appeal, even though this aspect of the claim was not asserted at trial. As this Court has recognized "'[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would determine the claim raised on appeal.'" (*People v. Partida* (2005) 37 Cal.4th 428, 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117; accord, *People v. Bonilla* (2007) 41 Cal.4th 313, 353, fn. 18.) This rule applies here. The federal constitutional claims based on the rights to due process, a fair trial, and to present evidence in support of one's case simply restate under alternative federal principles the legal consequences of the trial court's exclusion of Dr. Skidmore's testimony that was litigated under state law at trial. No different facts or legal standards are required for adjudication of these claims, and therefore the claims are preserved for appeal. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 ["defendant's new constitutional arguments are not forfeited on appeal" if they "do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequences* of violating the Constitution[,]" original emphasis]; accord, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 434, fn. 7; *People v. Hoyos* (2007) 41 Cal.4th 872, 889, fn. 8; *People v. DePriest* (2007) 42 Cal.4th 1, 19, fn. 6; *People v. Tafoya* (2007) 42 Cal.4th 147, 183, fn. 5; *People v. Halvorsen* (2007) 42 Cal.4th 379, 408, fn. 7.)

D. The Erroneous Exclusion Of Dr. Skidmore's Rebuttal Testimony Requires Reversal Of The Entire Judgment

The exclusion of Dr. Skidmore's rebuttal testimony was prejudicial under the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836) and the federal constitutional standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24). As with any error, it is important to assess the prejudice flowing from the exclusion of Dr. Skidmore's impeachment testimony in the context of the entire case. (*People v. Watson*, *supra*, at pp. 836-837; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Competency hearings are unique in that expert witnesses offer their opinions on the ultimate issue, as well as the component elements, of a defendant's competence to stand trial. It is no surprise that in this case a classic battle of the experts played out before the jury. The defense and the court-appointed experts disagreed on the threshold question presented to the jury, whether Buenrostro suffered from a mental disorder, as well as on the subsequent question of whether she was able to assist counsel in a rational manner. Drs. Perrotti, Kania and Mills all concluded that Buenrostro suffered from some sort of psychotic disorder which impeded her ability to assist counsel. (2 C-RT 312 [Dr. Perrotti]); 2 C-RT 491-492, 546 [Dr. Kania]); 4 C-RT 755, 763 [Dr. Mills].) Meanwhile, Drs. Rath and Moral concluded that Buenrostro did not have a mental disorder: Dr. Rath opined that Buenrostro was cooperating with her attorney (4 C-RT 952), and Dr. Moral opined that once Buenrostro became comfortable with her attorney, she would be able to cooperate with him (4 C-RT 857).

With these counterpoised opinions on the ultimate issue, the credibility of the experts obviously was pivotal since the verdict about

Buenrostro's competence likely turned on which experts the jury found most believable. The jury instructions underscored the importance of the jury's credibility determinations. The instruction pursuant to CALJIC No. 2.83 directed the jury to give close scrutiny to the bases of the experts' opinions in determining their credibility. And the instruction pursuant to CALJIC No. 2.20 focused the jury on specific factors affecting credibility – the existence or non-existence of a bias, interest or other motive, and the existence or non-existence of any fact testified to by the witness.

Of course, the jury was free to rest its verdict on whatever evidence it found persuasive. That evidence could have been a combination of Dr. Rath's and Dr. Moral's testimony, together with the prosecutions only other witnesses, Romeo Villar and George Groth, or only one of those expert witnesses alone. Or the jury could have concluded that none of the experts was believable and, therefore, that Buenrostro failed to overcome the statutory presumption of competence. However, given the extensive defense testimony, provided by the three experts and nine other witnesses, about Buenrostro's hallucinations and paranoid behavior and her refusal to cooperate with her attorney on the most basic matters such as signing an authorization for the release of information, it is unlikely that the jury dismissed outright the opinions of the defense experts. After all, they had spent far more time observing and interacting with Buenrostro – all together on about 17 separate occasions – than did Dr. Rath with his single hour and ten-minute interview and Dr. Moral with his two approximately one-hour interviews and quick follow-up during a trial recess. (4 C-RT 831, 858, 875, 876-877, 896-897 [Moral's interviews described]; 4 C-RT 948, 980-981 [Rath's interviews described]). Rather, as it is presumed to have done,

the jury most likely carefully judged the believability of each witness according to the legal principles stated in the jury instructions. (See *People v. Yeoman*, *supra*, 31 Cal.4th at p. 139 [the jury is presumed to follow the court's instructions].)

Dr. Rath's credibility was central to the prosecutor's attempt to tip the jury toward finding Buenrostro competent notwithstanding the evidence of her documented mental problems and persistent lack of cooperation with her attorney. First, as noted previously, Dr. Rath was the only expert whose interview, which was conducted at the behest of the prosecution for investigative purposes, was recorded and played for the jury. This taped interview, which gave the jury a one-hour-and-ten-minute view of Buenrostro's functioning in her own voice, undoubtedly was powerful evidence for the prosecution, even though Buenrostro's apparent coherence shortly after her arrest was not inconsistent with her having a psychotic disorder that rendered her incompetent to stand trial a year later. Moreover, the interview was the basis for Dr. Rath's assertion that he conducted a valid competency evaluation, even though at the time his purpose was not to assess her competence to stand trial, and he assessed only whether she exhibited a mental disorder and did not consider the elements of competence to stand trial under California law.

Second, Dr. Rath was the only expert who concluded that Buenrostro was malingering, and did so based solely on his opinion that the results of her MMPI – a purportedly objective, scientifically-validated test – proved she was faking symptoms of mental illness to gain advantage in her criminal case. Malingering, based on the premise of deliberate deception, was a potent charge which, if believed, could prompt the jury to reject all

the defense evidence as a deceitful pretense. In his closing argument, the prosecutor not only emphasized that the taped interview showed that Buenrostro suffered from no mental disorder and that she, in fact, was malingering (5 C-RT 1186), but he went so far as to insinuate, not very subtly, that "someone told her not to say something more as a roose [sic], as a guise, as a false attempt to appear sicker than she might be, as a trick" (5 C-RT 1182). Dr. Rath's testimony, and only Dr. Rath's testimony, gave the prosecutor the basis for such an attack.

Given the overriding importance of Dr. Rath's testimony – and thus his credibility – to the prosecution's case, the exclusion of Dr. Skidmore's impeachment testimony was prejudicial. Addressing factors highlighted in CALJIC No. 2.20, Dr. Skidmore would have given the jury reasons to find Dr. Rath not credible. Her testimony that Dr. Rath violated several applicable ethical standards would have offered the jury a basis for questioning the general reliability of his opinions. More specifically, her opinion that under governing professional standards, Dr. Rath did not conduct a valid forensic competency evaluation, and was burdened by at least a potential conflict of interest which he failed to disclose, would have given the jury cause to reject his opinions that Buenrostro had no mental disorder, but was malingering, and already was cooperating with her attorney. Had Dr. Skidmore's testimony not been excluded, there is a reasonable probability that at least one juror would have concluded that Buenrostro was incompetent. Alternatively, the State cannot prove that the exclusion of her evidence harmless beyond a reasonable doubt. In short, whether considered as state-law error under the *Watson* standard or federal-constitutional error under the *Chapman* standard, the trial court's erroneous

exclusion of Dr. Skidmore's rebuttal testimony was prejudicial and requires reversal of the entire judgment.

III. THE TRIAL COURT ERRONEOUSLY EXCLUDED DEFENSE EVIDENCE AS SANCTIONS FOR NON-EXISTENT DISCOVERY VIOLATIONS

As a discovery sanction, the trial court excluded relevant evidence – Dr. Kania's testimony about Buenrostro's delusions about computers and Dr. Mills's testimony about Dr. Rath's MMPI testing of Buenrostro – which supported these experts' opinions that Buenrostro was incompetent to stand trial. The trial court's rulings were premised on the assumption that the criminal discovery statute, section 1054 et seq., applies to competency trials. This Court has not yet addressed the question, although one Court of Appeal has. As shown below, the trial court's assumption was erroneous: the Civil Discovery Act of 1986, rather than section 1054 et seq., applies. Consequently, the exclusion of Buenrostro's evidence was a prejudicial abuse of discretion (see *People v. Vieira* (2005) 35 Cal.4th 264, 292 [stating standard of review]), which also resulted in the denial of Buenrostro's constitutional rights to due process, a fair competency trial, to present evidence in support of her case, and to contest the prosecution's case. (Cal. Const. art. I, § 15; U.S. Const., 6th & 14th Amends.)

A. The Trial Court Excluded Testimony Of Defense Experts Michael Kania And Mark Mills As Sanctions For Violations Of The Criminal Discovery Statute

1. Dr. Kania's Testimony

Defense clinical psychologist, Michael Kania, Ph.D., testified on direct examination that when he visited Buenrostro in the county jail, she expressed paranoid delusions that she was being persecuted or harmed. (2 C-RT 479, 487-489, 491-492, 507-508.) In Dr. Kania's opinion, these symptoms of a psychotic paranoid delusional disorder rendered her unable

to cooperate with her attorney in a rational manner. (2 C-RT 491-492, 502, 546.) As he further explained, Buenrostro was not manufacturing these symptoms or malingering because instead of exaggerating her symptoms in his presence, she tried to hide her symptoms and insisted she was able to cooperate with her attorney. (2 C-RT 485-487, 507, 515-516.)

The prosecutor cross-examined Dr. Kania extensively regarding Buenrostro's delusions. (3 C-RT 562-566). The cross-examination focused on the prosecutor's theory that Buenrostro was fabricating these delusions and that her scores on two separate MMPI's supported this conclusion. (3 C-RT 615-617.)[46]

On redirect, Dr. Kania testified that Buenrostro told him about a delusion that "computers were running the world and that they were killing people, and that when people died they somehow could be altered by computers. So she wasn't sure if people were – who she saw were really alive or if they were computers." (3 C-RT 641.) When the prosecutor objected that the testimony was beyond the scope of cross-examination and was new information, defense counsel explained that he was simply addressing the prosecutor's cross-examination regarding delusions. (3 C-RT 641-642.) The trial court allowed defense counsel to reopen his direct examination on this topic, but the prosecutor again objected, this time on discovery grounds. (3 C-RT 642.) The trial court asked defense counsel whether this particular delusion had been disclosed to the prosecutor. (*Ibid.*) When defense counsel responded that it did not appear in Dr.

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[46] Prosecution expert Dr. Craig Rath administered an MMPI to Buenrostro on October 28, 1994. (4 C-RT 949, 977, 980; Defense Exhibit C.) Defense expert Dr. Michael Kania administered a second MMPI to Buenrostro in December of 1994. (2 C-RT 538; Defense Exhibit B.)

Kania's report, the trial court sustained the prosecutor's late discovery objection and struck from the record Dr. Kania's testimony about Buenrostro's computer delusion. (*Ibid.*)

2. Dr. Mills's Testimony

As a discovery sanction, the trial court also excluded testimony of defense psychiatrist Mark Mills, M.D. Dr. Mills testified that Buenrostro suffered from a psychotic – probably delusional – disorder (4 C-RT 755); that she was incompetent to stand trial because the disorder rendered her unable to cooperate with her attorney (4 C-RT 795-796); and that he did not view malingering as an issue in her case (4 C-RT 799).

Toward the end of his direct examination, defense counsel Scott sought to illustrate part of the basis of Dr. Mills's opinion for the jury. He asked Dr. Mills whether he reviewed the results of an MMPI administered to Buenrostro by prosecution expert Dr. Craig Rath. (4 C-RT 756.) Outside the presence of the jury, the prosecutor objected to Dr. Mills mentioning his review of Dr. Rath's MMPI testing. (4 C-RT 756-757.) The prosecutor stated that he was unaware that Dr. Mills had sent Dr. Rath's raw data to a testing service, Caldwell, for evaluation (4 C-RT 756); that Dr. Mills's report made no mention of this information; and that he had received no discovery "on this particular issue regarding Dr. Mills" (4 C-RT 757). The trial court granted defense counsel permission to question Dr. Mills outside the jury's presence. (*Ibid.*)

At this in limine hearing, Dr. Mills testified that both he and Dr. Kania sent Dr. Rath's raw data to Caldwell and that they each received a report from Caldwell. (4 C-RT 758.) Dr. Mills explained that the report he obtained from Caldwell was slightly different from the report Dr. Kania

obtained from Caldwell, but "for all practical purposes, they say the same thing." (4 C-RT 758-759.) Defense counsel told the trial court that he wanted Dr. Mills to testify about the Caldwell report he received in order to provide the jury a basis for his opinion. (4 C-RT 758.) Defense counsel also argued that the prosecutor had the report Dr. Kania obtained from Caldwell, so the information was not new material. (4 C-RT 759.) Disagreeing, the prosecutor asserted that "Well, it is new. I have never seen that report." (*Ibid.*)

The trial court observed that "newness" was not the test (4 C-RT 759), but rather saw the issue as a discovery violation. It ruled as follows:

> the test is whether or not you provided discovery to the opposing side as to the information you intended to elicit from this witness. And you did not. Therefore, his motion to exclude the testimony with regard to the Caldwell report he received, based on Kania's test, that objection is sustained, and we will not go into that.

(4 C-RT 760.)

B. The Exclusion Of Dr. Kania's And Dr. Mills's Testimony Was An Abuse Of Discretion Because The Criminal Discovery Statute Does Not Apply To A Competency Hearing, And Thus There Were No Defense Discovery Violations To Sanction

The prosecutor's objection to Dr. Kania's and Dr. Mills's testimony, and the trial court's decision to sustain those objections, were based on a false premise – that defense counsel was obligated to comply with the criminal discovery statute. (§ 1054 et seq.) Although this Court has not yet addressed the question, it is plain that the pretrial discovery provisions of the Penal Code do not apply to a competency trial. To be sure, "[i]n criminal proceedings . . . all court-ordered discovery is governed

exclusively by – and is barred except as provided by – the discovery chapter of Proposition 115." (*In re Littlefield* (1993) 5 Cal.4th 122, 129.) However, a competency trial is not a criminal proceeding. Rather, it is a separate and distinct proceeding subject to its own procedures. (See §§ 1368-1369). As this Court has explained, "Although it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings." (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) Thus, this Court has applied rules applicable in civil trials, such as that regarding the number of peremptory challenges, to competency proceedings. (*People v. Stanley* (1995) 10 Cal.4th 764, 807.)

For these reasons, at the urging of the Attorney General, the First District Court of Appeal in *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, held that the provisions of the Civil Discovery Act of 1986, which expressly applied to "'a special proceeding of a civil nature,'" governed pretrial discovery in a competency trial. (*Id.* at p. 491, quoting former Code Civ. Proc., § 2016.)[47] The issue there was whether the trial court exceeded its authority in ordering the defendant to submit to an examination by the prosecution's expert. The appellate court specifically rejected the argument that authority for discovery in a competency proceeding was located in section 1054 et seq. (*Id.* at pp. 490-491.) Instead, the source for the mental examination that the prosecutor sought

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[47] In 2004, the Legislature repealed sections 2016-2036 to facilitate a non-substantive reorganization of the civil discovery rules. (See Code Civ. Proc., § 2016 Law Revision Committee Comment.) Buenrostro refers to the provisions of the now-repealed Civil Discovery Act of 1986 because they would have applied at her 1995 competency trial.

was Code of Civil Procedure section 2019, subdivision (a)(4). (*Id.* at p. 491.) Although finding pretrial discovery available in a competency trial, the Court of Appeal vacated the discovery order because the prosecution's request did not comply with the requirements of former Code of Civil Procedure section 2032, subdivision (d). (*Id.* at p. 492, 505-506.) The clear teaching of *Baqleh* is that the parties must comply with the specifications of the Civil Discovery Act to obtain pretrial discovery in a competency proceeding.[48]

In this case, neither the trial court nor the parties discussed the authority for discovery in a competency trial. Obviously, they did not have the benefit of *Baqleh,* which had not yet been decided. However, the legal basis for *Baqleh*'s ruling was well-established at the time of trial: "a proceeding under section 1368 . . . is a special proceeding rather than a criminal action" (*People v. Hill* (1967) 67 Cal.2d 105, 114, fn. 3), and civil discovery rules apply to such special proceedings (former Code Civ. Proc., § 2016, subd. (b)(1).) Rather than determine the source of its authority over discovery matters in a competency trial, the trial court apparently believed that pretrial discovery was required under the criminal discovery statute. This assumption is seen in its discussion with defense counsel about Dr. Kania's reference to the Caldwell report. The trial court drew an analogy to a prosecutor in a criminal trial calling a police officer as a witness and

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[48] Because the Attorney General representing the People in *Baqleh* asserted the position that that the civil discovery statute, not the criminal discovery statute, applied to competency trials, it should be equitably barred from arguing otherwise here. (*Id.* at p. 491; see *New Hampshire v. Maine* (2001) 532 U.S. 742, 749; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 [both discussing judicial estoppel].)

producing a police report that had not been disclosed to the defense. It posited that defense counsel would be upset about not getting discovery of the report. (4 C-RT 759.) This analogy only makes sense under the reciprocal discovery provisions of section 1054 et seq. But the criminal discovery statute did not apply, and on this key point the trial court was mistaken. (*People v. Baqleh*, *supra*, 100 Cal.App.4th at p. 491 [assumption that discovery relating to competency hearings is governed by the Penal Code is erroneous].)

Moreover, the prosecutor made no discovery motion under any statute before the competency trial. Under the Civil Discovery Act of 1986, discovery regarding expert witnesses, like discovery regarding any witness, was not automatic; it had to be requested. (See former Code Civ. Proc., § 2034, subds. (a) & (b).) A party could make a demand for the production "of all discoverable reports and writings" made by a designated expert in the course of preparing his or her opinion. (Former Code Civ. Proc., § 2034, subd. (a)(3), § 2034, subd. (g).) Since the prosecutor had not complied with any of the civil rules for seeking discovery from Buenrostro's expert witnesses, there was no discovery request, let alone a discovery order that Buenrostro could violate. Thus, the trial court had no basis for excluding Dr. Kania's testimony about Buenrostro's delusion regarding computers and Dr. Mills's testimony about the Caldwell report regarding the MMPI test that Dr. Rath gave to Buenrostro. The trial court's order, being wholly without authority, was a clear abuse of discretion. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [a discretionary ruling "based upon improper criteria or incorrect assumptions calls for reversal 'even though there may be substantial evidence to support the court's order'"]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where

fundamental rights are affected by the exercise of discretion of the trial court, . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"].)[49]

Finally, this argument is cognizable on appeal. As a prerequisite for challenging the exclusion of evidence, "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a); see *People v. Guerra* (2006) 37 Cal.4th 1067, 1144.) The

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[49] Even assuming, arguendo, that the criminal discovery provision in section 1054 et seq. applied to Buenrostro's competency trial, the exclusion of Dr. Kania's testimony about Buenrostro's computer delusions and Dr. Mills's testimony about the Caldwell report of Dr. Rath's MMPI testing still would be error. Under section 1054.6, Buenrostro's privileged statements to Dr. Kania were not subject to discovery until he was designated as a witness. (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269.) Moreover, if a discovery violation had occurred, the trial court still would have abused its discretion in striking Dr. Kania's testimony about Buenrostro's compuer delusion, since section 1054.5, subdivision (c) cautions that a court "may prohibit the testimony of a witness *only if* all other sanctions have been exhausted." (§ 1054.5, subd. (c), italics added.)

With regard to Dr. Mills, the trial court's ruling misunderstood the facts. It granted the prosecutor's "motion to exclude the testimony with regards to the Caldwell report that he received, based upon Kania's test. . . ." (4 C-RT 760), when Dr. Mills coded and sent Dr. Rath's – not Dr. Kania's – MMPI testing to Caldwell for scoring (4 C-RT 756-757). Under section 1054.3, the defense had no obligation to turn over the Caldwell report, because it was the report of a nontestifying expert. (*Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1823.) Moreover, the prosecutor already had the Caldwell report obtained by Dr. Kania based on Dr. Rath's test data which, as defense counsel pointed out, "for all practical purposes" was the same as the report Dr. Mills obtained. (4 C-RT 758-759.) And again, the trial court jumped to the most extreme sanction – excluding testimony – without first complying with the requirement in section 1054.5, subdivision (c), to exhaust all other remedies.

purpose of this offer of proof is to make an adequate record for appellate review. (*People v. Foss* (2007) 155 Cal.App.4th 113, 127.) Buenrostro complied with this condition.

Dr. Kania's testimony on redirect examination regarding Buenrostro's delusion about computers running the world and killing and then altering people, which the trial court ended up striking, made known to the trial court the substance of the excluded evidence. (3 C-RT 641-642.) It also was clear from the entire thrust of Dr. Kania's testimony that this evidence was relevant as a basis for his opinion (Evid. Code, § 802), and that its purpose was to support his opinion that Buenrostro's delusions rendered her unable to assist defense counsel Scott in a rational manner in conducting her defense and thus incompetent to stand trial (see 2 C-RT 491-492, 502, 546). Similarly, the direct testimony of Dr. Mills about asking the Caldwell service to score Dr. Rath's MMPI results, combined with the information presented at the in limine hearing, presented the trial court with the requisite offer of proof – the substance, relevance and purpose of the excluded testimony. As defense counsel plainly stated, he wanted Dr. Mills to testify about the Caldwell report because it assisted him in reaching, and was one of the underpinnings of, his opinion about Buenrostro's incompetence. (4 C-RT 758.) This showing adequately preserved the issue for appeal. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778 [witnesses' answers, together with the questions asked, informed the trial court that the excluded evidence was offered to show remorse as a mitigating factor].)

Moreover, even if there were a question about whether Buenrostro adequately preserved her position in the trial court, this Court still would retain discretion, which it should exercise, to hear claims involving new legal issues. (*People v. Williams*, *supra*, 17 Cal.4th at p. 161, fn. 6.) The

trial court and the parties apparently overlooked the question of which discovery provisions applied to Buenrostro's competency trial. This Court should exercise its discretion to review the claim.[50]

C. The Erroneous Exclusion Of Dr. Kania's and Dr. Mills's Testimony Resulted In A Violation Of Buenrostro's Federal Constitutional Rights To Due Process, To A Fair Competency Hearing, And To Present Evidence In Support Of Her Incompetence To Stand Trial

The exclusion of Dr. Kania's testimony about Buenrostro's delusions about computers and Dr. Mills's explanation of his reliance of the Caldwell report of Dr. Rath's MMPI testing, as set forth in Section B of this claim, not only violated state law, but also violated the federal Constitution. The trial court truncated the proof supporting Dr. Kania's and Dr. Mills's opinions that Buenrostro was unable to assist her attorney in a rational manner and thus undercut their credibility. As with the exclusion of Dr. Skidmore's testimony, the erroneous exclusion of Dr. Kania's and Dr. Mills's testimony deprived Buenrostro of her rights to due process, a fair competency trial, and the right to present evidence in support of her incompetence to stand trial under the Sixth and Fourteenth Amendments to the federal Constitution. The legal bases of these violations and their cognizability on appeal is set forth in Argument II, Section C, and is incorporated by reference in this claim.

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[50] A similar scenario occurred in *Baqleh* where the trial court and the parties at the competency hearing assumed the criminal discovery rules governed competency trials, and it was not until the case was on appeal that a party – the prosecutor – asserted that the Civil Discovery Act, not the Penal Code, applied. (*Baqleh v Superior Court*, *supra*, 100 Cal.App.4th at p. 491.)

D. The Erroneous Exclusion Of Dr. Kania's And Dr. Mills's Testimony Requires Reversal Of The Entire Judgment

The exclusion of Dr. Kania's testimony regarding Buenrostro's delusions about computers and Dr. Mills's testimony about Dr. Rath's MMPI testing, whether taken individually or together and considered as state law error or federal constitutional error, was prejudicial. As Buenrostro previously set forth in Argument II, Section D, and incorporates herein, any assessment of prejudice must take into account the unique and weighty role that psychologists and psychiatrists play in competency hearings generally and the sharp division in the expert evidence in this case. In that context, the trial court's exclusion of Dr. Kania's testimony about the delusions about computers that Buenrostro reported was important. Preliminarily, Dr. Kania's opinion that Buenrostro was unable to assist her attorney in a rational manner and was not malingering, which was partly informed by the excluded evidence, was significant. He had more extensive contact with Buenrostro than any other expert, and he was the only defense expert who conducted psychological testing of her. His excluded testimony about Buenrostro's delusions about computers was particularly vital, because it would have provided the jury with independent evidence of the type of delusions and hallucinations that otherwise were reported only by family members, whose testimony the jurors might more readily discount as biased. Striking Dr. Kania's testimony in the presence of the jury for non-disclosure left the jury with the impression that the information it had just heard about Buenrostro's delusion was somehow untrustworthy or perhaps even fabricated. The ruling thus weakened the testimony of a major defense witness and unfairly lent credence to the prosecution's theory that

Buenrostro was feigning incompetence to avoid trial for the murder of her three children.

The exclusion of Dr. Mills's testimony about the Caldwell report of Dr. Rath's MMPI testing also harmed Buenrostro's chances for a verdict of incompetence. That evidence was another piece of the picture of Buenrostro's mental illness and her inability to assist counsel in a rational manner. As discussed already in Argument II, Section D, Dr. Rath was the only expert to testify that Buenrostro was malingering, and his conclusion was based entirely on the MMPI test results. Dr. Rath, who did an investigative interview – but not a competency interview – of Buenrostro, testified with certainty that the partial MMPI test he gave Buenrostro the night of her arrest showed she was malingering incompetence a year later. Dr. Rath's opinion made malingering a hotly contested issue with all the defense experts disagreeing with his finding that Buenrostro was deliberately feigning mental illness. (See, e.g., 2 C-RT 271, 280-281 [Perrotti]; 3 C-RT 507 [Kania]; 5 C-RT 754 [Mills].) Dr. Mills's testimony about Caldwell's re-scoring of that test would have given the jury a different interpretation of Dr. Rath's own data, one presumably inconsistent with Dr. Rath's opinion that Buenrostro was malingering. Certainly using Dr. Rath's own evidence to undercut his opinion would have been forceful evidence in support of the defense experts' views that Buenrostro was not faking, but was incompetent.[51]

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[51] Although Dr. Perrotti testified that the MMPI results generated by Dr. Kania and Dr. Rath were consistent with his conclusion that Buenrostro was not malingering, the trial court sustained the prosecutor's hearsay objection to any further testimony about those tests. (2 C-RT 312-3162 C-RT 312-316.) Thus, Dr. Perrotti's testimony did not compensate for the exclusion of Dr. Mills's testimony because neither was permitted to explain

Furthermore, the prejudice flowing from the exclusion of Dr. Kania's and Dr. Mills's testimony must be assessed along with the harm resulting from the exclusion of Dr. Skidmore's rebuttal testimony. (*People v. Hill* (1998) 17 Cal.4th 800, 844, citing *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353 [a series of errors that may individually be harmless may nevertheless "rise by accretion to the level of reversible and prejudicial error"].) This is particularly true with regard to the exclusion of Dr. Mills's and Dr. Skidmore's testimony, since together their evidence would have significantly impeached Dr. Rath's credibility. (See Argument II, Section D.)

In this way, the trial court's discovery sanctions with regard to Dr. Kania and Dr. Mills prejudiced Buenrostro because under the state law *Watson* (*People v. Watson*, *supra*, 46 Cal.2d at p. 836) standard, in the absence of these errors, there was a reasonable probability that the jury would have found her incompetent to stand trial, and under the federal constitutional *Chapman* (*Chapman v. California*, *supra*, 386 U.S. at p. 24) standard, the errors were not harmless beyond a reasonable doubt. The entire judgment should be reversed.

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why Dr. Rath's partial MMPI did not support his malingering conclusion.

IV. THE TRIAL COURT ERRONEOUSLY ADMITTED AS SURREBUTTAL BUENROSTRO'S JAILHOUSE WRITINGS AFTER THE PROSECUTOR WITHHELD THEM DURING THE TRIAL AND MISLEADINGLY INDICATED THAT HE WOULD NOT USE THEM AS EVIDENCE

Over defense objection and as prosecution surrebuttal, the trial court erroneously admitted writings by Buenrostro, which had been seized from her jail cell during the trial and which, if relevant, should have been introduced in the prosecution's case-in-chief. The prosecutor misleadingly indicated that he would not introduce the writings, and the trial court's admission of this evidence was a prejudicial abuse of discretion (see *People v. Raley*, *supra*, 2 Cal.4th at p. 912), which resulted in the denial of Buenrostro's state and federal constitutional rights to due process and a fair competency trial. (Cal. Const. art. I, § 15; U.S. Const., 14th Amend.)

A. The Trial Court Admitted Writings Seized From Buenrostro's Jail Cell During The Competency Trial As Prosecution Surrebuttal Evidence Over Defense Objection

On Wednesday, November 1, 1995, when the prosecutor was in the middle of cross-examining the first defense expert witness, Dr. Perrotti (2 C-RT 371), Buenrostro's jail cell was searched pursuant to a warrant and several of her writings were seized. (5 C-RT 1140.) Eight days later, and on the next-to-the-last day of trial, Thursday, November 9, 1995, the prosecutor first mentioned that he possessed writings by Buenrostro and planned to introduce them into evidence. (*Ibid.*) The trial court noted that the writings were in Spanish and that without a translation, it would not give the evidence to the jury. The prosecutor responded "All right. That's fine. I will pass." (5 C-RT 1141.) After discussing other evidence (People's Exhibit 10), which is not at issue here, the trial was adjourned to

Monday, November 13, 1995. (5 C-RT 1144.)

On Monday, the last day of the competency trial, the prosecutor offered the writings, explaining that he had "just received" a translation of the writing that morning and had given a copy to defense counsel. (5 C-RT 1147.) The trial court described the writings as follows: "one appears to be a story and the other appears to be, for lack of a better word, thoughts and/or prayers on behalf of the defendant dealing with this case." (5 C-RT 1151.) The 3-page story,"ANOTHER 48 HOURS (Appointment with Death)," tells about a woman named "Dora," who " had decided to take revenge for a lifetime of humiliations," is granted her wish to leave jail and drives her car to the house of her husband "Alex," where she shoots and kills Alex and then shoots and kills herself. (5 C-RT 1049; P.Exh. 11A.) The other writing is a half-page portion of a 5-page document which, discussing the length of the trial, states in part "I swear to God that first something will happen to these stupid ones that want to try me within one year. These cases take at least from 2 to 3 years and I don't think that I'm going to accept this." (P.Exh. 12.) The prosecutor argued the writings were admissible to show Buenrostro's ability to form paragraphs and sentences, her ability to write, and her intelligence. (5 C-RT 1150.)

Defense counsel objected to the introduction of the writings as evidence that should have been presented in the prosecution's case-in-chief, not in rebuttal (5 C-RT 1148), and because he was "just receiving it now" (5 C-RT 1151). Defense counsel further complained about the sandbagging nature of the prosecutor's request: "[W]e were told on Thursday that this wasn't going to be offered, and now we come a few minutes before argument and it's offered." (5 C-RT 1148-1149.) The trial court had a different recollection. Recalling the discussion about the lack of a

translation, the trial court stated that the prosecutor "did not indicate, necessarily, he intended to introduce it, it was considered, it was considered for purposes of introduction as evidence." (5 C-RT 1149.) Defense counsel repeated his basic objection that the prosecutor previously indicated he would not offer the writings:

> THE COURT: What is your objection there?
>
> [DEFENSE COUNSEL] MR. SCOTT: Well, the objection I have already made. My recollection is that it was represented by [prosecutor] Mr. Soccio on Thursday that he was not going to be offering this.
>
> THE COURT: I agree with you, the last thing we had was 10; however, we did not close to evidence. It is not a surprise, we did discuss the information. I indicated I am not going to keep it out on that basis.

(5 C-RT 1150-1151.) Defense counsel stated he wanted to consult with his experts "to see what, if any, change this would make in their diagnosis." (5 C-RT 1151.)

The trial court ruled that the writings directly rebutted defense investigator Moreno's testimony, and noted that defense counsel had offered no authority that he was entitled to a "second rebuttal." (5 C-RT 1152.)[52] The trial court then gave defense counsel 15 minutes to review the

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[52] Riverside Public Defender paralegal, Catherine Moreno, had testified in defense rebuttal on November 9, 1995, that during her visits with Buenrostro in the county jail, Buenrostro's conversations were not coherent (5 C-RT 1084), and she was not able to structure coherent paragraphs (5 C-RT 1085, 1096). Moreno never had seen any of Buenrostro's writings and did not recall if she ever had read anything Buenrostro had written. (5 C-RT 1096.) This was not the sum total, nor even the primary purpose, of her testimony in rebuttal. Moreno also testified about her observations of defense counsel's meetings with Buenrostro and particularly about the fact that defense counsel never told

writings. (5 C-RT 1152-1153.) After this brief recess, the parties stipulated that the writings were confiscated during a search of Buenrostro's cell, and the trial court admitted the writings and translations. (People's Exhibits 11-13; 5 C-RT 1170-1171.)

B. The Trial Court Abused Its Discretion And Violated Due Process By Admitting Buenrostro's Jailhouse Writings After The Prosecutor Sandbagged The Defense

The order of proof generally rests in the discretion of the trial court, and the decision to admit rebuttal evidence is not overturned in the absence of a demonstrated abuse of that discretion. (Evid. Code, § 320; *People v. Harris* (2005) 37 Cal.4th 310, 335.) In a competency trial, order of proof is specified in section 1369 which, as noted previously, provides for both rebuttal testimony and "other evidence in support of the original contention." (§ 1369, subd. (d).) Although the trial court had discretion to admit evidence that should have been presented in the prosecution's case-in-chief, the admission of People's Exhibits 11-13 as surrebuttal after the prosecutor had sat on them throughout the trial, and after he stated at the end of the preceding week that he would "pass" on the evidence, constituted a 'palpable abuse'" of discretion (*People v. Raley*, *supra*, 2 Cal.4th at p. 912), which denied Buenrostro her due process right to a fair competency trial.

Buenrostro that she should not meet with the court-appointed experts (5 C-RT 1082-10855 C-RT 1082-1085.), which refuted Dr. Rath's testimony that records indicated that Buenrostro "was following the direction of her attorney not to talk to some people" (4 C-RT 952).

As a preliminary matter, the prosecutor did not establish that the writings seized from Buenrostro's cell reflected her *present* ability to communicate coherently. The documents were undated and could have been written at any time during the year between Buenrostro's arrest and their admission at trial. Thus, the prosecution failed to prove that the writings were relevant to Buenrostro's competence to stand trial. (See *Dusky v. United States*, *supra,* 362 U.S. 402 [test is in part whether the defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. . ."].)

Moreover, defense counsel was correct that People's Exhibits 11-13 belonged in the prosecution's case-in-chief. (5 C-RT 1152.)[53] The prosecutor's stated purpose in introducing Buenrostro's jailhouse writings was to show her ability to form paragraphs and sentences. (5 C-RT 1150.)[54] The trial court characterized Exhibits 11-13 as rebutting Moreno's testimony. (5 C-RT 1152.) However, the relevant portion of Moreno's rebuttal testimony – that in conversation Buenrostro was incoherent and could not form coherent paragraphs – did not introduce new evidence into the trial. Buenrostro's inability to converse coherently in a consistent manner was a theme throughout the defense case-in-chief. Dr. Perrotti described Buenrostro's incoherent, tangential and disorganized answers to his questions. (2 C-RT 293-294.) Jail nurse Terrill observed Buenrostro

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[53] Although the trial court and defense counsel used the term "rebuttal" evidence (5 C-RT 1142-1143), it was surrebuttal evidence, as the prosecutor recognized, since Buenrostro as the party with the burden of proof already had presented her rebuttal evidence.

[54] The parties had a similar dispute over jail medical records that the prosecutor sought to introduce on surrebuttal. (5 C-RT 1142-1143.)

when her speech was not connected and did not make reasonable sense (3 C-RT 682) and at other times when Terrill could understand what Buenrostro was saying (3 C-RT 692). Similarly, Dr. Mills also testified about interviews of Buenrostro when her speech was not coherent and her ideas were jumbled. (4 C-RT 812-813.)

The prosecutor's opportunity to counter this evidence was during his case-in-chief, and he did. Dr. Moral testified about Buenrostro's ability to answer his questions, give him information, and converse without difficulty. (4 C-RT 836-839, 847.) And the prosecution played for the jury the tape recording of Dr. Rath's interview of Buenrostro, which presumably allowed the jury to come to its own judgment about her verbal coherence a year earlier on the night her children were found dead. (P.Exhs. 3-4 [tapes], P.Exhs. 5-6 [transcripts].) Unquestionably, Buenrostro's ability to communicate verbally in a coherent fashion was at issue in the parties' cases-in-chief. It was not a new subject when Moreno testified in rebuttal.

By his own account, the prosecutor obtained Buenrostro's jailhouse writings on November 1, 1995, which was at the beginning of the defense case-in-chief. (5 C-RT 1140; see 2 C-RT 371.) If the prosecutor wanted to use that evidence to prove Buenrostro's ability "to form paragraphs and sentences" and "to write" and to show "her intelligence" (5 C-RT 1150), the time to do so was in his case-in-chief. "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession. . .. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions. . .." (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) Thus, Exhibits 11-13 did not qualify as proper surrebuttal evidence.

Certainly, the trial court had the authority to admit People's Exhibits 11-13 at the end of the trial as "other evidence in support of the [prosecution's] original contention." (§ 1369, subd. (d).) However, under the circumstances here, the trial court abused its discretion. In classic sandbagging form, the prosecutor withheld the evidence until the very end of the presentation of evidence – when the defense would have no opportunity to respond and just before the case was submitted to the jury. The prosecutor's statement at the Thursday, November 9 hearing, that "I will pass" indicated, or at least reasonably could have been understood to indicate, his intention to forego admission of Buenrostro's story. His representation turned out to be misleading. On Monday, November 13, he decided to offer the evidence. Defense counsel repeatedly asserted his understanding that the prosecutor had indicated he would not introduce the writings. (5 C-RT 1148-1149, 1150.) Notably, the prosecutor did not dispute defense counsel's characterization of his remarks. (See 5 C-RT 1147-1153.)

But the trial court did. It rejected defense counsel's claim of surprise because "we did discuss the information." (5 C-RT 1151.) Its finding that there was no surprise, however, is not supported by the record. In admitting People's Exhibits 11-13 on November 13, the trial court summarized its recollection of the discussion of the evidence on November 9 as follows:

> During the trial the seizure of this documentation was brought up. He mentioned last week it was in Spanish. I mentioned to him last week, "How do you intend to introduce it, it is written in some Spanish, we can't have the jurors translate it, we will have to have a translator translate the information." He did not indicate, necessarily, he intended to introduce it, it was considered, it was considered for purposes of introduction as evidence.

> I clearly remember that because I remember, "Isn't that interesting, how are we going to go ahead with documents in Spanish when, obviously, they haven't been translated?"

(5 C-RT 1149.) In fact, as the record shows, the trial court did not remember the prosecutor's last statement on the matter: "All right. That's fine. I will pass." (5 C-RT 1141.) Although the existence of the writings may not have been a surprise on Monday, the prosecutor's plan to use them was.

This Court has condemned such sandbagging tactics: "It is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence." (*People v. Coffman* (2004) 34 Cal.4th 1, 68.)[55] That is precisely what the prosecutor did here. The prosecutor at first maintained "'poker game' secrecy" (*Wardius v. Oregon* (1973) 412 U.S. 470, 475) about the seized writings, and then after misleading defense counsel about his hand, he played a surprise trump card in surrebuttal. His gambit was

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[55] Even though the prosecution at the competency trial did not, as in *Coffman*, a criminal case, have the burden of proof, it should not be permitted to sandbag the defendant. Prosecutors maintain a special position within the justice system whether in a competency trial or a criminal trial. As this Court has held, "prosecutors are held to an elevated standard of conduct. . .[,] to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 819-820.) For this reason, even when the prosecution is the responding party, a prosecutor should not be permitted to gain tactical advantage through "bait and switch" tactics when a defendant reasonably relies to his or her detriment on the prosecutor's statements in court.

unfair gamesmanship, which the trial court erroneously condoned, and as a result, the competency trial was fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67; *Walter v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357 [addressing due process violation from erroneous admission of evidence]; see also *People v Coffman, supra*, 34 Cal.4th at p 59 [assuming that prosecutor's use of defendant's statements after repeated assurances to the contrary was fundamentally unfair, but finding error harmless in light of abundant other evidence of guilt].)[56]

C. The Trial Court's Erroneous Admission Of Buenrostro's Jailhouse Writings Requires Reversal Of The Entire Judgment

The trial court's action in the wake of the prosecutor's sandbagging tactics, whether taken by itself or together with the evidentiary errors discussed in Arguments II and III and whether considered as state-law error or federal-constitutional error, was prejudicial. The admission of Buenrostro's writings unfairly harmed her case in two ways. First, the writings, which had been seized from Buenrostro's jail cell two weeks earlier, permitted the prosecution to present Buenrostro to the jury in her own presumably-recent words. The prosecution relied heavily on Dr. Rath's tape recorded interview of Buenrostro a full year before the competency trial. But, as the prosecutor argued, the question before the

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[56] Even assuming, arguendo, that the criminal discovery provision in section 1054 et seq. applied to Buenrostro's competency trial, the admission of the jailhouse writings still would be error as defense counsel's belated disclosure objection stated. (5 C-RT 1151.) The prosecutor did not timely comply with his duty to disclose the writings as soon as they were obtained (§ 1054.1, subds. (b)-(c)) and to disclose Wes Daw, the officer who seized the writings from Buenrostro's cell, as a rebuttal witness (§ 1054.1, subd. (a) and § 1054.7; *People v. Gonzalez* (2006) 38 Cal.4th 932, 956).

jury was Buenrostro's *present* competence to stand trial. (5 C-RT 1173-1174.) The writings, although undated, allowed the prosecution to give the jury evidence from Buenrostro's own hand that had the aura of recency even if that fact was not established.

Second, the writings permitted the jury to conflate the ability to write coherently with the ability to assist counsel rationally in the preparation of her defense. The two are not the same. The ability to write coherently on a given day is not inconsistent with incompetence to stand trial. Psychosis, which three experts found Buenrostro suffered in some form, may be an episodic, rather than a chronic, disorder, manifesting itself periodically, not constantly. (See, e.g., *People v. Jablonksi* (2006) 37 Cal.4th 774, 790; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 879; *People v. Danks* (2004) 32 Cal.4th 269, 285 [all acknowledging mental disorders with transient psychotic episodes.] Thus, a person may appear coherent and functional one day, yet be afflicted with a severe mental illness that renders her irrational and incompetent on another. (See Sylvia Nasar, A Beautiful Mind: The Life of Mathematical Genius and Nobel Laureate John Nash (1998).) The writings – which captured and magnified Buenrostro's ability to express herself in writing at one particular unknown moment – tended to negate this essential fact and thereby minimized Buenrostro's chances of being found incompetent to stand trial.

The prosecutor certainly considered the writings important to his case. He changed his initial position about not using them and introduced them. And during his closing statement he referred to the writings both to show that Buenrostro understood the proceedings (5 C-RT 1178) and then, emphasizing their alleged recency, to suggest that she was malingering:

> There is some evidence you have not seen yet, the notes we had translated from her jail cell, took about two weeks ago. When you read those notes you are going to see, one, is a story she wrote it is a fiction, she entitles it "A Story." Cathy Moreno came in the other day, the defense paralegal, testified, nice lady, testified that this particular person, Dora Buenrostro, could not put sentences together, couldn't form paragraphs, no cohesive thoughts. Read her story, read what she wrote, make your own decisions as to how well she can think or not think, the cleverness, the detail, the subtleties.

(5 C-RT 1176.) Defense counsel was concerned about the impact of the writings, so concerned that before ending his argument he told the jury he had "one other thing I want to say before I sit down." (5 C-RT 1206.) He questioned why the writings were not introduced earlier and rhetorically asked the jury why, "if these documents are such clear evidence that Dora is competent," they were not given to the experts for their assessment. (5 C-RT 1206-1207.) And he tried to explain why they did not show Buenrostro was competent:

> There is a level on which the document that you will get appears to be logical or lucid, and it's what I have alluded to before, the way Dora's mental illness operates. It is not total chaos. What's difficult for you, but you don't have the tools to look for, is the evidence in that document of paranoia, of confusion, of delusions. But it's clear that those things go on, they interrupt not just her behavior in the jail, not just her behavior with her paralegal, not just her behavior with her doctors, not just her behavior with her family, not just her behavior with Regena Acosta or people who could visit her, they interfere with her basic fundamental right and ability to participate in a meaningful manner in her own defense. . .

(5 C-RT 1207.) The focus of both the prosecutor and defense counsel on this surprise surrebuttal evidence confirms its importance and likely influence on the competency verdict.

In this way, the erroneous admission of People's Exhibits 11-13 was prejudicial, because under the state law *Watson* (*People v. Watson*, *supra*, 46 Cal.2d at p. 836) standard, in the absence of these errors there was a reasonable probability that the jury would have found her incompetent to stand trial, and under the federal constitutional *Chapman* (*Chapman v. California*, *supra*, 386 U.S. at p. 24) standard, the errors were not harmless beyond a reasonable doubt. Reversal of the entire judgment is required.

V. THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS AT THE COMPETENCY TRIAL UNFAIRLY FAVORED THE PROSECUTION AND UNFAIRLY DISFAVORED BUENROSTRO

The trial court's rulings on the prosecution and defense objections to evidence at the competency trial, as set forth in Arguments II, III, and IV, reveal an unequal application of the evidentiary rules that unfairly favored the prosecution and unfairly disfavored Buenrostro. This disparate treatment of the parties resulted in a due process violation under the Fourteenth Amendment to the federal Constitution and article I, sections 7 and 15 of the state Constitution. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373.)

As discussed in Argument III, the trial court erroneously applied the criminal discovery statute (§ 1054 et seq.) to Buenrostro's competency trial. In doing so, the trial court disparately treated the defense and the prosecution with regard to purported discovery violations. Employing the most drastic remedy available, the court excluded portions of Dr. Kania's and Dr. Mills's testimony as a discovery sanction (Argument III), while it permitted the prosecution to introduce the writings seized from Buenrostro's cell over the defense objection that the prosecutor had belatedly disclosed the evidence (Argument IV). This imbalance of excluding Buenrostro's evidence but admitting the prosecution's evidence, when discovery objections were lodged as to both, was fundamentally unfair. (See *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 469 (conc. opn. by Harlan, J.) ["evenhanded justice . . . is at the core of due process"].)

Similarly, the trial court disparately treated the rebuttal evidence offered by the defense and the prosecution. Clearly, as discussed in Argument IV, the trial court had the authority under section 1369 to admit

the additional evidence offered by the parties. It excluded the testimony of defense expert, Sherry Skidmore, about the professional standards governing forensic psychologists in a competency evaluation, although it was relevant and not collateral (Argument II), but admitted the prosecution's evidence of Buenrostro's writings, despite the prosecutor's misleading representation that he would not use the evidence (Argument IV). This unequal treatment unfairly advantaged the prosecution and unfairly disadvantaged the defense in violation of Buenrostro's state and federal constitutional rights to due process. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.) For the reasons set forth in Argument II, III, and IV, this deprivation of a fair competency trial was prejudicial and requires reversal of the entire judgment.

VI. THE TRIAL COURT ERRONEOUSLY REFUSED TO GIVE A DEFENSE INSTRUCTION THAT BUENROSTRO WOULD NOT BE RELEASED FROM CUSTODY IF THE JURY FOUND HER INCOMPETENT TO STAND TRIAL

At the competency trial, the defense requested an instruction informing the jury that if Buenrostro was found incompetent to stand trial, she would not be released from custody. The trial court refused to give the instruction. Buenrostro is aware that this Court has rejected similar claims in *People v. Dunkle*, *supra*, 36 Cal.4th at p. 896, *People v. Turner* (2004) 34 Cal.4th 406, 433, and *People v. Marks* (2003) 31 Cal.4th 197, 221, but as shown below, none of those decisions is dispositive of her claim. The trial court's error in refusing to give an appropriate, requested instruction violated Buenrostro's state law right to an accurate instruction addressing a pertinent issue in the trial and her state and federal constitutional rights to due process and a fair trial and requires reversal of the competency verdict. (Cal. Const. art. I, § 15; U.S. Const., 14th Amend.)

A. Buenrostro Requested, But The Trial Court Rejected, An Instruction On The Consequences Of A Verdict Finding Her Incompetent To Stand Trial

During jury selection at the competency trial, defense counsel asked the trial court "to inform the jury at this juncture that the effect of their finding, if they were to find her incompetent, would not be to release her." (1 C-RT 60.) The trial court said it would differentiate between "a not guilty by reason of insanity" and a competency hearing. (*Ibid.*) In its introductory remarks to the jury panel, the trial court explained this difference as well as other principles relating to a competency hearing. Toward the end of its explanation, the trial court stated:

> I want to make it clear to you, this does not involve the question of her guilt or innocence of the underlying charge. So, a determination by the jury that she is, let's say, incompetent, does not eliminate the criminal charges, it simply defers the matter until she regains her competence to stand trial.

(1 C-RT 78.) Later during voir dire, the trial court repeated this point:

> If she is not competent, the case does not go away, it simply waits until she regains her competence. If she is found competent, then the matter goes on to trial. So, I want you to understand it is not a not guilty or a guilty kind of situation.

(1 C-RT 147.) These statements did not mention whether or not Buenrostro would be or could be released from custody following a finding that she was incompetent to stand trial.

At the close of the competency trial, defense counsel requested an instruction on the consequences of an incompetency verdict, stating that Buenrostro would not be released from custody. The pertinent part of the proposed instruction reads as follows:

> A verdict of "incompetent to stand trial" does not mean the defendant will be released from custody. Instead, she will remain in confinement at a state hospital or another public or private institution for treatment of the mentally disordered until the court determines that she had [sic] regained her competence.
>
> Moreover, if and when the defendant is found to be competent, the criminal proceeding that was pending against her will be reinstituted. A finding by you, the jury, that the defendant is not competent to stand trial does not constitute the final disposition of the criminal case against her. Rather it will have the effect of postponing that case until she is deemed to be competent to assist in her own defense.

(Sealed 5 SCT 166.) The conference on jury instructions was not reported, nor was the content of the hearing memorialized on the record. (5 C-RT

1081.) However, it is clear that the trial court refused to give the defense instruction (Sealed 5 SCT 166 [handwritten notations states "Defense requested Instruction Refused"]), and did not otherwise inform the jury that upon a finding of incompetence, Buenrostro would remain in custody and not be released back into society (see Sealed 5 SCT 134-162; 5 C-RT 1209-1219 [jury instructions given].)

B. Buenrostro Was Entitled To The Requested, Relevant And Correct Instruction Under State Law

In a criminal trial, the trial court may charge the jury "on any points of law pertinent to the issues, if requested by either party." (§ 1093, subd. (f).) With regard to requested instructions on matters of law, "[i]f the court thinks it correct and pertinent, it must be given; if not, it must be refused." (§ 1127; see *People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) As a general rule, a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. (*People v. Gurule* (2002) 28 Cal.4th 557, 559; *People v. Sanders* (1995) 11 Cal.4th 475, 560.) Similar rules apply in civil trials. (See Code Civ. Proc., § 607a; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 ["A party is entitled upon request to correct, nonargumentative instructions" on theories supported by substantial evidence].)

Buenrostro's request met the three fundamental requisites for an instruction: (1) it dealt with the law, not with facts; (2) it set forth a point of law that was relevant to the issues; (3) it stated the law correctly. (See 5 Witkin, Cal. Crim. Law 3d (2000), Crim. Trial, § 606, p. 864.) The requested instruction made two main points. It told the jury that if the verdict was "incompetent to stand trial," Buenrostro would not be released from custody, and the criminal prosecution against her would be postponed

until she regained her competence. The instruction also elaborated these principles by informing the jury where Buenrostro would be confined (a public or private hospital or institution for the mentally disordered) and who would make the determination that she had regained her competence (the court). The instruction accurately, and in a non-argumentative manner, stated the law regarding the consequences of a finding of incompetence.

The instruction also was relevant and important to the reliability of the jury's decision-making about Buenrostro's competence to stand trial. It apparently was patterned after CALJIC No. 4.01 "Effect of Verdict of Not Guilty by Reason of Insanity," which "is intended to aid the defense by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*People v. Kelly* (1992) 1 Cal.4th 495, 538 [citing with approval *People v. Moore* (1985) 166 Cal.App.3d 540, 548-557, and *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1140-1141, which reversed convictions because the defendants were denied no-release instructions even though the instructions they proffered were inaccurate].) The instruction ultimately contained in CALJIC No. 4.01 was found necessary in a sanity trial because jurors, who "are unaware of the postverdict disposition of an insane defendant," could "assume the defendant will walk free just as would an accused found not guilty for other reasons." (*People v. Moore*, *supra,* at p. 554.)

The same principle should apply here. There was a risk that jurors, unfamiliar with competency proceedings, would mistakenly assume that Buenrostro would or could be released from jail upon a finding that she was incompetent to stand trial and, therefore, might vote for a verdict of competence, even if they believed the evidence proved her incompetent, to guarantee that she remained in custody. It would be understandable if jurors

were concerned that Buenrostro, whom they knew was charged with the murder of her three children and who had displayed bizarre, erratic and paranoid behavior in the county jail, not be released back into their community. The risk of this extraneous factor tainting the competency deliberations was obvious, but so was the remedy. The defense instruction would have eliminated the danger that the jury's consideration of mistaken, extraneous factors may have resulted in an erroneous verdict by informing the jury that, in accordance with California law, Buenrostro would remain confined while she was incompetent to stand trial and would be retried if she regained her competence. Defense counsel decided that the risk was serious enough to be addressed, and he drafted a clear, correct, and succinct instruction in response. The trial court abused its discretion in denying the special instruction. (See *People v. Moore*, *supra*, 116 Cal.App.3d at p. 555, citing *People v. Ramos* (1984) 37 Cal.3d 136, 159 [applying this Court's ruling that the defendant should be allowed to assess the relative cost and benefit of a cautionary instruction in a particular case to the consequences of a verdict of not guilty by reason of insanity].)

The risk that the jurors improperly considered what would happen to Buenrostro if they found her incompetent was heightened by the prosecutor's closing statement. He argued that Buenrostro was a malingerer (5 C-RT 1186), which had been a theme in Dr. Rath's testimony (see 4 C-RT 954-956, 979, 983). In his closing argument, the prosecutor discussed the concept and evidence of malingering. (5 C-RT 1185-1187.) His message to the jury was plain – Buenrostro was malingering to avoid punishment:

> Does Dora Buenrostro malinger? Well, the answer seems to be, yes. It seems to be "yes" by the tests that were given.

> You heard more about the M.M.P.I. than you probably ever wished you had learned, take it for what it is worth, you make the decision what it is worth, what those tests are worth.
> * * *
> But those reports sent to the Caldwell Institute that you heard such fine things about from several of the witnesses indicate exaggeration of symptoms. And you know from various doctors that *when a person exaggerates their symptoms for a secondary gain, for instance, avoiding punishment or penalty, that's called malingering.*

(5 C-RT 1186, italics added.) In a lay person's mind, punishment likely equates with jail or prison, i.e., confinement. Having been told that Buenrostro was "faking it" to avoid "punishment or penalty," (*ibid.*) a juror might reasonably worry that the entire incompetence claim was a "ruse," "a guise," or a "trick" – as the prosecutor had suggested earlier in his argument (5 C-RT 1182) – to evade judgment in what the jury had been told was potentially a death penalty case. The jury knew this was a high-stakes prosecution. At the same time that the prosecutor explicitly warned the jury against using the competency trial as a forum for expressing their views on capital punishment (5 C-RT 1181), his malingering argument encouraged the jurors to speculate about whether a verdict of incompetence would insulate Buenrostro from the death penalty or other severe punishment by ending the prosecution with her release. The prosecutor's argument made giving the defense instruction even more imperative.

Moreover, the taint from speculation about Buenrostro's possible release upon a finding of incompetence was not counteracted by any curative measure during the trial. The trial court's explanatory preface during jury selection told the prospective jurors that a finding of incompetence would defer the trial, but it did not inform them, as defense counsel had requested, that Buenrostro would not be released in the interim.

(1 C-RT 78, 147.) Five mental health experts testified during the trial, but only one, Dr. Moral, made any mention of what might happen upon a finding of incompetence. In passing, while discussing another subject, Dr. Moral explained that Patton State Hospital was "the place where people . . . who [are] declared not competent to stand trial" are sent "for treatment until they regain competency. Once they regain competency, they come back to trial." (4 C-RT 917.)[57] Neither the prosecutor nor defense counsel pursued this topic in their examination of the witnesses, and neither said anything about the consequences of an incompetency verdict in their closing arguments (see 5 C-RT 1172 -1190 [prosecutor's argument]; 5 C-RT 1190-1206 [defense counsel's argument]).) In this way, there was no remedial action that might have compensated for the rejected instruction.

Buenrostro understands that this Court has denied similar claims in *People v. Marks*, *supra*, 31 Cal.4th 197, *People v. Turner, supra*, 34 Cal.4th 406, and *People v. Dunkle*, *supra*, 36 Cal.4th 861. But those rulings are distinguishable in crucial respects that lend support to Buenrostro's claim, and they otherwise should be reconsidered. Unlike the defendants in all three prior cases, Buenrostro requested and was denied the accurate instruction she now asserts should have been given. She did not, like the

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[57] The issue came up during Dr. Moral's direct testimony when he repeatedly referred to Buenrostro's belief that she would be sent to Patton State Hospital for a psychiatric evaluation in connection with the possibility of a pleading of not guilty by reason of insanity. (4 C-RT 852, 863, 870.) In his testimony on cross-examination, Dr. Moral again discussed Buenrostro's expectation that she would be transferred to Patton State Hospital. (4 C-RT 904, 917, 921, 923- 926, 932.) In response to a question on cross-examination, Dr. Moral agreed that a defense attorney could not request the defendant's transfer to Patton State Hospital, and then he went on to identify Patton State Hospital. (4 C-RT 917.)

defendant in *Turner*, *supra* at pp. 433-434, seek and obtain an instruction about the consequences of a verdict of incompetency and then on appeal challenge the instruction she successfully had requested. She did she not, like the defendant in *Marks*, request a flawed instruction that improperly "characterized [her] return to competence and the eventual resumption of criminal proceedings as inevitable." (*People v. Marks, supra*, at pp. 221-222.) Nor did she, like the defendant in *Dunkle*, *supra*, at p. 897, fail to request the instruction and then argue on appeal that there was a sua sponte duty to give what she did not seek. Rather, Buenrostro squarely presents a cognizable claim based not on the assertion of a sua sponte duty to instruct, but on her request for an accurate instruction stating a pertinent point of law.

In fact, all three of this Court's prior decisions support Buenrostro's claim of error. As noted above, in *People v. Marks*, *supra*, 31 Cal.4th at p. 222, the Court affirmed the denial of the requested instruction because it inaccurately suggested "the defendant's speedy restoration to mental competence" when there was no such guarantee.[58] This ruling implies that an accurate instruction would be appropriate and should be given. In addition, the Court described, but did not rule on, the defendant's argument

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[58] The requested instruction in *Marks* read: "'If the defendant is found mentally competent to stand trial, criminal proceedings will immediately be resumed and the trial on the offense charged shall be held in the normal course of the court's business. [¶] If the defendant is found mentally incompetent to stand trial, criminal proceedings shall remain suspended until such time as he becomes mentally competent. In the meantime, the court will order the defendant to be confined at a state hospital for the care and treatment of the mentally disordered where he will participate in a program designed to promote the defendant's speedy restoration to mental competence.'" (*People v. Marks*, *supra*, 31 Cal.4th at p. 221.)

based on *People v. Moore*, *supra*, 166 Cal.App.3d 540. Notably, the Court did not reject the defendant's analogy between informing the jury in a sanity trial of the consequence of a "not guilty by reason of insanity" verdict and informing the jury in a competency trial of the consequence of an "incompetent to stand trial" verdict. (*People v. Marks*, *supra*, at p. 222.) Instead, the Court simply noted that it had "declined to extend *Moore* beyond its original context." (*Ibid.*)

Although this Court found the claim in *Turner* forfeited under the doctrine of invited error (*People v. Turner*, *supra*, 34 Cal.4th at pp. 433-434), its alternative ruling inferentially acknowledges the appropriateness of the instruction Buenrostro requested. In *Turner*, the jury was instructed: "If [defendant] is found to be competent, his trial will resume. [¶] If [defendant] is found to be incompetent, he will not be released from custody and other proceedings will result." (*Id.* at p. 433.) On appeal the defendant argued that the instruction improperly permitted the jurors to speculate that he would go unpunished if he were found incompetent given the prosecutor's argument that the defendant was trying to evade responsibility for his crimes. Rejecting the claim, this Court relied on the requested and given instructions as preventing this possibility:

> Indeed, the instruction expressly stated that defendant would "remain in custody" if the jury found him incompetent. Moreover, the trial court instructed the jury that it should "reach a just verdict regardless of what the consequences of that verdict may be." As such, the instructions adequately informed the jury that defendant would not be immediately released if found incompetent and that the jury should not, in any event, consider that possibility.

(*Id.* at p. 434.) Thus, *Turner* acknowledges both the risk that jurors will consider the consequences of an incompetency verdict and the efficacy of

the instructional remedy that Buenrostro sought. Not only was the defendant in *Turner* given what Buenrostro was denied, i.e., an instruction that he would not be released if found incompetent, but the trial court in *Turner* went further and instructed the jury not to consider the consequences of the verdict in reaching its decision, which was an additional safeguard that the trial court did not give to Buenrostro's jury. (See 5 C-RT 1209-1219.)

As mentioned above, in *People v. Dunkle*, *supra*, 36 Cal.4th at p. 897, the Court found that the defendant forfeited his claim of error by failing to request the instruction at trial. In addition, in dicta, the Court did what it had not done in *Marks* – rejected the argument based on an analogy to *Moore* on its merits. The Court explained its decision as follows:

> We have declined to apply Moore outside its original context (People v. Marks (2003) 31 Cal.4th 197, 222, 2 Cal.Rptr.3d 252, 72 P.3d 1222 [finding no error in the trial court's refusal of a flawed instruction, requested by the defense, regarding the consequences of a verdict of incompetency]), and do so again here. Because the outcome of any future efforts at restoring a defendant to competency is uncertain at the time when the jury must make its decision on competency, an instruction patterned after Moore and CALJIC No. 4.01 is necessarily speculative.

(*Ibid.*) The Court's two reasons for rejecting the claim are misguided, and Buenrostro asks the Court to revisit its dictum.

The Court simply reasserts its prior position declining to apply *Moore* outside a sanity trial. In *Dunkle*, the Court just cites *Marks* to support this proposition, and in *Marks*, the Court cites *People v. Thomas* (1992) 2 Cal.4th 489, 539, without elaboration. However, *Thomas* does not support the Court's dictum in *Dunkle*, nor would it support denial of Buenrostro's claim here.

Thomas did not involve a competency trial and therefore did not address the consequences of a verdict of incompetence. During the penalty-phase deliberations in *Thomas*, the jury first asked whether a sentence of life without parole could be appealed. With the agreement of all counsel, the trial court informed the jury that "[a]nyone convicted of a crime no matter what the penalty is given . . . appellate rights" and further instructed the jury not to consider the defendant's appellate rights in deciding the appropriate sentence. (*People v. Thomas*, *supra*, 2 Cal.4th at p. 539.) The jury later asked what action the trial court would take if the jury could not reach a unanimous verdict, and the trial court again instructed the jury not to concern itself with that issue and to try to reach a unanimous decision if possible. (*Ibid.*)

On appeal the defendant argued that the jury's two questions, taken together, "showed that the jury was concerned that if it could not reach a verdict, defendant might be given a sentence less than life without possibility of parole and might someday be released from prison." (*Ibid.*) Analogizing to the instruction given in a sanity trial about the consequences of a verdict of not guilty by reason of insanity, the defendant argued that the trial court should have told the jury "that their inability to reach a verdict could not result in a sentence less than life without possibility of parole, but would only result in a retrial of the penalty phase." (*Ibid.*) This Court rejected the analogy as unpersuasive because (1) there was no likelihood of the risk the defendant feared, i.e., "that the jury could have returned a death sentence because it feared he would receive a sentence less than life without possibility of parole in the event they could not unanimously agree" and (2) the instruction the defendant urged on appeal "would have diminished the jurors' sense of duty to deliberate and to be open to the ideas of their fellow

jurors." (*Ibid.*)

Thomas is inapposite to the claim presented here. First, the attenuated two-step inference about the defendant's possible release from prison at some distant date in the future is not on a par with the possibility that the jurors in Buenrostro's competency trial might have assumed that an incompetency finding would mean that she could immediately walk out of jail. The consequences of an incompetency verdict are more direct and immediate than the consequences of the appealability of a life-without-parole sentence in the event that the jury could not reach a unanimous penalty verdict. Consequently, there is a much greater risk that the concern about release would have affected the competency deliberations in this case than would have influenced the penalty deliberations under the scenario envisioned in *Thomas*.

Second, there was a countervailing interest in *Thomas*'s penalty-phase context that does not apply to Buenrostro's competency claim: the concern that the instruction the defendant sought would undercut the jurors' sense of their duty to deliberate in a free and open manner. (*People v. Thomas*, *supra,* 2 Cal.4th at p. 539.) Because Buenrostro's requested instruction did not implicate the jury's duty to try to reach a unanimous verdict, this factor did not weigh against giving the instruction. Moreover, there was no other competing interest militating against telling the jury the consequences of a finding that Buenrostro was incompetent to stand trial.

Third, the trial court in *Thomas,* like the trial court in *Turner*, gave cautionary instructions. (See *People v. Turner, supra*, 34 Cal.4th at p. 434.) As agreed by the parties, the trial court in *Thomas* warned the jury not to consider the possibilities of an appeal of a life-without-parole sentence or the inability to reach a unanimous verdict in its deliberations. (*People v.*

Thomas, *supra*, at p. 539.) In this case, the trial court took no such corrective action. It denied the requested instruction and gave no alternative admonition.

In short, this Court's repeated assertion that it has declined to apply *Moore* outside the sanity trial context does not establish a well-reasoned and justified rule that the requirement of an instruction of the consequences of a not-guilty-by-reason-of-insanity verdict cannot and should not be adapted to a competency trial.

The Court's other reason in *Dunkle* for rejecting an instruction based on *Moore* and CALJIC No. 4.01 – that it would be "necessarily speculative" (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 897) – also is misguided. To be sure, future attempts to restore a defendant's competency are uncertain when the jury must render its verdict. (*Ibid.*) This Court made a similar point about the flawed instruction requested in *Marks*. (*People v. Marks*, *supra*, 31 Cal.4th at p. 222.) But an instruction on the consequences of an incompetency verdict need not speculate about the prospects of the defendant regaining competence, and indeed Buenrostro's requested instruction did not.

Buenrostro's instruction, like that given in *Turner* and implicitly approved by this Court, was legally accurate. It told the jury that if found incompetent to stand trial, she would not be released from custody. This was the essential point of the instruction, and there was nothing speculative about it. The instruction further told the jury that (1) Buenrostro would be confined in a state hospital or other institution for the treatment of the mentally disordered until a judge determined she had regained competence and (2) an incompetency verdict would not be a final disposition of the case, but would postpone the proceedings until she regained competence.

These statements also were legally accurate. Although the instruction mentioned the future possibility of an incompetent Buenrostro regaining competence, it did not in any way speculate about the likelihood of that occurring. Instead, the clear message of the instruction was that Buenrostro would remain in custody and that the criminal proceeding would be postponed but not terminated. The truthful instruction requested in this case was no more speculative than the instruction required by *Moore* and routinely given pursuant to CALJIC No. 4.01.

For all these reasons, the dictum in *Dunkle* emanating from the decision in *Thomas* does not decide Buenrostro's claim. Furthermore, the analogy to *Moore* is apt and forceful. Jurors are not commonly aware of what happens to a defendant who is found incompetent to stand trial and reasonably may be concerned that the defendant would pose a danger if set free. To avoid the risk that concern about the possibility of Buenrostro's release improperly influenced the jury's verdict, she was entitled as a matter of state law to inform the jury that she would not be released. The trial court abused its discretion in refusing to give the correct and relevant instruction she requested.

C. Buenrostro Also Was Entitled To The Requested, Relevant And Correct Instruction Under The Federal Due Process Clause

The trial court's refusal to give the requested instruction denied not only Buenrostro's state law right, but also her federal constitutional rights. Buenrostro was entitled under the due process clause of the Fourteenth Amendment to inform the jury that she would not be released upon a finding that she was incompetent to stand trial. The principle requiring the instruction was set forth in *Simmons v. South Carolina* (1994) 512 U.S. 154 (plur. opn. of Blackmun, J.), and reiterated in both *Shafer v. South Carolina*

(2001) 532 U.S. 36, and *Kelly v. South Carolina* (2002) 534 U.S. 246. In those cases, the United States Supreme Court held that "where a defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." (*Simmons v. South Carolina*, *supra*, at p. 156; accord, *Shafer v. South Carolina*, *supra*, at p. 39; *Kelly v. South Carolina*, *supra*, at p. 248 [all reversing death sentences where trial courts denied requested parole-ineligibility instructions].)

The high court's rationale was straightforward: when a jury may consider future dangerousness in determining the appropriate sentence, a defendant who is eligible for parole reasonably will be viewed as a greater threat to society than a defendant who will not be released, and without accurate information about the actual duration of a defendant's prison sentence, the jury is left to speculate about the possibility of his release in assessing his potential for future dangerousness. (*Simmons v. South Carolina*, *supra*, at pp. 163, 165.) To avoid the risk that the jury might impose a death sentence it otherwise did not think appropriate in order to prevent the defendant's release, the defendant is entitled to give the jury legally accurate information about his parole ineligibility. (*Id.* at pp. 168-169.)

In applying the *Simmons* rule in *Kelly v. South Carolina*, *supra*, 534 U.S. 246, the high court made clear that the defendant's right to inform the jury about his parole ineligibility arose (1) even when the jury did not inquire or demonstrate confusion about the issue (*id.* at p. 255); (2) when evidence tended to prove his dangerousness in the future even if it also supported other inferences (*id.* at p. 254); and (3) when the issue of future dangerousness was raised impliedly rather than directly by the prosecutor's

argument (*id.* at p. 255).

Although the *Simmons* rule arose in the context of the question of future dangerousness at a capital-sentencing trial, its central teaching applies to Buenrostro's competency trial. In *Simmons*, the high court acknowledged the reality that jurors will speculate about whether the defendants they are judging will be released back into society. Certainly, that issue is front and center when a jury is deciding between life and death and future dangerousness is part of the evidentiary equation. But as the Court of Appeal recognized in *People v. Moore*, *supra*, 166 Cal.App.3d at p. 544, similar speculation occurs about the consequences of the verdict in a sanity trial, which precludes punishment after a trial and a finding of guilt.

Logic and common sense dictate that the same speculation likely occurs about the consequences of the verdict in a competency trial, which interrupts the trial and postpones any possible punishment. There is no reason to think that jurors are any more certain, or any less concerned, about what happens to a defendant after an incompetency verdict than after a sentence of life imprisonment. As explained above, the prosecutor here put the question of Buenrostro's release at issue with his argument that she was malingering as a way to avoid punishment. (5 C-RT 1186.) Just as the defendants in *Simmons*, *Shafer* and *Kelly* had a due process right to give their juries "truthful information" about their ineligibility for parole (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 169), Buenrostro had a due process right to rebut the prosecutor's charge with accurate information explaining that she would be not released from custody upon a finding that she was incompetent. The trial court's refusal to give the requested instruction violated Buenrostro's right to due process under the Fourteenth Amendment.

Buenrostro is aware that in *People v. Turner*, *supra*, 34 Cal.4th at p. 434, this Court, once again in dictum, rejected a due process claim based on analogy to *Simmons*, *Shafer* and *Kelly* to an instruction on the consequences of an incompetency verdict. This Court explained its conclusion as follows:

> Unlike the jury in the penalty phase-which makes "the moral judgment whether to impose the death penalty" (*Shafer,* at p. 51, 121 S.Ct. 1263) – the jury in a competency hearing exercises no sentencing discretion and merely resolves a factual inquiry – whether the defendant is competent to stand trial (see *ibid.*). Thus, "none of *Simmons*' due process concerns arise" in the competency context. (*Ibid.*)

(*People v. Turner*, *supra*, 34 Cal.4th at p. 434.) This reasoning is mistaken.

Notwithstanding the language quoted from *Shafer*, the distinction between "factual" and "moral" determinations does not govern whether the due process concerns addressed in *Simmons* apply to the instruction at issue in *Turner* or that at issue here. Although the ultimate penalty decision in *Simmons* may have involved a moral judgment, the issue addressed by the high court was the defendant's right to inform the jury of his ineligibility for parole when future dangerousness is an issue at the penalty trial. (*Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 162-163 [discussing role of future dangerousness in state capital-sentencing scheme and ruling that "[i]n assessing further dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant.") Future dangerousness is a factual question; it is not a moral judgment. The high court's holding in *Simmons* makes this clear. It stated with regard to the defendant's parole ineligibility:

> The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our

> well-established precedents interpreting the Due Process Clause.

(*Id.* at p. 164; see *id.* at p. 171.) Thus, the Court did not link its due process concerns to the "moral" dimension of a capital-sentencing trial, but rather to the right to refute factual assertions of future dangerousness.

The Court's analysis of its precedents also underscores that its overriding concern was with the defendant's due process right to rebut factual information that the decision-maker considered, and upon which it may have relied, in rendering its death sentence. (*Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 165-166 [discussing due process rulings in *Skipper v South Carolina* (1986) 476 US. 1 and *Gardner v. Florida* (1977) 430 U.S. 349.) In this way, the Court relied on "one of the hallmarks of due process in our adversary system" which applies to the litigation all sorts of facts in a criminal prosecution – "the defendant's ability to meet the State's case against him." (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 175 (conc. opn. of O'Connor, J.) Notably, and consistent with its focus on the defendant's right to counter evidence rather than on the moral or normative nature of capital sentencing, the Court explicitly refused to decide whether the Eighth Amendment, which pertains only to questions of punishment, compelled the parole-ineligibility instruction that it found was required by the Due Process Clause. (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 162, fn. 4.)

In *Shafer v. South Carolina*, *supra*, 532 U.S. at p. 51, cited by this Court in *Turner*, the due process issue remained the right to disprove the defendant's parole eligibility when the jury was presented with evidence of his future dangerousness. Again, the focus was on factual questions, not moral judgments. The high court explained under the South Carolina

capital-sentencing scheme, future dangerousness and thus parole eligibility are not part of the jury's determination of the statutory aggravating circumstances, which decide the defendant's death-eligibility. (*Ibid.*)[59] Rather, parole eligibility "may become critical" only when the jury decides "whether to impose the death penalty." (*Ibid.*) Thus, although in *Shafer* the high court refers to the point at which the parole eligibility question arises, i.e., when the jury makes the "moral judgment" in determining the appropriate sentence, as in *Simmons*, the Court ties the due process right to prove parole ineligibility to the *factual* question of future dangerousness, and not to the ultimate normative decision made in selecting the sentence.

In sum, this Court's reading of *Simmons* as applying due process concerns to moral, but not factual, decisions is insupportable, and its distinction of a parole-ineligibility instruction at the penalty phase from a no-release instruction at a competency hearing is misplaced. *Simons, Kelly* and *Shafer* fully support Buenrostro's requested instruction, and the trial court's refusal to give the instruction violated her right to due process under the Fourteenth Amendment.

D. The Erroneous Refusal To Instruct On The Consequences Of A Verdict Of Incompetence Requires Reversal Of The Entire Judgment

The trial court's error in refusing to give Buenrostro's instruction about the consequences of finding that she was incompetent to stand trial requires reversal of all the verdicts. In reversing for analogous claims, the United States Supreme Court in *Simmons*, *Shafer* and *Kelly* and the California Courts of Appeal in *Moore* and *Dennis* did not engage in

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[59] The high court expressly noted that if future dangerousness was a factor with regard to the aggravating circumstances, "a *Simmons* charge would at that point be required." (*Id.* at p. 51, fn. 5.) ,

harmless error review or indicate that such a prejudice analysis would be appropriate. Rather, all these courts reversed the relevant judgment and remanded for further proceedings not inconsistent with their opinions. (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 171; *Shafer v. South Carolina*, *supra*, 532 US. at p. 55; *Kelly v. South Carolina*, *supra*, 534 U.S. at p. 258; *People v. Moore*, *supra*, 166 Cal.App.3d at p. 557; *People v. Dennis*, *supra*, 169 Cal.App.3d at p. 1141.) Upon remand from the United States Supreme Court, the South Carolina Supreme Court remanded for resentencing without engaging in harmless error review. (See *State v. Shafer* (S.C. 2002) 573 S.E.2d 796, 801-802.)[60] The clear implication of all these cases is that the distortion in jury deliberations resulting from speculation about the defendant's possible release is prejudicial no matter how strong the evidence may be in support of the jury's verdict. The lack of any discussion of prejudice is especially noteworthy in *Kelly*, where there was no jury inquiry about the defendant's parole eligibility, and thus there was "'nothing whatsoever to indicate that the jurors were concerned at all with the possibility of [Kelly's] future release . . .'" (See *Kelly v. South Carolina*, *supra*, 534 U.S. at p. 256.) Consistent with these cases, this Court should find that the error in refusing to instruct on the consequences of an incompetency verdict requires reversal per se.

But even if a traditional harmless error analysis were undertaken, reversal still would be warranted whether the error is considered under the state standard (*People v. Watson*, *supra*, 46 Cal.2d at p. 836) or the federal constitutional standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24). As set forth in Argument I, Section D, Argument II, Section D, Argument

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[60] The decisions on remand in *Simmons* and *Kelly* apparently were not published.

III, Section D, and Argument IV, Section C, and incorporated here, the evidence at the competency trial did not overwhelming point to a competency verdict, but instead was roughly balanced with a sharp dispute among the experts on the ultimate issue. Where, as here, the evidence was in equipoise, and the burden of proof was by a preponderance of the evidence, the jury's concern about the Buenrostro's possible release likely influenced the deliberations toward a verdict of competency. Accordingly, reversal of the entire judgment is required.

For all the foregoing reasons, the trial court's refusal to instruct the jury that Buenrostro would not be released if found incompetent to stand trial requires reversal of the entire judgment.

VII. THE CUMULATIVE EFFECT OF THE ERRORS AT THE COMPETENCY TRIAL UNDERMINES THE INTEGRITY OF THE VERDICT AND REQUIRES REVERSAL

Assuming that none of the errors at the competency trial is prejudicial by itself, the cumulative effect of these errors nevertheless undermines confidence in the integrity of the adjudication of Buenrostro's competence to stand trial and warrants reversal of the entire judgment. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The case was close at the competency trial with sharply disputed evidence. As discussed previously, the validity of Dr. Rath's opinion that Buenrostro was competent was open to serious question, while Dr. Moral's similar opinion was based on speculation that she would be able to assist her counsel in a rational manner at some point in the future, not a finding that she was then presently able to do so. This prosecution evidence was countered by the opinions of three defense experts, who had spent considerable time observing and interacting with Buenrostro, that she was

unable to assist counsel in a rational manner and by evidence of her bizarre and uncooperative behavior which supported the experts' opinions. The fundamental instructional errors regarding the definitions of competence and incompetence (Argument I) and the serious instructional error in refusing to instruct the jury on the consequences of a verdict of incompetence (Argument VI), combined with several evidentiary errors that undercut Buenrostro's case (Arguments II, III, and V) and bolstered the prosecution's case (Argument IV and V), combined to obscure the relevant facts and mislead the jury as to the appropriate standard in deciding whether Buenrostro was competent to stand trial for capital murder.

The cumulative effect of these errors so infected Buenrostro's competency trial with unfairness as to make the resulting verdict of competence a denial of the state and federal guarantees of due process. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) The competency verdict, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) Because the competency verdict resulted from an unfair trial, there was no reliable determination that Buenrostro was competent when she was tried

for murder and condemned to death. Accordingly, the combined impact of the various errors in this case requires reversal of the entire judgment.

VIII. THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE REQUEST FOR A SECOND COMPETENCY HEARING WHEN, AFTER THE PROSECUTION ANNOUNCED IT WAS SEEKING A DEATH SENTENCE, BUENROSTRO BECAME INCREASINGLY IRRATIONAL AND NON-RESPONSIVE

Not long after the jury in the competency trial returned its verdict finding Buenrostro competent, the prosecution announced its intention to seek the death penalty. Buenrostro had become less logical, coherent and communicative, and her attorney asked for a renewed competency determination. Defense counsel established a bona fide doubt as to Buenrostro's competence to stand trial by presenting new information showing changed circumstances relating to both the case and his client. Although the trial court initially granted the motion in the absence of the prosecutor, it ultimately denied a second competency determination after rehearing the motion in the prosecutor's presence. In doing so, the trial court abused its discretion and violated Buenrostro's state and federal constitutional rights to due process and a fair trial, as well as her related trial rights such as the rights to effective assistance of counsel, to present evidence, to confront and cross-examine witnesses and to a reliable, non-arbitrary determination of guilt and penalty. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 6th, 8th & 14th Amends.)

A. Defense Counsel Moved For A Renewed Competency Determination Based On A Fundamental Change In The Nature Of The Prosecution And Further Deterioration In Buenrostro's Functioning

On December 27, 1995, a little over a month after the competency verdict, the prosecution filed a Notice of Intention to Seek Capital Punishment. (1 CT 59-61.) Almost immediately, on January 3, 1996,

defense counsel Scott again asked for a competency determination and for the appointment of doctors pursuant to section 1368. (1 P-RT 51.) The renewed competency motion initially was heard that same day, following a *Marsden* hearing, before Judge McIntyre who adjourned criminal proceedings and appointed two experts. (1 P-RT 51.) At the time of this appointment, the prosecutor was not present because he had been excused from the *Marsden* proceeding. (Sealed RT January 3, 1996, p. 50.)

On January 5, 1996, with the prosecutor at the hearing, Judge McIntyre explained that she had erred in appointing doctors to assess Buenrostro's competency in the prosecutor's absence. (1 P-RT 53; 1 CT 66.) Therefore, the trial court vacated its previous appointment under the then-recent case of *People v. Medina* (1995) 11 Cal.4th 694, which required the trial court to find a "substantial change of circumstances" before ordering a second competency hearing after a defendant had been found competent. (1 P-RT 53.) The matter was continued to January 19, 1996.

On January 19, 1996, defense counsel Scott repeated his request before Judge Sherman. (1 P-RT 56-57.) He explained that he had met with Buenrostro twice since the competency verdict on November 13, 1995. (1 P-RT 60.) During those meetings, Buenrostro talked in a rambling fashion about her dissatisfaction with Scott's legal representation, but when he tried to discuss the nature of her dissatisfaction in a logical manner and to apprise her of her options, she did not appear to understand his explanations. (*Ibid.*) The prosecutor argued that under *Medina* defense counsel had presented no new evidence to justify a second appointment of doctors to assess Buenrostro's competence. (1 P-RT 61.)

Defense counsel disagreed. Scott explained that he did have new evidence to present, namely that Buenrostro's conduct at the *Marsden*

hearing and in conferences with him showed an increased inability to understand and respond to the legal proceedings and to cooperate with him in preparing her defense. (1 P-RT 62-63.) Scott pointed to the recent *Marsden* hearing where Buenrostro reportedly said no more than ten words (1 P-RT 60), and her answers to the trial court's questions demonstrated her inability to respond to the demands of proceedings. (1 P-RT 61.)[61]

Moreover, when Scott told Buenrostro that the prosecution was seeking the death penalty, she did not respond. (1 P-RT 62.) Buenrostro did not say a word when Scott asked several questions to determine whether she understood the impact of the prosecutor's decision to seek the death penalty. (*Ibid.*) She just faced him with a blank stare. (1 P-RT 63.) Scott reported that this conduct was substantially different from Buenrostro's previous behavior. (*Ibid.*) In Scott's view, Buenrostro's confusion, inability to understand and inability to cooperate had deepened since the competency trial. (1 P-RT 66.) She was more disorganized, incoherent and uncooperative. (*Ibid.*)

Nevertheless, denying the request, the trial court found that there was an insufficient factual basis for distinguishing Buenrostro's condition presently from what it was prior to the first competency referral. (1 P-RT 66-67.)[62]

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[61] At the January 3, 1996 *Marsden* hearing before Judge McIntyre, Buenrostro, in fact, uttered more than ten words. She asserted that she did not like the way Scott was handling the case. When the trial court asked her to give some examples, Buenrostro said that counsel refused to do small things for her and never had answers to her questions. (Sealed RT January 3, 1996, at p. 50.)

[62] Judge Sherman granted defense counsel's first request for a competency evaluation on March 14, 1995, based on defense counsel's

B. The Prosecution's Decision To Seek Death And Buenrostro's Increasing Incoherence And Her Non-Responsiveness Were Changed Circumstances That Established A Bona Fide Doubt About Her Competence To Stand Trial

As discussed in Argument I, the trial of an incompetent state-court defendant violates the due process clause of the Fourteenth Amendment, and the standard for competence under the federal Constitution and the test for incompetence under state law are well-settled. (*Dusky v. United States, supra*, 362 U.S. at p. 402; *Drope v. Missouri, supra*, 420 U.S. at pp. 171-172; *People v. Lewis* (2008) 43 Cal.4th 415, 524; § 1367.) Both the federal due process clause and state law require a trial judge to suspend criminal proceedings and conduct a competency hearing whenever the court is presented a bona fide doubt about the defendant's competence to stand trial. (*Drope v. Missouri, supra*, 420 U.S. at p. 181; *Pate v. Robinson, supra*, 383 U.S. at pp. 383-386 [implicitly endorsing Missouri's and Illinois's "bona fide doubt" standard]; *People v. Rogers* (2006) 39 Cal.4th 826, 847 [explicitly following "bona fide doubt" standard in applying §1368].)[63]

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representations that Buenrostro gave him only minimal information; that her mental health had deteriorated; that she reported being the subject of experiments by jail personnel consisting of gas being introduced into her cell causing her to fear for her life; and that she was unable to articulate the role of the prosecutor and the difference between the roles of the defense attorney and the prosecutor. (1 P-RT 31-37.)

[63] This Court phrases this test in slightly different terms. A trial judge is required to suspend trial proceedings and conduct a competency hearing when presented with "substantial evidence of incompetence, that is, evidence that raises a *reasonable or bona fide* doubt concerning the defendant's competence to stand trial." (*People v. Lewis, supra*, 43 Cal.4th at p. 524, italics added; *People v. Halvorsen* (2007) 42 Cal.4th 379, 401; *People v. Rogers* (2006) 39 Cal.4th 826, 847.)

Where, as here, the defendant after a hearing already has been found competent to stand trial, "a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence." (*People v. Medina, supra*, 11 Cal.4th 694, 734.) The trial court's decision whether to hold a competency hearing is reviewed for abuse of discretion (*People v. Welch* (1999) 20 Cal.4th 701, 742), but where substantial evidence of incompetence exists, and the trial court fails to hold a competency hearing, the judgment must be reversed (*People v. Young* (2005) 34 Cal.4th 1149, 1216-1217).

In this case, the trial court abused its discretion in denying the motion for a renewed competency hearing. As the high court has cautioned, "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope v. Missouri, supra*, 420 U.S. at p. 181.) As noted before, a defendant's ability to understand the nature of the proceedings and to assist rationally in the defense must be assessed in light of the particular charges. (See Sadock & Sadock, eds., Kaplan & Sadock's Comprehensive Textbook of Psychiatry (8th ed. 2005) Vol. II, p. 3983. (See *ante* page 64, footnote 28.) The trial court here completely disregarded the seismic shift in this case from a non-capital to capital prosecution. The prosecutor's decision to seek the death penalty constituted a new circumstance, which fundamentally altered the nature of the case and both prompted and justified the renewed motion for a competency determination.

Having been put on notice that Buenrostro's life now hung in the balance, Scott had a heightened duty toward his client. Defense counsel in

a capital case must conduct a thorough investigation of the defendant's background (*Rompilla v. Beard* (2005) 545 U.S. 374, 387) in order "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (*Wiggins v. Smith* (2003) 539 U.S. 510, 524.) Concomitantly, the defendant's ability to communicate and cooperate rationally with her counsel assumes a heightened urgency and may be crucial to her chances of avoiding a death sentence. Although an attorney must investigate penalty phase evidence even over a client's objection (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 840; ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.C. (1989)), the client's cooperation greatly enhances the attorney's ability to discover and develop the mitigating factors and respond to the aggravating factors in the client's life (Goodpaster, G., "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 299, 321 (1983).)

At this critical juncture, Scott was faced with the heaviest responsibility a lawyer can assume and a client who was not even able to tell him that she understood that the prosecutor was seeking her execution. When Scott informed Buenrostro of this new development, she essentially "faced him with a blank stare." (1 P-RT 63.) This report hardly instills confidence that Buenrostro was able to grasp the significance of the prosecution's decision to seek a death sentence or the extremity of her predicament. The prosecutor did not present, nor did the trial court note, any evidence disputing Scott's account. Moreover, the trial court did not attempt to verify that Buenrostro had even a rough understanding of the significance of the Notice of Intention to Seek Capital Punishment. A colloquy with Buenrostro might have confirmed or disproved Scott's

concern. But this simple step was not taken.

Contrary to the trial court's finding that there had been no change in Buenrostro's condition (1 P-RT 66), defense counsel explained that there had been a significant deterioration in Buenrostro's functioning since the previous competency hearing.[64] Scott reported that Buenrostro had become less responsive since the competency verdict and that, in his opinion, she was unable to cooperate with him in a logical manner. (1 P-RT 60, 63.) He was unequivocal about the change in Buenrostro's condition, particularly with regard to her non-responsiveness.[65] As he explained, the legal issues regarding her ability to understand and her ability to assist, which define competence, were the same, but Buenrostro's "factual presentation" was

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[64] Although Judge Sherman had granted the original motion for a competency hearing (1 P-RT 31-37; 1 C-RT 1-6), she did not preside over the trial which was handled by Judge Hanks (see 1 P-RT 41). Therefore, she did not have firsthand knowledge of the evidence presented, and there is no indication that she reviewed the transcripts of the competency trial before ruling on the motion for another competency determination (see 1 P-RT 66-67). Rather, she asked deputy district attorney Rodric Pacheco, who was *not* the prosecutor who litigated the competency trial, but was appearing on behalf of that attorney, Michael Soccio, for information about any change in Buenrostro's condition. (See 1 P-RT 56-58, 65-66.) However, the prosecutor, whether Pacheco or Soccio, would not have been privy to Buenrostro's out-of-court interactions with her attorney. In this way, Judge Sherman's ruling is not entitled to the deference to which it might have been entitled under other circumstances.

[65] After Scott told the trial court that Buenrostro just stared when he told her the prosecutor was seeking death, the court questioned Scott as follows:

> THE COURT: Did you get the same, similar sort of reaction when you discussed this case with her prior to the jury trial on the 1368 issue, in any way, shape or form?
>
> MR. SCOTT: No.

(1 P-RT 63.)

qualitatively different – "more disorganized, incoherent and uncooperative." (1 P-RT 66.)

The deterioration in Buenrostro's condition had dire implications for her ability to rationally assist counsel with the entire defense. In a capital case, the guilt-phase strategy and penalty-phase strategy are integrally related, and the mitigation case for life may actually be integrated with the defense to the substantive charges. (See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases*, Guideline 10.10.1, 31 Hofstra L.Rev. 913, 1047-148; Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill.L.Rev. 323, 357-358 (1993); Goodpaster, *The Trial for Life*, *supra*, 58 N.Y.U. L.R. 324-325.) The critical importance of rational attorney-client communication in preparing for both phases, and for exercising the rights necessary for a fair trial, cannot be overstated. Defense counsel Scott notified the trial court that Buenrostro was no longer able to communicate with and assist him rationally at a time when that capability had become even more imperative.

As demonstrated above, defense counsel's showing raised the very real possibility that Buenrostro might proceed to trial without a rational and factual understanding that her life was at stake and without the ability to consult with and assist counsel rationally with the conduct of her defense. In short, the transformation of this case into a death case was a monumental change in circumstances which converged with a significant decline in Buenrostro's condition and together raised a bona fide doubt about her competence to stand trial on capital charges. The trial court's denial of another competency determination not only violated sections 1367-1368, but also deprived Buenrostro of her constitutional rights to due process and a fair trial. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.) Moreover,

as discussed in Argument I, the United States Supreme Court has stated:

> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one' own behalf or to remain silent without penalty for doing so."

(*Cooper v. Oklahoma*, *supra*, 517 U.S. at p. 354, quoting *Riggins v. Nevada* (1992) 504 U.S. 127, 139-140; accord, *People v. Pokovich* (2006) 39 Cal.4th 1240, 1250.) In refusing to hold a renewed competency hearing, the trial court also infringed on these constitutional trial rights, as well as on the right to reliable verdicts in a capital case. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 6th, 8th, and 14th Amends.)

C. The Cases Upon Which The Trial Court And The Prosecutor Relied, As Well As This Court's More Recent Decisions, Do Not Support The Refusal To Hold A Second Competency Hearing

The cases cited by the trial court and the prosecutor do not support the denial of Buenrostro's renewed motion for a competency determination. The trial court cited *People v. Campbell* (1987) 193 Cal.App.3d 1653 and *People v. Hale* (1988) 44 Cal.3d 531 (1 P-RT 68), and neither supports its ruling. In *Campbell*, defense counsel requested a competency determination based on the defendant's allegedly "babbling" direct testimony and his subsequent letter to the trial court. (*People v. Campbell*, *supra*, 193 Cal.App.3d at p. 1661.) The Court of Appeal concluded that the defendant's testimony, while in stream-of-consciousness style, was coherent and resulted from defense counsel's tactical choice to elicit the uninterrupted testimony in a narrative style by asking open-ended questions, rather than from the defendant's "unglued" mental state. (*Id.* at p. 1666.) The court also concluded that his letter, which explained that he made a

mistake during his testimony, reflected his concern that the jury be presented with all the facts and did not suggest that he lacked an understanding as to the nature of the criminal proceedings. (*Id.* at p. 1667.) In sum, the court found that the very evidence proffered to show a doubt about the defendant's competence refuted any such concern. In contrast, there was no contemporaneous evidence from Buenrostro controverting defense counsel's reports of her inability to understand the prosecutor's decision to seek death or her inability to communicate rationally.

In *Hale*, this Court reversed the defendant's convictions and death sentence because the trial court failed to conduct a competency hearing after ordering one. (*People v. Hale*, *supra*, 44 Cal.3d at pp. 541-542.) The record showed that the defendant exhibited "abnormal and bizarre" behavior at the preliminary hearing. (*Id.* at p. 535.) But the extensive evidence establishing a doubt as to Hale's competency does not, by some negative implication, suggest that Buenrostro did not present raise a bona fide doubt as to her own competence. Rather, *Hale* simply enforces the trial court's sua sponte duty to "jealously guard[]" the due process prohibition against trying a defendant who is incompetent. (*Pate v. Robinson*, *supra*, 383 U.S. at p. 385.)

The cases cited by the prosecutors are similarly inapposite. (See 1 P-RT 54, 57-58.) The ruling in *People v. Medina*, *supra,* 11 Cal.4th 694, actually supports defense counsel's request for a second competency determination. In *Medina*, after an initial competency trial which found Medina competent and several months before the guilt phase began, defense counsel informed the trial court that Medina refused to talk to him or even acknowledge his presence. (*Id.* at p. 733.) The trial court appointed two experts to assess Medina's competence and set a date for a second competency hearing. (*Ibid.*) The trial court later terminated the

competency proceedings, an action this Court upheld, when after Medina refused to talk to the appointed experts, one expert reported he obtained no new information, and the other reported he could not offer an opinion about Medina's present competence. (*Id.* at pp. 733-734.)[66] Defense counsel conceded that he had no new evidence to present at a second competency hearing. (*Ibid.*)

Although the second competency hearing ultimately was not held, *Medina* nevertheless establishes that a defendant's refusal to communicate with counsel is a sufficient factual basis for initiating another competency proceeding. In appointing two experts to reassess Medina's competence and ordering a second hearing, the trial court necessarily found a bona fide doubt as to Medina's competence. Indeed, the showing in this case is more substantial than in *Medina*. Buenrostro's non-responsiveness to counsel was a new development. Whereas Medina exhibited an unwillingness to cooperate with his counsel and examining psychiatrists before the initial competency determination (*id.* at p. 734), Buenrostro did not. On the contrary, she had interacted with counsel and had cooperated with the defense experts who evaluated her, but then she stopped responding to counsel after the State announced its decision to seek the death penalty. This was a new and significant change in circumstances.

In addition, the other cases cited by the prosecutor do not support the trial court's ruling. (See 1 P-RT 54.) In contrast to this case, the defendants in *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1154, and *People v. Kelly* (1992) 1 Cal.4th 495, failed to present specific facts of a change in circumstances after the initial competency determinations. In

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[66] The opinion earlier states that the two experts did find that the "defendant remained competent to stand trial." (*People v. Medina*, *supra*, 11 Cal.4th at p. 733.)

Jones, defense counsel made the renewed motion at the very end of the trial – after the trial court had denied the motion for modification of the death verdict, but before it pronounced judgment. (*People v. Jones, supra,* 53 Cal.3d at p. 1152.) Counsel asserted that, for a substantial period of time, the defendant had been unable to assist in the preparation and defense of his case, and he had a psychiatrist present who would so testify. The trial court denied the motion without hearing from the psychiatrist. This Court found the proffer was insufficient because it lacked specific facts showing that the defendant was unable to cooperate with his attorneys and demonstrating a change in the defendant's condition. (*Id.* at p. 1153-1154.) In contrast, Buenrostro's attorney did not rely on conclusory allegations of incompetence, but articulated specific facts to illustrate Buenrostro's inability to understand and assist, i.e., she stared blankly without responding when asked whether she understood that the prosecutor was seeking the death penalty; she was less responsive, logical and coherent in her communications; and she did not appear to understand her options if she was dissatisfied with counsel's representation. (1 P-RT 60-62.)

Moreover, *People v. Kelly, supra*, 1 Cal.4th at pp. 541-543, is completely inapposite. Defense counsel there declared a doubt about the defendant's competency during jury selection, and the trial court appointed two experts who both found the defendant competent. Defense counsel then withdrew his request for a jury trial on the issue of competence; the trial court found the defendant competent based on the experts' reports, and the question of the defendant's competence was not raised again. On appeal, the defendant argued that the trial court sua sponte should have ordered another competency evaluation based on evidence presented at the sanity and penalty phases. Rejecting the claim, this Court explained that there was no evidence of a change of circumstances, since the evidence

relied upon on appeal "was generally included in the facts defense counsel recited when they expressed their doubts as to competency in the first place." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 543.) That did not happen here. Rather, defense counsel made a motion for another competency determination on the basis of specific new facts that showed substantial changes in the nature of the trial and Buenrostro's condition.

Similarly, more recent decisions of this Court upholding the failure to conduct a second competency determination do not shore up the trial court's ruling in this case. Those cases are distinguishable most plainly on the question of whether a change in circumstances supported the defendant's request or required the trial court to order a hearing sua sponte. Unlike Buenrostro's motion, none of those claims for a renewed competency determination was triggered by the prosecution's decision to seek the death penalty or by any other fundamental change in the case.

Thus, in *People v. Leonard* (2007) 40 Cal.4th 1370, 1415-1416, penalty-phase evidence of a PET scan of the defendant's brain, which showed severe damage underlying his epilepsy, was not a change in circumstances that cast doubt on the validity of the prior competency determination, because the competency experts had been aware of the defendant's seizure disorder as well as the likelihood of brain damage. Moreover, the defense experts at the penalty phase did not indicate that the defendant lacked the ability to understand the nature of the proceedings or to assist his counsel.

In *People v. Huggins* (2006) 38 Cal.4th 175, 218-220, the trial court held an informal hearing on the defendant's renewed competency motion at which the defense psychiatrist conceded that the defendant satisfied minimum requirements for competence at the pretrial determination. (*Id.* at p. 219.) Although the psychiatrist initially expressed doubt about the

rationality of some of the defendant's guilt-phase testimony, he also acknowledged its potential exculpatory purpose. Moreover, the psychiatrist agreed that the defendant did not appear to have cognitive difficulties, memory failures, or difficulty in explaining his conduct, and that the defendant appeared to understand that he was on trial and the nature of a trial. This testimony supported the trial court's conclusion that there had been no substantial change in defendant's condition from the prior competency finding. (*Ibid.*). Buenrostro was denied even an informal inquiry with expert assistance, and there was no contemporaneous evidence about Buenrostro's condition at the time of the renewed motion that contradicted defense counsel's concern that she did not understand the prosecution's decision to seek the death penalty.

In other cases, the defendant's conduct, including bizarre statements and outbursts, did not constitute a substantial change in circumstances or new evidence raising a doubt about his competence and, in at least one case, this unusual behavior showed that the defendant was able to understand the nature of the proceedings and to assist counsel in a rational manner. (*People v. Marks* (2003) 31 Cal.4th 197, 220-221 [defendant's most conspicuous outburst – interrupting an eyewitness's testimony to point out that he originally identified another person as the shooter – proved his ability to understand the proceedings and assist counsel]; *People v. Lawley* (2002) 27 Cal.4th 102, 136-138 [self-represented defendant's behavior manifested the same delusional beliefs that the experts reported in their competency evaluations or reflected "the ineptitude frequently exhibited by self-represented defendants," and after trial, the court expressly found that it had no doubt about his competency or ability to represent himself]; *People v. Frye* (1998) 18 Cal.4th 894, 1004 [defendant's request to waive his presence at the penalty phase because of his angry and emotional reaction to

the verdict of guilt and his desire not "to jeopardize anything that I might have with the jury" did not indicate an inability to understand the nature of the criminal proceedings or rationally to assist counsel]; *People v. Marshall* (1997) 15 Cal.4th 1, 29, [defendant's bizarre statements during and after trial, including assertions that he was a god and that the President and Governor were conspiring against him, did not establish a substantial change of circumstances].)

In this case, defense counsel presented what was missing in these cases – substantial evidence of a substantial change in the circumstances relevant to Buenrostro's competency. At the critical point when this case became a capital prosecution, Buenrostro became less responsive and more rambling in her communication with defense counsel, making it impossible for her assist him in a rational manner, and she did not appear to understand, let alone appreciate, the significance of the prosecutor's decision to seek her execution. The defense presentation was sufficient to prompt further inquiry, and the trial court erroneously concluded that there had been no such showing. (See *People v. Kaplan*, *supra*, 149 Cal.App.4th at pp. 384-387.) As set forth in Section B of this argument, the erroneous denial of Buenrostro's renewed competency determination violated state statutory as well as state and federal constitutional law.

D. The Erroneous Denial Of A Second Competency Hearing Requires Reversal Of The Entire Judgment

The trial court's failure to hold a second competency hearing requires that all the verdicts be reversed. The United States Supreme Court long ago recognized "the difficulty of retrospectively determining an accused's competence to stand trial." (*Dusky v. United States*, *supra*, 362 U.S. at p. 402.) Therefore, it consistently has ordered a new trial on the

criminal charges as the remedy for the erroneous failure to conduct a competency determination. (*Ibid.* [reversing conviction and remanding "for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent"]; accord, *Drope v. Missouri*, *supra*, 420 U.S. at p. 183 [refusing to order hearing in 1975 to determine whether the defendant was competent in 1969, given "the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances," and reversing judgment with instructions that the State was free to retry the defendant]; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 386-387 [refusing to order competency hearing "six years after the fact" and instead granting writ of habeas corpus with regard to conviction, unless State gave petitioner a new trial rather than ordering competency hearing at which he could request a hearing on his competence].)

Similarly, this Court also has held that "where the substantial evidence test is satisfied and a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed." (*People v. Young* (2005) 34 Cal.4th 1149, 1216-1217, citing *People v. Stankewitz*, *supra*, 32 Cal.3d at p. 94.) The error is per se prejudicial. It may not "be cured by a retrospective determination of defendant's mental competence

during his trial." (*People v. Pennington*, *supra*, 66 Cal.2d at p. 521.) Accordingly, the convictions and death sentence must be reversed.[67]

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[67] As this Court has acknowledged, some courts have remanded to determine whether a a retrospective competency hearing could be held where none was held at time of trial. (*People v. Young*, *supra*, 34 Cal.4th at p. 1217, fn. 16, citing *People v. Ary* (2004) 118 Cal.App.4th 1016; see also *Odle v. Woodford* (9th Cir.2001) 238 F.3d 1084, 1089.) Even assuming, arguendo, that there may be a rare situation in which a meaningful retrospective competency determination might be possible, this is not that case. Although psychiatric and psychological evidence was presented at the competency trial, the question raised by defense counsel's motion for a further competency determination was whether, given the confluence of the prosecution turning into a capital case and the deterioration in Buenrostro's functioning abilities, she had become incompetent after the jury's verdict of competence. On the question of Buenrostro's capability to assist counsel rationally after January 1, 1996, there is no available psychiatric or other expert evidence. Indeed, none was presented at either the guilt phase or the penalty phase of the criminal trial. It is unrealistic that the parties would be able to obtain credible retrospective evaluations of Buenrostro more than 12 years after the fact.

CLAIMS REGARDING JURY SELECTION IN THE CRIMINAL TRIAL

IX. THE TRIAL COURT ERRONEOUSLY EXCLUDED THREE PROSPECTIVE JURORS BECAUSE THEY WERE OPPOSED TO, OR WOULD HAVE DIFFICULTY IMPOSING, THE DEATH PENALTY

The trial court erroneously excused two prospective jurors, Bobbie R. and Francis P., solely on the basis of their death-qualification answers in the juror questionnaire. Their specific answers provided no grounds for concluding that they could not be impartial. In addition, the trial court erroneously excused another prospective juror, Richard J., after voir dire on the basis of his death penalty views. His answers, both in the jury questionnaire and upon oral examination, presented no cause for excluding him from jury service. Excusing these three prospective jurors, singly and together, violated Buenrostro's rights to due process and a fair trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412), and article I, section 16 of the California Constitution, and requires reversal of her death sentence.

A. The Jury Selection Procedure

Jury selection for Buenrostro's capital trial took place over five days. (21 CT 5954 [June 29, 1998]; 32 CT 3832 [June 30, 1998]; 35 CT 9829 [July 6, 1998]; 35 CT 9830-9831 [July 13-14, 1998].) On June 29-30, 1998, the trial court began jury selection in each of the four panels used in this case with an explanation of the trial process, including that the death penalty might be involved (1 RT 9, 13-25 [panel 1]; 1 RT 58-76 [panel 2]; 1 RT 86-99 [panel 3]; 2 RT 112-131 [panel 4]), followed by the hardship excusals which, pursuant to the trial court's preference, were resolved almost entirely by stipulations of the parties (1 RT 27-54 [panel 1]; 1 RT

77-83 [panel 2]; 1 RT 101-106 [panel 3]; 2 RT 131-133 [panel 4]).) The prospective jurors without a hardship claim filled out the jury questionnaire. (1 RT 25-26, 76, 99; 2 RT 130-131.)

The jury questionnaire contained 81 questions divided into 11 topical sections. (33 CT 9224-9252.) The section entitled "Opinions about the Death Penalty" consisted of questions 68-81, but only questions 68-73, and question 76 related to the prospective juror's views about capital punishment. (21 CT 5942-5948.) These questions were as follows:

68. Briefly describe your general feelings about the death penalty:

a. On a scale of 1-10, with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty, how would you rate yourself?
(circle one)
1 2 3 4 5 6 7 8 9 10

b. Is there a particular reason why you feel as you do about the death penalty?
____Yes ____No
If yes, please explain:

c. If you are against the death penalty, would your opinion make if [sic] difficult for you to vote for the death penalty in this case, regardless of what the evidence was?
____Yes ____No
Please explain:

d. If you are in favor of the death penalty, would your opinion make it difficult for you to vote for life without the possibility of parole regardless of what the evidence was?
____Yes ____No

Please explain:

e. Have you ever held a different opinion about the death penalty?
____Yes ____No

f. In what ways, if any, have your views about the death penalty changed over time?

g. What purpose do you think the death penalty serves?

h. In what types of cases/offenses do you think the death penalty should be imposed?

i. What are your impressions of life in prison without the possibility of parole as a punishment for murder?

69. Do you have any religious affiliations that takes [sic] a stance on the death penalty?
____Yes ____No
If yes, please explain:

70. It is important that you have the ability to approach this case with an open mind and a willingness to fairly consider whatever evidence is presented as opposed to having such strongly held opinions that you would be unable to fairly consider all the evidence presented during the possible penalty phase.
There are no circumstances under which a jury is instructed by the court that they must return a verdict of death. No matter what the evidence shows, the jury is always given the option in a penalty phase of choosing life without the possibility of parole.
Assuming a defendant was convicted of a special circumstance murder, would you:
_____a. No matter what the evidence was,

ALWAYS vote for the death penalty.

_____b. No matter what the evidence was, ALWAYS vote for life without the possibility of parole.

_____c. I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate.

71. Are there any crimes for which you feel that the death penalty should ALWAYS be imposed, regardless of the circumstances of the crime and the defendant's background or mental state.

If yes, please explain:

72. If a person is sentenced to life in prison without the possibility of parole, you must assume that he or she will never be eligible for parole. If a person is sentenced to death, you must assume that the sentence will be carried out. Can you follow this instruction?

____ Yes ____ No

If no, please explain:

73. Do you have an opinion as to whether you think death or life in prison is the more severe punishment?

____ Yes ____ No

If yes, please explain which you feel is more severe and why:

* * *

76. In deciding on an appropriate penalty, that is, life in prison without the possibility of parole or death – you may not under any circumstance consider the relative cost of keeping someone in prison for life, or the cost of bring a person to execution. Can you set aside such considerations for all purposes?

____ Yes ____ No

If no, please explain:

(21 CT 5942-5947 [lodged jury questionnaire].) The remaining questions in this section addressed other issues. (21 CT 5946-5948.)

On July 6, 1998, after the jury questionnaires were completed, the trial court encouraged counsel to stipulate to the exclusion of prospective jurors on the basis of the jury questionnaires in order to "whittle down" the panel. (1 RT 5, 16.) The trial court identified potential jurors that it probably would excuse for cause, but indicated it would like stipulations from counsel for the for-cause exclusions. (3 RT 134.) The trial court explained that, in the absence of a stipulation, it would (and did) excuse about 30 people beginning from the back of the random list based solely on their questionnaires. (3 RT 135-154.)

On July 13-14, 1998, the trial court then conducted voir dire of some, but not all, of the remaining prospective jurors. As explained in Argument X, *post*, the trial court did not conduct sequestered death-qualification voir dire. With all present, the trial court randomly selected and questioned 18 panel members at a time and permitted each party 30 minutes to ask follow up questions. (3 RT 158-159; 4 RT 185, 191.) The trial court did not permit the attorneys to conduct voir dire to try to rehabilitate the prospective jurors it had concluded were biased. (4 RT 239.) The parties exercised their for-cause and peremptory challenges, and the jury was sworn. (4 RT 190 - 5 RT 554; 35 CT 9831.)

B. The Trial Court Erroneously Excluded Prospective Jurors Bobbie R., Frances P. And Richard J., Whose Views About Capital Punishment Did Not Substantially Impair Their Ability To Serve On Buenrostro's Jury

Under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views

would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 421.) As this Court has explained, a prospective juror would be "prevented or substantially impaired" in the performance of his or her duties as a California juror only if "he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart* (2004) 33 Cal.4th 425, 447.) Exclusion of even a single prospective juror who is not "substantially impaired" violates the defendant's "right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment. . . ." (*Uttecht v. Brown* (2007) __ U.S. __, 127 S.Ct. 2218, 2224), and requires automatic reversal of the death sentence (*Gray v. Mississippi* (1987) 481 U.S. 648, 668).

The trial court erroneously excluded Bobbie R., Frances P. and Richard J. As to none of these prospective jurors was there any showing that the juror's death penalty views would substantially impair his or her ability to serve on the jury as required for exclusion under *Witt*. As a result, the death sentence must be set aside.[68]

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[68] These claims are properly preserved for appeal. This Court never has required an objection from the defense in order to argue on appeal that the trial court unconstitutionally excused an anti-death penalty juror under *Witherspoon* and *Witt*. "[T]he failure to object does not waive the right to raise the issue" of the erroneous excusal of a juror based on the juror's opposition to the death penalty. (*People v. Cox* (1991) 53 Cal.3d 618, 648 fn. 4; see *People v. Velasquez* (1980) 26 Cal.3d 425, 443 [federal precedents hold *Witherspoon* error not waived by "mere" failure to object], reiterated in its entirety, *People v. Velasquez* (1980) 28 Cal.3d 461.)

1. The Trial Court Erroneously Excluded Bobbie R. Based Solely on Her Written Answers to the Jury Questionnaire Which Established Only that She Opposed the Death Penalty, Did Not Want to Make a Capital-Sentencing Decision, and Would Find it Difficult to Impose a Death Sentence

Bobbie R.'s answers to the jury questionnaire constituted the sole basis for her exclusion. She did not respond to all the questions, and her incomplete answers established only that she opposed the death penalty, did not want to make a decision about the death penalty, and would find it difficult to impose a death sentence. Her written responses were insufficient to disqualify her from jury service under *Witt*, and her exclusion, by itself, requires reversal of the death sentence.

a. Bobbie R.'s juror questionnaire answers and the trial court's sua sponte ruling to exclude her

The trial court started its sua sponte exclusion of prospective jurors with Bobbie R. (Juror No. 14). (3 RT 135.)[69] The trial court relied on her jury questionnaire (33 CT 9221-9252) and did not question her on voir dire or permit counsel to do so. Bobbie R., a 70-year-old widow with two adult children, had lived in Riverside for over four decades. Between 1964 and 1989, she had worked as a payroll clerk for the same company. (33 CT 9224, 9226.) She considered herself to be a religious person. (33 CT 9228). Answering question 15.B on the questionnaire, Bobbie R. responded that her religious beliefs would not prohibit or make it difficult for her to sit

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[69] Unlike the jurors who served in this case, the prospective jurors' names are not sealed and thus are part of the public record on appeal. However, according to this Court's practice, only their first names and last initials are used to maintain their anonymity.

as a juror (33 CT 9228), but answering question 37, she indicated that she had a religious or moral feeling that would make it difficult for her to sit in judgment of another person (33 CT 9235). Bobbie R. once was robbed of her purse by a person with a gun. (33 CT 9236.) Her nephew had law enforcement experience with the sheriff's department. (33 CT 9231.) She did not have any feelings, positive or negative, about the criminal justice system (33 CT 9232), and she had no experience with it (33 CT 9231). Bobbie R. left unanswered several questions.[70] She also checked the option "unsure" – rather than "yes" or "no" – in response to some questions in the section of the questionnaire designated "trial issues."[71]

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[70] Bobbie R. did not answer questions about the following subjects: testimony by witness who have used or about the use of drugs or alcohol (33 CT 9232-923333 CT 9232-9233); the nature of the charges in this case (33 CT 9235); serving on as a juror in a case where graphic photographs of the victim will be in evidence (33 CT 9235-9236); whether the criminal justice system makes it too hard for police and prosecutors to convict people accused of crimes (33 CT 9238); following the law if it differs from her beliefs or opinions (ibid.); the credibility of law enforcement officers (33 CT 9240); the use of expert witnesses (33 CT 9240-9241); and what makes her feel she could be a fair and impartial juror (33 CT 9242).

[71] Bobbie R. was unsure about the following topics: whether she would be able to be fair and objectively evaluate the testimony of each witness (33 CT 9240); whether she agrees with the principle that the testimony of a single witness may be sufficient to prove a fact (*ibid.*); whether she would discuss her position with her fellow jurors and listen to their thinking about the evidence (33 CT 9241); whether during deliberations she could reconsider her position if she became convinced that she was wrong (*ibid.*); whether she would change her position merely because other jurors disagree with her (*ibid.*); whether she could give the defendant and the People a fair trial (*ibid.*); whether she could objectively view and consider graphic photos of dead children (33 CT 9242).

Bobbie R. answered some, but not all, of the questions about the death penalty. The questionnaire explained that a penalty trial would be held only if the jury found the defendant guilty and found a special circumstance to be true; that there would be only two sentencing choices at the penalty phase – death or life without the possibility of parole; and that the jury would attempt to determine the penalty by considering factors in aggravation and mitigation. (33 CT 9243.) Question 68 asked the prospective juror to briefly describe his or her "general feelings about the death penalty." (33 CT 9243.) Bobbie R. wrote, "I wouldn't want to make that decision." (*Ibid.*) Ranking herself on a scale of one to 10, Bobbie R. ranked herself as a one, which indicated she was strongly opposed to the death penalty. (33 CT 9244.) Asked if this opinion would "make if [*sic*] difficult for you to vote for the death penalty in this case, regardless of what the evidence was[,]" Bobbie R. circled the word "yes." (*Ibid.*) She indicated that she never had held a different opinion about the death penalty. (33 CT 9245.) In response to question 73, Bobbie R. indicated that she had no opinion as to whether death or life in prison was the more severe punishment. (33 CT 9247.) Finally, Bobbie R. did not answer several questions eliciting her views about the death penalty.[72]

Based on her questionnaire answers, the trial court wanted the parties to stipulate to her exclusion. The prosecutor noted that Bobbie R. was on his list of challenges. (3 RT 135.) Defense counsel Grossman stated, "We can't stipulate to them obviously, Your Honor, but we know

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[72] Bobbie R. did not answer Questions 68.b, 68.d, 68.f, 68.g, 68.i, 69, 70 or 71, which are listed ante in Section A of this argument. (See 33 CT 9244-924633 CT 9244-9246.)

what the Court's concerns are." (3 RT 135.)[73] In response to the trial court's inquiry, defense counsel acknowledged that he was "submitting." (3 RT 136.) Without further discussion, the trial court ruled: "Based on the answers that the potential juror would not vote for death, and at this time [Bobbie R.] would be excused for cause." (*Ibid.*)

b. Bobbie R.'s answers to the jury questionnaire do not justify her exclusion

The trial court erred by excluding prospective juror Bobbie R. solely on the basis of her written responses to the juror questionnaire. Bobbie R.'s answers did not establish that she could not or would not vote for death. Her answers did not establish that she could not follow the law or the court's instructions. Rather, her questionnaire showed only that she did not want to make a decision about the death penalty and that her opposition to capital punishment would make it difficult for her to vote to impose a death sentence. (33 CT 9243-9244.) There was no other cause for her disqualification. Because the trial court did not conduct voir dire, no deference is accorded to the trial court's ruling. (*People v. Avila* (2006) 38 Cal.4th 491, 529; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 451-452; see *United States v. Chanthadara* (10th Cir. 2003) 230 F.3d 1237, 1269-1270.) The exclusion of Bobbie R. can be upheld on appeal only if it is supported by substantial evidence. (*People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Ashmus* (1991) 54 Cal.3d 932, 962; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial-impairment standard was met is fairly

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[73] Because neither the trial court nor the attorneys made any statement about Bobbie R.'s qualifications for jury service, these concerns do not appear in the record.

supported by the record considered as a whole].) It is not.

This Court previously has decided the propriety of excluding prospective jurors on the basis of their death penalty views as set forth solely in answers to jury questionnaires. In *People v. Stewart*, *supra*, 33 Cal.4th at p. 445, the Court held that a trial court may not discharge a prospective juror for cause based only upon the written responses in a jury questionnaire when they do not provide sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties under *Witt*, *supra*, 469 U.S. at p. 424. In *Stewart*, prospective jurors were unconstitutionally excluded because they indicated that their opinions about the death penalty "would prevent of make it very difficult" to vote to convict or to impose the death penalty. (*People v. Stewart*, *supra*, at pp. 446-448.) At the same time, *Stewart* did not hold that a trial court may never exclude prospective jurors on the basis of the jury questionnaire alone. (*Id.* at p. 449.)

In *People v. Avila* (2006) 38 Cal.4th 491, 531, the Court addressed the question it reserved in *Stewart*. In that case, the Court held that a prospective juror may be excluded for cause based solely on the written questionnaire if the prospective juror's answers "*leave no doubt* that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties in accordance with the court's instructions and the juror's oath" and "if *it is clear* from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*People v. Avila*, *supra*, at p. 531, italics added.) In *Avila*, prospective jurors were constitutionally excluded because they asserted that as a result of their conscientious objections to the death penalty, they would

"in every case *automatically* vote for something other than murder in the first degree . . ., for a verdict of not true as to the special circumstances alleged . . . ., [or] for life imprisonment without the possibility of parole and never vote for a verdict of death." (*Id.* at p. 528, fn. 23.)

More recently, in *People v. Wilson* (2008) 44 Cal.4th 758, 787, the Court reiterated its position in *Avila*:

> [R]eliance on written responses alone to excuse prospective jurors for cause is permissible if, from those responses, it is clear (and 'leave[s] no doubt') that a prospective juror's views about the death penalty would satisfy the *Witt* standard (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 105 S.Ct 844, 83 L.Ed.2d 841) and that the juror is not willing or able to set aside his or her personal views and follow the law.

In *Wilson*, prospective jurors were constitutionally excluded on the basis of their questionnaires alone because they had agreed that "[n]o matter what the evidence was," they would "ALWAYS vote for life without possibility of parole." (*Id.* at pp. 784-785.) The Court found this answer to be the equivalent of the disqualifying answer approved in *Avila*. (*Id.* at p. 787.)

The key question is whether the prospective juror's written answers provide an unambiguous response to the "pertinent constitutional issue," i.e., whether the juror is substantially impaired under *Witt*. (*People v. Stewart*, *supra*, 33 Cal.3d at p. 447.) The trial court here misconstrued Bobbie R.'s written answers. In excluding her from jury service, the trial court found that Bobbie R. "would not vote for death." (3 RT 136.) This single finding was the trial court's entire explanation for excluding Bobbie R. And it is mistaken. Bobbie R.'s answers do not establish that she would not vote for death. The questions Bobbie R. answered did not ask if she would (or if she could) vote to impose the death penalty. Instead, as discussed below, the death qualification questions she answered asked

whether her general feelings about the death penalty would make it difficult to vote for that sentence. (33 CT 9243-9244.)

The only question to ask how a prospective juror would vote was Question 70, which is identical to the question found to be dispositive in *Wilson*. It asked in part whether, no matter what the evidence was, the juror would always vote for the death penalty or would always vote for life without the possibility of parole. (33 CT 9246.) As *Wilson* held, an affirmative answer would provide cause for an exclusion. (*People v. Wilson, supra*, 38 Cal.4th at pp. 787-789.) But Bobbie R. did *not* answer Question 70. She made no statement whatsoever about how she would vote in a capital penalty trial. She simply left the space for an answer blank. Unlike the prospective jurors held to have been constitutionally excluded in *Wilson* and unlike some other prospective jurors excluded in this case, Bobbie R. never stated that she would be unable to vote to impose a death sentence.[74] Therefore, *Wilson* is not controlling.

Of course, Bobbie R.'s failure to answer all the questions cannot possibly, in and of itself, justify her exclusion. The blank portions of her questionnaire at most establish an absence of information about the effect of her death penalty views on her ability to sit as a juror. Her silence on these questions provided a reason for voir dire examination, not a reason for

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[74] See, e.g., 30 CT 8541, 3 RT 148-149 (on the questionnaire Roberto A. [Juror No. 112], who was excluded upon the prosecutor's motion, answered that no matter what the evidence was, he would always vote for life without the possibility of parole); 28 CT 7709, 3 RT 138 (on the questionnaire Alicia D. [Juror No. 39], who was excused by stipulation, answered that no matter what the evidence was, she would always vote for life without the possibility of parole).

exclusion. (See *People v. Wilson*, *supra*, 44 Cal.4th at p.789 [a trial court should examine prospective jurors in person when it has "reason to suspect a prospective juror is a poor reader or may simply have misunderstood the questionnaire"].) Bobbie R.'s jury questionnaire simply did not present the trial court with the information necessary to determine whether her death penalty views would prevent or substantially impair her ability to serve as a juror. Thus, the trial court's reason for excluding Bobbie R. is not fairly supported by the record. (*People v. Heard, supra,* 31 Cal.4th at p. 958.)

Nor do the questions that Bobbie R. answered provide sufficient basis for her exclusion. The jury questionnaire used in this case contained essentially the same "materially flawed question" that undermined the exclusion of prospective jurors in *Stewart*. Question 68.c here, similar to Question 35(1)(c) in the questionnaire at issue in *Stewart*, asked if the prospective juror's opinion about the death penalty would "make if [sic] difficult for you to vote for the death penalty in this case, regardless of what the evidence was?" (3 CT 9244).[75] Bobbie R.'s affirmative answer to this

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[75] Question 68.c in the questionnaire in this case provided an even less adequate basis for exclusion than the non-disqualifying question in *Stewart*. Question 35(c)(1) in *Stewart* asked: "Do you have a conscientious opinion or belief about the death penalty which would *prevent or make it very difficult for you* . . . [t]o ever vote to impose the death penalty?" (*People v. Stewart*, *supra*, 33 Cal.4th at p. 442-443, italics added.) This Court observed that this italicized phrase was unusual and diverged from the language in the sample questionnaires published by the California Center for Judicial Education and Research, California Continuing Judicial Studies Program, Death Penalty Trials (Aug. 2002). *(People v. Stewart*, *supra*, 33 Cal.4th at p. 447, n. 12.) In contrast, Question 68.c did not ask whether the prospective juror's opinion would "prevent" or make it "very difficult" to impose death, but instead asked only whether the juror's views would make it "difficult" to vote for the death penalty. Because the question in *Stewart* was insufficient to justify exclusion, *a fortiori* the

question proves only that she would find voting for death difficult in all cases. Such difficulty, however, is not equivalent to being "substantially impaired" as a juror. As this Court explained in *Stewart*:

> The question as phrased in the juror questionnaire did not directly address the pertinent constitutional issue. A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, original italics, citing *People v. Kaurish* (1990) 52 Cal.3d 648, 699; accord *People v. Avila*, *supra*, 38 Cal.4th at p. 530 ["mere difficulty in imposing the death penalty does not per se, prevent or substantially impair the performance of a juror's duties"].) Later in this case, while questioning other prospective jurors, the trial court itself acknowledged that voting for a death sentence "would be a difficult decision for most fair-minded people." (5 RT 454; see also 5 RT 456, 458, 461.) Nevertheless, the trial court unjustifiably disqualified Bobbie R. when she expressed this exact sentiment.

To be sure, the questionnaire in this case, unlike the questionnaire in *Stewart*, asked more than one question about the death penalty. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 442.) But Bobbie R.'s responses to these additional questions do not establish that her ability to sit as a juror was substantially impaired. At most, some of her additional answers reiterate her general opposition to the death penalty, but they offer no insight into her ability to set aside her personal belief and perform her duties as a juror.

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question in this case cannot support Bobbie R.'s disqualification for cause.

First, Bobbie R's ranking herself as "strongly against" the death penalty in response to Question 68.a (33 CT 9244) reveals nothing more than a generalized opposition to capital punishment that, under *Witt*, is inadequate to support exclusion from jury service. As the United States Supreme Court observed over 20 years ago, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord, *People v. Stewart*, *supra*, 33 Cal.4th at p. 448 ["many members of society – and thus many prospective jurors – may share those exact same sentiments [against the death penalty], and yet remain qualified to sit as a juror under the standard set out in *Witt* . . . ."].)

Second, Bobbie R.'s indication in response to Question 68.e that she never had held a different opinion about the death penalty (33 CT 9245) simply restates her conscientious objection to capital punishment. The consistency of her opinion adds no information suggesting that her views would substantially impair her ability to follow the court's instructions and the juror's oath as required under *Witt*, *supra*, 469 U.S. at p. 424.

Third, her lack of an opinion, solicited in Question 73, as to whether death or life in prison without the possibility of parole is the more severe punishment (33 CT 9247) cannot be grounds for her exclusion, especially since the questionnaire did not explain the law or ask whether she could follow it. (See *People v. Heard, supra*, 31 Cal.4th at p. 963 [prospective juror's questionnaire response that life imprisonment without parole was worse than death, given before trial court explained the law, was not an

adequate basis for exclusion].)[76]

Furthermore, Bobbie R.'s sole statement in response to Question 68's inquiry about her general feelings about the death penalty – "[she] wouldn't want to make that decision" (33 CT 9243) – shows only that she was reluctant to participate in a capital case. As the United States Supreme Court has ruled, a prospective juror's hesitancy or disinclination to sit in judgment in a capital case is *not* an adequate ground for an exclusion for cause. In *Witherspoon*, the high court held that a prospective juror was erroneously excluded, where, similar to Bobbie R., she repeatedly stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515.) Such reluctance is normal: "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Ibid.*) Later, in *Adams v. Texas*, *supra*, 448 U.S. 38, the high court explained that emotions, akin to the reluctance Bobbie R. expressed here, are not sufficient grounds for exclusion under the "prevent or substantially impair" standard: "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Id.* at p. 50.)[77]

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[76] As discussed *post* in Section B.2.b. with regard to the exclusion of prospective juror Frances P., the prosecutor objected to the trial court's proposal to inform the prospective jurors in the questionnaire that they must accept that death is a more severe punishment than life imprisonment without parole, and the trial court deleted that instruction.

[77] In fact, some of the prospective jurors found to have been erroneously excluded in *Adams*, like Bobbie R., had stated that they would

This Court also has ruled that a prospective juror's aversion to serving on a capital jury does not justify her exclusion. As the Court explained long ago in *People v. Bradford* (1969) 70 Cal.2d 333, 346-347:

> The venireman herein expressed little more than a deep uneasiness about participating in a death verdict. She complained that a death vote would make her "very nervous" and agreed with the trial court's suggestion that such a vote might have a "great physical effect" on her. It cannot be said from this limited examination that the venireman was physically "incapable of performing the duties of a juror." The decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty. (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fns. 8, 9, 88 S.Ct. 1770, 20 L.Ed.2d 776.)

(See also *People v. Lanphear* (1980) 26 Cal.3d 814, 841 ["[A]bhorrence or distaste for sitting on a jury that is trying a capital case is not sufficient"]; *People v. Stanworth* (1969) 71 Cal.2d 820, 837 ["the mere fact that a venireman may find it unpleasant or difficult to impose the death penalty cannot be equated with a refusal by him to impose that penalty under any circumstances"].) Feelings of reluctance or dislike, like those expressed by Bobbie R., are an impermissible "'broader basis'" for exclusion than "inability to follow the law. . .." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522, fn. 21);

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not want to participate in a capital case. (*Adams v. Texas*, Brief for Petitioner, Appendix, *supra*, at p. 26 [prospective juror White thought she believed in capital punishment but did not "want to have anything to do with it."]; *id.* at pp. 14-16 [prospective juror Ferguson was opposed to capital punishment, believed involvement in a capital case "would be too hard for me to do," and stated that "as far as voting for the death penalty, I wouldn't want to do that"].)

see *Clark v. State* (Tex. Cr. App. 1996) 929 S.W.2d 5, 9 [holding that a prospective juror who preferred to let God make the penalty decision was erroneously excluded].)

Similarly, any inconsistency in Bobbie R.'s answer to question 15.B, that her religious beliefs would not prohibit or make it difficult for her to sit as a juror, and her answer to question 37, that she had a religious or moral feeling that would make it difficult for her to sit in judgment of another person, does not justify exclusion, but rather calls for further exploration of her views. As this Court noted in *Stewart*, a written response that suggests ambiguity establishes "the need for clarification on oral voir dire," but does not, by itself, disqualify the prospective juror. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448.) No such follow-up questioning was done in this case. And there is no justification for this failure. The venire, which started with approximately 278 people,[78] was reduced quickly to approximately 101 people by 177 stipulated hardship and less-than-hardship exclusions before general voir dire.[79]

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[78] See 1 RT 13 (80 people in panel 1); 1 RT 58-62 (59 people in panel 2); 1 RT 99 101-106 (79 people in panel 3) and 2 RT 112-116 (60 people in panel 4).

[79] See 1 RT 38-49, 51-54, 57 (35 hardship stipulations from panel 1) and 1 RT 41, 48; 2 RT 139 (3 other stipulations from panel 1); 1 RT 80-83 (42 hardship stipulations from panel 2) and 1 RT 62-63, 138-139 (3 other stipulations from panel 2); 2 RT 101-106 (56 hardship stipulations from panel 3); 2 RT 131-133 (38 hardship stipulations from panel 4).

Later in the process, counsel stipulated to another eight hardship exclusions (3 RT 165, 168, 168-169, 171, 173; 4 RT 356, 429, 430) and 16 more stipulated excusals for other reasons (3 RT 137-138 [Lisa H., Robin H., and Alicia D.]; 3 RT 139-140 [Alma A. and Richard T.]; 3 RT 142 [James M.]; 3 RT 144-145 [Carl S.]; 3 RT 147 [Debra Y.]; 3 RT 150-151 [Krista P., Gwendolyn H., Donna L. and David W.]; 4 RT 250 [Ola H.];

Conducting voir dire of this remaining group would not have posed an overly burdensome task, especially since "the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion." (*People v. Heard*, *supra*, 31 Cal.4th at p. 966.) The trial court already had taken action to expedite jury selection by denying Buenrostro's request for individual, sequestered *Hovey* voir dire (2 P-RT 350) and imposing a 30-minute limit on each party's voir dire of each group of 18 prospective jurors (2 RT 159, 191, 253). Nonetheless, apparently seeking to speed up the process even further, the trial court urged the parties to stipulate to exclusions and stated that "if we don't have stipulations, then my proposal would be to take the random list, starting at the end of the list and excuse approximately 30 people. . .." (3 RT 135.) Bobbie R. was the first prospective juror in that sua sponte process. (*Ibid.*) The trial court's desire to use jury questionnaires to help select the jury quickly does not excuse its failure to take the steps necessary to make sure that prospective jurors were not unconstitutionally excluded from serving on the jury.

The information about Bobbie R. before the trial court based on her questionnaire answers no more reveals substantial impairment of her ability to sit as a juror than did the "bare written response[s]" of the prospective jurors who were erroneously excluded in *Stewart*, where general opposition to the death penalty, uncertainty about favoring the death penalty, and support for legislation banning the death penalty all were held inadequate to justify exclusions for cause. (See *People v.* Stewart, *supra*, 33 Cal.4th at

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4 RT 321 [Sherman H.]; 4 RT 398 [Vincent G.]; 5 RT 544-545 [Timothy C.].)

pp. 448-449.)[80] Because Bobbie R. did not answer Question 70, the record here does not provide what this Court in *Wilson* requires: her questionnaire answers do not clearly and with "'no doubt'" demonstrate that her general opposition to capital punishment would substantially impair her ability to serve as a juror or her ability to set aside her own views and follow the law. (See *People v. Wilson*, *supra*, 44 Cal.4th at p. 787, quoting *People v. Avila*, *supra*, 38 Cal.4th at p. 531.)

Bobbie R.'s questionnaire answers also stand in sharp contrast to those that this Court held sufficient to justify exclusions for cause in *People v. Avila*, *supra*, 38 Cal.4th 491. Unlike Bobbie R.'s responses, the questionnaire answers of the excluded prospective jurors in that case unequivocally established that they would vote automatically against a death sentence or could not vote at all with regard to the penalty. (*Id.* at p. 531-533.) The questionnaire in *Avila* did not contain the crucial defect that rendered the prospective jurors' answers in *Stewart* and Bobbie R.'s written

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[80] In *Stewart*, this Court explained the insufficiency of the excluded prospective jurors' written answers as follows: Juror No. 8's statement that "I do not believe a person should take a person's life" showed only a "generalized opposition to the death penalty" and was not disqualifying; Juror No. 53's statement that "I am opposed to the death penalty" also established only a general opposition and was not disqualifying; Juror No. 59's statement that "I do not believe in capit[a]l punishment" expressed a non-disqualifying general opposition to the death penalty, and the juror's response of "I don't know," in answer to a question probing opinions or beliefs favoring the death penalty, was ambiguous and not disqualifying; Juror No. 93's statement that "in the past, I supported legislation banning the death penalty" showed disagreement with the current law which was not disqualifying; and Juror No. 122's statement "I don't believe in irrevers[i]ble penalties. A prisoner can be released if new information is found" reflected concern with the risk of error but was not disqualifying. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 444-445, 448-449.)

responses insufficient to support their exclusion. It did not, like Question 68.c here, ask the non-disqualifying question whether the prospective jurors' view would "make it difficult" to vote to impose a death sentence. Instead, the *Avila* questionnaire posed questions that went to the heart of *Witt*'s substantial impairment test. Its Questions 97-99, as this Court paraphrased them, asked whether a prospective juror entertained "such conscientious objections to the death penalty that, regardless of the evidence or strength of proof, he or she 'automatically' would refuse to return a first degree murder verdict, find a special circumstance true, or impose the death penalty." (*Id.* at p. 531; see also *id.* at p. 528, n. 23 [quoting the questions].) All the challenged prospective jurors in *Avila* answered one or more of these questions affirmatively. (*Id.* at pp. 531-533.)[81] As this Court concluded in *Avila,* "[a]ny juror who 'automatically' would vote in ways that precluded the death penalty would clearly be disqualified under *Witt.*" (*Id.* at p. 531.)[82] Nothing in Bobbie R.'s answers approaches this showing.

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[81] More specifically, in *Avila* prospective jurors R.V., R.W. and O.D. indicated that in every case and regardless of the evidence, they would automatically vote for life imprisonment without the possibility of parole, regardless of the evidence presented at trial; prospective juror O.D. also indicated he would automatically vote for something other than first degree murder and would automatically reject a special circumstance finding to avoid a penalty phase; and prospective juror C.H. indicated that she could not set aside her personal feelings and follow the law. (*People v. Avila, supra,* 38 Cal.4th at pp. 531-533.)

[82] The same obviously is true of a juror who cannot set aside her personal opposition to capital punishment and follow the law. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.)

There are no alternative grounds for affirming the trial court's sua sponte exclusion of Bobbie R. Notably, the trial court relied only on Bobbie R.'s death penalty views in disqualifying her. And the record reveals no other basis for a cause challenge. From her questionnaire, Bobbie R. appeared to be a stable person who was a long-time resident of Riverside County and who had worked the same job for 25 years. She displayed no bias for or against the prosecution or the defense: she had no experience with and no feelings about the criminal justice system. (33 CT 9231-9232.) Her questionnaire answers revealed that she once had been a victim of an armed robbery (33 CT 9236), and that her nephew had worked for the sheriff's department (33 CT 9231). But there is no indication whatsoever that these facts would affect her impartiality as a juror. Nor is there any other ground that could constitute cause for her disqualification. Thus, this is not a case in which views unrelated to the death penalty might supply a reason for the prospective juror's exclusion. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1341 [prospective juror excluded on basis of questionnaire stated both that she could never vote for the death penalty and that she could set aside her feelings against the death penalty, and also admitted that victim photographs would strongly affect and anger her and that she automatically would accept the opinions of professional medical experts].)[83]

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[83] In refusing to stipulate to the exclusion of Bobbie R., defense counsel Grossman acknowledged that he knew "what the Court's concerns are." (3 RT 135.) That cryptic reference does not justify the exclusion where the record does not reveal the nature of those concerns, let alone establish that they amount to "substantial impairment" under *Witt*.

This Court has emphasized the need for trial courts to proceed with special care in conducting jury selection in capital cases. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 967-968.) The trial court here acknowledged the inadequacy of jury questionnaires: "A lot of these jurors are filling out the questionnaires in the dark, based upon their perception of the law, perception of crimes, and sometimes it's very confusing." (5 RT 517.) Nevertheless, the trial court summarily excluded Bobbie R. on the basis of her questionnaire alone, without conducting any follow-up questioning to assess whether she could set aside her views and follow the law, although both written questionnaires and oral voir dire are a standard part of the jury-selection process in a capital case. (*People v. Lewis* (2001) 25 Cal.4th 610, 630; Code Civ. Proc., §223; see also California Rules of Court, Standards of Judicial Administration, Standard 4.30, subd. (b) ["[e]xcusing jurors based on questionnaire answers alone is generally not advisable"] and former § 8.5 (1998 ed.).) In this way, the trial court neglected its "duty to know and follow proper procedure, and to devote sufficient time and effort to the process." (*People v. Stitely* (2005) 35 Cal.4th 514, 539.)

As its sua sponte challenge to Bobbie R. shows, the trial court prejudged her qualifications to serve on the basis of written answers to a few of the death-qualification questions in the questionnaire. And, as its reason for excluding Bobbie R. shows, the trial court mistakenly construed her answers as stating that she would not vote to impose the death penalty when, in fact, she made no such statement. The trial court's exclusion of Bobbie R. without having conducted a sufficient inquiry into whether her opposition to the death penalty would prevent or substantially impair her ability to function as a juror was "a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn." (*People v. Heard*,

supra, 31 Cal.4th at p. 967.) As a result, the record does not support the trial court's conclusion that Bobbie R. could not be an impartial juror, and her exclusion violated article I, section 16 of the state Constitution and the Sixth and Fourteenth Amendments of the federal Constitution.

2. The Trial Court Erroneously Excluded Frances P. Based Solely on Her Written Answers to the Jury Questionnaire Which Established Only that She Did Not Believe in the Death Penalty and Preferred a Life Imprisonment Without Parole Sentence

Frances P., like Bobbie R., was on the list of people in the first panel of the venire which the trial court proposed excluding. And like Bobbie R., Frances P. was excluded from jury service based solely on her answers to the jury questionnaire. Frances P. answered each and every question presented. (28 CT 7908-7939.) The sum total of her answers showed only that she opposed the death penalty, preferred life without the possibility of parole, which she viewed as a more severe penalty, and was unsure whether her views would make it difficult to vote for the death penalty. This information did not establish that her views would prevent or substantially impair her ability to serve as a juror under *Witt*, 469 U.S. at p. 424, and her exclusion, by itself, requires reversal of the death sentence.

a. Frances P.'s juror questionnaire answers, the prosecutor's challenge, and the trial court's decision to exclude her

Frances P. (Juror No. 11) was a 64-year-old retiree who had lived in Corona her entire life, had never married, and had worked for almost 40 years as secretary to a high school principal. (28 CT 7911-7913; 3 RT 151.) She previously had served on a jury in an attempted murder case which reached a verdict. (28 CT 7921.) Aside from her jury service, she had had

no experience with the judicial system (28 CT 7917-7918), nor any feelings about the criminal justice system (28 CT 7919.) Although she answered "yes" to a question asking whether she would automatically reject the testimony of a witness who admitted that he or she had used drugs or alcohol, she explained that their "testimony might be suspect if the event happened while [the] witness was under the influence." (28 CT 7919.) She also stated that she could be a fair and impartial juror in a case which involves testimony regarding the use of drugs or alcohol and people involved with drugs or alcohol. (28 CT 7920.) Throughout her questionnaire, Frances P. stated that she was willing to consider all of the evidence and follow the court's instructions.[84] She described herself as able to be a fair and impartial juror, explaining that "I do not make quick judgments of individuals. I take time in analyzing information." (28 CT 7929.)[85]

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[84] See 28 CT 7925 (indicating in response to Question 50 that she would follow instructions on the law even if they differed from her beliefs or opinions); 28 CT 7926 (indicating in response to Questions 51-53 that she would follow instructions as to the burden of proof, the presumption of innocence, and the defendant's right not to testify); 28 CT 7928 (indicating in response to Questions 60-63 that she would engage in the weighing process, listen to fellow jurors, receive the benefit of their thinking, and reconsider her position if necessary); 28 CT 7933 (indicating in response to Question 72 that she could assume that, if sent to prison, the defendant would never be eligible for parole); 28 CT 7934 (indicating in response to Question 76 that she could set aside the economic considerations associated with the death penalty for purposes of deciding on an appropriate sentence).

[85] See 28 CT 7925 (indicating in response to Question 47 that the fact that the case involved young children would not impair her ability to be fair to the defendant); 28 CT 7927 (indicating in response to Question 54 that she could be fair and objectively evaluate the testimony of each witness); 28 CT 7929 (indicating in response to Question 64 that she could

Frances P. belonged to a Catholic Church and considered herself to be a religious person. (28 CT 7915.) But in response to both Question 15.B and Question 37, she stated that her religious beliefs would not prohibit or make it difficult for her to sit as a juror or sit in judgment of another person. (28 CT 7915, 7922.) Frances P. had heard about this case from the local newspaper. (28 CT 7924.) Buenrostro's name had come to her attention because, as a teenager, Frances P. "knew a lady with the same last name . . . and wondered if she could be related." At the time of the trial, that woman would have been in her 80's. (28 CT 7924.) In answering another question, Frances P. indicated that she did not know either the defendant or her family. (28 CT 7916.) Asked whether she had "the opinion that any mother who kills her children must be 'crazy[,]'" Frances P. answered "yes" and explained that "[c]ircumstances must have led her to lose temporary control of her sanity." (28 CT 7922.)

Describing her general feelings about the death penalty, Frances P. wrote "I do not believe in it. Life without parole is preferable." (28 CT 7930.) She rated herself as being opposed to the death penalty and gave herself a three on a scale from one to 10. (28 CT 7931.) She explained her feeling about the death penalty as follows: "the criminal does not have an opportunity to think and regret his crime." (*Ibid.*) In response to Question 68.c, Frances P. stated she was "unsure" if her opinion on the death penalty would "make if [sic] difficult for [her] to vote for the death penalty in this case, regardless of the evidence." (28 CT 7931.) She gave no explanation. She checked "no" when asked if her opinion on the death penalty would "make it difficult for [her] to vote for life without the possibility of parole

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give both the defendant and the People a fair trial).

regardless of what the evidence was." (*Ibid.*) Frances P. stated that she had never held a different opinion about the death penalty. (28 CT 7932.)

When asked what purpose capital punishment serves, Frances P. wrote, "none." (28 CT 7932.) She also wrote "none," when asked in what types of cases or offenses she thought the death penalty should be imposed. (*Ibid.*) Asked her impression of life in prison without the possibility of parole as a punishment for murder, Frances P. responded, "I believe this is the best punishment for murder." (*Ibid.*) She also believed that "[l]ife in prison is the more severe [punishment]. Prisoners are not free, have more time to think of their crime. Death is a release from their troubles." (28 CT 7934.) Frances P. then responded "yes" to a question asking if she has any religious affiliations that take a stance on the death penalty, explaining that "[a]s a member of a Catholic Church we are taught that a life for a life is wrong." (28 CT 7932.) Finally, in response to Question 70, Frances P. indicated that, assuming a defendant is convicted of a special circumstance murder, she would not "ALWAYS" vote for either life without parole or death, but would consider all of the evidence and the court's instructions and impose the penalty she felt was most appropriate. (28 CT 7933.)

Outside the presence of the venire, the prosecutor challenged Frances P., noting that she does not believe in the death penalty and that she is a Catholic who believes that "a life for a life is wrong." (3 RT 152.) The trial court noted Frances P.'s statement that a life-without-parole sentence is more severe and that she "knows a lady with the same last name as the defendant." (*Ibid.*) The prosecutor asked the trial court to excuse Frances P. (*Ibid.*) Defense counsel Grossman stated "[t]echnically she's not a juror that's going to end up on this jury because of preemtories [sic], so we'll submit." (*Ibid.*) The trial court asked defense counsel if he had an

opposition, and counsel said, "No." (*Ibid.*)

b. Frances P.'s answers to the jury questionnaire do not justify her exclusion

As with Bobbie R., the trial court erred by excluding prospective juror Frances P. solely on the basis of her written responses to the juror questionnaire, which did not establish that her views about the death penalty would substantially impair her ability to serve as a juror under *Witt*, *supra*, 469 U.S. at p. 424. Frances P.'s answers did not establish that she could not, or would not, vote for death. On the contrary, in contrast to the properly excluded prospective jurors in *People v. Wilson*, *supra*, 44 Cal.4th 758, and *People v. Avila*, *supra*, 38 Cal.4th 491, she made clear that she would *not* always vote against the death penalty or for life without the possibility of parole. Rather, in answering Question 70, she stated that she would consider all the evidence and instructions and impose the penalty she felt was appropriate. (28 CT 7933.) This statement captures the essence of an impartial juror in a capital case. Frances P. did not even go so far as to state that her views about the death penalty would make voting for a death sentence difficult which, as explained above with regard to the exclusion of Bobbie R., would *not* have been a disqualifying response. Instead, she was simply "unsure" whether her opinion would make it difficult to vote for a death sentence in this case. (28 CT 7931.) These answers demonstrate that Frances P. was qualified for jury service.

With regard to capital punishment, Frances P.'s questionnaire showed only that she opposed the death penalty on religious grounds and believed life in prison without the possibility of parole to be a preferable, and more severe, punishment for murder. (28 CT 7930-7934.) But neither opinion is a reason for exclusion under *Witt*'s substantial impairment test.

As explained above with regard to the exclusion of Bobbie R., general opposition to the death penalty, whatever its genesis, and a corollary preference for a sentence of life without parole are precisely the overly broad grounds for exclusion held unconstitutional in *Witherspoon* and condemned in *Witt.* Contrary to the prosecutor's suggestion, Frances P.'s Catholicism which, as she stated teaches that "a life for a life is wrong," was not sufficient by itself to disqualify her. (See 3 RT 152.) This religious teaching would be disqualifying only if France P.'s adherence to it rendered her unable or unwilling to vote for a death sentence. But her questionnaire answers do not establish – and indeed refute – this crucial fact. Rather, they indicate she was able "to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*People v. DePriest* (2007) 42 Cal.4th 1, 20.)[86]

Likewise, Frances P.'s assertion in response to Question 73 that a life sentence is a more severe penalty than death, which the trial court noted in its ruling, does not justify her exclusion.[87] First, as noted previously with regard to Bobbie R. in Section B.1.b. of this argument, this Court already has held that a prospective juror's answer in a questionnaire that a life-without-parole sentence is more severe than a death sentence, when "*given*

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[86] Any suggestion that Frances P. was biased because she is Catholic is wholly untenable as explained with regard to the error in excluding Richard J., in Section B.3.b. of this argument *post* and incorporated herein.

[87] The questionnaire posed the wrong question. It asked whether "death or life in prison is the more severe punishment." (28 CT 7934.) But "life in prison" was not the alternative sentence to death. The only options were "death or imprisonment in the state prison for life without the possibility of parole." (§ 190.2, subd. (a).) At least one juror understood the reference to "life in prison" to include the possibility of parole. (See, e.g., 22 CT 5982 [Juror No. 1].)

without the benefit of the trial court's explanation of the governing legal principles," generally does not justify an excusal for cause. (*People v. Heard*, *supra*, 31 Cal.4th at p. 963, original italics.)[88] This holding applies here. The trial court deliberately dropped this subject from the jury questionnaire. It had proposed telling the prospective jurors that "the law assumes that a sentence of death is more severe than a sentence of life without possibility of parole, and you must too. Can you follow this instruction?" (4 P-RT 559.) The prosecutor "strongly objected" and asserted that "I don't know that the law assumes that it's more severe." (*Ibid.*) Although disagreeing with the prosecutor's view, the trial court nonetheless deleted the question. (4 P-RT 559-560.) Having acceded to the prosecutor's objection to explaining this point of law in the questionnaire, the trial court could not legitimately rely on that very principle to exclude Frances P., especially without determining what the law requires, explaining the law to Frances P., and conducting voir dire to determine whether she could follow the court's instruction.[89]

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[88] In contrast to the unequivocal position of the United States Supreme Court that death is "the most severe punishment" (*Roper v. Simmons* (2005) 543 U.S. 551, 568), this Court has not been consistent on this point of law. Although in *People v. Heard*, *supra*, 31 Cal.4th at p. 963, the Court discussed with apparent approval the trial court's explanation to a prospective juror that "California law considers death the more serious punishment," this Court also has ruled that a juror would be entitled to conclude that a sentence of life without the possibility of parole is appropriate precisely because he or she views it as more severe than death. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1223.)

[89] The trial court's failure to instruct the jury that under the law death is the more severe penalty is raised in Argument XVII *post*.

Second, the answers to Question 73 by the jurors who served in this case undercut the trial court's reliance on Frances P.'s opinion that a life sentence was more severe than death as disqualifying her from jury service. The majority of sitting jurors did not have an opinion about which penalty was more severe.[90] One sitting juror did not answer the question.[91] And two alternate jurors, like Frances P., believed that life in prison was more severe than a death sentence.[92] Only three sitting jurors gave what the trial court considered was the correct answer to Question 73 – that death was more severe.[93] Nevertheless, whether they had an opinion, had no opinion, or failed to answer the question, most jurors were not questioned about the subject.[94] In fact, only one juror, Alternate Juror No. 3, was asked about her

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[90] 22 CT 6014 (Juror No. 2); 32 CT 8959 (Juror No. 3); 22 CT 6142 (Juror No. 7); 22 CT 6174 (Juror No.8); 22 CT 6206 (Juror No. 9); 32 CT 8991 (Juror No. 10); 22 CT 6238 (Juror No. 11); 23 CT 6270 (Juror No. 12); see also 23 CT 6334 (Alternate Juror No. 2).

[91] 22 CT 6110 (Juror No. 6).

[92] 23 CT 6302 (Alternate Juror No. 1 wrote "for life without the possibility of parole you are also requiring the financial support of the public for that life, the prisoner has 'no hope'"); 32 CT 9023 (Alternate Juror No. 3 wrote that "life in a cage seems harsher – death is over").

[93] 22 CT 5982 (Juror No. 1); 22 CT 6046 (Juror No. 4); 22 CT 6078 (Juror No. 5).

[94] See, e.g., 5 RT 496-497, 512-513 (Juror No. 2); 5 RT 495-498, 513 (Juror No. 3); 4 RT 321-324, 333-324, 340-341, 346-347 (Juror No. 8); 4 RT 217-220 (Juror No. 9); 4 RT 316-318, 332-333, 346-347 (Juror No. 10); 4 RT 325-327, 335 -336 (Juror No. 11); 5 RT 459-460, 470-472, 482-483 (Juror No. 12); 5 RT 527-529, 540-541 (Alternate Juror No. 1); 5 RT 548-549 (Alternate Juror No. 2).

or his views. (5 RT 551.)[95] And none was told what the law required.

If the trial court thought that an understanding that death was the more severe penalty and an ability to follow an instruction to this effect were essential to a juror's impartiality, then it would have questioned the jurors about the issue. But it did not, even though 11 of the 15 people selected to serve as jurors and alternates indicated on their questionnaires either no understanding or, in the trial court's view, the wrong understanding of the relevant law. And if the belief that a life sentence was more severe than a death sentence were cause for exclusion, then the trial court would have excused both Alternative Juror No.1 and Alternative Juror No. 3.[96] Given these circumstances, the record simply does not support the trial court's implicit finding that Frances P.'s impartiality was substantially impaired by her opinion about the relative severity of the sentencing options.

There was no other cause for excluding Frances P. In ruling on the exclusion, the trial court noted that Frances P. knew a woman with same last name as Buenrostro. Knowing someone who shared an uncommon name with the defendant would have been a reason to conduct voir dire, but this extremely tenuous link does not justify the exclusion. Frances P., who, at the time of the trial in 1998, was 64-years old and had lived her entire life in Corona, knew this unidentified woman when Frances P. was a teenager,

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[95] The trial court asked how Alternate Juror No. 3 felt "about the issue of death versus life without possibility of parole," and Alternate Juror No. 3 responded that "both very harsh punishments, and I would weigh them both. Personally, the thought of being caged would be more to me. That is my personal feeling. I realize death is final and it's the most crucial." (5 RT 551.)

[96] See footnote 92 *ante*.

which would have been in the late 1940's or early 1950's. Although Frances P. wondered whether this woman was related to Dora Buenrostro, in answer to Question 16, she stated that she did *not* know the defendant or her family. (28 CT 7916.) That statement should have answered the trial court's concern. Moreover, it is highly unlikely that this unidentified woman was related to Dora Buenrostro given that "Buenrostro" is Dora's married name and that her family immigrated to this country and settled in Los Angeles in 1970, when Dora was a child, years after Frances P. was a teenager. (12 RT 1346.) It also is completely speculative that the unidentified woman was related to Dora's husband, Alejandro Buenrostro, who lived in Los Angeles, especially since there is no indication that any of his relatives had lived in Riverside County in the 1940's or 1950's. (See 8 RT 822-824.) The salient point is that the trial court conducted no inquiry whatsoever about this unknown woman or the nature of her relationship to Frances P. before citing this attenuated surname coincidence in excluding Frances P. for cause. The fact that four or five decades before the trial Frances P. knew somebody named "Buenrostro" did not render her biased and subject to exclusion for cause.[97]

In sum, the record before the trial court, consisting only of the written answers to the jury questionnaire, failed to provide a substantial basis for concluding that Frances P. was unable to perform the duties of a

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[97] Similarly, some of Frances P.'s other answers which were not cited by the trial court in its ruling – e.g., that she would automatically reject the testimony of a witness who was under the influence of drugs (28 CT 7919) and believed that any mother who kills her children must have lost "temporary control of her sanity" (28 CT 7922) – may have provided cause to question her but not to exclude her.

juror in accordance with the law. As a result, her erroneous exclusion violated article I, section 16 of the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

c. Defense counsel's submission on the challenge without opposition does not defeat this claim

When the prosecutor moved to exclude Francis P., defense counsel noted that she would not end up on the jury because of the peremptory challenges and stated "we'll submit." (3 RT 152.) The trial court asked defense counsel, "You don't have any opposition," and defense counsel responded, "No." (*Ibid.*) Defense counsel's response does not defeat this claim because he did not agree, and the record does not permit an inference that he agreed, that Francis P. was substantially impaired and thus excludable under *Witt*.

As noted previously, *ante* page 192, footnote 68, this Court never has required an objection at trial to preserve a *Witherspoon* claim for appeal. (*People v. Velasquez*, *supra*, 26 Cal.3d at p. 443.) In *Uttecht v. Brown*, *supra*, 127 S.Ct. 2218, the high court explained although there is no federal requirement that a defendant in state court must object to the prosecution's challenge in order to preserve a *Witherspoon* claim for federal habeas review, the Court would "take into account voluntary acquiescence to, or conformation of, a juror's removal." (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2229.) Significantly, the Court did not hold that such acquiescence or confirmation waived the claim. Rather, the Court treated "the defense's volunteered comment that there was no objection" as one factor to be considered in assessing whether the trial court erred in excluding the challenged juror. (*Id.* at pp. 2229-2230.) The high court closely reviewed the pattern of the defense objections to the prosecution's challenge for

cause as well as the specific views of and characteristics about Juror Z. Based on this analysis, the high court concluded that the defense's volunteered assertion that it had "no objection" to the exclusion was not "inconsequential" because the record showed that "[t]he defense may have chosen not to object because Juror Z seemed substantially impaired." (*Ibid.*)

The circumstances in *Brown* that justified factoring defense counsel's acquiescence into the assessment of *Witherspoon-Witt* error do not exist in Buenrostro's case. First, *Brown* arose on federal habeas corpus review where principles of comity and federalism require federal court restraint in overturning state court judgments that do not apply to this Court's review of state court judgments on direct appeal. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2222.)

Second, defense counsel in *Brown*, who volunteered that they had no objection, did not explain their acquiescence with regard to the challenged Juror Z. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2238), whereas Buenrostro's attorney, who only stated that he had no opposition in response to a direct question from the trial court, made clear his reason for not opposing Francis's P.'s exclusion – he knew that the prosecutor would use a peremptory challenge against her (3 RT 152). His comment in no way indicated that he thought Francis P. was not qualified to serve or would be an unfavorable juror for Buenrostro. In this way, the detailed review of the record that the high court undertook in *Brown* to infer specific characteristics about the challenged juror that might have motivated the defense's decision not to object (*Uttecht v. Brown*, *supra*, at p. 2229-2230) is unnecessary here. Defense counsel told the trial court why he was "submitting" on the prosecutor's challenge to Francis P, and his reason was

wholly unrelated to the merits of the prosecution's for-cause challenge.

Third, even if the approach taken in *Brown* were appropriate here notwithstanding defense counsel's explanation of his position, the record in this case would not permit that type of analysis. The reason is simple: there was no voir dire of Francis P. The trial court decided the prosecution's challenge on the basis of her jury questionnaire alone. The high court in *Brown* was able to conclude that the defense may have thought that Juror Z seemed substantially impaired because there had been voir dire of the juror by the trial court, defense counsel and the prosecutor. (*Id.* at pp. 2229; see *id.* at pp. 2231-2238.) Those critical aspects of jury selection – questioning the prospective juror, observing her, and listening to her answers – are missing here. Thus, unlike *Brown*, there is no evidentiary basis in this case for speculating about defense counsel's possible assessment of Francis P. as the reason for not objecting her exclusion.

In short, defense counsel's statement that he had "no opposition" to the exclusion of Francis P does not foreclose or otherwise undercut this challenge on appeal because, unlike the defense's acquiescence in *Brown,* defense counsel here did not implicitly agree that the exclusion was justified under *Witt*.

3. The Trial Court Erroneously Excluded Richard J. Who Was Ambivalent About Capital Punishment and Who, Before Hearing Any Evidence, Would Lean Toward Life Imprisonment Without Parole but Could Vote for the Death Penalty

Unlike Bobbie R. and Frances P., Richard J. was not excluded solely on the basis of his answers in the jury questionnaire. He was examined by the trial court. Nevertheless, his written and oral answers together do not establish that his ability to serve as a juror was substantially impaired under

Witt. They show that he was uncertain about the death penalty and that without hearing any evidence, he would be inclined toward a sentence of life imprisonment without the possibility of parole, but he could vote for the death penalty. The record does not fairly support the trial court's finding that Richard J. lacked the impartiality required for jury service, and his exclusion for cause, by itself, requires reversal of the death sentence.

a. Richard J.'s juror questionnaire answers, the prosecutor's challenge, the ensuing voir dire, and the trial court's order excluding him

According to his answers to the jury questionnaire, Richard J. (Juror No. 19) was a 67-year-old retired elementary school teacher, who had been married for 40 years, had been widowed and had remarried. (24 CT 6599; 3 RT 153.) He had 14 grandchildren. (24 CT 6613.) He described himself as actively pro-life on the issue of abortion, religious, and recently converted to Catholicism which, as he described, teaches that "all life is precious." (24 CT 6620, 6603, 6610, 6612, 6618.) Throughout his questionnaire, Richard J. stated that he was willing to consider all of the evidence and follow the court's instructions.[98] Asked in one question to

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[98] See 24 CT 6613 (indicating in response to Question 50 that he would follow instructions on the law even if they differed from his beliefs or opinions); 24 CT 6614 (indicating in response to Questions 51-53 that he would follow instructions as to the burden of proof, the presumption of innocence, and the defendant's right not to testify); 24 CT 6616 (indicating in response to Questions 60-63 that he would engage in the weighing process, listen to fellow jurors, receive the benefit of their thinking, and reconsider his position if necessary); 24 CT 6621 (indicating in response to Question 70 that he would consider all of the evidence and the jury instructions at the penalty phase); 24 CT 6621 (indicating in response to Question 72 that he could assume that, if sent to prison, the defendant would never be eligible for parole); 24 CT 6622 (indicating in response to

explain his ability to do so, Richard J. wrote, "It's the law – I try to be law abiding." (24 CT 6614.)

In his questionnaire answers, Richard J. also repeatedly described himself as able to be a fair and impartial juror.[99] Asked to explain the reason for this self-assessment, Richard J. drew on his professional experience, explaining, "As a teacher tried to be fair and impartial in kids' disputes." (24 CT 6617.) However, in answering two questions, Richard J. admitted some doubt. Question 36 asked, "Do you have any feeling about the **nature of the charges** in this case that would make it difficult or impossible for you to be fair or impartial?" (24 CT 6610, original emphasis.) Richard J. circled the answer "Yes," and provided the following explanation: "I'm pro-life (anti-abortion) – I am ambiguous about capital punishment because murderers often made that choice to kill." (*Ibid.*) In addition, the questionnaire informed the prospective jurors that Buenrostro was charged with stabbing to death her three children, ages 9, 8 and 4. (24 CT 6612.) Question 46 then asked, "In what ways do you think your feelings and experiences would affect how you would view a crime which involves the death of young children?" (*Ibid.*) Richard J. answered as follows: "Since I'm pro-life and actively so I might be a little biased where

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Question 76 that he could set aside the economic considerations associated with the death penalty for purposes of deciding on an appropriate sentence).

[99] See 24 CT 6608 (indicating in response to Question 27 that he could be fair and impartial in a case involving drugs or alcohol); 24 CT 6613 (indicating in response to Question 47 that the fact that the case involved young children would not impair his ability to be fair to the defendant); 24 CT 6615 (indicating in response to Question 54 that he could be fair and objectively evaluate the testimony of each witness); 24 CT 6617 (indicating in response to Question 64 that he could give both the defendant and the People a fair trial).

the deaths of children are involved. I would try to be impartial." (*Ibid.*) But in response to the very next question, he made clear that his feelings were *not* "so strong that they would impair [his] ability to be fair to the defendant in this case[.]" (24 CT 6613.)

With regard to capital punishment, Richard J. was neither strongly in favor of, nor strongly against, the death penalty. In response to Question 68, he rated himself as a four on a scale from one to 10, which indicated a slight opposition. (24 CT 6619.) He explained that he "used to be for capital punishment" but that as a result of his pro-life work, "I'm not so sure – I waver – I have no what ifs, I'm just not sure." (24 CT 6618; see also 24 CT 6619, 6620.) Richard J. asserted that his opinion against the death penalty would *not* make it difficult for him to vote for the death penalty in this case, regardless of what the evidence was. (24 CT 6619.) He added: "Not regardless of the evidence but because I am not sure of the degree of my belief on the death penalty." (*Ibid.*) Richard J. also stated that he thought the death penalty should be imposed in "preplanned" and "hire hit men" cases and for "assaults resulting in death." (24 CT 6620.) Finally, in answer to Question 70, he stated that he would *not* "ALWAYS" vote for life or death, but would consider all of the evidence and the court's instructions before imposing the penalty he personally felt most appropriate. (24 CT 6621.)

Based on his answers to the jury questionnaire, the prosecutor challenged Richard J. on the grounds that "he is unsure in regards to the death penalty," works in a pro-life ministry, and is a recent convert to Catholicsm which "regards the death penalty as a sin." (3 RT 153.) The prosecutor further noted that Richard J. "says on number 36 it would be difficult for him to be fair because he is prolife." (*Ibid.*) Defense counsel

Grossman objected to excusing Richard J. (*Ibid.*) The trial court deferred its ruling (*ibid.*) and later conducted voir dire (4 RT 227-230).

Upon examination, Richard J. explained that he thought his career, which was devoted to helping young children, probably would influence his opinion, but maybe not his judgment in the case because "I try to be fair throughout my life." (4 RT 228.) The trial court followed up by reminding Richard J. that the prosecution must prove the charges beyond a reasonable doubt and that he cannot "supplement that with sympathy for the victims." (*Ibid.*) Richard J. assured the trial court that he could hold the prosecution to its burden of proof. (*Ibid.*)

Asked whether his position on abortion would influence how he would vote with regard to the death penalty, Richard J. replied:

> A. I could vote for the death penalty, but I would probably lean more the other, probably give weight to life in prison over the death penalty.
>
> Q. At this point in time?
>
> A. At this point in time.
>
> Q. At this point in time, you feel you are leaning toward life without possibility of parole because of your personal views?
>
> A. Yes.
>
> Q. And that's without hearing any further evidence?
>
> A. Yes, of course, I could change my mind.
>
> Q. I'm sorry?
>
> A. *I could change my mind upon hearing the evidence.* But I do have more weight to life imprisonment side.

(4 RT 228-229, italics added.) The trial court next asked whether Richard J. indicated on his questionnaire that he might be a little biased against the

defendant because the victims were children. (4 RT 229.) Richard J. disagreed with this assessment of his answer stating that "I try to be fair and law abiding throughout my life." (*Ibid.*) The trial court pressed further asking again whether he indicated in his questionnaire that he might have a difficult time being fair in this case. (*Ibid.*) Richard J. again asserted that he did not. He did not recall making such a statement and explained, "If I did I misconstrued it." (*Ibid.*) The trial court replied, "We'll just scratch that answer." (*Ibid.*)

The trial court turned to its need for jurors who could be fair to both parties and asked Richard J.:

Q And at this point in time, where do you feel that you fit in?

A I've always tried to pride myself on open mind, but I do tend to shy away from the death penalty..

Q And, do you–

A But as I indicated earlier, in my life an eye for an eye, I would certainly think death penalty would be easy. But now it would be hard to say.

Q It would be hard to say?

A (Witness nods head.)

Q At this point in time, again, as you stated before, you feel you are leaning toward life without possibility of parole?

A Yes, without hearing any evidence or anything.

(4 RT 230.) The prosecutor again challenged Richard J. over defense counsel's objection and request to be heard, and the trial court excluded Richard J. finding him "substantially impaired." (4 RT 230-231.) Neither party was given an opportunity to question Richard J. After the trial court's ruling, defense counsel was permitted to make his objection for the record. (4 RT 238.) The prosecutor then sought confirmation that when the trial

court had made up its mind about cause, it would not allow the attorneys to try to rehabilitate the prospective jurors. The trial court responded, "That's right." (4 RT 239.)

b. Richard J.'s answers to the jury questionnaire and on voir dire do not justify his exclusion

The prosecution failed to carry its burden to show that Richard J. was not qualified for jury service (see *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445), and the trial court erroneously excused him from Buenrostro's jury. Taken together, Richard J.'s answers to the jury questionnaire and his voir dire, which were clear and consistent, do not support, but rather refute, the trial court's unexplained conclusion that his answers showed his ability to serve on the jury to be "substantially impaired." (4 RT 230-231.) As a result, the trial court's erroneous ruling is not entitled to deference by this Court. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 968.)

The prosecutor's grounds for his initial objection were either insufficient under *Witt* or mistaken. Being unsure about the death penalty, working in pro-life organizations, and recently converting to Catholicism (3 RT 153) do not, either individually or collectively, establish that Richard J. was unqualified to serve as a juror. Such views and associations might be reason to explore further the effect of a prospective juror's death penalty views. But they do not establish that a pro-life Catholic who is unsure about the death penalty, ipso facto, is ineligible for jury duty in a capital case, i.e., cannot temporarily set aside his personal feelings about the death penalty and follow the court's instructions to determine whether death is the appropriate penalty. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447 [discussing the *Witt* standard].) Nor is it clear that, as the prosecutor

asserted, all Catholics believe the death penalty to be a "mortal sin." (4 RT 291-292; see James D. Davidson, "What Catholics believe about abortion and the death penalty," *National Catholic Reporter*, September 30, 2005 [reporting that 54 percent of Catholics in 1999, and 57 percent of Catholics in 2005 support stiffer enforcement of the death penalty], available at http://ncronline.org/NCR_Online/archives2/2005c/093005/093005o.php.)[100] In fact, Juror No. 1, who also was Catholic, made this point in his questionnaire, stating that "Some priests in Catholic Church condemn . . . the death penalty. I feel that this penalty is justified in some cases." (22 CT 5980.) Later, Juror No. 6, who also was Catholic, made the same point during voir dire. He told the prosecutor that during the break he "did call my parish priest, and he did put my mind to rest that making a death penalty decision is not against the church teaching. . .." (4 RT 300.)

In addition, the prosecutor's concern about Richard J.'s answer to Question 36, like any possible concern about his answer to Question 46, turned out to be unfounded.[101] Richard J.'s response to Question 36 suggested that, given his anti-abortion views, the nature of the charges would make it difficult for him to be fair or impartial (24 CT 6610), and his answer to Question 46 suggested that the fact that the victims were children might make him "a little biased" (24 CT 6612). However, these matters were clarified on voir dire. In response to questioning by the trial court,

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[100] The prosecutor's assertion that the Catholic Church considers the death penalty to be a sin misconstrues Richard J.'s questionnaire answer which states that Catholics "are taught all life is precious." (24 CT 6620.)

[101] The prosecutor's failure to cite Richard J.'s answer to Question 46 is not surprising. If the answer had suggested any problem, it raised possible bias against Buenrostro, which most likely would not have prompted the prosecutor to lodge a for-cause challenge.

Richard J. unequivocally stated that, notwithstanding his position with regards to abortion, he "could vote for the death penalty." (4 RT 228.) And he plainly disavowed that he might be biased against the defendant because the victims were children. He directly stated that he could hold the prosecution to its burden of proof. (4 RT 228.) As he explained, he simply had misconstrued the question posed by the questionnaire. (4 RT 229.) The trial court apparently was satisfied with this explanation since he told Richard J. that it would "just scratch that answer." (*Ibid.*) Thus, neither Richard J.'s answer to Question 36 or his answer to Question 46, nor his explanations of those answers, disqualified him from jury service.[102]

The profile that emerges from Richard J.'s jury questionnaire shows him to have been eligible for jury service. He repeatedly stated that he would consider all the evidence (24 CT 6621; 4 RT 229-230), would follow the trial court's instructions even if they differed from his beliefs or opinions (24 CT 6613), and would strive to be fair and impartial (4 RT 229; 24 CT 6615, 6617). Although he previously supported capital punishment, at trial he was unsure, but did not hold strong views, about the death penalty. (24 CT 6618-6620.) He affirmatively asserted that his opinion about capital punishment would *not* make it difficult for him to vote for the death penalty. (24 CT 6619.)[103] He believed the death penalty should be

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[102] It also is unlikely that the trial court found that Richard J.'s abortion views and feelings about murdered children substantially impaired his ability to serve as a juror, since the trial court denied a for-cause challenge to a prospective juror, James B., who had vehement anti-abortion views and believed that anybody who, for whatever reason, intentionally takes the life of a child should be sentenced to death. (5 RT 507.)

[103] Of course, as discussed with regard to prospective juror Bobbie R., difficulty voting for a death sentence is not a disqualifying bias under

imposed in a variety of homicides including murders that, as the prosecutor argued about those charged in this case, are "preplanned." (24 CT 6620.) And, most importantly, Richard J.'s answer to the critical *Witt* inquiry in Question 70 proved him eligible to serve on a capital case. He unequivocally stated that he would not always vote for a life sentence or a death penalty but rather would consider all the evidence and follow the instruction given by the trial court before deciding the appropriate penalty. (24 CT 6621.) In this way, the jury questionnaire established that Richard J. was able to sit as an impartial juror.

Nothing in the trial court's voir dire disturbs this picture of Richard J. as qualified for jury service. All the voir dire shows is that given a blank slate, i.e., "without hearing any evidence or anything," Richard J. leaned somewhat toward a sentence of life without the possibility of parole. (4 RT 230.) But he assured the trial court he "could change [his] mind upon hearing the evidence" and "could vote for the death penalty. . . ." (4 RT 229.) The Constitution requires no more. Nothing in United States Supreme Court's jurisprudence demands that to be qualified to serve on a capital jury, a prospective juror must profess complete neutrality on the subject of capital punishment. It is simply unrealistic, and perhaps unwise, to expect that prospective jurors will come to court devoid of opinions about such an important and controversial issue as the death penalty. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 ["a juror . . . who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who

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Witt. See *ante* Section B.1.b. of this argument which is incorporated here.

categorically denies any prejudgment but may be disingenuous in doing so"].) The trial court, however, did demand more. It told Richard J. that "we don't want you leaning one way or the other." (4 RT 229.) That is plainly not grounds for exclusion under *Witt, supra*, 469 U.S. at p. 421.[104]

Richard J.'s impartiality was not destroyed merely because he admitted uncertainty about capital punishment or an inclination toward the option of life without possibility of parole. As discussed above with regard to prospective juror Bobbie R., even a juror who is strongly opposed to capital punishment – and thus, potentially much more biased than Richard J. – is improperly excluded absent evidence he is unable to subordinate these views and carry out his oath as a juror. (*Gray v. Mississippi, supra*, 481 U.S. at p. 658.) Richard J.'s admission that he "could change his mind upon hearing the evidence" but gave "more weight to life imprisonment side" (4 RT 229) at most indicates that he might "assign greater than

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[104] The trial court denied defense for-cause challenges of prospective jurors who, like Richard J., would listen to all the evidence, follow the court's instructions and could vote for either sentence, but who "leaned" to the very extreme end of the pro-death spectrum. (See 25 CT 7003; 5 RT 491-493, 503-506, 510, 511-515 [Jill E. who rated herself as a "10" on Question 68]; 25 CT 7035; 5 RT 493-495, 506-508, 512-515 [James B. who rated himself as a "10" on Question 68]. The trial court also failed sua sponte to disqualify extreme death-inclined prospective jurors who had rated themselves as either a "9" or a "10" in response to Question 68, but who, again like Richard J., indicated they could consider the evidence, the instructions, and vote for either sentence. (See, e.g., 32 CT 9020, 5 RT 550-551 [Alternate Juror No. 3]; 25 CT 6907; 5 RT 460-462, 472-474, 483-484 [Margaret B.]; 29 CT 7995; 4 RT 391-39, 404-405 [Mohammad Z.]; 29 CT 8155, 4 RT 398-400, 410-413 [Leah R.]; 32 CT 8859; 4 RT 353-355, 371-372, 384 [Tiffany R.]; 33 CT 9404; 4 RT 201-203, 266-268, 273-275 [Jonathan K.]; 34 CT 9500; 4 RT 364-365, 374-375, 386-387 [Donald W.]; 25 CT 7067; 5 RT 495-496, 508-510 [Jeffrey R.].)

average weight to the mitigating factors presented at the penalty phase." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) But this would be an inadequate reason to disqualify Richard J. from serving on Buenrostro's jury because his "predilection would [not] actually preclude him from engaging in the weighing process and returning a capital verdict." (*Ibid.*)

The trial court's erroneous finding that Richard J. was substantially impaired (4 RT 230-231) resulted in part from its failure to exercise the "special care and clarity" that this Court requires "in conducting voir dire in death penalty trials" to ensure that a capital jury is constitutionally selected. (*People v. Heard*, *supra*, 31 Cal.4th at p. 967; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-736 [trial court's questions were insufficient to determine whether prospective jurors would impose death upon conviction regardless of the facts and circumstances].) The trial court failed to ask the right questions and fell short of establishing the "pertinent constitutional issue." (*People v. Stewart, supra*, 33 Cal.4th at p. 447.) The trial court did not ask Richard J. whether his "leaning towards life without possibility of parole" meant he would reject a death verdict under all circumstances. Nor did the trial court ask whether Richard J. could set aside this inclination and perform his duties as a juror in accordance with the law. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Thus, Richard J.'s dispositive answers remained unimpeached: in his questionnaire he stated that in deciding the penalty, he would consider all the evidence and the instructions and impose the sentence he felt was appropriate (24 CT 6621), and on voir dire he stated that he could vote for the death penalty (4 RT 228).

The deficiency of the trial court's voir dire of Richard J., which led in part to his exclusion on a constitutionally inadequate basis, contrasts with that of prospective jurors who favored the death penalty. For example,

Sandra B. rated herself as an eight on the scale of 10, indicating that she favored capital punishment more than Richard J. questioned it. (25 CT 6875.) Just as Richard J. indicated that his death penalty views would not make it difficult for him to vote for the death penalty (24 CT 6619), Sandra B. indicated that her death penalty views would not make it difficult for her to vote for life without the possibility of parole (25 CT 6875.) Like Richard J., on voir dire Sandra B. maintained that she was open to both penalty alternatives and could vote for life without possibility of parole if the evidence suggested that penalty to her. (5 RT 454.) Although Sandra B. had indicated that "it would be a difficult decision[,]" she agreed that she "could do it[.]" (*Ibid.*) After noting that Sandra B. was unsure whether or not she could be fair to both parties (*ibid.*), the trial court clarified her position by asking whether she felt she "could be a fair judge in this case?" Sandra B. replied, "Yes, I do." (*Ibid.*) At the conclusion of her voir dire, the trial court again asked Sandra B. if she "could follow the propositions of law we discussed and be a fair-minded juror?" And Sandra B. replied, "Yes." (5 RT 455.)

The trial court did not ask similar questions of Richard J. If the trial court had any concern about Richard J.'s unequivocal statement that he could vote for the death penalty, although he leaned more toward a life sentence, then it should have probed further. If it had, perhaps Richard J.'s answers might have been disqualifying. But given the existing record, it is equally likely that he would have given similarly qualifying answers. The trial court failed to take these additional steps. The record as it stands does not fairly support the trial court's conclusion that Richard J.'s death penalty views substantially impaired his ability "to follow the law or abide by his

oath." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48.)[105]

The rule of deference to the trial court does not apply to Richard J.'s exclusion. According to this Court:

> '"[o]n appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.' [Citations.]"

(*People v. Lewis* (2008) 43 Cal.4th 415, 483, quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 987; accord, *People v. Cooper* (1991) 53 Cal.3d 771, 809.) The deference principle makes sense where the prospective juror's answers are confused, inconsistent, ambiguous or evasive. In that situation, the judgment about whether a prospective juror is biased may be based

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[105] The inadequate voir dire in this case contrasts sharply with the voir dire in *Uttecht v. Brown* (2007) 127 S.Ct. 2218, the high court's most recent ruling on *Witt/Witherspoon* exclusions. The voir dire in *Brown* spanned more than two weeks with 11 days of voir dire devoted to death qualification. (*Id.* at p. 2225.) In this case, the entire voir dire, including death qualification, was conducted in a day and a half. (35 CT 9830-9831; 4 RT 190 - 5 RT 554.) In *Brown*, in addition to initial voir dire by the trial court and counsel, before deciding a contested challenge, the trial court gave each side a chance to recall the potential juror for additional questioning. (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2225.) In contrast, the trial court in this case permitted each party 30 minutes to voir dire each group of 18 prospective jurors, or about 1.67 minutes per person, which is hardly conducive to careful or probing questioning, and precluded counsel from re-examining any prospective juror the trial court thought should be excluded for cause. (4 RT 239.) Moreover, the voir dire of challenged Juror Z was over four and a half times as long as that of Richard J. (Compare 4 RT 227-231 [approximately 87 lines of voir dire] with *Uttecht v. Brown*, *supra*, 127 S.Ct. at pp. 2231-2238 [approximately 366 lines of voir dire].)

"'upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.'" (*Uttecht v. Brown*, *supra*, 127 S.Ct. at p. 2223, citation omitted; see, e.g., *id.* at pp. 2231-2238 [Juror Z initially did not understand that the alternative sentence to death did not permit release on parole, was not clear that mitigation was broader than a defense to the crime, and would hold the prosecution to proof beyond "a shadow of a doubt" at the penalty phase]; *People v. Thornton*, *supra*, 41 Cal.3d at pp. 414 [each challenged prospective juror gave ambiguous and sometimes conflicting answers].) When the trial court must make a judgment call about the prospective juror's impartiality based on confused or inconsistent answers, nonverbal cues may convey important information about credibility. (See *Uttecht v. Brown*, *supra* at p. 2224 [citing jury selection treatises on the role of nonverbal communication].)

However, as this Court has recognized, the deference principle does not make sense where, as here, the prospective juror's answers are clear, consistent, direct and unambiguous. (See *People v. Cooper*, *supra*, 53 Cal.3d at p. 809 [if there is no inconsistency in the prospective juror's responses, the only question is whether the trial court's determination is supported by substantial evidence].) In that situation, the trial court's judgment about bias most likely is made by assessing what the prospective juror says, not his demeanor while saying it. In this case, Richard J. gave forthright answers to the trial court's voir dire. He was not confused by the questions and did not hedge his answers. (4 RT 227-230.) He corrected the trial court when it misconstrued one of his questionnaire answers. (4 RT 229.) He was consistent about his death penalty views. (24 CT 6619-6622; 4 RT 228-230.) And most important, he unqualifiedly stated that although he leaned toward a life without parole sentence, he could vote for the death

penalty. (4 RT 228.) Given the clarity of Richard J.'s position, there could have been no reason for the trial court to depend on a judgment about his demeanor to rule on the prosecutor's challenge. Indeed, the record suggests that it did not. Notably, the trial court made no findings as to Richard J.'s demeanor or credibility, although it did make such findings when granting some of the prosecutor's death qualification challenges over defense objections. (See, e.g., 3 RT 153-154, 4 RT 310-311 [in excluding Cathlene E., the trial court observed, "I closely reviewed her demeanor and manner, and she's agonized over a lot of her answers."]; 5 RT 517 [in excluding James B. and Jill E., the trial court explained, "I am basing my decision on their demeanor in answering the question. Both potential witnesses, I feel, were giving truthful answers to my questions . . .."].)

Here, where Richard J.'s answers were clear and consistent, the only question is whether the trial court's finding of substantial impairment is fairly supported by the record (*People v. Heard*, *supra*, 31 Cal.4th at pp. 964-965), and the trial court's determination is not accorded deference (*id.* at p. 968 [no deference is given where the trial court provides this Court "with virtually nothing of substance to which we might properly defer"]). The high court's decision in *Uttecht v. Brown*, *supra*, 127 S.Ct. 2218, is completely congruent with this Court's longstanding position. As the high court stated:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment.

(*Id.* at p. 2230.) As shown above, the trial court's dismissal of Richard J. is not fairly supported by the record, is erroneous under *Witherspoon* and *Witt*, and violates article 1, section 16 of the state constitution and the Sixth and

Fourteenth Amendments to the federal constitution.

C. The Erroneous Exclusions Of Bobbie R., Frances P. And Richard J. Require Reversal Of The Death Sentence

Finally, the improper exclusion of even a single qualified juror for cause requires a per se reversal of the death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Heard*, *supra*, 31 Cal.4th at pp. 966.) In this case, three impartial prospective jurors were unconstitutionally disqualified from jury service. The death sentence must be reversed.

X. THE TRIAL COURT ERRED IN FAILING TO MAKE A CASE-SPECIFIC DETERMINATION ABOUT WHETHER LARGE GROUP VOIR DIRE WAS PRACTICABLE AND, IN THE ALTERNATIVE, IN DENYING BUENROSTRO'S REQUEST FOR INDIVIDUAL, SEQUESTERED VOIR DIRE

Prior to trial, Buenrostro asked the trial court to conduct individual, sequestered voir dire as necessary to select a fair and impartial jury. (1 CT 147-155.) In support of this request, defense counsel cited, inter alia, the emotional issues raised by the killing of three young children allegedly at the hands of their own mother and the nature of the death-qualification process in a capital case. (1 CT 150-151.) In his Points and Authorities Regarding Death Penalty Voir Dire, the prosecutor did not oppose this request. (See 3 CT 608-613.)

The trial court, Judge Sherman, adopted a "modified *Hovey* method" in which groups of 18 prospective jurors would be questioned out of the presence of the other groups. (2 P-RT 349-350; 2 CT 457.) The court made no determination as to the practicability of large group voir dire. When Judge Magers replaced Judge Sherman, the trial court followed this same method of conducting voir dire in groups of 18 prospective jurors. (3 RT 158.) However, the court questioned these groups in the presence of the entire panel. (3 RT 158-159; see also 4 RT 187-188, 190-191.) Again, the court did not make any ruling about the whether large group voir dire was practicable in this case.

In denying Buenrostro's request for individual, sequestered voir dire, the trial court abused its discretion.[106] Under Code of Civil Procedure

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[106] The minute order for May 4, 1998 regarding Buenrostro's motion for individual, sequestered voir dire, states that the motion was "[g]ranted in part–modified Hovey method to be used." (2 CT 457.) The trial court never

section 223, the trial court was required to make a case-specific determination about whether group voir dire was practicable. It did not. Because reviewing courts are not suited to substitute their judgment for the discretionary decision of a trial judge familiar with the community in which a case is tried and with the particular issues in the case, and because remand is not feasible at this point, reversal is required.

Assuming, arguendo, that this Court concludes the trial court properly made a determination that group voir dire was practicable in this case, reversal still is required. Defense counsel was entitled to exercise for-cause challenges against prospective jurors whose support for the death penalty would substantially impair their ability to serve. Accordingly, Buenrostro was entitled to voir dire that was adequate to identify prospective jurors who could not be impartial, but the death-qualification inquiry employed here was insufficient to discover these biased jurors. As a result, she was denied a fair and impartial jury at the penalty phase in violation of article I, section 16 of the state Constitution and the Sixth and Fourteenth Amendments to the federal Constitution.

A. Because The Trial Court Made No Case-Specific Finding That Group Voir Dire Was Practicable In This Case, And Because This Court Is Unsuited To Make Such A Fact-Intensive Determination In The First Instance, Reversal Is Required

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80, this Court held that in a capital case "that portion of the voir dire of each prospective juror which deals with [views on the death penalty] should be done individually

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made an explicit ruling granting or denying the motion. The decision to voir dire in groups of 18, especially as occurred at trial before the entire panel, in effect denied Buenrostro's request.

and in sequestration." On June 5, 1990, the electorate enacted Proposition 115, which in section 7 added Code of Civil Procedure section 223. That section provides in pertinent part:

> Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

As this Court has noted, Proposition 115 abrogated the holding in *Hovey*. (*People v. Waidla* (2000) 22 Cal.4th 690, 713.) After Proposition 115, sequestered voir dire is no longer required in capital cases. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171.) However, trial courts still have discretion to permit *Hovey* voir dire. (*Ibid.*) When a defendant asks for *Hovey* voir dire, the trial court must exercise its discretion to determine – under the plain terms of Code of Civil Procedure, section 223 – whether group voir dire is "practicable." (*Id.* at p. 1182.)

Where a trial court's comments do not reflect "an exercise of discretion about whether, in the particular circumstances of th[e] case, large group voir dire was practicable," the trial court's ruling cannot be sustained. (*People v. Covarrubias*, *supra*, 60 Cal.App.4th at p. 1182.) The trial court may not simply give reasons which are applicable to all capital cases and which fail to reflect consideration of "the particular circumstances of the case" before it. (*Id.* at pp. 1182-1184.) Instead, the trial court must "engag[e] in a careful consideration of the practicability of large group voir dire as applied to [the defendant's] case." (*Id.* at p. 1183.)

The Court of Appeal's decision in *Covarrubias* is instructive. There, a defendant sought *Hovey* voir dire after the enactment of Proposition 115. The trial court noted that after Proposition 115, such voir dire was "not required." (*People v. Covarrubias*, *supra*, 60 Cal.App.4th at p. 1183.) The

trial court expressed its view that "the lawful and the best process is to conduct voir dire whenever possible in the presence of other jurors." *(Ibid.)* The defendant sought pre-trial review of the trial court's ruling. Reversing, the appellate court held that the trial court's ruling did not reflect the type of case specific finding of "practicability" required by Code of Civil Procedure section 223. (*Id.* at pp. 1182-1184.) This Court has endorsed and applied the *Covarrubias* analysis. (*People v. Vieira* (2005) 35 Cal.4th 264, 288; *People v. Waidla*, *supra*, 22 Cal.4th at pp. 713-714.)

The trial court's ruling here is similarly flawed. Judge Sherman announced that she would use a "modified *Hovey* method," in which she would conduct voir dire of the prospective jurors in groups of 18 outside the presence of all the other jurors. (2 P-RT 349-350.) When Judge Magers took over the case, he decided to examine the prospective jurors in randomized groups of 18, but in the presence of all those remaining in the combined panels after resolution of the hardship claims. (1 RT 1-5 [discussion jury selection process with attorneys], 13-17 [explaining process to panel 1], 72-74 [explaining process to panel 2], 96-97 [explaining process to panel 3]; 2 RT 117-118 [explaining process to panel 4]; see also 3 RT 158-160; 4 RT 190-191.) The court proceeded without making any mention of the practicability of large group voir dire or the concerns raised by Buenrostro's prior motion for individual, sequestered voir dire. In fact, the trial court made no reference to Buenrostro's motion.[107] Thus, the court

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[107] In addressing the prospective jurors, Judge Magers explained that by using the jury questionnaire "we will not have to ask the same kinds of questions in open court." (1 RT 16.) This remark, which was not a response to the motion for *Hovey* voir dire, was hardly the type of "careful consideration" of "the particular circumstances of the case" that Code of Civil Procedure section 223 requires. Virtually every capital case has jury

here failed to exercise its discretion as required by Code of Civil Procedure section 223. Indeed, it did not even offer the type of cursory explanation that was found insufficient in *Covarrubias*. It gave no explanation whatsoever for denying Buenrostro's request for individual, sequestered voir dire. As this court has stated with regard to section 223: "A trial court that altogether fails to exercise its discretion to determine the practicability of group voir dire has not complied with its statutory obligation." (*People v. Vieira, supra*, 35 Cal.4th at p. 288.)

The remaining question concerns the appropriate remedy. In *Covarrubias*, the court properly noted that "whether large group voir dire is practicable" in a particular case is not for a reviewing court to decide in the first instance. (*People v. Covarrubias, supra*, 60 Cal.App.4th at p. 1182.) "That issue is for the trial court." (*Ibid.*) Thus, where a trial court has failed to exercise discretion and make a case specific consideration of practicability, the remedy is to remand the case for such a finding. (*Ibid.*)

The *Covarrubias* ruling properly recognizes the institutional limits of a reviewing court. Reviewing courts generally are not equipped to exercise the type of discretion required by Proposition 115 in determining the practicability of large group voir dire. It is the trial court that will be most aware of publicity the case has received that may make large group voir dire impracticable. It is the trial court that will know the community at large, and the particular factors in a specific case, that may warrant individual, sequestered voir dire. These factors may not be apparent on the face of the appellate record. By their nature, reviewing courts – even this Court –

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questionnaires, and their use does not obviate the concerns expressed in *Hovey* about death-qualification voir dire in a large group.

simply are not in a position to make the kind of discretionary, fact-based decision contemplated by Proposition 115 in the first instance on the basis of the cold appellate record.[108]

In short, the trial court failed to exercise its discretion in ruling on Buenrostro's motion for individual, sequestered voir dire, and this Court cannot substitute for the trial court on appeal and exercise its discretionary judgment. Remand ordinarily would be the logical remedy. However, unlike *Covarrubias*, that option is not realistic at this point – 10 years after judgment. If the trial court on remand were to conclude that large group voir dire was not practicable and that sequestered voir dire should take place, there would be no way to effectuate that ruling. Rather, given that large group voir dire risked compromising the impartiality of jurors, reversal is the proper remedy for the trial court's failure to exercise its discretion.

The harm resulting from large group voir dire that was recognized in *Hovey* was present in this case. As this Court recognized long ago, exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death. (*Hovey v.*

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[108] Even if this Court were institutionally suited to make the type of case-specific discretionary evaluation which Proposition 115 requires, an exercise of that discretion on appeal in the first instance would raise a constitutional problem. Under state law, Buenrostro was entitled to (1) a trial judge who would properly exercise discretion pursuant to Proposition 115 and (2) appellate review of that discretionary decision based on an abuse of discretion standard. The record leaves no doubt that the trial court here did not exercise its discretion under Proposition 115. If this Court were to do so in the first instance on appeal, Buenrostro then would lose her right to appellate review of that ruling in violation of the due process clause of the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [arbitrary violation of state-created right denies due process].)

Superior Court, *supra*, 28 Cal.3d at pp. 74-75.) When jurors are dismissed after stating their opposition to the death penalty, remaining jurors, who have some reservations about the death penalty but are qualified to serve, may be less inclined to rely upon their own impartial attitudes when choosing between life and death. (*Id.* at p. 74.) At the same time, "[j]urors exposed to the death qualification process may also become desensitized to the intimidating duty of determining whether another person should live or die." (*Covarrubias v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1173.) "What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Hovey*, *supra*, at p. 75.) Death qualification voir dire in the presence of other members of the jury panel may further cause jurors to mimic responses that appear to please the court, and to be less forthright and revealing in their responses. (*Id.* at p. 80, fn. 134.)

In addition to these risks, there were other potentially prejudicial factors during jury selection. Because the trial court denied Buenrostro's motion for sequestered voir dire, the prospective jurors were exposed to comments that the death penalty is not carried out fast enough (4 RT 271); that people who murder small children should be put to death (4 RT 234); that the expense of life without parole and execution was a concern (4 RT 224, 244, 259); that the criminal justice system makes it too hard to convict criminals (4 RT 216); and that a panel member served on a prior jury that resulted in a hung jury and afterward learned that evidence had been excluded that would have convinced him to vote for conviction (4 RT 274). Individual voir dire would have eliminated the risk that these biased or irrelevant views would taint the views of other prospective jurors.

In short, the trial court erred in denying Buenrostro's request for individual, sequestered voir dire without properly exercising its discretion to decide such voir dire was appropriate in this case. This Court cannot exercise this discretionary decision in the first instance. And although the potential harms from the trial court's failure are not necessarily ones which the appellate record would reflect, this record shows that the risks of large group voir dire identified in *Hovey* were present. On this record, reversal of the death verdict is required.

B. The Questioning That Occurred After The Trial Judge Denied *Hovey* Voir Dire Was Inadequate To Protect Buenrostro's Right To An Impartial Jury

As noted above, the trial court questioned the prospective jurors in groups of 18 before the entire combined panel. The trial court also limited the parties to 30 minutes for follow-up examination of each group and did not permit the attorneys to question a prospective juror that it had concluded was biased. (3 RT 159; 4 RT 191, 253, 298.) This voir dire was inadequate to identify those jurors who defense counsel could legitimately strike for cause based on their views of the death penalty.

Under *Morgan v. Illinois* (1992) 504 U.S. 719, 728-729, prospective jurors whose support of the death penalty will prevent or substantially impair their ability to obey their oaths and follow the court's instructions are considered biased and excludable for cause. (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that her constitutional right to an impartial jury will be honored. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) To that extent, the right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*; see *Dennis*

v. United States (1950) 339 U.S. 162, 171-172; *Morford v. United States* (1950) 339 U.S. 258, 259.) While the federal Constitution does not dictate any particular form that voir dire must take, less than adequate voir dire results in an unreasonable risk of juror partiality and violates due process. (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37; *Ham v. South Carolina* (1973) 409 U.S. 524, 526-527.)

That unacceptable risk was created in this case. Defense counsel sought *Hovey* voir dire especially for death qualification. Instead, the trial court examined the prospective jurors before everyone who was being considered for service on Buenrostro's jury. With regard to the death qualification, the trial court generally asked prospective jurors only if they could "be fair to both sides" on that issue, stay "open to both alternatives," and "vote either way." (See 4 RT 197, 203, 205, 211, 212, 217, 218, 219, 226, 227, 229, 232, 235, 236, 237, 240, 243, 248, 253, 263, 282, 314, 320, 322, 324, 349, 353, 354, 362, 365, 366, 393, 394, 399, 401; 5 RT 452, 454, 456, 458, 460, 491, 496, 497, 498, 514, 522, 524, 525, 529, 530, 546, 550, 551.) The trial court's leading questions, at times in the form of declaratory statements ending in a question mark, certainly telegraphed the preferred response. The questions to the very first prospective juror examined are illustrative. The trial court asked, "And if we get to a penalty phase, depending on the evidence, you could vote for death or life without the possibility of parole, depending on the evidence presented?" (4 RT 198.; see also 4 RT 213.) Even in interrogative form, the trial court's questions were not likely to elicit hidden bias: "As far as the death penalty issue . . ., do you feel you can keep an open mind to both alternatives?" (4 RT 203.) Indeed, at the beginning of the voir dire the trial court told the prospective

jurors what it was looking for. In questioning Amber M., the court's entire death qualification inquiry was as follows:

> You indicate in your questionnaire that you are strongly in favor of the death penalty. That's your personal opinion. But you also indicate that you can listen to all of the evidence, weigh the evidence, and impose life in prison, if you felt it was the appropriate punishment.
>
> That's what you said in our questionnaire. That's the kind of juror we want, regardless of your personal opinion. You can be fair to both sides on that issue and vote either way depending on how you evaluate the evidence in this case, that you feel you can do that.
>
> Do you feel you can follow the propositions of law that we've discussed today?

(4 RT 214-215.) Not surprisingly, Amber M. answered affirmatively. (*Ibid.*) The trial court consistently signaled the acceptable death penalty answers to the prospective jurors, rather than elicited their views and feelings in their own words. (See, e.g. 4 RT 208 ["On the issue of death, Mr. Gilmore, do you feel that you're open to both alternatives, depending on the evidence?"]; 4 RT 315 ["And depending on what the evidence is, you could vote one way or the other?"]; 5 RT 454 ["I take from that you are open to both alternatives in this case?"].) This type of questioning halted revelation of views that might have provided the basis for a defense for-cause challenge.[109]

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[109] Given the short time defense counsel had to question the prospective jurors, the group setting further restricted his ability to elicit hidden biases, since he had to be careful not to expose, and risk tainting, the other members of the panel with a partial prospective juror's views. (See, e.g. 4 RT 271 [view that death penalty is not carried out fast enough]; 4 RT 274-275 [prior experience with hung jury and feeling that could not be fair to defendant]; 4 RT 279 [would judge killing a child differently than killing an adult].)

Putting aside the concerns about group voir dire expressed in *Hovey*, and assuming jurors would be candid despite the public nature of the inquiry, the trial court's questions were inadequate to assure an impartial jury. In a capital case, both the prosecution and the defense are entitled to discharge not just those jurors whose views would cause them to automatically vote for one of the two penalties, but any juror whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; see *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 728-729.) Here, the trial court's voir dire, coupled with its limitation on attorney-conducted examination of the prospective jurors, was insufficient to reveal this broader form of impartiality. Yet, Buenrostro was constitutionally entitled to discharge jurors on this basis. When the inadequacy of voir dire raises a doubt as to whether a penalty phase jury was impartial, the resulting death sentence cannot stand. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 738.) Reversal of the death judgment is required.

CLAIMS REGARDING THE MURDER CONVICTIONS AND SPECIAL CIRCUMSTANCE FINDINGS

XI. THE TRIAL COURT ERRONEOUSLY DENIED BUENROSTRO'S REQUEST TO REPRESENT HERSELF

On the second day of testimony in the prosecution's case-in-chief, Buenrostro moved to represent herself because she disagreed with her attorneys' defense strategy and wished to present witnesses whom they refused to call. The trial court denied Buenrostro's request. In doing so, the court violated her Sixth and Fourteenth Amendment right to self-representation. Accordingly, as a matter of federal constitutional law, the entire judgment must be reversed per se, notwithstanding this Court's decision in *People v. Windham* (1977) 19 Cal.3d 121, 128-129, which impermissibly restricts the fundamental right of a criminal defendant to represent herself that the United States Supreme Court recognized in *Faretta v. California* (1975) 422 U.S. 806, 834-835. In the alternative, even if *Windham* did not misapply *Faretta*, the erroneous denial of self-representation still requires reversal of Buenrostro's convictions and death sentence.

A. The Trial Court Denied Buenrostro's Clear And Unequivocal Request To Represent Herself Made On The Second Day Of The Prosecution's Case

On July 20, 1998, during the second day of the prosecution's case-in-chief, Buenrostro moved to represent herself. (Sealed RT July 20, 1998: 696-706.)[110] Her request came after the prosecutor played part of the taped

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[110] The sealed transcripts for July 20, 1998 are paginated 691-692 and 695-706. Confidential matters unrelated to the *Faretta* motion are covered on page 695, line 17 through page 696, line 17. The discussion of Buenrostro's motion for self-representation is contained on pages 691-692 and page 696, beginning on line 18 through page 706.

interview of Buenrostro by San Jacinto Police Detective Frederick Rodriguez on the night of the homicides. (7 RT 679, 687-689.) During a morning recess, defense counsel Grossman asked the trial court for an in camera hearing. (7 RT 690.) Without the prosecutor or Buenrostro present, Grossman told the court that Buenrostro wanted to make a *Faretta* motion. (Sealed RT July 20, 1998: 691.)

According to Grossman, Buenrostro was unhappy with the level and quality of his and co-counsel's representation. (Sealed RT July 20, 1998: 691.)[111] Grossman suggested to Buenrostro that one option was for her to represent herself because some of the things she wanted them to do, while not unethical, were not in her best interest. (*Ibid.*) Buenrostro told Grossman that she wanted to represent herself and wanted to talk to the trial court. (*Ibid.*) Grossman told Buenrostro he did not think the court would grant her a continuance should she be allowed to represent herself. (*Ibid.*) Grossman characterized the conflict over trial tactics as a "continuing problem [that is] exacerbated every day there is more testimony." (Sealed RT July 20, 1998: 692.) Cocounsel David Macher added that they would object to a *Faretta* motion as untimely and not in Buenrostro's best interest. (*Ibid.*) The trial court indicated it would hear from Buenrostro later that day. (*Ibid.*)

After the morning recess, the jury heard the remainder of Buenrostro's taped statement. (7 RT 693.) During the lunch recess, the trial court held a hearing on Buenrostro's *Faretta* motion. (Sealed RT July

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[111] In fact, Buenrostro previously had expressed dissatisfaction with her appointed counsel. (See 1 P-RT 51 [January 3, 1996]; 1 P-RT 257 [April 2, 1998]; 2 P-RT 302-303 [May 4, 1998]; 5 RT 440 [July 14, 1998]; 6 RT 661 [July 16, 1998].)

20, 1998: 695-706.) Defense counsel Grossman told the court that after about 20 minutes of Buenrostro's taped statement was played for the jury, Buenrostro for the first time told counsel that the voice on the tape was not hers. (*Id.*: 696-697.) Both defense attorneys then met with Buenrostro in the holding tank of the courtroom. (*Id.*: 697.) According to Grossman, Buenrostro told them the tape was part of the prosecution's plan to frame her, and she wanted counsel to produce witnesses to contest the tape's authenticity. (*Ibid.*) Grossman told Buenrostro that he was aware of no such witnesses and that it was unlikely that the tape was a fabrication. (*Id.*: 697-698.) Buenrostro was adamant that the tape was a fraud (*id.*: 698) and told her attorneys that if they would not produce such witnesses, she would represent herself and/or testify on her own behalf (*id.*: 697). Grossman made clear to the trial court that Buenrostro was not asking him or co-counsel to do anything unethical; rather, she wanted to present a defense based on what she believed were the facts. (*Id.*: 701-703.)

Buenrostro told the trial court that she never had heard the tape before it was played for the jury that morning in open court. (Sealed RT July 20, 1998: 699.) Grossman confirmed this fact: although he had discussed the taped statement with Buenrostro, he had not played the tape for her. (*Ibid.*) Buenrostro reiterated that she wanted to represent herself. (*Id.*: 700, 703.) In response to questioning by the trial court, she expressed dissatisfaction with Macher's cross-examination of police officer Blane. (*Id.*: 703.) She stated that should she be granted that right, she was prepared to go forward with the case that very day without any further delay. (*Id.*: 704.) Grossman also confirmed this fact: in his view, Buenrostro was not seeking to delay the trial via a *Faretta* motion, but instead was concerned with presenting her version of the facts to the jury.

(*Id.*: 701.)

The trial court expressly declined to advise Buenrostro about the consequences and detriments of self-representation because it viewed her conduct as an obstructionist tactic. (Sealed RT July 20, 1998: 704.) The court denied the *Faretta* motion as untimely, not made in good faith, and designed to obstruct and delay the trial. (*Id.*: 700, 704-705.) The trial court based its decision on overhearing Buenrostro yelling at her attorneys that morning in the holding cell near the courtroom and on her "demeanor and manner during the *Marsden* hearing." (*Id.*: 704-705.)[112]

B. A Criminal Defendant Has A Sixth Amendment Right To Self-Representation As Long As Her Assertion Of That Right Will Not Unjustifiably Disrupt The Trial Or Obstruct The Administration Of Justice

Over thirty years ago the United States Supreme Court established that "[t]he Sixth Amendment grants to the accused personally the right to make his own defense." (*Faretta v. California*, *supra*, 422 U.S. at p. 819.) The Sixth Amendment right to self-representation is not a "legal formalism." (*Adams v. U.S. ex. Rel. McCann* (1942) 317 U.S. 269, 279.) In *Faretta*, the Court understood that self-representation rarely was a wise decision: "[I]n most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." (*Faretta v. California*, *supra*, 422 U.S. at p. 834.) Nevertheless, "[t]he right to defend is personal[,]" grounded on the "inestimable worth of free choice."

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[112] Presumably the trial court was referring to the *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) motion heard and denied on July 16, 1998, the court day immediately before the current *Faretta* hearing. (7 RT 662; 35 CT 9832.)

(*Faretta v. California*, *supra*, 422 U.S. at p. 834; see *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 ["The right to appear pro se exists to affirm the dignity and autonomy of the accused . . ."].) As this Court has acknowledged, "[t]he primary motivation for the *Faretta* rule is respect for the accused's freedom of choice personally to conduct his own defense." (*People v. Joseph* (1983) 34 Cal.3d 936, 946.) Thus, although a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (*Ibid.*, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350-351 (conc. opn. of Brennan, J.).)

In *Faretta*, the high court concluded that the Sixth Amendment implies a right of self-representation by examining the history and structure of the Sixth Amendment, federal and state authority, and English legal history. (*Faretta v. California*, *supra*, 422 U.S. at pp. 818-831.) In so doing, *Faretta* disapproved of this Court's decision in *People v. Sharp* (1972) 7 Cal.3d 448, which had held a criminal defendant had no federal or state constitutional right to represent himself. (*Id.* at p. 811, fn. 6.) Under *Faretta*, a defendant is entitled under the Sixth and Fourteenth Amendments to defend herself so long as she "clearly and unequivocally" declares her wish to represent herself and "proceed without counsel" and "voluntarily and intelligently elects to do so." (*Faretta v. California*, *supra*, 422 U.S. at pp. 807, 835; accord, *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2383.)

Although the Court in *Faretta* did not explicitly state the reasons a defendant may be refused self-representation, it implicitly indicated that the permissible bases for denying the right are narrowly drawn. The Court made clear that the right to represent oneself may be terminated when the defendant "deliberately engages in serious and obstructionist misconduct."

(*Id.* at p. 834, fn. 46.) Logically, the grounds for denying the right in the first place must be, and until very recently have been, similarly circumscribed. Thus, a defendant can be denied self-representation only when it is shown that proceeding pro se will seriously and unjustifiably disrupt or obstruct the trial. (See *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2384 [*Faretta* does not include the right to abuse the dignity of the courtroom, avoid compliance with rules of procedural and substantive law, and engage in serious and obstructionist misconduct].)[113]

Certainly, *Faretta* did not have occasion to consider the timeliness of a defendant's assertion of the right because Faretta had requested to represent himself well in advance of trial. (*Faretta*, *supra*, 422 U.S. at p. 807.) But nothing in the holding or rationale of *Faretta* made the constitutional right of self-representation subject to a timeliness requirement. (See *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 265 (conc. opn. of Fernandez, J.)[114]

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[113] As Justice Scalia has stated:

> The only circumstance in which we have permitted the State to deprive a defendant of this trial right [self-representation] is the one under which we have allowed the State to deny *other* such rights: when it is necessary to enable the trial to proceed in an orderly fashion.

(*Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2392 [dis. opn. of Scalia, J.].)

[114] Recently, the United States Supreme Court created a narrow, "severe mental illness" exception to the Sixth Amendment right of self-representation. (*Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2388.) This new limitation says nothing about whether there is a timeliness requirement for asserting the right of self-representation and, as explained below, is inapplicable to Buenrostro's case.

Shortly after *Faretta* was decided, this Court again addressed the right to self-representation in *People v. Windham* (1977) 19 Cal.3d 121. It held that to invoke this "constitutionally-mandated unconditional right to self-representation," a defendant had to do so "within a reasonable time prior to the commencement of trial." (*People v. Windham*, *supra*, at p. 128.) *Windham*'s pretrial timeliness rule has two significant consequences. First, when the request is made within a reasonable time before the commencement of trial, the trial court must permit the defendant to represent herself if she has voluntarily and intelligently waived her right to counsel. (*Ibid.*) However, once a defendant proceeds to trial represented by counsel, the decision to grant or deny a demand for self-representation is within the trial court's discretion. (*Ibid.*) Second, the erroneous denial of a pretrial *Faretta* motion is a matter of constitutional magnitude requiring reversal per se (*People v. Tyner* (1977) 76 Cal.App.3d 352, 356), whereas the erroneous denial of an untimely *Faretta* motion is subject to review under the state harmless error standard. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1051.)

Notably, *Windham* made clear that the "reasonable time" requirement for asserting the right to self-representation should not be used to limit a defendant's constitutional right to self-representation. Rather, it was only to be used to ensure that a defendant not misuse the *Faretta* mandate as a means to unjustifiably delay, i.e., to disrupt a scheduled trial or to obstruct the orderly administration of justice. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) For that reason, cases immediately after *Windham* focused on the delay aspect of the equation. (See *People v. Harris* (1977) 73 Cal.App.3d 76, 82 [substantial delay would have been

necessary if request granted]; *People v. Hall* (1978) 87 Cal.App.3d 125, 129 [defendant requested 30-day continuance along with the right to self-representation].) In fact, in *People v. Tyner*, *supra*, 76 Cal.App.3d 352, where the request for self-representation was made immediately prior to impaneling the jury, the Court of Appeal specifically noted this Court's statement in *Windham* that the "reasonable time" requirement should not be used to limit a defendant's right to self representation. (*Id.* at pp. 354-355 [error to deny right to defendant who specifically stated he was not requesting a continuance].)[115]

A fair reading of *Windham*, one which is contrary to some indications from this Court, is not that the federal constitutional right to self-representation somehow evaporates once a jury is selected, but rather that the timing of the request for self-representation affects the evaluation of the factors that may legitimately limit the right – the disruption or obstruction of the trial. This is the only reading that makes sense, since the right of self-representation for a criminal defendant in California has its source only in the federal Constitution.

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[115] More recent decisions from this Court have been less consistent in assessing the concerns involved when a defendant seeks self-representation sometime after the start of trial. (See, e.g. *People v. Roldan* (2005) 35 Cal.4th 646, 684-686 [affirming the denial of midtrial *Faretta* motion, where the trial court did not find it untimely and defendant asserted a continuance was justified, and affirming the denial of another *Faretta* motion, made after guilt phase finished but before penalty phase started, without considering whether self-representation would unjustifiably delay or disrupt trial]; *People v. Clark* (1992) 3 Cal.4th 41, 98-101 [affirming denial of *Faretta* motion made on eve of trial, where defendant did not request a continuance for self-representation, but Court concluded such delay would be necessary].)

As noted previously, the impetus for the *Faretta* decision was this Court's ruling in *People v. Sharp*, *supra*, 7 Cal.3d 448, which erroneously held that there was no right to self-representation under either the state or federal Constitutions. Since *Faretta*, the decisions from this Court and the Courts of Appeal that have addressed a defendant's right to self-representation have centered on the proper application of that decision, both when the right is asserted before trial and after the trial starts. Consequently, to say – as this Court has said – that once a trial begins a defendant's right to self-representation does not have a constitutional basis is perplexing. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)[116] There simply is no basis in California for the right to self-representation other than a federal constitutional basis. And the Sixth Amendment right to represent oneself, which applies to the states through the Fourteenth Amendment, is not transmuted into a non-constitutional right once the trial begins.

The most logically consistent explication of this Court's interpretation of the right to self-representation is set forth in *People v. Mayfield* (1997) 14 Cal.4th 668. There, the Court held that the right is absolute only when it is asserted a reasonable time before the trial begins, and that self-representation motions made after that time are addressed to the trial court's sound discretion. The Court identified the timeliness requirement as the tool that prevents a defendant from misusing a *Faretta*

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[116] It is possible that this statement worked its way into the opinion because Bloom based his argument upon a supposition that he did not have a constitutional right to self-representation after the trial began, and this Court merely accepted that statement as correct. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.)

motion "'to delay unjustifiably the trial or obstruct the orderly administration of justice.'" (*Id.* at p. 809, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [categorizing the assertion of a right to self-representation made prior to the start of trial as the "constitutionally mandated unconditional right of self-representation"].)

This concern with delay and obstruction is consistent with *Faretta*, where the United States Supreme Court noted that "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.) Thus, while the assessment of the factors of disruption, which may include delay and obstruction of justice, may alter depending upon the stage of the trial at which the defendant asserts the right to self-representation, the factors themselves remain the same, and these are the only factors that can be considered under the federal Constitution. To the extent that this Court has held that concerns other than these should be factored into a trial court's assessment of whether to grant a *Faretta* motion, such holdings are without foundation.

This Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial and discretionary if asserted close to the time of trial or after trial has begun. Yet, no opinion of the Court discusses why this is the case, either legally or logically. There is nothing in *Faretta* itself that warrants such a distinction, and a reading of *Windham* that is consistent with *Faretta* does not warrant such a distinction. Apart from the aspect of a

knowing and voluntary relinquishment of the right to counsel, there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice

Apart from its illogic, holding that the federal constitutional right to self-representation evaporates once a trial begins impinges on a defendant's Sixth Amendment rights in a manner not condoned by the federal Constitution itself. As stated above, the right of self-representation recognized in *Faretta* finds support in the structure of the Sixth Amendment and its fundamental nature. (*Faretta v. California*, *supra*, 422 U.S. at p. 818; *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161.) Because this Court has established a rule that significantly interferes with the exercise of a fundamental constitutional right, the validity of that rule must be assessed by applying the strict scrutiny standard, which applies when there is a real and appreciable impact on, or significant interference with, the exercise of a fundamental right. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 783-784; *People v. Ramos* (2004) 34 Cal.4th 494, 512; see Winnick, *New Directions in the Right to Refuse Mental Health Treatment: the Implications of Riggins v. Nevada* (1993) 2 Wm. & Mary Bill Rts. J. 205, 225-226 & fn. 117 [citing *Faretta* for proposition that a criminal defendant's right to control his or her defense is a fundamental constitutional right, the infringement of which warrants heightened scrutiny].)

Under the strict scrutiny standard, the state must establish a compelling interest which justifies the rule at issue, and must establish that the distinctions drawn by the rule are necessary to further the purpose of

that interest. (*Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 738.) To the extent that *Windham* changes the equation for determining whether a defendant can exercise his or her right to self-representation based solely upon the fact that the right is asserted after the start of the trial, it does not meet this test. Any compelling interest for regulating the assertion of the right to self-representation is encompassed by the *Faretta* standards themselves. As discussed previously, the concerns about disruption of the trial and obstruction of justice are interests that can be given proper effect at any point in the trial; consequently, establishing a different, and discretionary, test merely because the trial has begun does not reflect a purpose or interest that withstands strict scrutiny.

To be sure, the discretionary aspect of the *Windham* decision essentially has been adopted by all federal jurisdictions when applying *Faretta* to a self-representation request that is made after the start of trial. (See, e.g., *United States v. Mayes* (10th Cir. 1990) 917 F.2d 457, 462; *United States v. Wesley* (8th Cir. 1986) 798 F.2d 1155, 1155-1156; *United States v. Brown* (2d Cir. 1984) 744 F.2d 905, 908.) But the federal courts have long recognized the right of self-representation by dint of federal statute. (See 28 U.S.C. § 1654.) With regard to federal cases, *Faretta* only made clear that self-representation was a fundamental constitutional right when asserted before the start of trial. Thus, federal courts simply continued to follow their same practice, based on a statutory rather than a constitutional right, regarding self-representation requests asserted after the start of trial.

This state was in a different posture when *Faretta* was decided, however, because it did not recognize the right of self-representation. Consequently, *Faretta* was not a clarifying holding that confirmed an

accepted practice, it was a revolutionary holding that created new law for this state. *Windham*, therefore, was a case that did not – as the post-*Faretta* federal cases did – say that *Faretta* had no effect on existing law interpreting the right of self-representation at a later stage of trial. Rather, *Windham* was a case that said the United States Supreme Court, in *Faretta*, was making a doctrinal distinction between an assertion of a self-representation right made pretrial as opposed to during trial. That is an unreasonable interpretation of the *Faretta* decision and should not be followed.

In short, *Faretta*'s clear constitutional doctrine is that a criminal defendant has a fundamental Sixth Amendment right to represent herself. (*Faretta v. California*, *supra*, 422 U.S. at pp. 833-834.) This right can be denied only when its assertion will unjustifiably disrupt or obstruct the trial. The fact that this rule arose from a case in which the demand was made pretrial is not, in and of itself, constitutionally significant. In *Windham,* this Court was simply incorrect to ascribe doctrinal meaning to this fact.

C. The Trial Court Erroneously Denied Buenrostro's *Faretta* Motion In Violation Of The Sixth And Fourteenth Amendments

Claims of federal constitutional error generally are reviewed de novo (*People v. Zamudio* (2008) 43 Cal.4th 327, 342), although this Court reviews claims of *Faretta* error for an abuse of discretion (*People v. Jenkins* (2000) 22 Cal.4th 900, 961). Under either standard, the trial court erroneously denied Buenrostro's motion to represent herself on the basis of factors not supported by the record and in part not condoned by *Faretta*. Whether judged independently of *Windham*, as Buenrostro asserts is correct, or under *Windham*, as this Court does, the trial court impermissibly violated her right of self-representation.

As a preliminary matter, Buenrostro's request was clear and unequivocal. (*Faretta v. California*, *supra*, 422 U.S. at p. 835.) Defense counsel first informed the trial court in unambiguous terms that Buenrostro wanted to represent herself. (Sealed RT July 20, 1998: 691.) Buenrostro then twice reasserted her motion herself. (*Id.*: 700, 703.) Thus, unlike the *Faretta* motions in some cases, there was no confusion about Buenrostro's request. (Compare, e.g., *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888-889 [impulsive, emotional outburst after denial of defendant's motions for new trial and substitution of counsel did not seriously invoke *Faretta*]; *People v. Marshall* (1997) 15 Cal.4th 1, 14-27 [defendant's history of vacillating about whether he wanted to represent himself and his asserting request in the course of a rambling, virtually incoherent diatribe did not clearly and unequivocally assert right to self-representation].)

The trial court denied Buenrostro's motion for self-representation for three reasons: it was untimely; it was not made in good faith; and it was designed to obstruct and delay the trial. (Sealed RT July 20, 1998: 700, 704-705.) As explained above, under *Faretta* the only legitimate reasons for denying self-representation are unjustified disruption (including delay) of the trial or other obstruction of the administration of justice, and the timing of the defendant's motion is relevant only as it affects these factors. The same is true with regard to the trial court's finding that the motion was not made in good faith; that concern is pertinent only insofar as it sheds light on whether Buenrostro's motion was intended to, or in fact would disrupt or obstruct her trial. The record fails to support the trial court's findings.

First and foremost, the representations of both Buenrostro and her attorneys clearly establish that granting the *Faretta* motion would not have

delayed or disrupted the trial. The trial court asked defense counsel Grossman for his "honest take" on whether Buenrostro's motion was, as the trial court believed, "not in good faith" and "designed to obstruct or delay these proceedings." (Sealed RT July 20, 1998: 700.) Grossman plainly disagreed with the court that delay was Buenrostro's motive or her goal:

> MR. GROSSMAN: Honestly, Your Honor, and I try to be honest, I don't think that's my client's wish. I explained to her that I didn't think this Court would allow her a continuance or to discharge this jury. Her concern is not one of delay, her concern in her own mind is presenting what she considers the true facts to be to this jury.
>
> And she's never expressed any desire to continue the case at all, in the context of Faretta or in the context of the problem I had in front of Judge Sherman. That's never been an issue.

(*Id.*: 701.)[117] In a colloquy with the trial court, Buenrostro directly confirmed that she did not seek to delay the trial:

> THE COURT: All right. And you're telling me that you are – you feel that you are competent to proceed today, without any further delay, in representing yourself?
>
> THE DEFENDANT: From what I see in the way they have conducted the case, yes, I think so. I think I would be.

(*Id.*: 704.) The record is unequivocal: Buenrostro was prepared to take over handling her case without even the slightest continuance. Moreover, her readiness to go ahead immediately with the trial was fully consistent with her history throughout the case of aggressively asserting her right to a speedy trial. In fact, one of the reasons that the trial court granted Buenrostro's pretrial *Marsden* motion and replaced the Riverside County

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[117] The problem Grossman had before Judge Sherman refers to the selection of the first jury in his absence. (See 10 P-RT 1633-1649, 1735-1785, 1808-1847.)

Public Defender with attorney Grossman from the Conflict Defense Panel was Buenrostro's refusal to waive her speed trial rights when her attorneys requested a further continuance to prepare for trial. (1 P-RT 164-166.) Her conduct in asserting her right to self-representation and her earlier conduct in no way suggested a desire or design to delay, disrupt or obstruct the trial. The trial court's finding that her request sought to obstruct the proceedings is flatly refuted by the record.

Similarly, there is no evidence whatsoever that Buenrostro's *Faretta* motion was not made in good faith. The trial court does not detail what facts, other than a nonexistent " obstructionist tactic," supports its finding to the contrary. But at the hearing on the motion, Buenrostro's attorneys dispelled any suggestion that she was acting with less than good faith. Grossman told the trial court that Buenrostro was not asking to do anything unethical. (Sealed RT July 20, 1998: 701-702.) Rather, in her attorney's estimation, Buenrostro adamantly believed that the police interrogation tape was fraudulent and that she could prove it to be a fabrication. (*Id.*: 697-698.) Buenrostro's motivation was to present her version of the facts to the jury. Although both Grossman and Macher were "almost at total loggerheads" with Buenrostro "about how to proceed and what issues . . . to raise" (*id.*: p. 701) and disagreed with Buenrostro's views of the case (*id.*: 703), they never questioned her sincerity. There simply was no indication that Buenrostro was disingenuous or playing games with the court. The trial court's conclusion that Buenrostro lacked good faith is completely unfounded.

Furthermore, neither Buenrostro's speaking to her attorneys in a "raised, angry voice" during a meeting in the holding cell nor her demeanor at a prior in-camera hearing, which were cited by the trial court in his

ruling, justify the decision to deny her self-representation. (See Sealed RT July 20, 1998: 700, 704-705.) It is hardly surprising that during the course of a capital trial, there will be moments of tension and conflict between the defendant and her lawyers. This is especially true where, as here, the defendant repeatedly disagrees with counsel about trial strategy. (See *id.*: 702 [defense cocounsel Macher notes the recurring problem regarding potential witnesses].) Being under extreme stress, defendants at times will yell at their lawyers. Such behavior, while less than ideal, is entirely human. When it occurs during a recess in a private attorney-client consultation outside of the courtroom, a raised voice, even angry yelling, is not serious misconduct or obstructionist behavior that may justify denial or revocation of the right to self-representation.[118]

Here, Buenrostro and her attorneys had no choice but to meet in the holding cell adjacent to the court room. Although the trial court overheard Buenrostro raise her voice before the beginning of the day's proceedings, there is no indication that Buenrostro disrupted the trial court's calling of his calendar or other court business. (Sealed RT July 20, 1998: 700.) More importantly, there is absolutely no evidence of emotional outbursts or

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[118] Compare *People v. Welch* (1999) 20 Cal.4th 701, 735, in which this Court affirmed the denial of self-representation where the defendant, inter alia, had engaged in belligerent and disrespectful conduct including turning his back on the trial court while addressing it, interrupting the trial court several times to argue what the trial court had declared to be a non-meritorious point, and refusing to obey the trial court's admonitions to be quiet, and *People v. Davis* (1987) 189 Cal.App.3d 1177, 1200, in which the Court of Appeal upheld the revocation of self-representation where the defendant continuously disparaged opposing counsel and the trial court in front of the jury, made accusations in front of the jury that the government had manufactured evidence and that the court was prejudiced again him, and continued this conduct after being warned repeatedly to desist.

disrespectful conduct by Buenrostro during any of the court proceedings, including the in camera *Marsden* hearing mentioned by the trial court. Although the trial court referred to Buenrostro's "demeanor and manner during the *Marsden* hearing," it did not explain what it meant. (*Id.*: 705.) And the record of the in camera hearing on July 16, 1998, does not show that Buenrostro engaged in any disrespectful or otherwise improper behavior. She simply expressed her dissatisfaction with her attorneys' handling of the DNA testing. (Sealed RT July 16, 1998: 662-665.) There is simply no evidence that Buenrostro at any time acted other than civilly in court.

Plainly put, the record before the trial court did not support its decision to deny Buenrostro the right to represent herself. Her *Faretta* request, although asserted after the trial began, was not designed to delay or disrupt the trial, and granting her motion would not, in fact, have caused any delay or disruption. Buenrostro was entitled under *Faretta* to proceed pro se, and the trial court unjustifiably denied her that right in violation of the Sixth and Fourteenth Amendments.

Finally, the high court's recent decision in *Indiana v. Edwards*, *supra*, 128 S.Ct. 2379, does not apply to this case. *Edwards* held "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at p. 2388.) At the competency trial the defense experts testified that Buenrostro suffered from a mental disorder, and the court-appointed experts sharply disagreed. The jury's competency verdict does not reveal its finding on this question. (See Argument I, Section D.) And the question of mental illness did not factor

into the trial court's denial of the *Faretta* motion. The court made no finding that Buenrostro suffered from mental illness, severe or otherwise, and no finding that mental illness rendered her incompetent to conduct trial proceedings herself. As already shown, the sole – and unsupported – grounds for the trial court's ruling were that the motion for self-representation was untimely, was not made in good faith, and was designed to obstruct and delay the trial. (Sealed RT July 20, 1998: 700, 704-705.) The trial court erred in denying her *Faretta* request.

Even assuming, arguendo, that *People v. Windham*, *supra*, 19 Cal.3d 121 were not, as shown above, inconsistent with *Faretta*, the trial court nonetheless would have abused its discretion in denying Buenrostro's motion for self-representation. When a midtrial request for self-representation is made, the trial court must inquire first into "the specific factors underlying the request" and then should consider other factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham*, *supra*, 19 Cal.3d at p. 128.) Under these criteria, the trial court abused its discretion in denying Buenrostro's *Faretta* motion.[119]

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[119] The trial court only addressed what it believed was Buenrostro's reason for the request and the risk of disruption or delay. Although the trial court is to consider the factors listed in *Windham* to ensure a meaningful record for appellate review (*People v. Windham*, *supra*, 19 Cal.3d at p. 125), it need not explicitly discuss the factors as long as the record is sufficient to permit the reviewing court to determine if the ruling constituted an abuse of discretion (*id.* at p. 129, fn. 6). Here the record establishes that the trial court abused its discretion.

The trial court only explicitly addressed one of these factors – the disruption or delay that might result from granting Buenrostro the right to represent herself. As Buenrostro already has demonstrated, her motion was not an attempt to "unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852.) Buenrostro wanted to represent herself so she could contest the authenticity of her taped statement which the prosecutor played for the jury. Disregarding her plainly-stated reason, which defense counsel confirmed, the trial court instead attributed a different, completely unsubstantiated motive to her *Faretta* request – to obstruct or delay the trial. As shown above, the trial court's finding is contrary to the evidence before it.

Under *Windham*, the overriding focus of the trial court in exercising its discretion must be on the reason for, and specific factors relating to, the defendant's mid-trial request. The record before the trial court was clear: Buenrostro wanted to represent herself because she was dissatisfied with her attorneys' representation. As defense counsel Grossman admitted, they were "almost at total loggerheads" regarding tactical decisions about her defense. (Sealed RT July 20, 1998: 701.) The disagreement came to the fore over how to respond to the tape recording of Buenrostro's post-arrest custodial interview. However, Buenrostro's complaints about her attorneys were not new. At a pretrial in camera hearing before Judge Sherman a couple of months earlier, defense cocounsel Macher stated that Buenrostro had "significant dissatisfaction" with "our planned conduct of the defense of her case" with respect to both defense counsel's tactics and legal theory.

(Sealed RT May 4, 1998: 305.)[120] This dissatisfaction resurfaced before Judge Magers twice in the week before Buenrostro's *Faretta* motion when she asserted *Marsden* motions. (5 RT 432; 35 CT 9831 [July 14, 1998]; 6 RT 662; 35 CT 9838 [July 16, 1998].)

Buenrostro's conflict with her counsel over their handling of her case was real and persistent. She had specific grievances about the prosecution's evidence and specific requests with regard to the defense's witnesses. She did not, like the defendant in *Windham*, express satisfaction with her attorneys' competence. (*People v. Windham*, *supra*, 19 Cal.3d at p. 125 & fn. 3.) And she did not, like the defendant in *Windham*, simply assert at the end of the taking of evidence that she could have better elicited testimony in support of a defense without pointing to any other witnesses that she would have called. (*Id.* at p. 125, fn. 1.) The very point of the right to self-representation is to permit the defendant to assume responsibility for, and accept the personal consequences of, her own defense when she is dissatisfied with her appointed counsel's efforts. (*Faretta v. California*, *supra*, 422 U.S. at p. 834.) Because Buenrostro's *Faretta* motion was prompted by specific, documented and longstanding disagreements with her attorneys, the trial court abused its discretion in denying her the right to represent herself.

Moreover, Buenrostro had a reasonable justification for any tardiness in her self-representation request: she told the trial court, and defense

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[120] At this hearing defense cocounsel Macher stated that Buenrostro was ready to proceed as her own attorney (Sealed RT May 4, 1998: 304), but Buenrostro, in fact, did not ask either to represent herself at that time or request substitution of counsel, as the trial court specifically found (*id.*, pp. 306-308, 311-312).

counsel confirmed, that until the tape of her custodial interview was played for the jury, she had never heard it and, therefore, had no prior opportunity to discuss its authenticity with counsel. (Sealed RT July 20, 1998: 699.) "When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Buenrostro, as noted previously, did not seek even a slight continuance of the trial. Since the timing of her request resulted from circumstances beyond her control, the trial court abused its discretion by finding it untimely.

The other factors to be considered under *Windham* did not militate against self-representation. First, the trial court made no mention about the quality of counsel's representation. Although obviously deficient representation may support a defendant's *Faretta* motion, a silent record about the defense counsel's performance, or even evidence of competent representation, logically does not defeat a self-representation request. After all, the *Faretta* right is not intended to guarantee effective representation, but rather to ensure "the inestimable worth of free choice" with regard to one's own defense. Indeed, the high court in *Faretta* warned that, in most cases, a defendant would fare better with "counsel's guidance than by their own unskilled efforts" but nonetheless concluded that "[p]ersonal liberties" like the right to defend pro se "are not rooted in the law of averages." (*Faretta v. California*, *supra*, 422 U.S. at p. 834.)

In this case, the *Faretta* motion came on the second day of the prosecution's case. Defense counsel had reserved their opening statement (6 RT 598), so the trial court had no knowledge of the defense they planned. It was thus too early for the trial court, who did not hear the pretrial motions, to assess the quality of counsel's representation except by their

general reputation. Defense counsel apparently attempted to answer Buenrostro's complaints as they arose. And they exercised their independent judgment to conclude that her request to challenge the authenticity of the tape recorded interrogation was "just not based in reality." (Sealed RT July 20, 1998: 703.) But these efforts did not minimize the intractable conflict over trial strategy between Buenrostro and her attorneys or the legitimacy of her resulting request to represent herself.[121] In short, the "quality of counsel's representation" factor does not carry significant weight in this case.

Second, the "defendant's prior proclivity to substitute counsel" factor, if anything, favored self-representation. The fact of Buenrostro's *Marsden* motions document her previous dissatisfaction with her attorneys' representation. Her request to represent herself was not a sudden ploy to derail the trial, but rather was the manifestation of a genuine, continuing, and unresolved discontent with her legal representation.[122]

Finally, the "length and stage of the proceedings" factor did not support the denial of the *Faretta* motion. To the extent that protracted trials may weigh against granting self-representation, that was not a concern here.

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[121] Buenrostro's dissatisfaction with her legal representation was made clear to the jury in pointed and apparently sarcastic terms during her testimony at the penalty phase. (See 12 RT 1307-1309.)

[122] As noted above, the impetus for the removal of the Riverside County Public Defender as defense counsel in 1996, and the substitution of attorneys Grossman and Macher did not come from Buenrostro, but from the public defender's request for a continuance and the trial court's concern about what it perceived as defense delay in preparing the case for trial and Buenrostro's desire to assert her right to a speedy trial. (1 P-RT 164-166.)

Although this was a capital case, the trial was not long.[123] Buenrostro made her motion on the second day of a five-day guilt phase.[124] At the guilt phase, defense counsel reserved but then did not give an opening statement (6 RT 598, 10 RT 1030), and Buenrostro was the only defense witness (10 RT 1030-1081, 1083.) The penalty phase took another three days.[125] With regard to the case in mitigation, defense counsel waived an opening statement (12 RT 1302), and Buenrostro testified explicitly against the advice of counsel (12 RT 1303). By testifying at both the guilt and penalty phases, Buenrostro became a considerable factor in the proceedings, notably without disrupting them.

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[123] It is well-settled that the right of self-representation applies in a capital case. (*People v. Dent* (2003) 30 Cal.4th 213, 218, 222 and *People v. Joseph* (1983) 34 Cal.3d 936, 944-945 [reversing judgments where the trial court denied *Faretta* motions because murder charges carried possibility of death sentence].)

[124] After the jury was selected on July 14, 1998, the guilt phase from the opening statement of the prosecutor to verdict took five days. The prosecutor's opening statement and the beginning of his case-in-chief took place on July 16, 1998. (35 CT 9832.) The second day of the prosecution case and Buenrostro's *Faretta* motion occurred on July 20, 1998. (35 CT 9852.) The prosecution's case continued on July 21 and July 22, 1998. (35 CT 9858-9859, 9871-9873.) The defense case, which consisted solely of Buenrostro's testimony, took place on July 23, 1998, along with closing arguments, jury instructions, jury deliberations and the rendering of the verdicts. (35 CT 9968.)

[125] The penalty phase took three days: the prosecution presented its case in aggravation on July 27, 1998. (36 CT 10081-10081A.) The defense presented its case in mitigation, both parties presented their arguments, and the jury began its deliberations on July 28, 1998. (36 CT 10116-1011736 CT 10116-10117.) The jury resumed its deliberations on July 29, 1998, and returned its death verdict later that day. (36 CT 10129-10130.)

In sum, even if the *Windham* test controls this case, the trial court abused its discretion. Buenrostro sought the right to represent herself for a legitimate reason, i.e., a well-established and persistent conflict with her attorneys about trial strategy. She and her attorneys expressly represented that she was ready to proceed immediately without a continuance. The trial, taking a total of eight days, was short for a capital case. And there was no reason to believe that her self-representation would cause any delay or disruption. Under these circumstances, the trial court's denial of Buenrostro's *Faretta* motion, which forced her to proceed to trial in a capital case with counsel she did not want, was an abuse of discretion. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [trial court abused its discretion in denying midtrial *Faretta* motion, where defendant did not request a continuance, was prepared to proceed with the trial, had profound disagreement with defense counsel about how case should proceed, did not show a proclivity to substitute counsel and there was no indication that his self-representation would obstruct the orderly administration of justice]; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 593-594 [trial court abused its discretion in denying *Faretta* motion in a special circumstances murder case, where self-representation was requested for a legitimate reason, there was no request for a continuance, and there was no reason to believe there would be any delay or disruption].)

D. The Erroneous Denial Of The Right Of Self-Representation Requires Reversal

The deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic reversal. (*McKaskle v. Wiggins* (1984) 465 U.S. 166, 177, fn. 8; *Faretta v. California*, *supra*, 422 U.S. at p. 806; *People v. Joseph, supra*, 34 Cal.3d at p. 948.) This is logical since the right of self-representation is embodied within the structure of the Sixth Amendment and structural error defies harmless error analysis. (*United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 150 [the "erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as 'structural error.'" (citation omitted)].) Consequently, to the extent this Court accepts Buenrostro's argument that the denial of her right of self-representation violated the federal Constitution, the error mandates reversal.

Because *Windham* holds that a defendant's midtrial assertion of the right of self-representation is not a right based on the federal Constitution, intermediate appellate courts in this state have held that any error attendant to denying this right is subject to analysis under *People v. Watson*, *supra*, 46 Cal.2d 818. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058.) This view is flawed and automatic reversal should follow when a trial court errs in denying self-representation pursuant to *Windham*'s abuse of discretion standard.

People v. Rivers, *supra*, 20 Cal.App.4th 1040 is the case most commonly relied upon for the rule that the *Watson* test applies to a denial of a self-representation request asserted after the start of the trial. In *Rivers*, the trial court denied a *Faretta* motion as untimely without engaging in any of the analysis required by *Windham*. Consequently, the record was devoid

of any evidence which would have permitted a reviewing court to conclude that the trial court acted properly. Therefore, the appellate court found that the trial court erred in denying the request for self-representation. (*Id.* at pp. 1048-1049.) The court then concluded that because the right affected was not a constitutional right, but rather a right based on the case law, the rule of automatic reversal did not apply. The court analogized to this Court's holding in *People v. Crandell* (1988) 46 Cal.3d 833, addressing the erroneous failure to appoint advisory counsel, and utilized the harmless error standard rather than a reversible per se standard. (*People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1053-1053.)

It is difficult to understand how the Rivers court arrived at this conclusion given the nature of the *Faretta* error and the *Crandell* holding. First, the denial of self-representation is not the type of error that is a proper subject for harmless error analysis. That is why both the United States Supreme Court and this Court have held that reversal is automatic when a defendant's *Faretta* rights have been violated. Like the consequences resulting from denial of the right to counsel of choice, the harm resulting from the denial of self-representation "are necessarily unquantifiable and indeterminate. . .." (*United States v. Gonzales-Lopez*, *supra*, 548 U.S. at p. 150.) Even if the right to self-representation is not unqualified if it is requested midtrial, the nature of the right itself is not altered by the juncture of the trial at which it is asserted. If the nature of the right has not changed, the type of harm analysis does not change, despite the fact that the way to measure whether the error itself occurred may be different. In other words, the fact that the trial court may have the discretion to engage in an analysis of additional factors in determining whether to grant a midtrial request for self-representation does not change the impact of its decision to grant or

deny self-representation. The *Rivers* court was wrong to assume otherwise.

Second, the *Rivers* opinion is problematic in relying on *Crandell*, an inapt analogy, to arrive at its conclusion. In *People v. Crandell*, *supra*, 46 Cal.3d 833, the trial court had denied a request for advisory counsel based on the mistaken belief that such a right did not exist, and, therefore, the error was the trial court's failure to exercise its discretion to grant advisory counsel. This Court used a harmless error standard because it found the trial record contained sufficient facts to show that if the trial court had exercised its discretion and denied the defendant's motion, it would not have been an abuse of discretion. (*Id.* at p. 864.) In other words, the error on the part of the trial court was in believing that such a right did not exist, and the harmless error standard was not being applied to the result of that error – the impact of the failure to appoint advisory counsel – but to the fact that the trial court's erroneous belief was harmless because the trial record revealed facts such that even if the trial court understood the right existed, it still would have ruled against defendant.

The result in *Crandell* must be compared to the result in *People v. Bigelow* (1984) 37 Cal.3d 731 to fully understand the *Rivers* court's misperception. In *Bigelow*, the trial court also mistakenly believed there was no right to advisory counsel, but the record there showed enough facts so that this Court could determine that if the trial court had denied the request on the record, rather than on its misperception of the law, it would have been an abuse of discretion. Because of that, the error was found to be reversible per se. The Court found reversal per se to be the proper standard because of "the impossibility of assessing the effect of the [error] upon the presentation of the case." (*Id.* at p. 745, and pp. 745-746.) In doing so, the Court analogized to the denial of the right of self-representation. (*Id.* at p.

745.)

Indeed, the *Crandell* Court itself summarized the proper application of the prejudice test for error such as the one Buenrostro asserts here. It noted that the reversal per se standard applies if the trial court's denial of the defendant's request would have been an abuse of discretion, but the harmless error standard applies if the trial court's denial would not have been an abuse of discretion. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 863- 864.) This is the correct rule, and the rule set forth in *Rivers* is not. Under the correct per se rule, if the trial court erred by denying Buenrostro's request for self-representation, the guilt and penalty phase verdicts must be set aside.

Even if this Court chooses to apply a harmless error test which considers the result of the incorrect ruling, reversal is warranted. This is not a case like *People v. Rogers*, *supra*, 37 Cal.App.4th 1053, where the erroneous denial of self-representation was held harmless because through defense counsel's representation the defendant was convicted of "the lesser included offense of attempted voluntary manslaughter and was acquitted of two counts of assault with a firearm upon a peace officer" despite strong prosecution evidence. (*Id.* at p. 1058.) Such a beneficial verdict in light of the evidence did not happen here. Buenrostro was convicted of all counts and allegations charged – three counts of first degree murder with special circumstances – and was sentenced to death. She could have fared no worse representing herself.

Moreover, there is a reasonable probability that she would have done better representing herself. During the penalty-phase deliberations, the jury sent the trial court a note asking "was there any testamony [sic] of the mental competancy [sic] for Dora to stand trial (there was some recalection

[sic] of something and we want clarification.)" (36 CT 10128.)[126] If Buenrostro had represented herself at trial, the jury would have had even more direct exposure to her irrational views of the case unmediated by the efforts of defense counsel. Under those circumstances, it is reasonably probable that at least one juror would have had a reasonable doubt as to the proof of premeditation and deliberation, which would have resulted in either non-capital murder convictions or a mistrial. And even if there is no reasonable probability of a more favorable verdict at the guilt phase, there is at the penalty phase. If Buenrostro had represented herself, it is reasonably probable that the concern troubling the jury about Buenrostro's competence at the guilt phase would have been magnified at the penalty phase and the jury would have found her mental state mitigating enough to return a sentence of life in prison without the possibility of parole.

This analysis is supported by the decision in *People v. Nicholson*, *supra*, 24 Cal.App.4th 584. As noted above, the trial court had abused its discretion in denying the defendants' midtrial *Faretta* motion in a prosecution in which they were convicted of murder with a special circumstance. Despite apparently strong evidence of the defendants' guilt, the Court of Appeal found the error to be harmful under the *Watson* standard:

> Had Nicholson and Goldsberry been permitted to control their own fate, the evidence against them would have been no less overwhelming. But we simply cannot discount the fact that it might have been to their advantage to conduct voir dire and to present opening statements and closing arguments, thereby

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[126] The trial court responded: "No testimony has been introduced regarding her mental competency to stand trial. Her mental competency to stand trial is not an issue for this jury to decide." (36 CT 10128.)

> giving the jury an opportunity to hear from them (without the inconvenience of cross-examination). (Cf. *People v. Tyner*, *supra*, 76 Cal.App.3d at p. 356; *People v. Herrera*, *supra*, 104 Cal.App.3d at p. 175.) While it seems safe to say the defendants could not under any circumstances have been acquitted, they might have been able to avoid a true finding on the special circumstance allegation.

(*Id.* at p. 595.) In the same way, this Court should find that in this case the erroneous denial of self-representation was not harmless and requires reversal of the guilt and penalty phase verdicts.

XII. THE INSTRUCTIONS ON THE DEGREE OF MURDER AND THE INSTRUCTION ON MOTIVE IMPERMISSIBLY DILUTED AND UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law.'" (*In re Winship, supra,* 397 U.S. at p. 363.) It also is central to the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court gave flawed standard instructions on the degree of murder (CALJIC No. 8.71 and CALJIC No. 8.74) and motive (CALJIC No. 2.51). The first two instructions were confusing and misleading, and all three instructions enabled the jury to convict Buenrostro on a lesser standard than is constitutionally required. Because the instructions violated the federal Constitution in a manner that never can be "harmless," the

judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)[127]

A. The Prejudicially Misleading Instructions Under CALJIC No. 8.71 On Doubt About Whether The Murder Was First Or Second Degree And CALJIC No. 8.74 About Unanimity As To Degree Of Murder Undermined The Requirement Of Proof Beyond A Reasonable Doubt

At the guilt phase, the main disputed issue was whether the murders were of the first degree or second degree. The prosecutor argued that all three murders were done with premeditation and deliberation. (10 RT 1093-1096, 1118-1119.) Although testifying in her own behalf, Buenrostro insisted that she did not kill her children (10 RT 1047), defense counsel argued that if the jury found Buenrostro guilty, it should be only of second degree murder because there was insufficient evidence of premeditation and deliberation (10 RT 1103-1110). The jury instructions pursuant to CALJIC No. 8.71 and CALJIC No. 8.74 on this central issue were confusing and ambiguous, and there is a reasonable likelihood that the jury applied these instructions in a way that violated the federal Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California* (1990) 494 U.S. 370, 380.)

The trial court instructed the jury first about the presumption of innocence and the corollary burden on the prosecution of proving Buenrostro's guilt beyond the reasonable doubt. (10 RT 1136-1137.) The

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[127] This claim is cognizable on appeal under section 1259 which, as explained in Argument I, provides that a legally erroneous instruction affecting the defendant's substantial rights is reviewable without the requirement of objection at trial. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1134.)

trial court then instructed that Buenrostro was charged with the crime of murder and instructed on the elements of murder, the elements of first degree murder and the elements of second degree murder. (10 RT 1137-1140.) At that point, as required by section 1097, the court should have instructed on the consequences of a reasonable doubt as to the degree of murder. More particularly, the trial court should have instructed that, if the jury unanimously found Buenrostro guilty of murder beyond a reasonable doubt: (1) in order to find her guilty of first degree murder, the jury unanimously would have to be satisfied of her guilt of first degree murder beyond a reasonable doubt; and (2) in the event the jury was not unanimously satisfied of her guilt of first degree murder beyond a reasonable doubt, it must find her guilty of second degree murder. (See CALJIC No. 8.71 [5th ed.].) The jury was not so instructed. Instead, the court gave CALJIC No. 8.71 (6th ed.) as follows:

> . . . If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(35 CT 9913; 10 RT 1140-1141.) The court next gave CALJIC No. 8.74 (6th ed.) as follows:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find her guilty of an unlawful killing, you must agree unanimously as to whether she is guilty of murder of first degree or murder of the second degree.

(35 CT 9914; 10 RT 1141.) These instructions were incomplete and inaccurate, lessened the prosecution's burden of proof, and prejudiced Buenrostro's chance that the jury would return a second degree murder verdict, thereby depriving her of her state and federal constitutional rights to a jury trial and to due process. (Cal. Const., art. I, §§ 15, 16; U.S. Const., 6th & 14th Amends.)[128]

The jury never was clearly told by the instructions that to find Buenrostro guilty of first degree murder, it had to find unanimously and

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[128] This version of CALJIC No. 8.71 did not appear in earlier editions of CALJIC, and this Court apparently has never approved the instruction. The comment following CALJIC No. 8.71 in both the 5th and 6th editions cites *People v. Morse* (1964) 60 Cal.2d 631, 656-657 as approving this instruction. That assertion may be true of the version of the instruction contained in the 5th edition of California Jury Instructions, Criminal, but it is not true of the version of the instruction contained in the 6th edition. In *Morse*, the defendant challenged the failure of the trial court sua sponte to direct the instructions concerning reasonable doubt and circumstantial evidence specifically to the issue of degree. The Court held that the defendant suffered no prejudice from this omission:

> The general instructions as to circumstantial evidence and reasonable doubt were . . . implemented by the following instruction as to the degree of the crime: "When, upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

(*People v. Morse*, *supra*, at p. 657.) Thus, the instruction approved in *Morse* did not include the confusing language of the instruction given to Buenrostro's jury and challenged here.

beyond a reasonable doubt the elements of first degree murder (premeditation and deliberation). Conceivably a reasonable juror might have intuited this legal requirement by drawing a negative inference from the instruction pursuant to CALJIC No. 8.71, but a reasonable juror likely would have understood that directive – which said nothing about the prosecution's burden of proof on the elements of first degree murder – to require a second degree murder verdict only if the juror was more or less in equipoise between the two possible verdicts.[129]

Nothing in the remaining instructions would have corrected such a mistaken impression, and, in fact, the absence of further instructions on the issue only could have confirmed the misunderstanding. The instruction pursuant to CALJIC No. 8.74 told the jury that it "must agree unanimously as to whether she is guilty of murder of first degree or murder of the second degree." (35 CT 9914; 10 RT 1141.) But the instruction did not mention the requirement to find the degree of murder beyond a reasonable doubt and did not clarify the confusion created by the flawed CALJIC No. 8.71 instruction. The other instructions referred to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt

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[129] CALCRIM 521 does not present the problems posed by the CALJIC No. 8.71 instruction given at Buenrostro's trial. CALJIC No 8.71 is not incorporated into CALCRIM. Instead, under CALCRIM 521, the jury is instructed: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree." The jury then is instructed on the applicable theories of first degree murder. In conclusion, the jury is told: "All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

only in reference to whether Buenrostro was guilty of murder or a special circumstance had been proved, but never in reference to the setting of the degree of murder. (10 RT 1140-1141.)

The verdict forms given to the jury similarly fostered the erroneous notion that the nature of the "degree decision" was different than the other decisions the jury was called upon to make. The jury was given separate verdict forms to determine guilt of murder, the special circumstance and the enhancements – all decisions on which the jury was told the prosecution had the burden of proof beyond a reasonable doubt. In contrast, the decision as to degree simply was to be inserted onto a blank space on the murder verdict form. (35 CT 9950-9958.) This treatment of degree-setting as a lesser decision, almost as an afterthought, coupled with the trial court's failure to instruct that the prosecution had the burden of proof beyond a reasonable doubt on this issue, created "a reasonable likelihood that the jury understood the instructions to allow conviction" of Buenrostro of first degree murder based on a lesser standard than that constitutionally mandated by the presumption of innocence. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 6.) This constitutionally infirm instruction deprived Buenrostro of a "jury verdict within the meaning of the Sixth Amendment." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

The instructions were prejudicially misleading for yet another reason. The instructions pursuant to CALJIC No. 8.71 and CALJIC No. 8.74 set out contradictory requirements for reaching a second degree murder conviction. The first, CALJIC No. 8.71, seems to have required that the jury be unanimous in its uncertainty as to the degree of the murder in order to return a second degree murder verdict. By contrast, the second, CALJIC No. 8.74, seems to have required that the jury be unanimous in its certainty

of the degree of the murder in order to return a second degree murder verdict. Further, neither instruction dealt with the possibility of a jury divided between the two views, i.e., a jury where some jurors were uncertain as to the degree of the murder and others were certain that it was a second degree murder. In that circumstance, Buenrostro would have been entitled to a second degree murder verdict, but the jury could not have reached such a verdict under the instructions, and so the jurors likely would have understood that they were compelled to continue deliberating. Neither the prosecutor nor defense counsel tried to clarify or explain the circumstances in which the jury, having unanimously found Buenrostro guilty of murder beyond a reasonable doubt, would have been required to return second degree murder verdict.

As a result of these defects, there is a reasonable likelihood that the jury applied the instructions about the degree of murder on a standard that is less than the constitutional requirement of proof beyond a reasonable doubt. (See *Byrd v. Lewis* (9th Cir. 2007) 510 F.3d 1045, 1049-1051 [scope-of-consent instruction violated due process, since it permitted jury to apply lowered burden of proof on intent element and jury likely did so]; *Polk v. Sandoval* (9th Cir. 2007) 503 F.3d 903, 910 [Nevada murder instruction unconstitutionally relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated]; *Gibson v. Ortiz* (9th Cir. 1994) 387 F.3d 812, 814 [CALJIC No. 2.50.01 allowed jury to find defendant guilty of the charged offenses by relying on facts found only by a preponderance of the evidence thereby unconstitutionally lessening burden of proof in violation of due process].)

B. The Motive Instruction (CALJIC No. 2.51) Also Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The trial court instructed the jury pursuant to CALJIC No. 2.51:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(35 CT 9897; 10 RT 1134.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to Buenrostro to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See, e.g., 35 CT 9886; 10 RT 1130 [CALJIC No. 2.03, stating with regard to making a willfully false or deliberately misleading statement about the crime that it "is not sufficient by itself to prove guilt . . ."].) The absence of this qualification told the jury otherwise with regard to motive.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced Buenrostro during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the contrast with CALJIC No. 2.03 highlighted the omission, so the jury would have understood that motive alone could establish guilt.

The instruction, by informing the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty, effectively placed the burden of proof on Buenrostro to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Buenrostro of her federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 364 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Buenrostro to be convicted without the prosecution

having to present the full measure of proof. (See *Beck v. Alabama,* (1980) 447 U.S. 625, 637-638.)

Buenrostro acknowledges that this Court repeatedly has rejected constitutional challenges to CALJIC No. 2.51 (see, e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 154-155; *People v. Kelly* (2007) 42 Cal.4th 763, 792) and asks the Court to reconsider these rulings. She raises this claim to preserve it for possible federal court review. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

C. The Instructional Errors Require Reversal Of The Convictions And Special Circumstance Findings

Because the erroneous instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Even if the erroneous instructions were subject to harmless error review, reversal still is required because the State cannot show that the giving of the instructions pursuant to CALJIC No.8.71, CALJIC No. 8.74 and CALJIC No. 2.51 was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Buenrostro personally contested the evidence against her, vehemently asserting that she did not kill her children. And her counsel contested the prosecution's circumstantial evidence that the killings were premeditated and deliberated. (10 RT 1103-1110.) As noted previously, there was a clear dispute about whether the homicides were premeditated first-degree murders or intentional, but not premeditated, second-degree murders resulting from what the prosecutor described as Buenrostro's "explosion of . . . anger." (10 RT 1119). Addressing this central question, the confusing direction and dilution of the reasonable-doubt requirement in CALJIC No.

8.71 and CALJIC No. 8.74 was prejudicial no matter what standard is applied, because the consequences of the error are "necessarily unquantifiable and indeterminate" (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 282) or at least the prosecution cannot prove beyond a reasonable doubt that the error did not contribute to the first degree murder verdict (*Chapman v. California, supra*, 386 U.S. at p. 24).

Moreover, the defective instruction on motive under CALJIC No. 2.51, which permitted the prosecution to prove motive alone in order to establish guilt, was particularly prejudicial. The prosecutor focused much of his closing argument on the question of motive. Although the prosecutor acknowledged that motive was not an element he had to prove (10 RT 1085), he repeatedly returned to the subject and emphasized his view that Buenrostro's motive was to hurt her estranged husband, Alex. (10 RT 1119-1123, 1125.) In fact, motive was such a central theme that the prosecutor wrapped up his first argument asking the jury, "Who has the largest motive in this courtroom? Who is on trial for a triple homicide, a triple murder? Dora Buenrostro." (10 RT 1099.) Thus, the prosecutor was able to exploit the confusion created by the motive instruction so that Buenrostro's purported motive became a substitute for proof beyond a reasonable doubt that the murders were committed with premeditation and deliberation. These instructional errors, individually or together, require reversal of Buenrostro's convictions, special circumstance findings, and death sentence.

XIII. TWO OF THE JURY'S THREE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE FINDINGS MUST BE STRICKEN

The Information alleged three multiple-murder special circumstances, one as to each of the alleged murders. (1 CT 51-53.) On May 7, 1998, during a discussion of the jury questionnaire, Judge Sherman pointed out that the multiple-murder special circumstance should be charged only once and not more than once as alleged in the Information. (4 P-RT 546-547.) She ordered the prosecutor to strike the repetitious allegations. (4 P-RT 547.)

On May 11, 1998, Judge Sherman, citing this Court's decision in *People v. Allen* (1986) 42 Cal.3d 1222, again ordered the prosecutor to amend the Information to charge just one multiple-murder special circumstance. (4 P-RT 608-609.) That same day, Buenrostro filed a "Memorandum of Law Regarding Multiple Murder Special Circumstance Allegations (P.C. § 190.2(a)(3))" which, following up on the trial court's discussion with counsel, requested that the excessive multiple-murder special circumstances be dismissed. (3 CT 627-630.) On May 13, 1998, the prosecutor filed an Amended Information complying with the trial court's order and alleging only one multiple-murder special circumstance. (4 CT 831-833.)

When Judge Sherman recused herself, the parties agreed they would be bound by her pretrial rulings. (21 CT 5954; 1 RT 2.) On July 20, 1998, during the guilt phase, the prosecutor submitted a draft of the verdict sheets to defense counsel and Judge Magers, who presided over the trial. (7 RT 676-677.) The trial court noted that the draft contained only one allegation of the multiple-murder special circumstance as the case law required. (7 RT 676.)

However, a couple days later, the issue resurfaced with regard to the prosecutor's draft of the proposed verdict sheet jury instruction. (9 RT 961.) The prosecutor acknowledged that he had amended the Information because defense counsel was correct that the multiple-murder special circumstance should be alleged once at the end of the Information and not in each murder count. (*Ibid.*) But the prosecutor asserted that he was uncertain about the wording of the special circumstance allegation in the verdict instruction. (*Ibid.*) The trial court agreed with the prosecutor's suggestion that he should list the special circumstance allegation in *each* count. (9 RT 963.) Defense counsel objected based on this Court's decisions that the multiple-murder special circumstance should appear only once in the Information and only once in the verdicts. (*Ibid.*) Rejecting the defense objection, the trial court ruled:

> If you are proposing to do a special allegation as to each count, then I would approve of that, Mr. Soccio. That solves the problem, and I don't think there would be any error in doing that.

(9 RT 964.)

The jury returned nine verdict forms against Buenrostro. All had a hand-written notation "Guilty" on them. Three verdicts found Buenrostro guilty of murder in the first degree as charged, respectively, in counts I, II and III of the Amended Information. (35 CT 9950-9952; 10 RT 1146-1147.) The next three verdicts found that Buenrostro personally used a deadly and dangerous weapon in the commission of the murders charged, respectively, in counts I, II and III of the Amended Information. (35 CT 9953-9955; 10 RT 1149-1150.) And the last three verdicts found the multiple-murder special circumstance true as to each murder charged, respectively, in Counts I, II and III of the Amended Information. (35 CT

9956-9958; 10 RT 1151-1153.) In this way, the verdict forms did precisely what Judge Sherman had prohibited, but Judge Magers had permitted – they submitted excessive special circumstance allegations to the jury.

The trial court erred in submitting three multiple-murder special circumstance allegations to the jury because they all referred to the same exact circumstance. Judge Sherman's original ruling to strike two of the special circumstance allegations was correct. The law in this area is clear: a defendant charged with two or more murders may be charged with only one multiple-murder special circumstance, which should be charged separately from the individual murder counts. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422; *People v. Diaz* (1992) 3 Cal.4th 495, 565; *People v. Allen* (1986) 42 Cal.3d 1222, 1273.) As noted by this Court in *People v. Allen*, *supra*, upon which Judge Sherman relied:

> A plurality held in *People v. Harris* (1984) 36 Cal.3d 36 [201 Cal.Rptr. 782, 679 P.2d 433], "alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender. (*Jurek v. Texas* (1976) 428 U.S. [262] at pp. 273-274 [49 L.Ed.2d 929, 96 S.Ct. 2950].)" (36 Cal.3d at p. 67.) Pursuant to our reasoning in *Harris*, appropriate charging papers should allege one multiple-murder special circumstance separate from the individual murder counts."

(*People v. Allen*, *supra*, 42 Cal.3d at p. 1273.)

Judge Sherman and defense counsel both made this point in unequivocal terms before trial. Judge Sherman repeatedly ordered the prosecutor to strike the two extra special circumstance allegations from the Information. (4 P-RT 547, 608-609.) Buenrostro's filed motion to dismiss

the excessive special circumstance allegations cited no less than 13 cases stating the rule and condemning the use of more than one multiple-murder special circumstance "'as artificially inflating the seriousness of the defendant's conduct.'" (3 CT 629.) The prosecutor had no trouble grasping this principle, since he filed a corrected Amended Information that set forth the three murder allegations in separate counts and then separately alleged the special circumstance allegation. (4 CT 831-833.) He also stipulated to abiding by Judge Sherman's pretrial rulings.

Given this history, the prosecutor's assertion of uncertainty before Judge Magers about how to word the verdict forms rings hollow. The solution was simple and obvious: there should have been one multiple-murder special circumstance verdict form following the verdict forms for the murder charges and the personal use of a deadly weapon allegations, just as appeared in the Amended Information. Indeed, defense counsel suggested as much. (9 RT 963.) The trial court's submission of three multiple-murder special circumstance verdicts to the jury was clear error, and two of the true findings on two of the multiple-murder special circumstance allegations should be stricken. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 422.)

CLAIMS REGARDING THE DEATH SENTENCE

XIV. THE TRIAL COURT ERRONEOUSLY ADMITTED VICTIM IMPACT EVIDENCE AND ERRONEOUSLY REFUSED TO GIVE A CAUTIONARY INSTRUCTION AS TO ITS USE

At the penalty trial, the prosecution introduced three witnesses and a videotape to show the effect of the children's murder on their father, step-sister and schoolmates. In addition, the jury watched a videotaped tribute to the children. This victim impact evidence should not have been admitted, particularly under the unique circumstances of this filicide case. But even if some victim impact evidence were appropriate, the two videotapes and testimony about the school children exceeded the limits of the due process clause of the federal Constitution. The evidence was cumulative, irrelevant and inflammatory. The admission of this evidence, and the trial court's refusal to limit its prejudice with a cautionary instruction, rendered Buenrostro's penalty phase fundamentally unfair and her death sentence arbitrary and unreliable and requires reversal of her death sentence. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th and 14th Amends.)

A. Over Buenrostro's Objection, The Trial Court Admitted The Testimony Of Three Victim Impact Witnesses And Two Victim Impact Videotapes

Before trial, the prosecutor filed Statements in Aggravation Pursuant to Section 190.3, asserting his intention at the penalty phase to use "[t]he effect of each victim's death, including but not limited to the manner of death, notification of fact of the killing, and circumstances regarding the impact of the killings on families, friends, and acquaintances of the victims." (1 CT 125; 2 CT 444.) Buenrostro filed a Motion in Limine to Exclude Evidence in Aggravation of Victim Impact (Item 4) arguing that victim impact evidence is inadmissible under the state and federal

Constitutions (36 CT 9987-9988), and in the alternative, that even if victim impact evidence were admissible, the prosecution's proposed evidence was so unduly prejudicial as to render the trial fundamentally unfair under the due process clause of the Fourteenth Amendment. (36 CT 9997, 10010.)

On July 27, 1998, the trial court heard argument, reviewed two videotapes and ruled on Buenrostro's in limine motion. (11 RT 1191-1204, 1231, 1236-1237.) At that hearing, defense counsel objected to all of the victim impact evidence based on the arguments in the written motion. (11 RT 1193.) The trial court admitted all of the prosecution's victim impact evidence. (36 CT 10079; 11 RT 1202, 1204, 1237.) As a result, the following evidence was admitted at the penalty trial: (1) the testimony of Alejandra Buenrostro, the children's 19-year-old half-sister (11 RT 1258-1263); (2) the testimony of Alex Buenrostro, the children's father (11 RT 1264-1272); (3) a videotape of Alex Buenrostro in a police interview room receiving the news that Susana and Vicente were dead (P.Exh. 185; 11 RT 1272-1273); (4) the testimony of Deborah De Forge, the principal of the school that Susana and Vicente attended, regarding the impact of their deaths on the children and staff at the school (11 RT 1236-1243); and (5) a videotape montage of photographs of the children when they were alive, a makeshift memorial at their apartment, and their shared grave (P.Exh. 186; 11 RT 1273).

Buenrostro asked the trial court to give a cautionary instruction, which defense counsel proposed, about the jury's consideration of the victim impact evidence. (36 CT 10051.) The request was denied. (36 CT 10116; 12 RT 1280.)

B. *Payne* Was Wrongly Decided And The Eighth Amendment Should Preclude Admission Of Victim Impact Evidence

At trial, defense counsel argued that notwithstanding the decision in *Payne v. Tennessee* (1991) 501 U.S. 808, the admission of victim impact evidence violates the constitutional guarantees of reliable capital sentencing, due process and equal protection unless the harm caused to the actual victim is probative of the defendant's mens rea, character or future dangerousness or to the question of financial restitution. (36 CT 9987-10009, 10003). *Payne*, of course, is binding on this Court. Buenrostro asserts her claim here on appeal in order to exhaust her state remedies so she can, if necessary, present her claim in federal habeas corpus proceedings and obtain the benefit of any new rule of law on this question by the United States Supreme Court. (See 28 U.S.C. §§2254(b)(1), 2254(d)(1).)

As discussed at length in the defense motion at trial, *Payne* was wrongly decided because it is contrary to the dictates of the Eighth Amendment, as Justice Stevens and Justice Marshall explained in their dissenting opinions. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 856-866 (dis. opn. of Stevens, J.); *id.* at pp. 844-856 (dis. opn. of Marshall, J.) First, victim impact evidence is inconsistent with the Eighth Amendment principle that the decision to impose the death sentence should be based solely on an assessment of the defendant's blameworthiness, as informed by the character of the offense and the character of the defendant, and not on evidence that "serves no purpose other than to appeal to the sympathies or emotions of the jurors. . .." (*Id.* at pp. 856-857 (dis. opn. of Stevens, J.).) Second, victim impact evidence is not necessary to avoid a sentencing proceeding that is unfairly imbalanced against the state. The Constitution

does not require parity between the defendant and the state, but rather grants rights to the criminal defendant and imposes special limitations on the state designed to protect the individual from overreaching by the disproportionately powerful state. (*Id.* at pp. 859-860 (dis. opn. of Stevens, J.); see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements* (1996) 63 U. Chi. L. Rev. 361, 401 [disputing the assumption in *Payne* that without victim impact evidence, the defendant has the advantage at the penalty phase].) Third, the admission of victim impact evidence introduces a substantial risk of arbitrary results by permitting the jury to impose a death sentence on the basis of the character or reputation of the victim or the grief of his or her survivors. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 864-866.) Although, as noted above, *Payne* envisioned that the due process clause would protect against evidence that renders the trial fundamentally unfair (*id.* at p. 825), that limitation has proved an ineffective remedy. (See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials* (1999) 41 Ariz. L. Rev. 143, 175-186.)

For these reasons and those stated in the defense motion at trial, *Payne* was wrongly decided, and the admission of victim impact evidence at Buenrostro's penalty phase violated her Eighth Amendment and Fourteenth Amendment rights.

C. Under The Circumstances Of This Filicide Case, Victim Impact Evidence Should Not Have Been Admitted

Even under *Payne*, victim impact evidence should not have been admitted in this filicide case because it served no legitimate purpose. The family of the victims was also the family of the defendant, and they bore pain and grief on both accounts. The slain children were not "valueless

fungibles" (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 838 (conc. opn, of Souter, J.) who needed to be humanized so the jury could understand the tragedy of their deaths. The jury heard about Susana, Vicente and Deidra at the guilt phase. The horror experienced by Alex Buenrostro was made clear during his guilt phase testimony, while the loss of other relatives was conveyed during the mitigation case. Nor was victim impact evidence justified to counterbalance the cursory mitigating evidence about Buenrostro's background and character. The only point of the victim impact evidence was impermissible – to play on the emotions of the jury in making its "'moral assessment of . . . whether the defendant should be put to death.'" (*People v. Edwards* (1991) 54 Cal.3d787, 834, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863-864.)

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, the United States Supreme Court held that the Eighth Amendment did not erect a *per se* bar to admission of victim impact evidence. The Court, however, did "not hold . . . that victim impact evidence must be admitted, or even that it should be admitted." (*Id.* at p. 831, conc. opn. of O'Connor, J.) Rather, the Court ruled that "[i]n the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes" – clearly acknowledging that victim impact evidence will not be proper in all penalty trials. (*Id.* at p. 825.) Similarly, in *People v. Edwards* (1991) 54 Cal.3d 787, this Court did not hold that victim impact evidence is admissible in every capital case. The Court framed the issue as whether "'evidence of the specific harm caused by the defendant' (*Payne*, *supra*, 501 U.S. at p. 825) is a circumstance of the crime admissible under factor (a). We think it *generally* is." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833, italics added.)

This case proves an exception to the general rule since the reason for permitting victim impact evidence does not apply. The concern underlying the decision in *Payne* was a perceived imbalance between the defendant's right to present humanizing, mitigating evidence and the state's inability to present comparable evidence about the victim. Writing for the majority in *Payne*, Chief Justice Rehnquist referred to the Court's previous decisions in *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805, which had barred the admission of victim impact evidence, as having "unfairly weighted the scales in a capital trial," against the state. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 809.) The majority opinion recognized the state's

> legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]

(*Id.* at p. 825; see also *id.* at p. 839 (conc. opn. of Souter, J.) ["given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process" [Citations].) The Court was concerned that the victim not be turned into a "'faceless stranger at the penalty phase of a capital trial.'" (*Id.* at p. 825, quoting *Gathers v. South Carolina, supra*, 490 U.S. at p. 821 (conc. opn. of O'Connor, J.) This Court also has highlighted that victim impact evidence is admissible to counterbalance the defendant's mitigating evidence. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1182 ["'there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant,'" quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 826];

People v. Brown (2004) 33 Cal.4th 382, 398 ["just as the defendant is entitled to be humanized, so too is the victim"].

That imbalance was not present here. First, the jurors were given a "brief glimpse" of the victims at the guilt phase and in the testimony of Buenrostro's mitigation witnesses, so they understood that the children whose lives were taken were "unique human being[s]." (*Payne*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.).) The jury knew from the taped police interviews of Buenrostro that Susana, the oldest, looked like her father, as did Vicente, the middle child, while Deidra, the youngest, looked like her mother. (P.Exh. 166, 2nd Transcript at p. 39.) Each child was different, and Vicente was very smart. (P.Exh. 166, 3rd Transcript at p. 1; P.Exh 166, 2nd Transcript at p. 47.) He also was harder to deal with and required more attention. (P.Exh. 166, 2nd Transcript at p. 40.) Deidra always was with Buenrostro, like her escort. (*Id.* at p. 40.) Meanwhile, Buenrostro was trying to enroll Deidra in a Head Start preschool program. (*Ibid.*) At almost four, Deidra was toilet trained, could feed herself and make her needs known (P.Exh. 166, 2nd Transcript, at p. 47), and the children could cook food themselves in the microwave (*id.* at pp. 5-6). The children would go kite-flying with an adult neighbor (*id.* at p. 36), and went to a children's movie with their parents the Sunday before they were killed (*id.* at p. 2).

The jury also learned about the victims from other evidence at the guilt phase. Both Alex and Dora Buenrostro testified about the basic facts of the children's family life including the custody, support and visitation arrangements for the children afer they separated. (8 RT 821-825; 10 RT 1031-1035.) The children's lives were marked by discord and physical violence between their parents which resulted in a restraining order against

Alex. (8 RT 823-824, 845.) Alex also relayed specific details about his children, such as Vicente's keen desire for a Nintendo. (8 RT 830.) The children's neighbor, Velia Cabanila, offered other concrete details about the children, who often were at her house and played with her daughters. (8 RT 800.) According to Cabanila, Buenrostro yelled at the children and locked them out of the house frequently, and they would come to her house to use her bathroom or tell her they were hungry. (8 RT 803.) All this evidence helped portray Susana, Vicente and Deidra as specific children, so they were not faceless, fungible victims.

Second, at the guilt phase the jury was given a sense of the magnitude of the pain suffered by Alex Buenrostro. His ordeal was made palpable by his own testimony, as well as by the testimony of Stanley Reshes, his employer. They testified about Alex's sense that something dreadful had happened to his children as the media calls came into the store asking for him, his co-workers, joking, asked him, "What did you do, Alex?" (8 RT 838), media vans parked near the store, and 10 police cars surrounded the store (8 RT 809-815, 838-840). When Alex finally went outside to see what was going on, news reporters yelled at him asking what had happened to his children, which made him feel terrible. (8 RT 840.) The police grabbed and handcuffed him. (8 RT 816, 840.) Alex saw a screen with the word "homicide" and although he asked what had happened, none of the officers would talk to him. (8 RT 840.) Alex was taken to a police station, confined in a cell-like room, and later was questioned and videotaped for 10 to 15 hours. (8 RT 841.) At some point, he was transported from Los Angeles to San Jacinto. (8 RT 842.) Hours into the interview, the police told Alex that Susana and Vicente had been killed and that Deidra was missing. (8 RT 841-842.) Finally, around 3:00

a.m., he was released from custody. (8 RT 842.)

In addition, at the guilt phase Alex himself let the jury see his sadness and regret. In talking about Vicente's wish for a Nintendo, Alex testified, "I told him, 'I [sic] be back and buy you a Nintendo.' Never got a chance to do that." (8 RT 830.) Having heard all the evidence and seen Alex testify, the jury surely understood the depth of his loss.

The grief of other members of the family was apparent in the mitigating evidence presented at the penalty phase. Buenrostro's sisters testified about their loss of two nieces and a nephew who had been close to them, expressed their inability to comprehend the crime, and nonetheless made pleas for Buenrostro's life. (12 RT 1347-1348, 1363-1364.) As one of Buenrostro's sister testified, "the family already lost three kids, and we don't want to lose any more family members as it is very hard, very difficult for the whole family . . . ." (12 RT 1363.)

Third, unlike other cases, the mitigating evidence here was not extensive and the circumstances of the crimes themselves were highly aggravating, so there was no unfair imbalance against the state that called for remedy through victim impact evidence. The mitigation consisted of a very cursory sketch of Buenrostro's background, testimony that she was a good and loving mother, a description by her mother and sisters that Buenrostro's behavior in the months before the homicides was changed and bizarre, and a plea for mercy. No significant social history evidence was presented. Nor, as the prosecutor pointedly noted in his closing argument, was there expert mental health testimony that might help the jury understand how Buenrostro, as the guilt verdicts found, came to murder her own children and then consistently and steadfastly deny all culpability. (Cf., *Payne v. Tennessee*, *supra*, 501 U.S. at p. 814 [at sentencing phase, a

psychologist testified that Payne, who "despite the overwhelming and relatively uncontroverted evidence against him, testified that he had not harmed any of the [victims]," was "mentally handicapped"];)

In sum, in the unique circumstances of this filicide case, victim impact evidence was not necessary to achieve parity between the defense and the prosecution or to give the jury a sense of the victims as unique human beings and the family's grief as relatives of both the victims and the defendant. The introduction of additional evidence at the penalty phase specifically addressing the impact of the children's deaths on their family gave unfair emphasis to this aggravating evidence. The prejudicial effect of the evidence outweighed its probative value under Evidence Code section 352, and its admission resulted in an unfair penalty trial and an arbitrary and unreliable death sentence in violation of the due process clause and the cruel and unusual punishment clause. (U.S. Const., 8th & 14th Amend.; see also Cal. Const., art. I, §§ 15, 17.)

D. Even If Victim Impact Evidence Were Admissible, Most Of The Evidence Presented At Buenrostro's Penalty Trial Violated The Eighth Amendment And The Due Process Guarantee Of Fundamental Fairness

If victim impact evidence were not entirely inadmissible for the reasons given above, only the testimony of Alex Buenrostro, the children's father, and Alejandra Buenrostro, the children's half-sister, was admissible, and the other victim impact evidence exceeded the restrictions intended by the high court in *Payne v. Tennessee*, *supra*, 501 U.S. 808, and this Court in *People v. Edwards*, *supra*, 54 Cal.3d 787.

In *Payne*, the high court held that a State may provide a capital-sentencing jury with evidence "offering 'a quick glimpse of the life'" which

a defendant "'chose to extinguish,'" and "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822 [citation omitted].) The victim impact evidence presented in *Payne* was limited to a single question eliciting brief testimony about the effect of the crime on the victim's young son who was in the same room when his mother and sister were killed and who also was attacked and suffered serious wounds. (*Id.* at pp. 812-815.) The evidence was closely tied to the circumstances of the crime – the impact on a young child who the killer knew was present at the time the crime was committed and who was himself a victim. Although holding that the Eighth Amendment erects no per se bar to the admission of victim impact evidence and argument, the Court noted that the use of victim impact evidence was not without limit: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Id.* at p. 825.)

In California, victim impact evidence is admissible as a circumstance of the crime under factor (a) of section 190.3. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835). However, like the high court, this Court has indicated that such evidence is not without limit, explaining that evidence which "invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.) This Court was explicit in *Edwards*: "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . . ." (*Id.* at pp. 835-836.) The Court warned that:

> Our holding also does not mean there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and

> rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citation.]"

(*Id.* at p. 836, fn. 11.) In *Edwards,* the victim impact presentation, consisting of a few photographs of the victims together the night before the murder and a short argument by the prosecutor, was limited and restrained. (*Id.* at pp. 832, 839.)

Buenrostro acknowledges that if any victim impact evidence were admissible, under *Payne* and *Edwards* the testimony of her estranged husband, Alex, and her step-daughter, Alejandra, was permissible. But the victim impact presentation did not end there. The videotape tribute to the children, the testimony of Deborah De Forge, the principal of Susana's and Vicente's school, and the videotape of Alex being told that his children, Susana and Vicente, were dead crossed the due process boundary, violated the Eighth and Fourteenth Amendments, and should have been excluded.

1. The Videotape Montage - Set to Music – of the Children, Flowers and Crosses on Their Doorstep, and Their Shared Grave Was Cumulative, Irrelevant And Inflammatory

The prosecutor showed People's Exhibit 186, a five-and-a-half minute videotaped collage set to an instrumental soundtrack by saxophonist Kenny G. and containing photographs of Susana, Vicente, and Deidra when they were alive. (P.Exh. 186; 36 CT 10145; 11 RT 1204.) Most of the pictures of the children depict them as babies, or at least as much younger than their age at the time of their deaths and show them smiling and sometimes being held in the arms of an unidentified female. Alex Buenrostro also is shown with his children. The photo series of the children ends with long shots of each of them individually at what appears to be their

age at the time of death. The montage continues with photographs of the front of their apartment with flowers and notes on the doorstep and three small white crosses under a window, and ends with a picture of the headstone on their single, shared grave which reads:

In Loving Memory Of
Three Little Angels
Susana Alejandra Buenrostro
Dic. 30, 1984 - Oct. 27, 1994
Vincent Alex Buenrostro
Ago. 17, 1986 - Oct. 27, 1994
Deidra Buenrostro
Ago. 12, 1990 - Oct. 27, 1994
From Daddy and Sister

(P.Exh. 186.)

Before the penalty trial began, defense counsel argued against the admission of the videotape:

> [I]t has very soulful spiritual . . . guitar music . . . [¶] I think under Payne versus Tennessee this should be excluded even under Judge Rehnquist's reasoning in Payne.
>
> He talks in the event victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the 14th Amendment provides relief.
>
> This is something emotional, knife to the heart, to the jurors. You can't help but see that and see the pictures, repeatedly different picture of the three children, smiling, being held.
>
> And then there's a flash, during this music, there's a flash to the grave sites.
>
> It totally distorts victim impact in the case. It makes it almost like – almost a quasi religious experience.

> The music is designed to affect you. The pictures are designed to affect you. And they are designed to affect you in only one way. They are designed to affect you as a juror to impose the death penalty.
>
> You're going to be upset and bothered and indeed are going to be much more inclined to vote for the death penalty.
>
> * * *
>
> [The jurors] are supposed to be fair and objective, that tape will go a long way to make that impossible.

(11 RT 1196-1198.)

The prosecutor countered that the photos of the children when alive were admissible as a circumstance of the crime under Penal Code section 190.3, subdivision (a). (11 RT 1199-1200.)[130] The trial court agreed that the photos of the victims when alive were generally admissible in the penalty phase subject to the court's review under Evidence Code section 352. (11 RT 1199.) The court asked counsel for any cases specifically dealing with videotaped evidence of this type. (*Ibid.*) Both counsel acknowledged that, at that time, there was no precedent for the admission of the videotape proffered by the prosecution. (11 RT 1199-1200.) After viewing the videotape, the trial court ruled that the video was admissible. (11 RT 1204.) Specifically, the court found that the video was not unduly prejudicial or unduly inflammatory, that the jury had "a right to see the victims in this case growing up," and that the evidence was "part of [the]

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[130] In support of the videotape's admission, the prosecutor cited *People v. Cox* (1991) 53 Cal.3d 618 and *People v. Davenport* (1995) 11 Cal.4th at 1171. However, *Cox* predated the United States Supreme Court's ruling in *Payne* and is therefore not controlling on this issue. In *Davenport*, trial counsel's failure to object to the pictures of the victim's dead body waived the issue on appeal; therefore, the Court's ruling on the merits is dicta. (*Davenport*, *supra*, at p. 1205.)

factor A evidence in this case." (11 RT 1203-1204.) The jury viewed the videotape at the conclusion of the testimony of Alex Buenrostro, who was the prosecution's last witness in aggravation. (11 RT 1273.)

The trial court erred in admitting the videotape montage about the victims. Although a trial court has discretion to admit or exclude evidence under Evidence Code section 352 at a capital-sentencing phase (*People v. Coffman* (2004) 34 Cal.4th 1, 115-116), the jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) The videotaped tribute was unnecessary to give the jury a "quick glimpse" of who Susana, Vicente and Deidra were. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) That legitimate purpose would have been served by a few still photographs. Similarly, the images of the children's grave, flowers at their doorstep, and three white crosses at their window were not probative of who the children were or how their deaths affected their family. (See *State v. Storey* (Mo. 2001) 40 S.W.3d 898, 909 [photograph of the victim's tombstone admitted as victim impact evidence was not relevant to show the impact of the victim's death, "and inappropriately drew the jury into the mourning process."].) Rather, the video tribute to the children was precisely the type of emotional evidence that was likely to provoke arbitrary or capricious action in violation of the due process clause of the Fourteenth Amendment and the Eighth Amendment. (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [cautioning that "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"].)

At the time of trial, this Court had not ruled on the admissibility of films or videos about the victim specially designed and produced for

presentation as aggravating evidence at the penalty phase of a capital trial. That is no longer true. The Court repeatedly has warned about the prejudicial emotional impact of presenting the jury with videotaped tributes to the victim. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 367; *People v. Kelly* (2007) 42 Cal.4th 763, 795; *People v. Prince* (2007) 40 Cal.4th 1179, 1289.) As the Court stated in *Prince*:

> Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents . . . . In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1289.) This Court also has acknowledged decisions of other court excluding victim videos as unfairly prejudicial. (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1288-1289 and *People v. Kelly*, *supra*, 42 Cal.4th at pp. 794-795, discussing *United States v. Sampson* (D. Mass. 2004) 335 F.Supp.2d 166 and *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330.)

However, the Court has yet to find admission of a videotape about the victim to be error. (*People v. Zamudio*, *supra,* at pp. 363-367 [14-minute video montage of 118 photographs throughout the elderly victims' lives ending with photographs of grave markers played without musical and audio portion but with live narration by victims' daughter]; *People v. Kelly*,

supra, at pp. 793-799 [20-minute videotape composed of photographs and video clips portraying victim's life from infancy until shortly before her death at the age of 19 with narration by her mother and music of Enya]; *People v. Prince*, *supra*, at pp. 1286-1291 [25-minute videotaped interview of 18- year- old victim about her training as an actor and singer which was conducted by local news station a few months before her death and from which trial court excluded portions depicting her musical performances].)

In *Kelly*, the Court acknowledged the risk that victim videos inject emotionalism into the penalty phase, especially through the use of a "'staged and contrived presentation'" and "irrelevant background music or video techniques that enhance the emotion of the factual presentation." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798, quoting *People v. Nye* (1969) 71 Cal.2d 356, 371 [discussing but not deciding the issue].) The Court posited that "the videotape, even when presented factually, must not be unduly emotional." (*Ibid.*)

The Court's prohibition only of victim videos that are "unduly emotional" is insufficient to satisfy the Eighth Amendment's dictate that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.) The very point of using a victim impact video is its emotional impact – its ability, like all film, to evoke an "emotional response through subliminal persuasion." (Leighton, *The Boob Tube: Making Videotaped Evidence Interesting* (2001) 2 Ann. 2001 American Trial Lawyers-CLE 1519, p. 2) A videotape is *editorialized* evidence. It is, by definition, "staged and contrived" to achieve dramatic effect (*People v. Kelly*, *supra*, 42 Cal.4th at p.798), and, as in all film,

cinematic techniques are used to manipulate the viewer's emotions toward a particular perspective. (See generally, Tan, Emotions and the Structure of Narrative Film: Film as an Emotion Machine (1996); Smith & Plantinga, eds., Passionate Views: Film, Cognition and Emotion (1999).)

As this Court intimated in *Prince*, the use of music is particularly troubling in victim impact evidence. "[M]usic is one of the strongest sources of emotion in film." (Cohen, *Music as a Source of Emotion in Film* in Music and Emotion: Theory and Research (Juslin & Sloboda, eds. 2001), p. 249.) Music has an inherent power to arouse strong feelings in the listener, and its use in film is calibrated for such impact. As composer Aaron Copland wrote about his music for the film, Of Mice and Men," "the score . . . is designed to strengthen and underline the emotional content of the entire picture . . . The quickest way to a person's brain is through his eye but even in the movies the quickest way to his heart and feelings is still through the ear." (Copland, *The Aims of Music for Films*, N.Y. Times, March 10, 1940, §11 at p. 6.) Thus, a musical soundtrack as background to evidence in aggravation always is irrelevant to the "reasoned, moral decision" facing a capital-sentencing jury. It serves no purpose other than to encourage emotion-driven sentencing which is antithetical to the reliable and non-arbitrary imposition of the death penalty required by the Eighth Amendment and the fairness required by the due process clause of the Fourteenth Amendment.[131]

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[131] Surely, the Court would not condone a saxophonist or other musician, live or recorded, accompanying Alex Buenrostro's courtrooom testimony. The use of the Kenny G. music as the background to the victim impact video in this case was no different.

Defense counsel understood the plain truth about victim impact videos. He objected to the video's "very soulful spiritual music" (11 RT 1196), its carefully calculated flashing from the smiling children to their graves that was "something emotional, knife to the heart, to the jurors," and its distortions that created an "almost a quasi religious experience." (11 RT 1197.) As defense counsel told the trial court, everything about the video was deliberately "designed to affect you as a juror to impose the death penalty." (11 RT 1197.) If the prosecutor were not after such an emotional punch, he simply would have introduced still photographs of Susana, Vicente and Deidra which would have been sufficient to make them real, vivid, and unique for the jury as *Payne* permits. But that apparently was not the prosecutor's purpose. Through his editorializing in the videotape – its melancholy music, camera angles, and timing of the images – the prosecutor aimed to manipulate the jury's emotions to achieve his desired result: a death verdict. The Eighth and Fourteenth Amendments do not countenance such theatricality when the defendant's life is on the line.

Certainly, the victim tribute video in this case was not as long or elaborate as that approved by this Court in *Kelly*. The issue, however, should not be whether a particular videotape was five minutes or 15 minutes, whether "[m]usic is not always impermissible" or "may have added an irrelevant factor" (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798), whether there was live, recorded, or no narration. The point is that victim impact videotapes should not be admissible at all in a capital-sentencing trial. They serve no legitimate purpose that cannot be met with other, non-inflammatory evidence, and they create an unconstitutional risk of arbitrary death sentencing in violation of the Eighth Amendment. (See *California v. Brown*, *supra*, 479 U.S. at pp. 545-546 (conc. opn. of O'Connor, J.)

["punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." (original italics)].) The admission of the videotape here (P.Exh. 186) violated the Eighth Amendment and rendered Buenrostro's trial fundamentally unfair in violation of Fourteenth Amendment due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

2. The Testimony of the School Principal Was Not Permissible Victim Impact Evidence

During in limine hearings held prior to the start of the penalty phase, defense counsel objected to the testimony of school principal, Deborah De Forge, as not qualifying for admission under *Payne*. (11 RT 1195.) Without citing any case law, the prosecutor argued that "[i]t goes not only to family and friends, but members of the community and the impact on them, and the case law is very clear on that issue." (11 RT 1195.) The trial court briefly took the matter under submission and summarily ruled that the principal's testimony was admissible. (11 RT 1236-1237.)

At trial, De Forge testified that in October of 1994, she was the principal of Hyatt Elementary School, which both Susana and Vicente attended. (11 RT 1238-1239.) She testified that the children's deaths affected everyone at the school. On their way to school, students had to walk by the apartment complex where the Buenrostro children were killed. They were afraid. Having heard that the father was a suspect, the students were concerned that the same thing could happen to them. (11 RT 1240.) De Forge organized a crisis response for both students and staff. (11 RT 1239-1240.) Mental health counselors were available for children who

needed individual counseling, and some did receive counseling. De Forge personally spoke to students which was a difficult task for her. (11 RT 1242.) The children were looking for a reason for the killings, and there was no real way to explain or justify what had happened. (*Ibid.*) Susana's classmates decided to keep her desk set apart with her things in it for a while, and Vicente's class did the same. (*Ibid.*) Both classes sent stories and pictures to Susana's and Vicente's father. (*Ibid.*) Defense counsel did not cross-examine De Forge. (11 RT 1243.)

The principal's testimony was not authorized by *Payne,* which addressed only evidence describing the impact of the capital crimes on a family member who was personally present during, and immediately affected by, the capital murders. (*Payne*, *supra*, 501 U.S. at p. 816.) In his opinion for the Court, Chief Justice Rehnquist distilled the issue as follows: "[w]e granted certiorari to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes *on the victim's family.*" (*Id.* at p. 817, italics added.) Although Justice Rehnquist referred intermittently to the "loss to the victim's family and to *society*" (*Payne*, *supra*, 501 U.S. at p. 822, 825, italics added), and "loss to the *community*" (*Id.* at p. 823, italics added), these general phrases appeared in the context of Justice Rehnquist's opinion that *Booth* rested on an incorrect reading of relevant precedent. These brief references, when viewed in context, do not stand for the proposition that victim impact evidence encompasses general societal harm. Rather, in his final synthesis of *Payne's* holding, Justice Rehnquist made clear that *Payne* allows evidence only about the family's loss and not about society's general harm: "A State may legitimately

conclude that evidence about the victim and about the impact of the murder on the *victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827, italics added.)

This Court has taken a different position, reading *Payne* to permit evidence regarding "'the effect of [the victim's] loss on friends, loved ones, and the community as a whole.'" (*People v. Marks* (2003) 31 Cal.4th 197, 235, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 236.) Despite *Fierro's* reference to the whole community, this Court only has approved testimony about the effect of the murder on the victim's family and close friends. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183 [harm from murder is not limited to suffering of the victim's "immediate family" but extends to loss inflicted on "close personal friends."].) Thus, in *Marks*, the Court upheld the admission of testimony about the impact of the murder on an employee whom the victim treated like a son. (*People v. Marks*, *supra*, at p. 235.) And in *Pollock*, the Court upheld the admission of testimony of close friends of the victim about their loss. (*People v. Pollock*, *supra*, at pp. 1182-1183.)

The principal, staff and students in general were not family members nor close friends who were harmed by the murders in a close, personal, long-lasting way, and thus De Forge's testimony about the impact of the crimes on the overall school population exceeded the parameters outlined in *Payne*. Undoubtedly, the killings were shocking to the public at large. But the attenuated relationship between Susana and Vicente and "everybody at the school" (11 RT 1239) lacked the intimate connection to the victims that led this Court in *Edwards* to conclude that evidence about the effect of the murders on the victim's family was admissible as a circumstance of the crime under factor (a) "'which surrounds materially, morally, or logically'"

the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833, quoting 3 Oxford English Dict. (2d ed. 1989) p. 240.) The staff and students were not "survivors" of the slain children in the sense that *Payne* and *Edwards* intend. To hold otherwise would permit the State to turn general public outrage about a murder, understandable as it may be, into aggravating evidence in support of a death sentence, which would risk rendering factor (a) unconstitutionally arbitrary, vague and overbroad (see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [upholding factor (a) against a facial challenge]) and would dilute the constitutionally-required nexus between the punishment and "the personal culpability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) Because the harm reported by De Forge was several steps removed from the family victim impact evidence approved by *Payne* and *Edwards*, the trial court erred in admitting her testimony.

Not surprisingly, some states have disallowed this type of attenuated victim impact evidence. In a case analogous to this one, *State v. Young* (Tenn. 2006) 196 S.W.3d 85, the Tennessee Supreme Court found error in admitting the testimony of a university professor, who taught in the department in which the victim was a student, about the effect of the murder on everyone in the department. The court noted that the testimony had some probative value since the professor's description "illustrated how interwoven a single individual's life is with many others." (*Id.* at p. 109.) Nonetheless, the court concluded that the danger of unfair prejudice outweighed the probative value of the evidence:

> Dr. Sundstrom's testimony was not limited to a "brief glimpse" of the victim's life, but rather laid the debilitating grief of over one hundred people at Defendant's feet. The risk of inflaming a jury's passions with such testimony is simply

too great to allow its admission.

(*Id.* at p. 110.) In addition, the court found error in admitting testimony that one of the victim's friends had been in therapy since – and was afraid she would commit suicide because of – the murder, and that the victim had "'a whole army of friends out here'" and "'friends all over the world will never have her again.'" (*Ibid.*) The court was unequivocal: all this evidence "exceeds the permissible scope of victim impact evidence" because it "goes beyond describing the effect of the victim's murder on her family and beyond providing a glimpse into her life." (*Ibid.*)

The Florida Supreme Court has taken a similar position. (See *Windom v. State* (Fla. 1995) 656 So.2d 432, 438-439 [testimony about the effect of the victim's death on children in the community was erroneously admitted because it was not limited to the uniqueness of the victim, and the resultant loss to the community members].) Other states, like Louisiana, by statute have limited victim impact evidence to family members after considering but rejecting a broader definition. (*State v. Frost* (La. 1998) 727 So.2d 417, 429 [amendment to expand victim impact evidence to include "the impact that the death of the victim has had on the family members, friends, close associates, and the community in which the victim lived" was unsuccessful].) Oklahoma is even more restrictive, permitting only immediate family members to testify as victim impact witnesses. (*Lott v. State* (Okla.Crim.App. 2004) 98 P.3d 318, 346-348 [error to admit testimony of grandmother about impact of victim's murder].) These judicial and legislative judgments reflect an understanding of the risk of arbitrariness in defining "victim" broadly and the view that under *Payne*, victim impact evidence is restricted to the victim's survivors. (*Id.* at p. 347, quoting *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 828 ["'victim

impact evidence is intended to provide a quick glimpse of a victim's characteristics and the effect of the victim's death on survivors.'"].) Consistent with the view that *Payne* deals with the impact of the murder on the victim's survivors and that *Edwards* defines these people as family and close friends, De Forge's testimony about the reaction of the students at Hyatt Elementary School was not permissible victim impact evidence.

In sum, Buenrostro asks this Court to reconsider its reading of *Payne* and to hold that only evidence about the impact of the murder on the victim's family is admissible or, in the alternative, to hold that the testimony of De Forge about the effect of the killings on the Hyatt Elementary School community as a whole was inadmissible under *Marks* and *Pollock* which extends victim impact evidence to reach close friends, but does not cover persons such as the students and staff at the victims' school.

3. The Videotape of Alex Buenrostro When He Was Told His Children Were Dead Was Cumulative and Inflammatory

At the in limine hearing on victim impact evidence, defense counsel objected to the admission of People's Exhibit 185, a videotape of Alex Buenrostro's reaction immediately after he was told his two older children were dead, as unduly prejudicial, cumulative and belatedly noticed. (11 RT 1201.) The prosecutor explained that he had not yet made the videotaped portion he intended to show the jury, but asserted that "they [the defense] have seen the video." (*Ibid.*) The trial court acknowledged that Alex Buenrostro's reaction on the video would be cumulative if he testified. (11 RT 1202.) Nevertheless, in the court's opinion, the videotape was "the best evidence" of "his physical and psychological reaction at the time." (*Ibid.*) For this reason, the court found that the video was "highly probative. Far

more probative than a witness four years later trying to tell us how he feels." (*Ibid.*) The court then viewed the videotape. (11 RT 1231.) Defense counsel reasserted Buenrostro's objection to People's Exhibit 185. (11 RT 1231.)

In fact, Alex Buenrostro already had testified about these events. As discussed in section C of this argument and incorporated by reference here, at the guilt phase Alex gave a detailed account of how he came to learn that three of his children were dead.

At the penalty phase, Alex Buenrostro again testified about the ordeal of losing his children. (11 RT 1265-1272.) He testified that the news that his children were dead destroyed him and that the pain would never be over. (11 RT 1267.) For Alex, the hardest part of their deaths was wondering who they would be and what they would do – something he would never find out. (11 RT 1270.) The deaths of his children affected his ability to have a relationship with other people, and he felt uncomfortable going out and having fun like a regular person. (*Ibid.*) Alex coped with his pain by taking life day by day. (11 RT 1271-1272.) He got up in the morning thinking about his children, and he went to bed at night thinking about them. All he could do for them was place fresh flowers next to their pictures. (*Ibid.*) Defense counsel did not cross-examine him. (11 RT 1272.)

Immediately following this testimony, the prosecutor played a two-minute segment of the videotape, People's Exhibit 185. (11 RT 1272-1273; 14 RT 1448-1449 [stipulation that People's Exhibit 185 was played from 4:45:20-4:47:24].) It shows a police interview of Alex on October 27, 1994, the day the children were discovered dead and Alex was taken into custody. The interviewer tells Alex that something happened to two of his

kids. (P.Exh. 185 at 4:45:27.) Alex deduces that the two are Susana and Vicente, since he knows that Deidra is still missing. (*Id.* at 4:45:30.) He then asks if they are dead and is told "yes." (*Id.* at 4:45:43-44.) The video shows Alex crying and sobbing, holding his head in his hands, pulling his hair, and saying "Oh my God" (*Id.* at 4:45:44-4:47:12.) The interviewer asks Alex to help the police find Deidra. (Id. at 4:47:12-4:47:24.) Immediately after playing this videotape, the prosecutor screened the victim impact videotape (P.Exh. 186) discussed in section D.1. above. (11 RT 1273.)

Once Alex Buenrostro testified, the videotape was clearly cumulative. The only reason to play it for the jury was to evoke a gut-wrenching response from the jury thereby diverting its attention from the constitutionally-mandated task of deciding penalty "based on reason rather than caprice or emotion." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.) Contrary to the trial court's conclusion, the videotape's probative value was outweighed by its prejudicial effect. (Evid. Code, § 352.) The videotape could not add anything to Buenrostro's testimony at the guilt phase about learning that Susana, Vicente and Deidra were dead or his testimony at the penalty phase regarding the impact of the crimes, except to inflame the jurors' emotions. The prejudicial impact of the videotape is obvious: the jury watched Alex in acute distress, crying uncontrollably. The three-fold repetition of the evidence about the harm Alex suffered – through his testimony at the guilt phase, his testimony at the penalty phase, and the police interview video – gave it undue emphasis, suggesting to the jury that a death sentence was appropriate as recompense for Alex's suffering. In sum, the trial court abused its discretion in admitting the videotape, which rendered the trial fundamentally unfair, because it could not help but

inflame the jury's passions and divert them from a rational assessment of the appropriate penalty. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

E. The Trial Court Erroneously Refused To Instruct The Jury On The Appropriate Use Of Victim Impact Evidence

On July 27, 1998, the same day that Buenrostro filed her motion to exclude the prosecution's victim impact evidence, she filed her request for penalty-phase jury instructions. (36 CT 10035-10074.) In special instruction 10, she requested that, in the event the prosecution was permitted to introduce any victim impact evidence, the trial court give a cautionary instruction based on the principles of *People v. Edwards*, *supra*, 54 Cal.3d 787, and *Payne v. Tennessee*, *supra*, 501 U.S. 808. The proposed defense instruction read as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by Dora Buenrostro's crimes. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether he [sic] should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument.

(36 CT 10051.) The trial court refused to give the instruction (12 RT 1280), and its refusal was error.[132]

Buenrostro is aware that this Court repeatedly has rejected claims involving similar, but slightly different, instructions. (See, e.g., *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-370; *People v. Harris* (2008) 43 Cal.4th 1269, 1318; *People v. Carey* (2007) 41 Cal.4th 109, 134; *People v.*

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[132] The trial court reviewed the memorandum on penalty-phase instructions filed by Buenrostro and rather than deciding them individually, denied them in toto. (12 RT 1280.)

Ochoa (2001) 26 Cal.4th 398, 455.)[133] Buenrostro asks the Court to reconsider these rulings.

Given the particularly emotional nature of victim impact evidence, the instructions at Buenrostro's capital-sentencing phase, including CALJIC No. 8.84.1, did not adequately guide the jury on its use and admonish the jury against its misuse. (See *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829 [all requiring special instructions when victim impact evidence is introduced].) This Court long ago recognized that in every capital case "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Without a proper cautionary instruction, which Buenrostro presented to the trial court, there was an unconstitutional risk that the victim impact evidence tainted the jury's

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[133] The instruction Buenrostro requested did not contain the last sentence of the instructions proffered in *Ochoa, Carey* and *Zamudio* which stated: "On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 368; *People v. Carey*, *supra*, 41 Cal.4th at p. 134; see also *People v. Ochoa*, *supra*, 26 Cal.4th at p. 455[proferring a slightly different version of this last sentence: "On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant."].) However, given the Court's ruling that no instruction is required on the appropriate use of victim impact evidence, this difference is not dispositive. Moreover, given the consistency of the Court's position, there is no point in presenting a full argument on this issue. Therefore, consistent with this Court directions in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, Buenrostro simply presents her claim to preserve it for possible federal court review.

sentencing decision which, in turn, resulted in the unfair, arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the federal Constitution.

F. The Admission of Impermissible and Inflammatory Victim Impact Evidence And Denial Of The Cautionary Instruction Require Reversal of the Death Sentence

The irrelevant, cumulative and prejudicial videotaped tribute to the children, the testimony of principal De Forge, and the videotape of Alex Buenrostro's emotional reaction to hearing that his children had been killed unfairly tipped the scales towards a death verdict. These errors were exacerbated by the trial court's refusal to give the cautionary instruction that Buenrostro requested. Whether the evidentiary and instructional errors are assessed individually or collectively, reversal of the penalty is required under either the harmless error standard for a federal constitutional violation (*Chapman v. California*, *supra*, 386 U.S. at p. 24) or the standard for state-law error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448). Reversal is required under the state standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus*, *supra*, 54 Cal.3d at pp. 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"]; *People v. Brown*, *supra*, at p. 472, fn. 1 (conc. & dis. opn. of Broussard, J.).)

In assessing prejudice, the victim impact evidence must be viewed in the context of all the penalty evidence. Certainly, the crimes themselves were exceedingly aggravated. There is no way to minimize the horror of a mother slitting the throats of her three children. Yet, filicide, particularly a mother killing her own children, is a unique capital crime about which

prosecutors and juries often show mercy. (See "Life for Susan Smith," New York Times, August 1, 1995 [reporting on unanimous jury verdict of paroleable life sentence for woman's "unspeakable crime" of drowning her two young sons in South Carolina].) Buenrostro's assault on Alex very close in the time to the homicides – another instance of intrafamilial violence – certainly was aggravating. The other evidence in aggravation – the technical battery and exhibiting a mop wringer on the medical floor of the jail and the prior grand theft conviction – was less consequential, although, as set forth in Argument XV *post*, the prosecutor inflated the trivial jailhouse incidents into foreboding evidence that Buenrostro would be a real danger to others if sentenced to life in prison without the possibility of parole. The brief testimony of Alex and Alejandra Buenrostro about their loss was straightforward and not unduly inflammatory.

This aggravating evidence was countered by the mitigation witnesses who testified that Buenrostro had been a good and loving mother to her children – a fact Alex had admitted at the guilt phase. (12 RT 1330-1332, 1341-1343, 1362-1363; 8 RT 853). But in the months before the murders, Buenrostro underwent a sudden and inexplicable change. She became aggressive, had conflicts with her sisters and mother, and described bizarre visual hallucinations both before and after the killings. (12 RT 1348-1351, 1354, 1365-1366, 1369, 1375.) Buenrostro also testified – against the advice of counsel as the jury was informed. (12 RT 1303.) As at the guilt phase, she insisted she was innocent, maintained her story that Alex Buenrostro came to her apartment, took Deidra, did not return her, and then came again to her apartment the day of the murders, speculated that perhaps police officer Dillon had framed her, and complained about her legal representation and denied being mentally ill. (12 RT 1303-1316, 1326.)

The jury thus faced sentencing a woman whom they had convicted of committing an appalling crime but who steadfastly denied all culpability and around whom hovered a suggestion, but no proof, of mental illness. The impermissible victim videotape, the testimony of principal De Forge, and the videotape of Alex ramped up the emotional intensity of this evidentiary mix. The testimony of the widespread effect of the murders on the children's schoolmates and teachers, the raw emotion depicted in the videotape of Alejandro Buenrostro receiving the news that Susana and Vicente were dead and Deidra was missing, and the potent, deliberately constructed video tribute to the children, replete with pictures of them throughout their short lives, with a photograph of the memorial of flowers and crosses to them at their doorstep, and the final shot of their joint grave – accompanied by soulful music – likely changed the jury's weighing calculus and unfairly skewed the balance in favor of death.

The power of the impermissible victim impact evidence was not lost on the prosecutor. In his argument, the prosecutor directly invoked the videos, reminding the jury that "[t]hey were emotional, they were sad for a lot of us in court. . . ." (12 RT 1403.) He argued that the videotape of the children showed that Buenrostro "selected her own children as victims having known everything intimate about them that a person can know." (12 RT 1404.) And he read the inscription on the grave stone for the jury. (*Ibid.*) The prosecutor then alluded to the video of Alex. He asked the jury to put themselves in Alex's place when he learned his children were "executed:"

> Where would you want to be when you find out that your children are dead? God forbid they should ever die before you. Where would you want to be? In an interrogation room with strangers, people you don't know? With no one to share

> your pain or to comfort you or to hold you? What's the impact of this killing?

(12 RT 1404.) The prosecutor did not stop here, but continued to exploit the video of Alex. He compared Alex's reaction to the news of the children's deaths, captured on the videotape taken by law enforcement, with Buenrostro's demeanor:

> [Y]ou watched Alex on that videotape yesterday, receive confirmation that Susana and Vincent were dead. And you saw his reaction. Did you even get a glimpse of any type of reaction like that from this defendant? She was cold, and she was mean, and she was evil.

(12 RT 1413-1414.) This rhetorical use of the videotape was patently unfair, but demonstrates the importance of the impermissible victim impact evidence in this case.[134] After asking the jurors to imagine "what it was like" for the children as they were killed and taking the jury step-by-step through each murder (12 RT 1405-1407), the prosecutor returned to the victim impact evidence. Referring to the children at Hyatt Elementary School and pointing at a picture of Vicente, the prosecutor reminded the jury of "what happened to his classmates in school as a result of this, the need for some of them to see counselors, to have a crisis team on campus

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[134] The police and the prosecutor, not Buenrostro, controlled whether the custodial interrogations were videotaped. The State chose to videotape its questioning of Alex, and then had footage to use at trial. The police and attorney from the Riverside County District Attorney's office who interviewed Buenrostro throughout the day and well into the night chose only to audio record selected portions of her interviews. To be sure, the jury was able to observe Buenrostro as she testified at both the guilt and penalty phases. But as Buenrostro herself asked the prosecutor during his cross-examination at the penalty phase, "why are you taping my husband crying? And I was interviewed for at least 12 hours, nobody taped me when I was crying, did they?" (12 RT 1325.)

because of their own fear." (12 RT 1408.) Obviously, the prosecutor viewed this evidence as fundamental to his quest for a death sentence.

The jury did not return its death verdict quickly, especially in light of the overall brevity of the penalty phase evidence. (See 36 CT 10017, 10129 [jury starts deliberations on July 28, 1998 around 4:00 p.m. and on July 29, 1998, deliberates from 9:00 a.m. until 2:20 p.m.].) Moreover, at least some jurors apparently had a question about Buenrostro's mental state. Mid-morning of the second day of deliberations, the jury sent a note to the trial court asking:

> Was there any testamony [sic] of the mental compentancy [sic] for Dora to stand trial
>
> (there was some recalection [sic] of something and we want clarification)

(36 CT 10028.) The trial court responded in writing: "No testimony has been introduced regarding her mental competency to stand trial. Her mental competency to stand trial is not an issue for you to decide." (36 CT 10028.) The jury's note clearly indicated that it was concerned that something was mentally wrong with Buenrostro. The testimony of her sisters and mother intimated as much, and Buenrostro's own demeanor on the witness stand at both the guilt phase and the penalty phase may have reinforced that notion. Moreover, after being told not to consider the question of competency to stand trial, the jury deliberated several more hours before returning its death verdict. Thus, a death sentence was not a foregone conclusion even with the thin mitigation case presented.

Given all these circumstances, the State cannot prove beyond a reasonable doubt that the impermissible and inflammatory victim impact evidence was harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at p. 24, and there is a reasonable possibility

that the inadmissible evidence affected the jury's penalty verdict under *People v. Brown*, *supra*, 46 Cal.3d at p. 448. The death sentence must be reversed.

XV. THE TRIAL COURT ERRONEOUSLY ADMITTED, AND ERRONEOUSLY INSTRUCTED ON, THE ADJUDICATED OTHER-CRIMES EVIDENCE

Over Buenrostro's objection and after an in limine hearing, the trial court admitted evidence of two minor incidents in the county jail – an alleged battery and an alleged exhibiting a deadly weapon, i.e., a mop wringer – to prove that Buenrostro engaged in criminal activity within the meaning of section 190.3, factor (b). The admission of this evidence at the penalty phase was erroneous because the alleged crimes were trivial acts of misbehavior, not acts of violent criminality, which lacked the use or threat of force or violence required to qualify as factor (b) aggravating evidence. As such, their use to obtain a death sentence violated the Eighth and Fourteenth Amendments. Moreover, even apart from the insubstantial nature of the other-crimes evidence presented here, the admission and adjudication of the other-crimes evidence at the penalty phase violated Buenrostro's federal constitutional rights. In addition, the trial court misinstructed with regard to both the battery and exhibiting-a-weapon charges. As a result of these errors, Buenrostro was denied her state and federal constitutional rights to due process, equal protection, a fair trial, trial by an impartial jury, and a reliable and non-arbitrary determination of penalty. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 6th, 8th & 14th Amends.) Although the incidents themselves were not acts of violent criminality, their admission tainted the death sentence and requires its reversal, because the prosecutor used the other-crimes evidence to argue that Buenrostro was a violent person who would be dangerous to others in prison.

A. Over Defense Objection And After A *Phillips* Hearing, The Trial Court Admitted Evidence That Buenrostro Allegedly Committed Two Violent Crimes While Confined Pretrial In The County Jail

Before trial, the prosecution filed its "First Amended Statement in Aggravation Pursuant to Section 190.3 of the Penal Code," which expanded the list of aggravating evidence it intended to present at the penalty phase to include allegations of assaultive conduct that occurred while Buenrostro was incarcerated at the Robert Presley Detention Center. (1 CT 124-126 [original statement]; 2 CT 443-445 [first amended statement].) Specifically, the prosecution alleged that Buenrostro "fought with staff" on February 28, 1995, and "used part of a mop bucket as a weapon against staff" on May 18, 1996. (2 CT 444.)[135]

In response, Buenrostro filed a "Motion in Limine to Exclude Evidence in Aggravation of Uncharged Acts (Items 5, 6, and 7)," which objected to the prosecution's use of the jail incidents in aggravation. (35 CT 9971-9986.) Buenrostro argued that the prosecution was attempting to introduce "trivial incidents" that were inadmissible because they were not crimes, did not involve violence, or both. (35 CT 9975.) She requested that the evidence be excluded or, in the alternative, that a hearing be held under *People v. Phillips* (1985) 41 Cal.3d 29 "to determine whether for each potential aggravating incident the prosecution has substantial evidence that a crime involving violence or the threat of force was committed . . . ."

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[135] In the Amended Statement, the prosecution also indicated its intention to present evidence that on January 18, 1998, Buenrostro allegedly assaulted a correctional officer. (2 CT 444; see 11 RT 1188.) The witnesses to this alleged incident failed to appear at the *Phillips* hearing (11 RT 1228-1229), and no evidence regarding this incident was presented at the penalty phase.

(35 CT 9975-9976.) In addition, Buenrostro moved to exclude the other-crimes evidence on federal constitutional grounds. (35 CT 9980-9984.) She requested that the evidence be excluded or that a separate jury or advisory jury be empaneled to determine whether the unadjudicated offenses occurred. (35 CT 9985.)

At a hearing before the start of the penalty phase, defense counsel reasserted Buenrostro's objection to the other-crimes evidence, arguing that the alleged incidents "did not satisfy the statutory criteria under 190.3 for admission" and were "just too trivial," so that their admission would violate the Eighth and Fourteenth Amendments. (11 RT 1188-1190.) The prosecutor asserted that there was no requirement that any acts of violence be charged and agreed with the trial court that the conduct did not need to rise to the level of a felony. (11 RT 1187, 1189.) At the defense's request, a *Phillips* hearing was held later the same day. (11 RT 1189, 1190, 1191; *People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25.)

1. The Prosecution's Evidence and the Trial Court's Ruling Regarding the Pill-Run Incident

Johnnie Anaya, a deputy sheriff who worked at the Robert Presley Detention Center, testified about an encounter with Buenrostro on February 26, 1995. (11 RT 1225.)[136] He was the only witness offered in support of this allegation, and at trial he essentially repeated his in limine testimony. (See 11 RT 1224-1228 [in limine], 1253-1257 [trial].) This incident occurred approximately three weeks before the trial court declared a doubt about Buenrostro's competence to stand trial and suspended the criminal

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[136] Although the First Amended Statement in Aggravation listed this alleged incident as occurring on February 28, 1995 (2 CT 444), deputy sheriff Anaya testified that it occurred on February 26, 1995 (11 RT 1225).

proceedings. (1 CT 16.)

Anaya accompanied the nurse on a "pill run" to dispense medication to inmates. (11 RT 1153.) They opened Buenrostro's cell door to give her some pills and ointment. (*Ibid.*) Buenrostro stepped outside of her cell which was not permitted. (*Ibid.*) Anaya told Buenrostro to move back, but she did not. (*Ibid.*) Buenrostro raised her arms toward Anaya and the nurse, and Anaya grabbed her hands which were slippery from the ointment. (11 RT 1254.) Buenrostro freed one of her hands and grabbed the nurse's sleeve. (11 RT 1254, 1256.) Anaya struggled with Buenrostro, took her hand off the nurse, who did not fall, and pushed Buenrostro back into her cell. (11 RT 1254-1255.) Inside the cell, the struggle continued, and both Buenrostro and Anaya ended up on the floor. (11 RT 1255.) Fighting with Anaya, Buenrostro tried to break her hands free, but she was not able to break from his grip. (*Ibid.*) The nurse called for assistance, backup arrived, and they took over. (*Ibid.*) The other staff were able to subdue Buenrostro. (*Ibid.*) No one, including Anaya, the nurse, or other jail personnel, was injured. (11 RT 1256-1257.)

At the close of Anaya's proffered testimony, defense counsel objected to the introduction of this conduct which, he surmised, at most constituted a battery. (11 RT 1228.) The trial court found that the incident could be admitted as several different violations of the Penal Code, and, without specifying any particular crime, ruled that the evidence was admissible. (36 CT 10075; 11 RT 1228.) Over a defense objection, the trial court instructed the jury on the elements for misdemeanor battery (§ 242) pursuant to CALJIC Nos. 16.140 and 16.141 with regard to the pill-run incident. (11 RT 1281; 36 CT 10101-10102.)

2. The Prosecution's Evidence and the Trial Court's Ruling Regarding the Mop-Wringer Incident

As with the pill-run episode, the prosecution presented only one witness on the second jailhouse incident. At both the in limine hearing and at trial, Stephanie Rigby, a correctional deputy with the sheriff's department, testified about an incident in Robert Presley Detention Center involving Buenrostro on May 18, 1996. (11 RT 1216-1220 [in limine], 1245-1250 [trial].) On that day, Rigby was working in the 6-A pod of the jail, which was a glass-encased control room. (11 RT 1245, 1248.) When Buenrostro returned from a visit, she grabbed the metal wringer of the custodial mop bucket in the sally port instead of stepping back into the day room where she was housed. (11 RT 1245-1246.) Rigby, who was no closer than eight feet away, told Buenrostro to go into the day room, but she did not. (11 RT 1246, 1248.) Buenrostro held the wringer like a baseball bat with both hands over her right shoulder. (11 RT 1246.) Rigby again told Buenrostro to drop the wringer and step into the day room, but she refused. (*Ibid.*) Rigby called other officers for assistance since Rigby could not leave the pod unattended. (11 RT 1246-1247.) Rigby was totally separated from Buenrostro by the metal and glass enclosure (11 RT 1248), and no one was near Buenrostro at this time (11 RT 1246).

The several deputies who responded talked with Buenrostro for a while. (11 RT 1247.) They were not separated from Buenrostro as Rigby was, but were about an arm's length from her. (11 RT 1247 1248-1249.) Buenrostro was still holding the wringer in the same position. (11 RT 1247.) She did not hit anyone and made no aggressive movements toward anyone, although she had the opportunity to do so. (11 RT 1247, 1249-1250.) The deputies physically took the mop wringer from Buenrostro.

(11 RT 1247.)

Following Rigby's testimony, the prosecutor argued that even though Buenrostro was separated from Rigby by a partition, Buenrostro disobeyed jail rules and did not desist her threatening conduct which, he asserted, was an assault. (11 RT 1221, 1222.) The trial court suggested that the incident could constitute the crime of exhibiting a dangerous weapon (Pen. Code, § 417, subd. (a)(1)), which the prosecutor had not considered. (11 RT 1221-1222.) Defense counsel argued that the incident did not rise to the level of criminal activity under section 190.3, factor (b). (11 RT 1222.) The trial court rejected the assault theory, but found sufficient evidence to show that Buenrostro committed a "417 misdemeanor," i.e. had exhibited a dangerous weapon. (11 RT 1222-1223.) The trial court then told the prosecutor: "the issue here is whether or not you feel that that is a sufficient aggravating factor in light of the facts and circumstances in this case to argue to a trier of fact." (11 RT 1223.) The prosecutor replied that he had not yet made that decision. (*Ibid.*) Over Buenrostro's objection at the penalty phase, the trial court instructed the jury pursuant to CALJIC No. 12.42 with regard to the mop-wringer incident.

B. The Trial Court Erred In Admitting Evidence Of The Pill-Run And Mop-Wringer Crimes Which Lacked The Force Or Violence Required By Factor (b)

Under factor (b), the prosecution may introduce as aggravating evidence "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b).) The purpose of factor (b) is to allow evidence of violent criminality to demonstrate the defendant's propensity for violence (*People v. Balderas* (1985) 41 Cal.3d

144, 202), which "assist[s] the sentencer in determining whether he is the type of person who deserves to die" (*People v. Ray* (1996) 13 Cal.4th 313, 349-350). Because of "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination," California law requires that the evidence presented in support of a factor (b) aggravator be proved beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; accord, *People v. Anderson* (2001) 25 Cal.4th 543, 589.) To ensure this foundational requirement, at a *Phillips* hearing the trial court must "determine whether there is substantial evidence to prove each element of the other criminal activity" (*People v. Phillips*, *supra*, 41 Cal.3d at p. 73, fn. 25), and its decision is reviewed for abuse of discretion (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 224). At trial, the prosecution must prove the other crimes beyond a reasonable doubt before a juror may consider the evidence as an aggravating factor in determining the defendant's sentence. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.)

As Buenrostro noted in her in limine motion, there are two key limitations to factor (b) evidence which the trial court must apply. (See 35 CT 9975.) First, the alleged "criminal activity" must demonstrate a violation of a section of the Penal Code. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72 [reversing death verdict in part for the admission of activity that did not constitute crimes]; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 93-94 [defendant's mere possession of handcuff key in jail was not "criminal activity" that constituted admissible aggravating evidence in penalty trial because it violated no statute].) Second, section 190.3 explicitly prohibits admission of "criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (Pen.

Code, § 190.3; *People v. Phillips*, *supra*, at pp. 69-72 [tracing the history of § 190.3 including this limitation].) As shown below, the prosecution's evidence failed to pass the second hurdle with regard to both the pill-run and mop-wringer incidents, and, therefore, the trial court abused its discretion in admitting evidence of these alleged crimes.

1. The Pill-Run Offense was a Simple Misdemeanor Battery that did not Establish the Violent Criminality Necessary to Qualify as a Factor (b) Aggravator

The evidence at the penalty phase established a scuffle during the pill-run when Buenrostro reached toward the nurse and Anaya, and Anaya grabbed Buenrostro's slippery hands. A chain reaction then occurred. Trying to free herself from Anaya's grip, Buenrostro grabbed the nurse's sleeve – the basis for a battery, the only alleged criminal act. Anaya removed Buenrostro's hand from the sleeve and forced her into her cell, where they tussled and fell to the floor.

The parties and the trial court understood that the unadjudicated crime at issue was Buenrostro's battery in grabbing the nurse's sleeve and not in resisting Anaya after he restrained her. At the in limine hearing, when defense counsel argued that Buenrostro's conduct was at most a battery (11 RT 1228), the prosecutor did not disagree. Nor did the trial court state an alternative view of the crime she committed. (See *ibid.*) At trial, when defense counsel requested that the trial court not instruct on the elements of battery (§ 417), the prosecutor again did not dissent from their characterization of the crime. (11 RT 1281.) On the contrary, in discussing jury instructions, the prosecutor told the court that "we need to tell them about battery." (11 RT 1284.) Moreover, the prosecutor did not object to

the court's instruction which explained "[t]he touching essential to a battery may be a touching of the person of the person's clothing or of something attached to or closely connected with the person." (12 RT 1397.) Thus, the record shows that the parties and the trial court understood the alleged battery to lie in – and only in – Buenrostro's act of grabbing the nurse's sleeve.

The United States Supreme Court has held that "force or violence" under factor (b) is not vague because it is phrased in "conventional and understandable terms," and has a "common-sense core of meaning . . . that criminal juries should be capable of understanding." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 975-976; accord, *People v. Dunkle* (2005) 36 Cal.4th 861, 922; *People v. Davis* (1995) 10 Cal.4th 463, 542.) Consistent with the stated purpose of factor (b) and its common-sense meaning, the force or violence (or threat of force or violence) must be directed against a person. (*People v. Boyd* (198) 38 Cal.3d 762, 776.) A common definition "of 'force' is 'such a threat or display or physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death.' (Webster's 3d New Internat. Dict. (2002) p. 887)." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.) A common definition of "violent" is "characterized by extreme force . . . marked by abnormally sudden physical activity and intensity." (Webster's 3d New Internat. Dict. (2002) p. 2554; see also Oxford American Dict. (1980) p. 774 [defining "violent" as "involving great force or strength or intensity"].)

In keeping with these common definitions, this Court has recognized that "force or violence" under factor (b) refers to conduct causing, threatening to cause, or likely to cause pain, serious bodily harm, or death. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 392 [threatening arson

and throwing burning sheet in trash can inside jail amounted to conduct involving threat of force or violence under factor (b) because of the "physical danger" it posed to the life and limb of other inmates and correctional officers]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [factor (b) "encompasses only those threats of violent injury that are directed against a person or persons"]; *People v. Mason* (1991) 52 Cal.3d 909, 955 [simple, attempted escape does not involve force or violence or the threat of force or violence, but when escape plan calls for use of gun to subdue guard, its danger to life or limb suffices to qualify under factor (b)].)

Misdemeanor battery does not necessarily cause or threaten to cause serious bodily harm, nor is it likely to do so. Misdemeanor battery is defined as "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242). Unlike the high court's common-sense understanding of "force or violence" under factor (b) in *Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976, the term "force or violence" under section 242 "has a special legal meaning of a harmful or offensive touching." (*People v. Page* (2004) 123 Cal.App.4th 1466, 1474, fn. 1.) It means nothing more than "the least touching," which "need not be violent or severe." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4.) It need not cause pain or serious bodily harm; it need not even be "[]likely to cause harm" or pain. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 423; accord, *People v. Rocha* (1971) 3 Cal.3d 893, 899-900, fn. 12.)

Thus, as this Court has implicitly recognized, the meaning of the term "force or violence" for battery under section 242 is not synonymous with the meaning of that term under factor (b). (*People v. Davis* (1995) 10 Cal.4th 463, 541-542 [on the facts it was not reasonably likely that jurors erroneously applied the special definition of force or violence in battery

context to substitute for the common-sense definition of the same term under factor (b)]); see also *People v. Collins* (1992) 10 Cal.App.4th 690, followed in *People v. Anzalone* (1999) 19 Cal.4th 1074, 1082-1083 [ordinary meaning of "force" and "violence" is different than the special legal meaning of "force or violence" in the battery context; ordinary meaning of violence "carries the connotation of more than a simple touching required for a battery"].) Given the technical, legal meaning of "force or violence" under section 242, misdemeanor battery in the abstract does not involve the level of force or violence that is dangerous.

This Court, however, does not decide in the abstract whether criminal activity that technically violates a criminal statute qualifies under factor (b). Rather, the question "can *only* be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955, italics added; accord, *People v. Dunkle*, *supra*, 36 Cal.4th at p. 922 ["Whether such a burglary "involves" force or violence, and thus qualifies as an aggravating factor under factor (b), depends on the circumstances of its commission"]; *People v. Rayley* (1992) 2 Cal.4th 870, 908 [lewd act on child only qualifies as crime involving "force or violence" under factor (b) if it involved force or violence under circumstances of its commission].)

Given that the purpose of factor (b) is to help the jury decide whether the defendant's propensity for violence makes her the type of person who deserves to die, a battery (§ 242) should be admissible as other-crimes evidence only when the circumstances of its commission causes, threatens to cause, or is likely to cause serious bodily harm. On the other hand, when the conduct that constitutes a battery is simply a technical violation of the least adjudicated, i.e. the minimum, elements of the offense – "the least touching" (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214, fn. 4) – that

does not cause, and is not likely to cause, serious bodily harm, it should not be admissible as other-crimes evidence. In that case, the technical violation is nothing more than a "trivial incident[] of misconduct and ill temper," that should not "influence a life or death decision." (*People v. Boyd*, *supra*, Cal.3d at pp. 774, 776.)

This Court's prior decisions are consonant with this reading of factor (b). This Court has held that acts amounting to a battery qualify under factor (b) when they cause, threaten to cause, or are likely to cause serious bodily harm, but it never has held that a mere, technical battery satisfying only the least adjudicated elements of the statute *alone* is sufficient to influence the choice between life and death under factor (b).

In *People v. Davis*, *supra*, 10 Cal.4th 463, the defendant argued that it was reasonably likely that the jurors erroneously considered mere technical batteries under factor (b) by substituting the specialized definition of "force or violence" in the battery context, with which they were instructed, for the common meaning of "force or violence" under factor (b), on which they were not instructed and which required a greater degree of force or violence than battery. (*Id.* at p. 541.) This Court implicitly acknowledged the validity of the underlying legal premise that the special meaning of "force or violence" in the battery context conflicts with the common-sense meaning of the same term under factor (b) and that, if the jurors misapplied the lesser battery standard to factor (b), it would be error. (*Id.* at pp. 541-542.) However, the Court rejected the defendant's argument for two reasons. The first turned on the language of the particular instructions which is not applicable here. (*Id.* at p. 542.) Second, the Court emphasized that the incidents of battery in that case went beyond mere technical violations of the least adjudicated elements of section 242 and

"indisputably involved the use of 'force, and 'violence,' and 'threats' of violence under their commonsense connotations: . . . defendant kicked the victim and repeatedly lunged at him with [a] sword; . . . defendant slashed at the victim, cutting his jacket with a knife; . . . defendant struck, choked and pushed the victim." (*Ibid.*) In this way, *Davis* impliedly recognized that mere technical batteries without more – evidence that they caused, threatened to cause, or were likely to cause serious bodily harm – do not qualify under factor (b).

In *People v. Pinholster* (1992) 1 Cal.4th 865, the defendant argued that a series of assaults and batteries he had committed in custody were not crimes involving force or violence under factor (b). Those acts included physical assaults on inmates and jail deputies in which he punched one person in the head, struck another in the groin, kicked several police officers, threatened to kill deputies, and threw urine at deputies. (*Id.* at pp. 910, 961.) This Court held that the acts of striking and kicking – acts that certainly caused pain and posed a danger of serious bodily harm – amounted to assaults and batteries involving "force or violence" under factor (b) and, therefore, were properly admitted. (*Id.* at p. 961.) As to throwing urine, this Court observed that it was a technical battery. (*Ibid.*) However, this Court did *not* hold that the act was admissible under factor (b) for this reason. To the contrary, this Court implicitly recognized that this act by itself did *not* involve "force or violence" within the meaning of factor (b). Instead, this Court emphasized the series of acts causing pain and posing a danger of serious bodily harm, of which the urine throwing was one part. (*Ibid.*) Therefore, that act was properly admitted under the general rule that "'all crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in

aggravation *even if some portions thereof* [i.e., the technical battery] *may not be violent.*' [Citation.]" (*Ibid.*, italics added.)

In *People v. Burgener* (2003) 29 Cal.4th 833, the Court also held that a series of acts in which the defendant threw a mixture of scouring powder and chlorine bleach, as well as water and urine, at jail guards amounted to batteries *and* involved force or violence under factor (b). (*Id.* at p. 866.) Again, as in *Pinholster*, the non-dangerous, non-violent act of throwing urine and water was part of a series of acts that were violent and did present a danger of serious bodily harm, since chlorine bleach is a toxic substance which poses a risk of serious injury if it comes into contact with a person's skin or eyes.[137]

In contrast to these cases, the evidence here proved only that Buenrostro grabbed the nurse's sleeve in response to being grabbed herself by deputy Anaya and then tussled with him as he pushed her into her cell.

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[137] Other decisions of this Court admitting evidence of battery under factor (b) similarly are consistent with the construction of the aggravating factor that Buenrostro advances here. (See *People v. Jones* (1998) 17 Cal.4th 279, 311 [circumstances of battery showed acts of causing bodily harm – defendant beat victim severely, possibly with a chair, resulting in need for medical attention and possible miscarriage]; *People v. Osband* (1996) 13 Cal.4th 622, 710-711 [circumstances of battery showed defendant hit 60-year-old woman with bicycle in effort to steal her purse]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1184-1185 [during forcible rape at knife point accompanied by threats to kill the victim and her child, defendant inserted a hair spray can into the victim's vagina, causing her considerable pain and resulting in a torn uterus, four unsuccessful operations and a hysterectomy, which if occurring prior to enactment of section 289, was admissible because "the conduct in question was unquestionably criminal activity – at least a battery (§ 242) – involving force or violence"]; *People v. Belmontes*, *supra*, 45 Cal.3d at pp. 796-797, 809 [defendant cut telephone cord when victim attempted to call police, pushed her, hit her on head, shoved her to the ground, and choked her].)

She was reactive rather than aggressive in the scuffle. Her "crime" of battery was not dangerous in the abstract, and it was not dangerous under the circumstances of its commission, in that it caused no serious bodily harm, threatened no serious bodily harm and was not likely to cause serious bodily harm to the nurse, who was the victim of the battery. Indeed, Buenrostro's act of grabbing the nurse's sleeve did not even involve moral turpitude that would suggest a "readiness to do evil." (See, e.g., *People v. Mansfield* (1988) 200 Cal.App.3d 82, 88-89.)

The most that can be said about Buenrostro's technical battery is that it amounted to an impulsive, "trivial incident[] of misconduct and ill temper." (*People v. Boyd, supra*, 38 Cal.3d at p. 774.) Indeed, almost everyone at some point in his or her life commits a "least offensive touching" of another person. Plainly put, the pill-run battery simply did not have the requisite degree of gravity to justify its use as an aggravating factor to influence the jury's decision to put Buenrostro to death. As a matter of statutory construction, Buenrostro's conduct did not satisfy the "force or violence" requirement of section 190.3, factor (b), and the trial court abused its discretion by admitting it.

2. The Crime of Exhibiting a Deadly Weapon, in Which Buenrostro Stood Frozen in a Defensive Stance with a Mop Wringer, did not Establish the Violent Criminality Necessary to Qualify as a Factor (b) Aggravator

The trial court correctly rejected the prosecutor's argument that the evidence about the mop-wringer incident established an assault. (11 RT 1223 ["[i]t doesn't appear she assaulted anybody that came in."].) However, it was wrong to admit the evidence under section 417, subdivision (a)(1), exhibiting a deadly weapon. The prosecution failed to

establish that Buenrostro's actions involved the "use or attempted use of force or violence or the express or implied threat to use force or violence," as required by section 190.3, subdivision (b). The crime defined in section 417, subdivision (a)(1) does not require either the use of, or the threat to use, force or violence. A person may commit the crime by exhibiting any deadly weapon in a "rude, angry, *or* threatening manner." (§ 417, subd. (a)(1), italics added.) The disjunctive phrasing of the statute permits a defendant to be convicted of exhibiting a weapon even when no threat of violence is involved. (See *People v. Hall* (2001) 83 Cal.App.4th 1084, 1091-1092 [brandishing a firearm under § 417, subd. (b) does not require proof of an intent to harm or a likelihood of harming, anyone, and although the crime may result in violence, it is not a violent crime].)

As discussed previously, this Court determines whether conduct involves force or violence under factor (b) not in the abstract, but by assessing the facts of each case. (*People v.Dunkle, supra*, 36 Cal.4th at p. 922.) The evidence unequivocally established that Buenrostro neither used nor threatened to use force or violence. Officer Rigby, who was the prosecution's only witness and who was protected by the glass partition at the time of the incident, testified that Buenrostro never said anything threatening and never made a move toward her or toward the responding officers. (11 RT 1243-1250.) The entire incident consisted of Buenrostro picking up the mop wringer, holding it like a baseball bat, maintaining that frozen, defensive position apparently for several minutes, and then releasing it to the officers who entered the sally port. At most, Buenrostro rudely exhibited a mop wringer. Indeed, in seeking admission of this evidence, the prosecutor described the entire crime as follows: Buenrostro "grabbed the removable part of the mop bucket and took a defensive stance." (11 RT

1190.) At the end of his proffer, the prosecutor acknowledged the argument that under the circumstances Buenrostro's pose was "not a threatening position[,]" but asserted that her failure to desist in maintaining her stance was dangerous. (11 RT 1221.) The prosecution's own evidence refuted its contention. Rigby's testimony showed that Buenrostro was alone with the mop wringer in a self-contained sally port and made no aggressive move or hostile remark, but rather released the mop wringer when the responding deputies took it.[138]

The only force Buenrostro used was to pick up the mop wringer. But long ago this Court held a crime involving only force or violence to property does not suffice under section 190.3. In *People v. Boyd*, *supra*, 38 Cal.3d at p. 776, the Court held that an attempted escape was erroneously admitted under factor (b) because, there was "no evidence that the defendant used or threatened force or violence to any person[.]" The Court soundly rejected the Attorney General's argument that the defendant's violent removal of the metal grate on the air vent of the jail was sufficient to justify admissibility of the incident. (*Ibid.*) As this Court explained, "[t]he purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision." (*Ibid.*; see *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013; *People v. Stanley* (1995) 10 Cal.4th

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[138] Even if Buenrostro's conduct could be considered to be ambiguous, it still would not have been admissible, since evidence that is susceptible of threatening and non-threatening inferences is inadequate to qualify under factor (b). (See *People v. Walker* (1988) 47 Cal.3d 605, 639 [trial court erred in admitting defendant's statement as threat under factor (b) because it "was at best ambiguous and equally supportive of an inference" that it did not amount to a crime].)

764, 823 [both asserting rule that force, violence or threats against property do not qualify].) This was the essential point argued by defense counsel at the *Phillips* hearing in this case – that such a trivial incident did not "satisfy statutory criteria under 190.3." (11 RT 1188, 1190.) As with the pill-run battery, Buenrostro's act of grabbing and holding the mop wringer lacked the force or violence required to establish her propensity for violence, especially since she peacefully permitted the officers to take it from her, and thus the trial court abused its discretion in admitting evidence of the mop-wringer incident.

C. The Admission Of Evidence Of The Pill-Run Battery And Exhibiting A Mop Wringer Violated The Federal Constitution

The admission of the evidence about the pill-run battery and mop-wringer exhibiting a weapon was not only state law error, but also violated the Sixth, Eighth and Fourteenth Amendments to the federal Constitution.

1. Use of the Invalid Factor (b) Aggravators Unconstitutionally Skewed the Sentence-Selection Process Toward Death

In *Brown* v. *Sanders* (2005) 546 U.S. 212, the United States Supreme Court revisited the question of when a capital-sentencing jury's consideration of an invalid aggravating factor violates the Eighth Amendment. The high court found that California is a nonweighing state under its distinction between weighing and nonweighing schemes (*id.* at p. 222) and then replaced this long-standing distinction, which it considered "needlessly complex," with a new rule:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors

> enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Id.* at p. 220.) In other words, when the jury considers an invalid aggravating factor in deciding the sentence, constitutional error ensues "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.* at p. 221.)

Such error occurred here. The legal insufficiency of Buenrostro's pill-run battery and her exhibiting the mop wringer to prove the "force or violence" required by factor (b) rendered any finding of the aggravating factor invalid. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316 [conviction upon insufficient evidence violates Fourteenth Amendment due process].) The jury was not entitled to consider these aggravating factors or the evidence introduced to support them in deciding Buenrostro's sentence. Under *Sanders*, the prosecution's failure to prove the "force or violence" element required for factor (b) resulted in Eighth Amendment error, because the jury could *not* "give aggravating weight to the same facts and circumstances" introduced under factor (b) under any other sentencing factor. Clearly, the pill-run battery and exhibiting a mop wringer were wholly unrelated to the facts and circumstances of the murders or the assault on Alex Buenrostro (§ 190.3, subd. (a)), Buenrostro's prior conviction for grand theft (§ 190.3, subd. (c)), or any of the other sentencing factors listed in section 190.3. Because the jury could not legitimately have considered anything at all about these two offenses as aggravation in any capacity at the penalty phase, the admission of this factor (b) aggravator skewed the jurors' balancing of aggravating and mitigating factors in favor of death in violation of the Eighth Amendment. (*Brown v.*

Sanders, *supra*, 546 U.S. at p. 221.)

2. The Other-Crimes Evidence was Constitutionally Irrelevant

Separate and apart from the *Sanders* error, the other-crimes evidence was constitutionally irrelevant to the jury's decision whether Buenrostro should live or die. Where, as in California, aggravating factors are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648), they must provide a principled basis for doing so (*Arave v. Creech* (1993) 507 U.S. 463, 474). Under the Eighth Amendment and the due process clause of the Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"].) As a general matter, relevant evidence at the selection phase is limited to that which relates to the defendant's character or the circumstances of his crime. (*Zant v. Stephens*, *supra*, at p. 879.)

However, this broad category of generally relevant evidence is not without limits. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [although defendant's membership in Aryan Brotherhood prison gang, which entertains "morally reprehensible" white racist beliefs, was suggestive of bad character, it was "totally irrelevant" to capital-sentencing where there was no evidence connecting racist views to the murder]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433, fn. 16 [although technically a circumstance of the crime, the fact that the murder was accomplished with a shotgun rather than a rifle, which resulted in a "gruesome spectacle," was

"constitutionally irrelevant" to the penalty decision]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310 [character evidence of non-violent sexual conduct, which included defendant's homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision where, for instance, there was no evidence connecting sexual history to charged crime or future dangerousness].) At bottom, to be constitutionally relevant, aggravating evidence must assist the jury in distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.)

In addition, as Buenrostro asserted at trial (36 CT 10056-10057), the constitutional relevance of the factor (b) aggravator must be assessed in terms of the Eighth Amendment requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic and law, bears on the selection of who, among those eligible for death, should die and who should live. " (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Thus, as the federal court in *Friend* explained in the context of the federal death penalty statute:

> relevance and heightened reliability . . . are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in

> selecting who is to live or die; and (b) is imbued with a sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

(*United States v. Friend, supra*, 92 F.Supp.2d at p. 543; accord, *United States v. Karake* (D.D.C. 2005) 370 F.Supp.2d 275, 279; *United States v. Johnson* (W.D.Va. 2001) 136 F.Supp.2d 553, 558-559; *United States v. Bin Ladin* (S.D.N.Y. 2001) 126 F.Supp.2d 290, 302.) In other words, "an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die." (*United States v. Friend, supra*, 92 F.Supp.2d at p. 544.)

Pursuant to these principles, several federal courts have recognized that minor incidents of only technically violent or forceful criminal conduct – like a violation of the least adjudicated elements of section 242 – are constitutionally irrelevant under the Eighth Amendment for purposes of capital sentencing. (See, e.g., *United States v. Grande* (E.D.Va. 2005) 353 F.Supp.2d 623, 634 [evidence of unadjudicated "high school fight" that occurred five years earlier and was wholly unrelated to charged murder was "unconstitutionally irrelevant to the determination of 'who should live and who should die'"]; *United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 153 [conduct amounting to crime that did not result in significant injury was "of insufficient gravity to be relevant to whether the defendant here should live or die"]; *United States v. Friend, supra*, 92 F.Supp.2d at p. 545 [evidence that defendant and codefendant talked about killing potential witness was "not of sufficient relevance and reliability to assume the important role of an aggravating factor which, if proven, may be weighed as

a factor to determine whether death is an appropriate penalty"].)[139]

The pill-run and mop-wringer offenses in this case violated these same Eighth Amendment precepts. Assuming, arguendo, that the admission of other-crimes evidence is not per se unconstitutional, section 190.3, factor (b) on its face may not violate the Eighth Amendment, because its purpose is to focus the sentencer on the defendant's violent criminality and thus her propensity for violence, which is a relevant, constitutional consideration in deciding the appropriate sentence in a capital case. (See *People v. Balderas* (1985) 41 Cal.3d 144, 202; *People v. Ray* (1996) 13 Cal.4th 313, 349-350.) But when the evidence admitted under factor (b) fails to meet its ostensible purpose, there is Eighth Amendment error. That is precisely what happened here. The pill-run and mop-wringer evidence introduced into the penalty deliberations a "trivial incident[] of misconduct and ill temper" (*People v. Boyd, supra*, 38 Cal.3d at pp. 774, 776) that was constitutionally irrelevant to the jury's life or death decision and thereby ran afoul of the Eighth and Fourteenth Amendments.

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[139] These cases construed the federal death penalty statute, which is similar in many respects, though not identical, to California's scheme. It lists 16 aggravating factors that apply when a defendant has been convicted of a homicide that is eligible for capital punishment. (18 U.S.C. § 3592, subd. (c).) It also contains a "catch-all" clause that allows the jury to consider the existence of "any other aggravating factor for which notice has been given." (*Ibid.*) The intent of this non-statutory aggravating factor is to permit consideration of constitutionally relevant evidence regarding the defendant's character and the circumstances of the crime. (See, e.g., *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1106.) Thus, the cases address whether certain conduct is constitutionally relevant aggravation under this "non-statutory" aggravating factor.

3. The Adjudication of the Other-Crimes Evidence at the Penalty Phase under the Applicable State Procedure Rules Further Violated Buenrostro's Federal Constitutional Rights

As Buenrostro predicted in her pretrial motion, the admission of the other-crimes evidence violated her rights to due process of law, heightened reliability in capital-sentencing, a fair trial by an impartial jury, and equal protection of the law under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (35 CT 9971, 9980-9985.) And as Buenrostro noted at trial and acknowledges on appeal, this Court repeatedly has rejected constitutional challenges to the use of unadjudicated crimes as aggravating factors at a capital-sentencing trial. (35 CT 9985; see *People v. Balderas* (1985) 41 Cal.3d 144, 204-206; see also, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 284, fn. 24; *People v. Gallego* (1990) 52 Cal.3d 115, 195.) However, the constitutionality of admitting unadjudicated other-crimes evidence at a capital penalty phase is a "recurring issue" on which the "State's highest courts have reached varying conclusions." (*Robertson v. California* (1989) 493 U.S. 879 [dis. opn. of Marshall, J. from denial of certiorari]; see *Williams v. Lynaugh* (1987) 484 U.S. 935 [dis. opn. of Marshall, J. from denial of certiorari asserting that "whether a State violates the Equal Protection Clause when it permits the sentencer to consider evidence of unadjudicated offenses in capital cases but not in noncapital" was a question worthy of the Court's consideration].) Accordingly, Buenrostro presents her federal constitutional claims to preserve them for possible federal habeas corpus review and asks the Court to reconsider its ruling in *Balderas* and subsequent decisions permitting the use of evidence of unadjudicated crimes at the penalty phase. (See *People v. Schmeck*

(2005) 37 Cal.4th 240, 303-304.) The use of the pill-run and mop-wringer evidence at Buenrostro's penalty phase resulted in separate but related constitutional violations.

First, the adjudication of the alleged other crimes by the same jury that had found Buenrostro guilty of capital murder violated her Eighth Amendment right to a reliable determination of penalty, her Fourteenth Amendment due process right to a fair sentencing trial, and her Sixth and Fourteenth Amendment rights to a penalty determination by an impartial jury. Having just convicted Buenrostro of three counts of first degree murder with a true finding on the special circumstance, the jury was not unbiased regarding Buenrostro's guilt of the unadjudicated crimes. (*Irvin v. Dowd* (1961) 366 U.S. 717, 727-728 [right to an impartial jury was violated in capital case where jurors during voir dire expressed opinion that defendant was guilty]; *Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554 [Sixth Amendment guarantee of an impartial jury is violated if juror who sat in a previous case in which the same defendant was convicted serves on defendant's jury in another similar prosecution close in time], relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

As a result of this bias, the jury was less likely to presume Buenrostro innocent of the alleged offenses and more likely to find her guilty of those crimes upon proof that was less than the constitutionally-mandated standard of beyond a reasonable doubt. This problem was particularly acute because the issue was whether the factor (b) offenses involved force or violence. Usually, the evidence of the unadjudicated factor (b) crimes clearly establishes the defendant's actual use of force or

violence. That was not the case here, and the jury was not directed to find those elements before considering the battery and exhibiting a deadly weapon as aggravating factors. Under these circumstances, the jury would be more likely to view the other crimes as involving force or violence precisely because they just convicted Buenrostro of three murders. By virtue of those convictions, the jury would be disposed to find Buenrostro to be a violent person, i.e., a person who would contemplate force or violence in an otherwise non-violent situation. Thus, the problem of jury bias likely affected the very determination that the factor (b) evidence required them to make.

The lack of an impartial adjudicator with respect to the determination of the factor (b) aggravators factors, which weighed in favor of a death sentence, created a substantial risk of an erroneous, unfair and unreliable penalty verdict. (See 35 CT 9981-9982; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [basing death sentence in part on reversed conviction violates Eighth Amendment's requirement of heightened reliability in capital-sentencing]; *Gardner v. Florida* (1977) 430 U.S. 349, 362 [applying fundamental notions of due process to evidence at a capital-sentencing hearing]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 [admission of murders for which defendant was not convicted would violate state constitutional rights to a trial by an impartial jury, to an indictment or presentation, to confront witnesses against him, and against self-incrimination and would result in a procedure so unfair and prejudicial as to violate the due process of law" guaranteed by the state Constitution]; *State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1082 [admission of evidence of a defendant's prior criminal activity (other than convictions) violates the Eighth Amendment and also state Constitution]; *State v. McCormick* (Ind.

1979) 397 N.E.2d 276, 279-280 [admission of unadjudicated homicide at capital-sentencing trial violates due process clause of Fourteenth Amendment].)

Second, the cumulative effect of the two separate jailhouse incidents prejudiced the jury's determination as to each of them. (See 35 CT 9982-9983.) By consolidating the jury's adjudication of two incidents in the same proceeding, the evidence of one alleged crime spilled over to, and bolstered the proof of, the other. The synergistic effect of multiple other-crimes evidence erroneously inflated the strength of the aggravating factors and again unfairly skewed the penalty phase in favor of death in violation of the Eighth Amendment's mandate of reliable capital sentencing and the Fourteenth Amendment's due process guarantee of a fair trial.

Third, under section 190.3, there is no requirement that the prior criminality be found true by a unanimous jury. (See *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) Buenrostro's request for unanimity instruction (36 CT 10045) was summarily denied (12 RT 1280). Moreover, the trial court explicitly told the jury that with regard to the pill-run and mop-wringer allegations, "[i]t is *not* necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror many consider that activity as a fact in aggravation." (36 CT 10099; 12 RT 1396, italics added.) The failure to require jury unanimity with respect to the other-crimes allegations violated Buenrostro's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 864-865, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530

U.S. 466, 478, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Buenrostro is aware that this Court has rejected this very claim. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 221-222.) She asks the Court to reconsider its holding.

Finally, the disparate treatment of capital and non-capital defendants with regard to other-crimes evidence violates the federal Constitution. Because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated Buenrostro's equal protection rights under the Fourteenth Amendment. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated Buenrostro's right to due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For all these reasons, this Court should reconsider its position regarding the constitutionality of admitting other-crimes evidence at the penalty phase.

D. The Trial Court Erroneously Failed To Define The "Force Or Violence" Requirement For Factor (b)

As with all jury instructions, the instructions on factor (b) "should be accurate and complete." (*People v. Montiel* (1993) 5 Cal.4th 877, 942; accord, *People v. Prieto* (2003) 30 Cal.4th 226, 268.) The instructions given to Buenrostro's jury were not. The trial court instructed generally on

factor (b) under CALJIC No. 8.87 and also gave CALJIC No. 16.140 on battery (§ 242), CALJIC No. 16.141 on the definition of "force and violence" for battery, CALJIC No. 16.290 on the definition of the crime of exhibiting a deadly weapon, and CALJIC 16.291 on the definition of "deadly weapon." (36 CT 10099, 10101-10104.) However, these instructions were incomplete and misleading because they did not define the "force or violence" elements of factor (b). Noting this problem, defense counsel unsuccessfully asked the trial court to define these pivotal terms. (36 CT 10057-10059.) As a result, the jury was left only with the inadequate and inapplicable definition of "force and violence" for battery. This instructional error resulted in an unfair, arbitrary and unreliable imposition of the death penalty in violation of the state and federal Constitutions. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th and 14th Amends.)

The trial court gave the standard instructions defining battery, including the definition of battery contained in CALJIC No. 16.141.[140]

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[140] The instruction under CALJIC No. 16.141 read as follows:

> As used in the foregoing instruction, the words "force and violence" are synonymous and mean any unlawful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude or angry manner, is sufficient.
>
> It is not necessary that the touching be done in actual anger or with actual malice; it was sufficient if it was unwarranted and unjustifiable.
>
> The touching essential to a battery may be a touching of the person, of the person's clothing or of something attached to or closely connected with the person.

Given the special, technical definition which defines battery as "[t]he slightest unlawful touching," the instructions were inadequate and misleading, because they failed to make clear that the meaning of "force or violence" for purposes of factor (b) was not the same as the meaning of "force and violence" for battery. In her request for supplemental penalty-phase instructions, Buenrostro asked for a "clear definitions of the terms 'force' and 'violence'" as used in factor (b) in order to avoid "an unacceptable risk of arbitrary sentencing." (36 CT 10057-10058.) Her request was denied. (12 RT 1280.)

Before considering the adequacy of the instructions, a preliminary question must be answered about the scope of the jury's decision-making with regard to factor (b): does the jury determine only whether the prosecution has proved that the defendant committed the unadjudicated crime, or does the jury also decide whether that offense constitutes a crime of force or violence under factor (b)? Obviously, if the jury does not decide the latter issue, then there is no need for the trial court to instruct on it. Buenrostro asserts that the jury decides both questions. However, in recent years this Court has ruled that the jury decides only the first question, but has not been consistent on this point. As shown below, the Court (1) should reconsider its recent limitation of the jury's role with regard to factor (b); (2) should hold that the jury decides both whether the defendant committed the unadjudicated crime suggested by the prosecution's evidence and whether that crime involves force or violence as required by factor (b); and (3) should rule that the instructions given with regard to the pill-run battery

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(12 RT 1397; 36 CT 10102.)

were inadequate and misleading with regard to the second issue.

This Court has not been consistent on the central point of what the jury decides with regard to factor (b) evidence. In *People v. Nakahara* (2003) 30 Cal.4th 705, 720, this Court ruled, without citation or explanation, that "[t]he question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court." The Court repeated this ruling in *People v. Monterroso* (2004) 34 Cal.4th 743, 793 and *People v. Loker* (2008) 44 Cal.4th 691, 745, again without elaboration and citing only to *Nakahara* in *Monterroso* and to both *Nakahara* and *Monterosso* in *Loker.*

However, between the decisions in *Monterroso* and *Loker*, this Court clearly indicated that the question of whether a particular criminal act involved sufficient force or violence to qualify for consideration as an aggravating circumstance under factor (b) was for the *jury* to decide. In *People v. Dunkle*, *supra*, 36 Cal.4th 861, the prosecution presented other-crimes evidence of a residential burglary under factor (b). The defendant challenged the trial court's failure to define "express or implied threat to use force or violence" as used in factor (b). (*Id.* at p. 922.) Rejecting the claim, the Court was unequivocal about the jury's task:

> the general section 190.3, factor (b) instruction, and CALJIC No. 8.87 adequately conveyed to the jury that before it could consider the Rennie incident in aggravation it had to find, beyond a reasonable doubt, all of the elements of the offense of burglary *and that the offense involved the use or attempted use of force or violence, or the express or implied threat to use force or violence.*

(*Id.* at pp. 922-923, italics added.) Thus, under factor (b), the jury decides both the question of whether the defendant committed the charged crime and what the Court in *Nakahara* denominated "the legal matter" of whether that crime involved force or violence. Indeed, this view is strengthened by the Court's assertion in *Dunkle* that factor (b) "possesses a 'common-sense core of meaning . . . that criminal *juries* should be capable of understanding.'" (*Id.* at p. 922, quoting *Tuilaepa v. California*, *supra*, 512 U.S. at p. 975, italics added and first internal quotation marks omitted.) If juries took no part in deciding whether the alleged crime met the "force or violence" requirement of factor (b), there would have been no reason for this Court to make this statement.

Moreover, section 190.3 itself envisions that juries have a role in determining not just whether the alleged crime is proved, but also whether it qualifies as a factor (b) aggravator. The first paragraph of section 190.3, sets out the categories of evidence that the jury considers at the penalty phase, including "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." The second paragraph of the section imposes an express limitation: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (§ 190.3.)

The statute's structure thus makes clear that whether the criminal act alleged involves "force or violence" under factor (b) is a preliminary fact on which the admissibility of the evidence depends. (Evid. Code, § 400.) The "force or violence" question addresses the relevance of the other-crimes

evidence, which generally is initially determined by the trial court to ensure that there is sufficient evidence to support its finding, but is finally determined by the jury. (Evid. Code, § 403, subd. (a)(1).) It does not involve a determination of the competency of the prosecution's evidence, which would be first and finally decided by the trial court. (Evid. Code, § 405, subd. (a).) In this way, the trial court at a *Phillips* hearing may decide that there is sufficient evidence to prove both the criminal activity alleged and the "force or violence" requirement of factor (b). But this initial determination does not end the inquiry. The jurors deliberating the other-crimes evidence make the final decision as to the sufficiency of the proof on both questions.

This approach to the adjudication of factor (b) is consistent with the jury's role in deciding the other sentencing factors in section 190.3. In none of the other enumerated aggravating and mitigating factors does the trial court definitively decide a preliminary fact that is a predicate to the jury's decision-making regarding the sentencing factor. For example, under factor (d), the jury, not the trial court, decides whether the defendant committed the offense under "mental or emotional disturbance" and whether such disturbance was "extreme," and under factor (g), the jury, and not the trial court, decides whether the defendant acted under "duress" or the "domination of another person" and whether the duress was "extreme" and the domination was "substantial." There is no reason to treat the "force or violence" element of factor (b) differently than the qualifying terms that restrict factors (d) and (g). All elements of the aggravating and mitigating factors are to be decided in the last instance by the jury.

For all these reasons, the Court's unexplained and unsupported statements in *Nakahara*, *Monterosso* and *Loker* that the trial court

determines the factor (b) "force or violence" question is partially mistaken. Both the trial court and the jury decide this fact.

Because the jurors decide whether the unadjudicated crime, if proved, qualifies as a factor (b) aggravator, they must understand the meaning of the "force or violence" language in that provision. Generally, there may be no need to instruct on the common-sense understanding of "force or violence" under factor (b) because it will be readily apparent. (*People v. Dunkle*, *supra*, 36 Cal.4th at pp. 922-923 [failure to instruct on common meaning of "force or violence" in residential burglary was not error where defendant's own statements supported an inference that he "armed himself with the scissors, entered the sleeping girl's bedroom and disturbed her quilt before being interrupted"].) But that is not true where, as here, battery is the criminal activity underlying the factor (b) aggravator; the jury is instructed in the specialized "slightest unlawful touching" definition of "force and violence" under section 242 (see 12 RT 1397); the evidence presented by the prosecution to prove the battery involves only minimal touching; and nothing else about the factor (b) evidence conveys the common-sense meaning of "force or violence" that defines the aggravator. In this situation, where the other-crimes evidence involved a trivial use of force, a juror likely would equate the technical "simple unlawful touching" definition of "force and violence" given in CALJIC No. 16.141 with the "force or violence" requirement in factor (b). (Cf. *People v. Davis*, *supra*, 10 Cal.4th at pp. 541-542 [no likelihood that jury would have misapplied the battery instruction where batteries – kicking victim, lunging at victim with sword, slashing victim with knife, and striking and choking victim – "indisputably involved the use of 'force' and 'violence' and 'threats' of violence under their common connotations"].)

Simply put, the trial court's instructions on factor (b) neglected to inform the jury that two separate requirements relating to "force" and "violence" applied to their assessment of the alleged battery – one, defined by CALJIC No. 16.141, for its determination of whether the prosecution had proved beyond a reasonable doubt that Buenrostro had committed a battery on the nurse and the other, left wholly undefined, for its determination of whether the battery, if proved, qualified for consideration as a factor (b) aggravator. In this context, the instructions were ambiguous. A juror is likely to have reasonably but erroneously applied the only definition provided by the instructions – the section 242 meaning – to all the determinations regarding "force" and/or "violence" he or she had to make with regard to the factor (b) evidence. Defense counsel unsuccessfully sought to avoid this problem by requesting clear definition of these elements. In this case, where both alleged crimes involved de minimis force and no violence by Buenrostro, the jury likely could have concluded that *any* force, the grabbing of the nurse's sleeve, entitled them to place the battery "on death's side of the scale" (*Stringer v. Black* (1992) 503 U.S. 222, 232), even though, as shown previously, it lacked the probity of her propensity for violence that would justify such use. In this way, there is a reasonable likelihood that in violation of the Eighth Amendment requirement of reliable and non-arbitrary capital-sentencing, the incomplete instruction misled at least some jurors to give aggravating weight to a trivial incident that should not have influenced their death verdict. *(Boyde v. California, supra*, 494 U.S. at p. 380 [stating standard of review for ambiguous penalty-phase instructions].)

E. The Erroneous Admission Of, And The Erroneous Instruction On, The Pill-Run And Mop-Wringer Crimes Require Reversal Of The Death Sentence

The admission of the other-crimes evidence was prejudicial under either the state law "reasonable possibility" standard (*People v. Brown*, *supra*, 46 Cal.3d 432 at pp. 447-448) or the federal constitutional "reasonable doubt' standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24). As discussed in Argument XIV, section F. *ante,* the impact of the erroneously-admitted evidence must be considered in light of all the penalty-phase evidence – the highly aggravated nature of the capital crimes for which Buenrostro denied all responsibility, juxtaposed with mitigating evidence that Buenrostro had been a good mother whose behavior underwent a strange and unexplained transformation just before the murders. In this context, the trivial nature of the factor (b) evidence and attendant instructional error initially might appear harmless. But that was not the case because the prosecutor pointedly used this evidence in his quest for a death sentence.

At the in limine hearing the trial court raised the question whether the jail incidents "were a sufficient aggravating factor" to present to the jury. (11 RT 1223.) The prosecutor's use of, and argument about, the evidence answered this question. He apparently thought the other-crimes evidence was important, and he made this view clear to the jury. The prosecutor inflated these insubstantial incidents into proof of Buenrostro's continuing violent nature and more particularly her potential for future dangerousness to those around her in prison:

> And you heard from correctional officers at the jail, about some incidents that may appear minor, but let's examine them for a minute and see if they really are that minor. They involved force and threats of force.

* * *

> What's she capable of doing to other people, when they get in the way, when she gets angry? Her violence is obvious. She has committed the most violent act known to mankind, three times, with a space in between the killings.
>
> And she continues to be hostile. It is appropriate for you to consider her dangerousness in deciding the appropriate penalty here, because she won't be alone in prison. There are staff, there are other inmates, there's nurses. Nothing's changed. She's the same person who killed in 1994 . . . .

(12 RT 1411.) The prosecutor's objective was plain – to erase the qualms the jury may have felt about sentencing to death a woman around whom swirled suggestions of mental illness and to replace any such concern with the fear that she might hurt others if sentenced to life without parole. As discussed in Argument XIV, section F. *ante*, at least some members of the jury wondered about Buenrostro's competence to stand trial. Concern about her mental state would have been a forceful mitigating factor, but the trial court instructed them that her competency was not an issue for the jury to decide. (36 CT 10028.) In addition, the penalty verdict was not returned quickly. In this context, the other-crimes evidence likely was the push toward death that the prosecution needed and likely tipped the deliberations toward a death sentence.

The instructional error increased the likelihood that the erroneously admitted other-crimes evidence prejudiced the penalty verdict. The trial court's failure to instruct adequately on the "force or violence" requirement of factor (b) kept from the jurors the legal principles that would have enabled them to critically scrutinize the prosecution's other-crimes evidence against the full requirements of the law and reject the evidence as insufficient for placing factor (b) aggravators on death's side of the penalty equation.

In sum, the admission of the other-crimes evidence, taken singly or together, and the with the instructional errors were not harmless under either *Chapman v. California*, *supra*, 386 U.S. at p. 24, or *People v. Brown*, *supra*, 46 Cal.3d at p. 448. The death verdict must be reversed.

XVI. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT DEATH WAS THE MORE SEVERE OF THE TWO AVAILABLE PENALTIES

Before jury selection, the trial court granted the prosecutor's objection and deleted from the jury questionnaire an explanation that the law deems a death sentence to be more severe that a sentence of life in prison without the possibility of parole. It became apparent during jury selection that the sitting jurors did not understand this legal principle. Nonetheless, the trial court at the penalty phase erroneously failed to instruct the jury as to which penalty is more severe. This error resulted in the violation of Buenrostro's state and federal constitutional rights to a fair penalty trial and a reliable and non-arbitrary determination of penalty (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th & 14th Amends.), and requires reversal of her death sentence.[141]

A. The Trial Court Did Not Instruct The Jury that A Death Sentence Was More Severe Than A Life-Without-Parole Sentence, Even Though Most Of The Sitting Jurors Made Clear They Did Not Understand This Legal Principle

As explained previously, the question whether death or life imprisonment without the possibility of parole was the more severe punishment arose during jury selection. (See Argument IX, Section B.2.b., regarding the exclusion of prospective juror Frances P.) The proposed questionnaire would have informed the jurors as follows: "'[T]he law assumes that a sentence of death is more severe than a sentence of life

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[141] As explained in Argument I, Section E, and incorporated by reference here, this claim of error is cognizable on appeal under section 1259, even in the absence of a request at trial.

without possibility of parole, and you must too. Can you follow this instruction?'" (4 P-RT 569.) The prosecutor objected to this part of the questionnaire because he did not "know that the law assumes that it's more severe." (*Ibid.*) The trial court (per Judge Sherman) disagreed with the prosecutor: "Oh, I think so. They are not going to give the defendant a benefit in their mind by sentencing her to death, Mr. Soccio, not in this court." (*Ibid.*) The court elaborated its concern in response to the prosecutor's question asking why the explanation was necessary:

> Because many jurors assume that life without possibility of parole is worse. They think about sitting in jail for the rest of their lives, especially if they're young, and they say I wouldn't want that, I'd rather have death. The problem you seek to avoid is them giving her some kind of benefit by sentencing her to death.

(4 P-RT 559-560.) Nevertheless, yielding to the prosecutor's objection, the court deleted this reference from the jury questionnaire. (4 P-RT 560.) Instead, the questionnaire asked, "Do you have an opinion as to whether you think death or life in prison is the more severe punishment? . . . If yes, please explain which you feel is more severe and why." (*Ibid.*; 21 CT 5946.) As explained previously (see Argument IX, Section B.2.b.), eight of the sitting jurors and one alternate did not have an opinion about which penalty was more severe;[142] one sitting juror did not answer the question;[143]

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[142] See 22 CT 6014 (Juror No. 2); 32 CT 8959 (Juror No. 3); 22 CT 6142 (Juror No. 7); 22 CT 6174 (Juror No. 8); 22 CT 6206 (Juror No. 9); 32 CT 8991 (Juror No. 10); 22 CT 6238 (Juror No. 11); 23 CT 6270 (Juror No. 12); see also 23 CT 6334 (Alternate Juror No. 2).

[143] 22 CT 6110 (Juror No. 6).

three sitting jurors viewed death as more severe,[144] and two alternates viewed a life-without-parole sentence as more severe.[145] At the penalty phase, the trial court (per Judge Magers) did not instruct on this legal principle.

B. The Failure To Inform The Jury That Death Is The More Severe Penalty Was Constitutional Error

The United States Supreme Court has long considered death to be qualitatively different in its severity from all other punishments. In *Woodson v. North Carolina* , *supra*, 428 U.S. at p. 305, the Court stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Much of the high court's capital jurisprudence is based on this fundamental premise: "There is no question that death as a punishment is unique in its severity and irrevocability." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187; accord, *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Coker v. Georgia* (1977) 433 U.S. 584, 598.) Life imprisonment – even without the possibility of parole – is not as severe as death. (See *California v. Ramos* (1983) 463 U.S. 992, 1024 [permanent imprisonment is less severe than a death sentence].) The Court has been absolutely clear on this point: "Because the death penalty is the *most severe* punishment, the Eighth Amendment applies to it with special force." (*Roper v. Simmons* (2005) 543 U.S. 551, 568, citing *Thompson v.*

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[144] 22 CT 5982 (Juror No. 1); 22 CT 6046 (Juror No. 4); 22 CT 6078 (Juror No. 5).

[145] 23 CT 6302 (Alternate Juror No. 1); 32 CT 9023 (Alternate Juror No. 3).

Oklahoma (1987) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.), italics added.)

Most of the sitting jurors, as well as the prosecutor, did not understand that the law holds that a sentence of death is more severe than a sentence of life in prison without the possibility of parole. Before jury selection, the trial court made clear that it understood the problem, but decided not to address the issue at that point. Significantly, the answers of the sitting jurors to the questionnaire underscored the issue: the majority of the sitting jurors obviously did not understand this point of law. Although their answers demonstrated the necessity of an instruction explaining that death is the more severe punishment, the trial court did not remedy the jurors' ignorance of the law at the penalty phase. The trial court's failure to instruct on this pivotal principle was erroneous and violated the Eighth and Fourteenth Amendments.

When the State seeks death, courts must ensure that every safeguard designed to guarantee "fairness and accuracy" in the "process requisite to the taking of a human life" is painstakingly observed. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; see also *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) As a result, the Eighth Amendment requires a "greater degree of accuracy" and reliability. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 ["[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim or error."].) Allowing the decision between life or death to turn on a misunderstood legal concept is inconsistent with the degree of reliability required by the Eighth Amendment. As the high court has stated:

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

(*Mills v. Maryland* (1988) 486 U.S. 367, 383-384.) The trial court here disregarded this basic constitutional requirement. Its failure to instruct the jury that death is the more severe penalty, especially given that the sitting jurors obviously were ignorant of the law, denied Buenrostro a fair penalty trial and a reliable and non-arbitrary sentencing determination in violation of the Eighth and Fourteenth Amendments.

C. The Instructional Error Requires Reversal Of The Death Verdict

As set forth in Argument XIV, Section F and Argument XV, Section E (and incorporated by reference here), the case for death was not overwhelming. Although the crimes were aggravated, the suggestion that Buenrostro had mental problems, her family's love for her and their pleas for mercy, the jury's question about her competence to stand trial, and the length of the penalty deliberations, taken together, indicate that the a death sentence was not inevitable. In light of these factors, the failure to inform the jury that death was the more severe penalty, especially when the sitting jurors obviously did not understand the law, was prejudicial under either the state reasonable-possibility standard (*People v. Brown*, *supra*, 46 Cal.3d at pp 447-448), or the federal reasonable-doubt standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24). The death judgment must be reversed.

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

Many features of California's capital-sentencing scheme violate the United States Constitution. Buenrostro requested modified instructions to remedy most of these defects, but her requests were summarily denied. (12 RT 1280.) This Court consistently has rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Buenrostro briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, Buenrostro requests the right to present supplemental briefing.[146]

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[146] As explained in Argument I, Section E, and incorporated here, these claims of error are cognizable on appeal under section 1259, even when Buenrostro did not seek the specific instruction or raise the precise claim asserted here.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against Buenrostro, Penal Code section 190.2 contained nineteen special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider Stanley and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Factor (a), Violated Buenrostro's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 36 CT 10096.) Prosecutors throughout California have argued that the jury

could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

In this case, the prosecutor under factor (a) walked the jury through the killings through the victims' eyes. He reminded the jurors of the "soothing, reassuring feeling of comfort" that a child feels asleep at home at night. (12 RT 1405.) He then asked them to imagine Susana being awoken from her sleep: "startled by the pain of a knife being driven through her jugular vein, through her skin all the way into the back to stick into the bone" only to discover that "the person inflicting that pain was the person who had bathed her as a baby, who had held her when she was sad, who had told her to go to sleep that night on the couch and relax. Who, by her very presence, reassured Susana and Vincent, 'It's okay. Sleep here. Sleep with me.'" (12 RT 1405-1406.) The prosecutor similarly argued the circumstances of the Vicente's and Deidra's death. (12 RT 1406-1408.) In urging the jury to return a death sentence, the prosecutor emphasized "the savagery, the coldness, the lack of remorse by this woman" – all factor (a) evidence. (12 RT 1410.) The prosecutor also highlighted the victim impact evidence, which was admissible as factor (a) evidence. He reminded the jurors of the videotape they watched of Alex hearing the news of his children's deaths and of the lifelong grief that Alex would suffer. (12 RT 1403-1404.)

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) Buenrostro raised this claim in the trial court (36 CT 10045-10050), but the trial court rejected it (12 RT 1280). Buenrostro is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) She urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Buenrostro's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, Buenrostro's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 36 CT 10096; CALJIC No. 8.88; 36 CT 10105.)

Apprendi v. New Jersey, *supra*, 530 U.S. at p. 478, *Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-305, *Ring v. Arizona*, *supra*, 530 U.S. at p. 604, and *Cunningham v. California*, *supra*, 127 S.Ct. at pp. 864-865, 871, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Buenrostro's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No.

8.88; 36 CT 10105.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. Buenrostro requested a special instruction that any aggravating factors had to be found beyond a reasonable doubt by a unanimous jury. (36 CT 10045.) The trial court denied this request. (12 RT 1280.) The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Buenrostro is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Buenrostro urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Buenrostro contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the

Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Buenrostro requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Buenrostro is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Buenrostro's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (36 CT 10096, 10105), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has rejected any instruction on

the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Buenrostro is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Buenrostro's Death Verdict was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Buenrostro made this point when she unsuccessfully requested a special instruction that any aggravating factors had to be found beyond a reasonable doubt by a unanimous jury. (36 CT 10045; 12 RT 1280.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Buenrostro asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the

overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Buenrostro asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon Buenrostro hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC 8.88; 36 CT 10105.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) Buenrostro requested an alternative instruction that would have remedied this defect (36 CT 10068), but the trial court denied her request (12 RT 1280).

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Buenrostro asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the

aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution. Buenrostro requested that a supplemental instructions that would have made clear that the jury must select the "appropriate" penalty, (36 CT 10069-10070, 10072), but the trial court denied her requests (12 RT 1280).

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Buenrostro urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California*, *supra*, 494 U.S. at p. 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the

rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Buenrostro's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Buenrostro identified this problem (36 CT 10072), and argued that the standard set forth in this instruction violates the Eighth and Fourteenth Amendments by creating a presumption in favor of death (36 CT 10071), but the trial court overruled her objection (12 RT 1280).

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Buenrostro submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 473-474.)

7. The Instructions Failed to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ 127 S.Ct. 1706, 1712-1724; *Mills v. Maryland*, *supra*, 486

U.S. at p. 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation. Buenrostro requested that the instructions on factor (k) be supplemented to make clear that she did not have to prove mitigating factors beyond a reasonable doubt. (36 CT 10073.) And she requested other supplemental instructions designed to ensure that the jury gave full consideration to the mitigating evidence. (36 CT 10065-10068.) The trial court summarily denied all of these requests. (12 RT 1280.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Buenrostro requested that the jury be instructed that they need not be unanimous to consider mitigation (36 CT 10068), but the trial court denied her request (12 RT 1280). Buenrostro's jury was told in the guilt phase that unanimity was required in order to acquit Buenrostro of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury

erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial, and requires reversal of Buenrostro's death sentence, since she was deprived of her rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Buenrostro's right to due process of law (U.S. Const., 14th Amend.), her right to be free from cruel and unusual punishment and to have her sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and her right to the equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the

state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That The Jury Make Written Findings Violates Buenrostro's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Buenrostro's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Buenrostro of her rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as her right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Buenrostro urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Buenrostro's Constitutional Rights

1. The Instructions Used Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85(d) and (g); 36 CT 10096; 12 RT 1393-1395; Pen. Code, § 190.3, factors (d) and (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486

U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Buenrostro objected to the word "extreme" in CALJIC 8.85(d) (36 CT 10059), requested a clarifying instruction about the mental disturbance factor (36 CT 10060-10062), and, as discussed in subsection 2 below, requested that factor (g) be deleted (36 CT 10063). The trial court denied these requests. (12 RT 1280).

Buenrostro is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Instructions Failed to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Buenrostro's case. (CALJIC 8.85(e), (f), (g), (i), and (j).) The trial court failed to omit those factors from the jury instructions (36 CT 10096; 12 RT 1393-1395) likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Buenrostro requested that these inapplicable sentencing factors be omitted from Buenrostro's penalty phase jury instructions. (36 CT 10043, 10062-10065.) In addition, Buenrostro requested the following clarifying instruction on this point. (36 CT 10044.) The trial court denied these requests. (12 RT 1280.)

Buenrostro asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Instructions Failed to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (36 CT 10096.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Buenrostro objected to "the failure of the California scheme to identify which factors are aggravating and which are mitigating" thereby creating the risk of arbitrary and capricious imposition of the death sentence . . .." (36 CT 10050.) Buenrostro also objected to the "whether or not" language in the instruction as "likely to mislead the jury into believing that the absence of th[e] factor can be considered in aggravation." (36 CT 10059.) She further requested that the jury be instructed that "[t]he absence of a statutory mitigating factor does not constitute an aggravating factor." (36 CT 10044.) The trial court denied all these requests. (12 RT 1280.) Buenrostro's jury, therefore, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate Buenrostro's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, Buenrostro asks

the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

4. The Instructions Failed to Inform the Jury That Lingering Doubt Could Be Considered a Mitigating Factor

The instructions failed to inform the jury that it could consider lingering doubt as to Buenrostro's guilt as a mitigating factor in determining the appropriate punishment. Buenrostro requested such an instruction on lingering doubt (36 CT 10054-10055), but the trial court denied her request (12 RT 1280). This Court has held that evidence and argument about lingering doubt can be presented as a mitigating circumstance (*People v. Gay* (2008) 42 Cal.4th 1195, 1218; *People v. Terry* (1964) 61 Cal.2d, 137, 145-147), but nonetheless repeatedly has held that a lingering doubt instruction is not required by state or federal law, and that the concept is sufficiently covered in CALJIC No. 8.85 (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 370; *People v. Cox* (1991) 53 Cal.3d 618, 675-679.) Contrary to these rulings, the trial court's refusal to give the instruction on lingering doubt violated Buenrostro's federal constitutional rights to due process, equal protection, the full consideration of her mitigating evidence and a reliable and non-arbitrary penalty determination. (U.S. Const., 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [right to present mitigation]; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [having jury consider lingering doubt as a mitigating factor is a state created-liberty interest protected by Due Process Clause]; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 383-384 [requirement of heightened reliability in capital sentencing].) Buenrostro asks the Court to reconsider its previous decisions.

5. The Instructions Failed to Inform the Jury Not to Consider the Deterrent Effect or the Cost of the Death Penalty

The instructions failed to inform that jury not to consider the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of executing a defendant or maintaining her in prison for life without the possibility of parole. Such factors are wholly irrelevant to a defendant's deathworthiness and risk an arbitrary, capricious and unreliable capital-sentencing decision in violation of the Eighth and Fourteenth Amendments. Buenrostro requested that CALJIC No. 8.84.1 be supplemented with an instruction that informed the jury that deterrence and cost were improper considerations for the determination of penalty (36 CT 10040-10041), but the trial denied her request (12 RT 1280). This Court has held that a trial court does not err in refusing to give such an instruction where "'neither party raise[s] the issue of either the cost or the deterrent effect of the death penalty . . .. [Citation omitted].'" (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 371.) The assumption that considerations of deterrence and cost may affect a jury's penalty determination only when the issues are directly raised by the parties is mistaken, especially where, as here, the subjects are raised in the jury questionnaire and in voir dire. (See 21 CT 5946 [Question 76]; 4 RT 259, 509.) Buenrostro asks the Court to reconsider its prior decisions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Buenrostro urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Buenrostro acknowledges that the Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but she asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Buenrostro urges the Court to reconsider its previous decisions.

XVIII. THE CUMULATIVE EFFECT OF THE ERRORS AT THE CRIMINAL TRIAL UNDERMINES THE RELIABILITY OF THE CRIMINAL JUDGMENT

As set forth with regard to the competency trial, even assuming that none of the errors at the criminal trial, by itself, is prejudicial, the cumulative effect of these errors undercuts confidence in fairness of the trials and the reliability of the jury's first degree murder verdicts, findings of special circumstances and sentencing enhancements, and determination that death is the appropriate sentence for Buenrostro, and warrants reversal of the judgment. (See Argument VII which is incorporated here.) Per se reversal of all the verdicts is required separately by three of the errors: (1) the erroneous denial of a second competency hearing (Argument VIII); (2) the erroneous exclusion of three prospective jurors because of their death penalty views (Argument IX); and (3) the erroneous denial of Buenrostro's request to represent herself (Argument XI). But even if the *Faretta* error (Argument XI) does not require automatic reversal, the prejudice from being denied the right to conduct the defense personally as Buenrostro wanted, combined with the instructional errors (Argument XII), unfairly impeded her chances of non-capital second degree murder convictions.

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Buenrostro's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) The cumulative prejudice with regard to the death sentence is pronounced. The evidentiary errors in admitting inflammatory victim impact evidence (Argument XIV), along with the non-violent but prejudicial other-crimes evidence (Argument XV), distorted the penalty phase and unfairly stacked the evidentiary deck in favor of a death sentence, although that penalty, by no means, was an inevitable or appropriate verdict. Indeed, the jury's

question about Buenrostro's competency indicated some hesitation about the sentence. The prejudicial effect of each of these evidentiary errors was compounded by an accompanying instructional error, which all but guaranteed that the erroneously-admitted victim impact and other-crimes evidence would not be assessed in a measured, limited, and non-inflammatory way. Moreover, all these errors were exacerbated by the trial court's failure to make clear to the jury that a death sentence is presumed to be more severe than a sentence of life imprisonment without the possibility of parole (Argument XVI) and the other defects in California's capital-sentencing scheme (Argument XVII).

In this way, the errors at the penalty phase – even if individually not found to be prejudicial – precluded the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra,* 476 U.S. at p. 8; *Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of Buenrostro's convictions, true findings of the special circumstances and sentencing enhancements, and death sentence.

CONCLUSION

For all of the reasons stated above, the entire judgment – the verdicts of competence, the convictions, the special circumstance findings, the sentencing enhancements, and the sentence of death – must be reversed.

DATED: September 26, 2008

Respectfully Submitted,

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(Cal. Rules of Court, Rule 8.630(b)(2))

I, Nina Rivkind, am the Supervising Deputy State Public Defender assigned to represent appellant Dora Buenrostro, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 115,561 words in length.

Dated: September 26, 2008

NINA RIVKIND
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Dora Buenrostro* S073823

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

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Each said envelope was then, on September 26, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on September 26, 2008, at San Francisco, California.

Glenice Fuller
DECLARANT