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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S092410
Respondent,	)	
vs.	)	Los Angeles Superior Court No. PA030589-01
SANDI DAWN NIEVES,	)	
Appellant.	)	

ON AUTOMATIC APPEAL FROM A JUDGMENT
AND SENTENCE OF DEATH

Los Angeles County Superior Court

Hon. L. Jeffrey Wiatt, Judge Presiding

APPELLANT'S OPENING BRIEF

VOLUME 1 of 2

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S092410
Respondent,	)	
vs.	)	Los Angeles Superior Court No. PA030589-01
SANDI DAWN NIEVES,	)	
Appellant.	)	

ON AUTOMATIC APPEAL FROM A JUDGMENT
AND SENTENCE OF DEATH

Los Angeles County Superior Court

Hon. L. Jeffrey Wiatt, Judge Presiding

APPELLANT'S OPENING BRIEF

VOLUME 1 of 2

I. STATEMENT OF THE CASE

A. Nature of the Case; Proceedings Below; Judgment of the Superior Court

1. Nature of the Case and Judgment of the Superior Court

This is an automatic appeal from a judgment that defendant Sandi Dawn Nieves be put to death.

Defendant was sentenced by the Los Angeles County Superior Court following her conviction of four counts of murder with special circumstances, attempted murder and arson. The judgment was entered on October 6, 2000. 22 RCT 5616 (Commitment and Judgment of Death), 5629 (Abstract of Judgment, Commitment).

2. Proceedings Below

a. Pretrial Proceedings

Defendant Sandi Dawn Nieves was charged in the Los Angeles County Municipal Court, Case No. PA 030589. The complaint was filed on July 6, 1998. It charged that she had committed four counts of first degree murder in violation of Penal Code § 187, with special circumstances (multiple murder, lying in wait and felony murder) in connection with the deaths of Nikolet Amber Nieves, Kristl Dawn Folden, Jaqlene Marie Folden and Rashel Hollie Nieves on or about July 1, 1998 (counts I-V). The complaint further charged that defendant had committed one count of attempted murder of David Fernando Nieves in violation of Penal Code § 664/187(a) on or about July 1, 1998 (count V). It further charged that defendant had committed one count of arson causing great bodily injury on or about July 1, 1998, in violation of Penal Code § 451(a) (count VI). 9 RCT 1999-2005.

The preliminary hearing before the Hon. Ronald S. Coen, sitting as a Municipal Court Judge, began on May 25, 1999 and continued through June

2, 1999. At the conclusion of the preliminary hearing, the court bound defendant over for trial on all counts. 9 RCT 1993 (6/2/99 Preliminary Hearing Transcript).

An information was filed on June 16, 1999. It charged defendant with four counts of first degree murder in violation of Penal Code § 187 in connection with the deaths of Nikolet Amber Nieves, Kristl Dawn Folden, Jaqlene Marie Folden and Rashel Hollie Nieves (counts I-IV) and alleged special circumstances of multiple murder (Penal Code 190.2(a)(3)), murder committed while engaged in the commission of the crime of arson (Penal Code § 190.2(a)(17)), and murder committed while lying in wait (Penal Code § 190.2(a)(15)). The information further alleged one count of attempted murder in violation of Penal Code § 664/187(a) related to David Fernando Nieves (count V), and one count of arson causing great bodily injury in violation of Penal Code 451(a) (count VI). 9 RCT 2014-2018.

On June 16, 1999, defendant was arraigned in Los Angeles County Superior Court before the Hon. L. Jeffrey Wiatt. She entered a plea of not guilty as to each count and denied the special circumstances alleged in the information. 1 RT 3, 9 RCT 2019 (6/16/99 Minute Order).

On September 7, 1999, the People filed a notice pursuant to Penal Code § 190.3. It stated that the People intended to introduce victim impact evidence and the facts of the crime as evidence of aggravation. 10 RCT 2109

Defendant filed several pretrial motions. On December 8, 1998, prior to the preliminary hearing, defendant filed a motion to dismiss the complaint on the basis of misconduct by the police and the prosecution. 3 RCT 476. The motion was initially ruled premature and taken off calendar on December 14, 1998. 2 RCT 210. On April 28, 1999, the court held a

hearing on the motion to dismiss and denied it. 6 RCT 1180.

On July 12, 1999, defendant filed a motion to set aside the information pursuant to Penal Code § 995. The motion was made on the grounds that the evidence presented at the preliminary hearing was insufficient to establish first degree murder or the alleged special circumstances, that defendant was prohibited from presenting a complete defense at the preliminary hearing, and that the court was biased in favor of the prosecution. 10 RCT 2043-2060. The motion was denied on August 23, 1999. 10 RCT 2107, 3 RT 114.

On March 23, 2000, defendant filed motions challenging the admissibility of evidence obtained as a result of searches of defendant's home and as a result of the review of her mail and telephone conversations while she was in the County jail. 11 RCT 2364, 2367. These motions were denied on March 28, 2000. 11 RCT 2505, 9 RT 485, 489, 501, 511.

On May 30, 2000, during the trial, an amended information was filed. It alleged four counts of first degree murder in violation of Penal Code § 187 in connection with the deaths of Nikolet Amber Nieves, Kristl Dawn Folden, Jaqlene Marie Folden and Rashel Hollie Nieves (counts I-IV), with special circumstances of multiple murder (Penal Code 190.2(a)(3)), murder committed while engaged in the commission of the crime of arson (Penal Code § 190.2(a)(17)), and murder committed by means of lying in wait (Penal Code § 190.2(a)(15)). It further alleged one count of attempted murder in violation of Penal Code § 664/187(a) related to David Fernando Nieves (count V), and one count of arson of an inhabited structure or property in violation of Penal Code 451(b) (count VI). 18 RCT 4487-4492; 28 RT 3608:7 - 3609:22. Defendant entered a plea of not guilty to the amended count VI on May 30, 2000. 28 RT 3609.

The amended information was again amended on July 18, 2000. In counts I-IV, the lying in wait special circumstances allegation was modified to allege murder committed "while lying in wait" rather than "by means of lying in wait." 18 RCT 4488, 4489 and 4490. As further amended, the superseding amended information set out the charges considered at the guilt phase of Sandi Dawn Nieves's trial.

b. Trial

i. Guilt Phase

Trial on the six counts alleged in the information started on April 24, 2000. 12 RCT 2928, 11 RT 633. Trial continued until June 1, 2000, when it was recessed for approximately two weeks. 18 RCT 4512, 30 RT 4112-4115. Trial recommenced on June 19, 2000. 18 RCT 4640-4641.

After closing arguments and instructions from the court, the jury started guilt phase deliberations on July 26, 2000. 20 RCT 5131. On July 27, 2000, the jury indicated it had reached a verdict. 20 RCT 5159. The jury found defendant guilty as to all counts. The jury found all of the alleged special circumstances to be true. 20 RCT 5160-5162, 58 RT 9026-9032.

ii. Penalty Phase

The penalty phase started on August 1, 2000. 21 RCT 5269; 60 RT 9266. The People offered victim impact evidence and the facts of the crime as aggravating circumstances, pursuant to Penal Code § 190.3. Defendant offered the testimony of some friends and of her aunt, a Los Angeles jail chaplain and a bishop of her church, in mitigation along with the testimony of a psychologist who had prepared a court ordered child custody report in connection with her divorce.

After closing arguments and instructions from the court, the jury

started penalty phase deliberations on August 8, 2000. 21 RCT 5383. On August 9, 2000, the jury returned its verdict. 21 RCT 5422. It recommended death. Id., 65 RT 10217.

iii. Post-Trial Proceedings

Following the penalty phase verdict, defendant moved for a new trial. 22 RCT 5535. On October 6, 2000, the court denied the motion for a new trial. 22 RCT 5630, 66 RT 10348, 10365-10366.

Pursuant to Penal Code § 190.4(e), the superior court considered defendant's automatic application to modify the death verdict. 22 RCT 5630. The court denied the application to modify. Id., 66 RT 10366.

The court then sentenced Sandi Dawn Nieves to be killed. 22 RCT 5616-5619, 66 RT 10391-10392. The court further sentenced her to seven years to life on count V (attempted murder) to run concurrent with the sentence imposed in counts I-V. 22 RCT 5638, 66 RT 10392-10393. The court further sentenced defendant to five years to run concurrent with the sentences imposed for counts I-V, but stayed the sentence on count VI pursuant to Penal Code § 654. 22 RCT 5638, 66 RT 10393-10394.

On October 10, 2000, the court imposed a restitution fine pursuant to Penal Code § 1204(b) in the amount of $10,000.00. 22 RCT 5641, 66 RT 10408.

On December 1, 2000, the court ordered defendant to pay restitution to the State pursuant to Penal Code § 1204(f) in the amount of $1,890.00 for David Nieves, $450.00 for Jaqueline Nieves, $900.00 for Fernando Nieves, $2,914.58 for Kristl Folden, $2,922.58 for Nikolet Folden, $2,922.58 for Rashel Folden, $3,580.25 for Jaqlene Folden, plus additional amounts to be determined. Supp RCT 1 at 2, 67 RT 10422-10423.

This automatic appeal follows.

II. SUMMARY OF SIGNIFICANT FACTS

A. Introduction

During the evening of June 30 or early morning of July 1, 1998 a fire occurred at the home of Sandi Dawn Nieves and her five children in Santa Clarita. Four children, girls aged five to twelve, died due to smoke inhalation. The fifth child David Nieves, age fourteen, survived. Sandi was convicted and sentenced to death for setting the fire and the resulting deaths.

Sandi had had complex relationships with men. She married Fernando Nieves when she was 19 years old. He was the father of three of the children, David, Nikolet, and Rashel. After a divorce from Fernando, Sandi married her stepfather, David Folden. Folden was the father of Kristl and Jaqlene. He also adopted the three older children, and his child support payments for all five children became Sandi's only source of income.

By most accounts Sandi had been a good mother before the fire. There was no evidence of child abuse, malnutrition or neglect. By some accounts she was overly controlling of her children, but prior to the fire there was little question that she loved them.

After a divorce from David Folden, Sandi befriended Scott Volk, a man who was eight or nine years younger. She became pregnant by him. This would have been her sixth child. When he learned of the pregnancy, he broke up with her.

Following the loss of Scott Volk, Sandi had an abortion. The abortion occurred several days before the fire. During this period she was served with legal papers by David Folden who sought to annul his adoption of the three older children and terminate them. A court hearing was set for July 2, 1998.

Although the evidence at trial was mixed, it appears that prior to the fire Sandi was in turmoil. The prosecution argued that Sandi intended revenge against the men in her life by killing her children. The defense contended that Sandi's life collapsed around her and that she had been in a dissociative state when the fire occurred. The defense contended that Sandi did not act with the mens rea required for conviction. It also argued that Sandi, intent on committing suicide, also set the fire for the sake of the children, believing they would be better off in heaven with her than living with either of their fathers.

B. Guilt Phase

1. The Prosecution Case

On July 1, 1998, at 1:09 p.m., Catherine Casterino, a law enforcement technician, took a 911 call from a person who identified herself as "Sandi" – 27445 Cherry Creek Drive. 16 RT 1475-77; Trial Exhibits [hereafter "Exhs."] 1-A and 1-B. The caller said there had been a fire "last night." When asked how the fire started, the caller said, "I have no clue." Exh. 1-B, at 2:2-3. The caller said she had children who were in the kitchen on the floor, but that she did not know their condition. Id. at 3:1-5. Castorino testified that the caller seemed "confused." 16 RT 1486:11-14. After giving paramedics her address in Santa Clarita and her phone number, the caller said that "everything is black." Id. at 4:15; 5:4. The caller explained that she had five kids, that she was thirty-four years old, and that she could not stand without swaying. Id. at 6:6-22. She said the smoke had "just kind of knocked me out." Id. at 9:5-9. She denied being on medications or feeling depressed. Id. at 8:14-22, 9: 12-14.

Castorino told paramedics that she was "not sure what she's got there, sounds like she might be a 5150." Id. at 5:23-24.[1]

Bruce Alpern, a firefighter paramedic testified that he arrived at the home at 1:20 p.m. He saw a van backed into the driveway touching up against the garage door of the home facing outward. 16 RT 1497:21-1501:5. Sandi Nieves answered the door. She was covered in soot. He also saw David and then asked both of them to step out and sit on the grass. Id. at 1501:23-1504:6. In the kitchen area, Alpern found four girls lying in middle of the kitchen floor. They were lying on sleeping bags and blankets and had foam around their mouths. He pronounced them dead. 16 RT 1506:4-1509:7; Exhs. 3 A-F, 4 A-D.

In one of the bedrooms, Alpern found a gas can with a pour spout attached.[2] In the stove was a burned dish towel and what looked like a

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[1] Over the defense objection, the court prohibited the defense from asking, on cross-examination, about the 5150 reference, about Castorino's interpretation of the phone call, or anything other than whether Castorino recalled anything that was not included on the tape. 16 RT 1487:25-1491:23. The judge said these questions were irrelevant. "The only question you can ask is if there is something that she said that is not on that tape; if she can recall anything that was said by the caller that is not contained on that tape, and that's it. That's the end of the inquiry." Id. at 1490:24-28. After breaking up defense counsel's cross examination by abruptly ordering counsel into chambers, the court said it would hold an Evidence Code § 402 hearing at a later time. Id. at 1491:9-13.

The court summarily stated it would not allow the defense to question Castorino as to the mental state of the caller during the prosecution's case-in-chief. 18 RT 1868:28-1874:14.

[2] A prosecution fingerprint specialist later testified that she could not determine who last touched the can. She did not find prints on the handle. 25 RT 3271:12-3272:3 (testimony of Karla Taylor).

tablecloth.[3] He smelled gasoline in the hallway. 15 RT 1510:19-1514:12. Alpern talked to Sandi Nieves outside the house. She asked about her "kids," but showed no emotion when Alpern told her they were dead. 16 RT 1516:24- 1520:24, 1538:26-27, 1590:14-19, 1601:22-28-1609:1.

Paramedic John Harm corroborated Alpern's observations. He also testified that the stove was still warm and that the gasoline can had about an inch and a half of liquid in it. 16 RT 1632:25-27, 1643:18-20, 1643:20-1646:26.[4] Maryse Ford, a neighbor, testified she smelled smoke at about 3:30 a.m. when she got out of bed to go to the bathroom. 17 RT 1664:1-1665:22. Another neighbor, Benjamin Debene, testified that he never saw Sandi Nieves's children outside, that her shades were always drawn, and that the van was usually parked head first in the driveway. Id. at 1674:18-1678:10. He also said he smelled smoke at 7:00 a.m. Id. at 1677:10-15. A third neighbor, Gregg Lewison, said Nieves's curtains were usually drawn, that her children did not play with other kids on street, that her van was usually parked head on, and that he, too, smelled smoke. Id. at 1699:5-1703:24, 1718:3-21.

James Ribe, M.D., a senior deputy medical examiner, performed an autopsy on Jaqlene Folden. He found she died from inhalation of products of combustion, that is, smoke inhalation. 17 RT 1720:11-1724:5. He described a typical death from inhalation as a combination of suffocation, internal lung injury, carbon monoxide intoxication, and irritative effects of

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[3] John Ament, a sheriff's fire investigator, testified that the towel did not smell of gasoline. It likely was burned from the stove. 19 RT 2024:10-22, 2026:26-2029:21.

[4] Ament estimated about one-half gallon of gasoline remained in the can. 18 RT 1970:2-6.

being in a fire. He said death usually takes between 30 minutes and several hours. Id. at 1724:22-1726:28. Pulmonary edema fluid is expelled from the lungs after death. Id. at 1731:1-28. He also performed the autopsy of Kristl Folden and assigned the same cause of death. Id. at 1733:1-1735:4. He testified that the major cause of death was carbon monoxide, but they both could have died without carbon monoxide. Id. at 1741:17- 1742:1. His best estimate of the time of death was "sometime between the time they were last known to be alive and the time when the bodies were found." Id. at 1760:12-14. See id. at 1772:8-19 (between four and twenty four hours).

Dr. Ribe did say that carbon monoxide poisoning leads to "diminished mentation or lower ability to process thought material by the brain." 17 RT 1778:23-25. It dulls both the brain and the body. It can cause someone to be lethargic and flat and it could cause symptoms of disorientation. Id. at 1779:9-1781:17. Therefore, Dr. Ribe admitted that the children could have been in a coma during the dying process. Id. at 1784:4-1786:4, 1820:5-28. After looking at photos as well as findings it would be consistent that the children were sleeping when overcome with smoke inhalation. Id. at 1792:9-1820:28.

Dr. Ribe supervised Dr. Stephanie Erlich who performed the autopsy on Nikolet Folden and Rashel Folden. 18 RT 1830:10-15. He testified that they, too, died from inhalation of products of combustion. Id. at 1830:16-21. Logically, he said, all four girls were comatose before they died. Id. at 1847:10-17. There was no evidence of singeing or burning. Id. at 1854:11-17.

John Ament, a sergeant with the Sheriff's arson and explosives detail, said he entered the home with a warrant around 6:00 p.m. on July 1. 18 RT 1876:10, 1882:5-25. He saw the bodies in the kitchen. In the

hallway he observed a burn area 9½ to 10 feet long. It was irregularly shaped, indicating a flammable liquid had been poured. On the ground he saw a smoke alarm melted. The door to a bedroom was impinged and partially destroyed by fire. Fire had gotten into studs through drywall. Paint had blistered on the bathroom door. Id. at 1885:10-18, 1892:18-1894:19. He also observed that the smoke alarm did not have a battery. And he saw another unconnected pour area just inside the entryway of the northwest bedroom. It was about one by one and half to two feet, irregularly shaped. The Southwest bedroom had a trailer, that is, a "trail of liquid" that was poured on the carpet that ran from the hallway to the inside of the bedroom. It ran all the way to another pour area of about one by three feet, irregularly shaped. 18 RT 1896:2-1897:15. Over objection, he stated in response to leading questions that the cause of the heavy sooting was gasoline, synthetic carpet, and incomplete combustion. 18 RT 1903:17-1905:3. In his opinion, the fires were "deliberately and intentionally set." Id. at 1905:5-6. He estimated that one to one and a half gallons of gasoline had been used. Id. at 1905:20-21. The fire had burned out because it was poorly ventilated. Oxygen was depleted and the fire self-extinguished. Id. at 1907:3-7. He stated that the cause and origin of the fire was gasoline in the hallway, northwest bedroom, and southwest bedroom. Gasoline had been poured, ignited by an open flame. He also said there had been a fourth attempt utilizing the oven. All, in his opinion, were deliberate and intentional. Id. at 1917:2-21. He ruled out accidental causes. Id. at 1917:22-28. Over a defense objection, Ament testified that "My opinion is that the person lit this fire with the intent to burn the house down." Id. at 1918:1-20.

Ament said the fire probably lasted 15 to 20 minutes. Id. at 1935:12-25. Although there were many combustible items in the home, the gasoline pours were confined to the carpet area. However, the likelihood of the fire spreading was reduced by lack of ventilation. Id. at 1954:13-1961:17. If the fire had been better ventilated it could have consumed the entire house. 19 RT 2000:26-2001:9. He stated that putting gas on the carpet was a very "inept" way of setting the fire (id. at 2032:7-10), but later contradicted that statement by saying it was an excellently set fire, poorly ventilated (id. at 2056:26-2061:9).

Ament admitted he could not find a source of ignition when he went into the house on July 1, but said the most likely source was a lighter found six days later by detective Robert Taylor on top of the kitchen counter underneath some papers. 19 RT 2041:23-2044:18; 2076:21-27, 25 RT 3406:12-3408:22; Exhs. 61 and 62. No fingerprints were found on the lighter and no one found it on July 1, even though a portion was visible on July 6. Id. at 2077:3-11; 24 RT 3272:15-28; 3283:8-12, 25 RT 3445:6-3446:8.

Ament requested that Sandi and David Nieves's blood be tested for carbon monoxide. Carbon monoxide causes disorientation and a degree of lethargy. A carbon monoxide atmosphere causes people to have poor judgment. 19 RT 2050:22-2052:23.

Phil Teramoto, a senior criminologist in the Sheriff's Crime Lab, testified he tested Sandi Nieves's clothing and found evidence of gasoline. 28 RT 3626:19-3628:1. He found evidence of gasoline in carpet samples from the hallway and bedrooms (id. at 3628:2 - 3629:27), but he could not determine how long the carpet samples had contained gas or the amount of gas (id. at 3635:8 - 3636:26).

Scott Volk testified Sandi Nieves was not fond of ex-husband David Folden, but, because she did not work, she lived off child support payments that Folden sent to her. 19 RT 2092:12-24. See also 24 RT 2997:24-2998:9 (testimony of Fernando Nieves). Scott Volk also supported Sandi while he lived in her house. 23 RT 2767:9-18.

Volk said he met Sandi Nieves over the Internet. He was about eight or nine years younger than her. 19 RT 2111:2-2112:22. At the time they met he was living in Santa Clarita; she was living in Perris, California. They dated on and off until Sandi Nieves moved to Santa Clarita. Then he moved in with her about three months before the fire. Id. at 2088:23-2091:28. He broke up with her about a month and a half to two weeks before the fire. Id. at 2098:5-12; 2158:18-25. When he said he was leaving Sandi tried to talk him into staying. She told him she was pregnant. Id. at 2098:26-2099:10.

On July 1, Scott Volk received a pager call from Sandi. 19 RT 2101:10-2102:25; Exhs. 19A and 19B. The message said: "Hey Scott, um, we had a fire last night." Exh. 19A. A few days later he received a letter from Sandi in the mail. Id. at 2107:12-2109:13; Exh. 20A. It was in the form a love letter, saying she could not live without him, that she felt as if her heart had been ripped out, that it was her fault, that she would always love him. Exh. 20B.

On cross-examination, Volk said Sandi Nieves had been a "caring and devoted mother." She cooked for her children and for him. She helped the children with their homework. 19 RT 2116:6-23, 2138:13-16 ("it was pretty much a loving and caring relationship"). Id. at 2146:13-24, 2152:5-2153:3. He never heard her say bad things about her ex-husbands in front of the children. Id. at 2119:6-17. She expressed pride in her children. Id.

at 2122:15-19. She did not abuse them; she was civilized and polite; and she was available to the children. Id. at 2138:25-2139:27; 2140:9-21. She also took care of him by cooking, cleaning, having sexual relations with him, and driving him in her van. 23 RT 2775:22-2776:3.

When they were together in Santa Clarita, Scott learned Sandi was pregnant with his child. 19 RT 2149:24-2149:28. Volk recalled that he may have told the police he broke up with her because she was too old and had too many kids. Id. at 2150:8-17. Volk recalled Sandi had told him of a suicide plan: "send the kids away, write the letter, and let everybody know, and then she was going to kill herself." 22 RT 2741:28-2742:16, 2744:22-2747:12.

Dr. Charanjit Saroa, a pulmonary specialist, treated Sandi and David Nieves at Henry Mayo hospital after the fire. 20 RT 2204:25- 2205:13. When he examined Sandi, she had black soot in her nose; she had burned hairs in her nose and was coughing and a little hoarse. She did not mention blackouts, seizures, or fits when he took her medical history. She said nothing about organic brain disease, dissociative states or fugue states. She said she took doxyclyline after an abortion, but did not mention anti-depressants. Id. at 2205:19-2208:28.

Yolanda Collins, a hospital nurse, said that Sandi Nieves told her she was depressed about the abortion. She said something about her boyfriend. Collins told a sheriff's deputy that Sandi Nieves said she was depressed because one husband was trying to get custody of the kids. 20 RT 2260:5-2262:17, 2267:27-2268:5, 2282:12- 2285:23. She recalled Sandi lying in a fetal position in the hospital. Id. at 2271:11-14, 2289:25-2290:3.

The owner of the house, Clare Csernay, testified that she and her husband rented the home to Sandi Nieves, who said she would be moving in

with three children and her husband, Fernando Nieves. 20 RT 2306:25-2307:25, 2318:7-19. She testified that rent was due on the 28th of the month, but that she received a letter with a check postmarked June 30, 1998. Id. at 2309:14- 2310:2, 2311:22-2312:12; Exh. 26. On cross-examination, Csernay said Sandi Nieves was straightforward about her financial condition and always paid her rent on time. 20 RT 2321:27-2322:20, 2326:9-2327:3.

Alethea Volk, Scott's mother, testified she spoke to Sandi Nieves the morning before the fire and Sandi sounded depressed and upset. 20 RT 2358:8-2358:21. She received a letter from Sandi Nieves on July 1, postmarked June 29, 1998. It was dated June 28. Id. at 2359:4-7, 2360:25-26; Exh. 27. She tried to call Sandi on July 1 because the letter indicated she was depressed. Id. at 2364:3-8. Later she received a second letter dated, June 30. Id. at 2366:26-2368:2; Exh. 28.

On cross-examination she testified she believed, after she came to know Sandi Nieves, that Sandi had little self worth or self esteem. Id. at 2377:18-22. She gave Sandi a book on self respect because she believed Sandi needed it. 22 RT 2661:24-2662:25. She too found Sandi to be a loving and devoted mother. She treated the children equally. 22 RT 2664:10-2665:6, 2666:16-2666:22. Her children were the center of her life. According to Alethea Volk, Sandi was always doing things with them and for them. Id. at 2378:7-25. See also 2737:15-17 (Scott Volk). She was a calm and devoted mother. 2672:12-14; 2673:4-23.

Alethea testified that Sandi was concerned she would not have enough money to support another child. 22 RT 2670:9-12. Additionally Sandi said abortion would go against Mormon teachings and she would feel guilty and have to live with it for the rest of her life. Sandi discussed

getting fat and the burden of an additional pregnancy. 22 RT 2671:15-2672:1.

Sandi treated Alethea like an older sister. Alethea talked with her almost every day. Sandi cried quite a bit in the last few weeks. Id. at 2676:28-2677:5. Alethea recounted a hurtful answering machine message Scott Volk had left Sandi, telling Sandi he would ask her to be the "best man at his wedding" to another woman. Id. at 2678:23-2679:10.[5] She also described a second letter from Sandi, received after July 4 in which Sandi said she was having a "very hard time knowing I killed my baby." Id. at 2689:20-2691:24.

David Nieves testified he was the son of Sandi and Fernando Nieves. 21 RT 2389:21-2390:8. He was fourteen at the time of the fire. Id. at 2389:21-2390:8, 2430:9-11. At the time of the fire, he lived with his mother and his four sisters: Nikolet, age 12, Rashel age 11, Kristl age 7, Jaqlene age 5. Id. at 2391:2-25, 2430:15-18. David said that on the night of the fire his mother had organized a "slumber party" for the children in the kitchen. She had never done that before. His mother said he "had to." The children ate popcorn and watched two movies. 21 RT 2392:3-2393:15. After the movies they went to sleep. Id. at 2394:6-13. At some point after he fell asleep he woke up, and he, his sisters, and mother were coughing. Id. at 2396:21- 2397:8. He asked his mother if they could go outside, but she said that "it" could be coming from outside. Id. at 2397:9-16. Nikolet asked to go to the bathroom to throw up, but her mother said to throw up where she was. Sandi Nieves told the children to put their faces in the

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[5] Scott Volk admitted he left "annoying-type" phone messages causing Sandi Nieves to change her phone number. He also specifically admitted the "best man" message. 23 RT 2753:24-2755:11.

pillows and covers and stay close to the ground. David then passed out. Id. at 2398:19-2399:28, 2558:11-2560:10, 22 RT 2622:17-2623:1. David woke up a second time. He went to the bathroom to urinate and then threw up. Id. at 2400:1-23. He noticed that the floor was burned and the wall and door on his sisters' bedroom was burned. A window was cracked and the blinds had fallen down and were leaning on the dresser. Id. at 2401:2-26. He noticed that his bedroom and floor were burned. Id. at 2402:3-4. David then went to the refrigerator, got some juice, and laid down again. Id. at 2402:24-2403:8. David saw his sisters. They were laying still and foam was coming out of their mouths. He thought they had just been drooling. Id. at 2406:8-2407:2, 2563, 2565:16-2566:23.

David woke up a third time when it was light out. He saw his sisters with foam. He thought his sisters were sleeping. Next he went to the refrigerator and got a popsicle and juice. His mother was on the telephone. He then sat on the couch with his mother. She was drinking from a pitcher of juice. Id. at 2408:28-2410:23. When the paramedics arrived, he saw his mother crying. Id. at 2493:5-18, 22 RT 2604:23-26.

David testified that he did not leave the house because he did what his mom "told him to do and I believed what she said." 21 RT 2418:12-14. He did what he was told, in part, because he was afraid his mother would whip him with a wooden spoon. 22 RT 2609:3-18. On recross, David admitted he was previously hit with a spoon for stealing. Id. at 2632:27-2634:25, 2647:12-28, 2648:6-26.

David further testified that his mother, his sisters, and he attended church activities. The Mormon Church played a big part in their lives. 24 RT 3064:14-3065:14 (testimony of David Folden). They sat in the first row. His mother drove the children around to church functions, soccer

events, piano lessons, and to little league. She did it alone. 21 RT 2432:13-2434:3, 2444:27-2445:1. David took piano lessons several nights per week. Id. at 2445:6-9, 2449:11-15. Each child had a separate piano schedule. Id. at 2483:23-2485:11. His mother also took him to beaches, playgrounds, and parks. His fathers did not participate. Id. at 2438:20-2439:3. She home taught the children. 2478:14-28. He trusted her because she was good to him. 22 RT 2645:16-2646:19.

David said his mother was anxious to get a job. 21 RT 2546:16-20. Her only source of income was child support from David Folden. Id. at 2482:10-16.

David saw some changes in his mother in the week before the fire. She did not spend much time with them; she got a new tattoo. She allowed him and his sisters to dye their hair. 21 RT 2541:26-2542:16, 22 RT 2621:16-21. His mother went out more during the week. 21 RT 2543:27-2544:2. His mother cooked less in the last few weeks. 22 RT 2619:19-27.

At the time he testified, David believed his mother set the fire. 22 RT 2626:13-17. He admitted he had had help from the police in piecing things together. Id. at 2646:21-27.

Fernando Nieves, David's father, testified that he married Sandi in 1983. They separated in 1984 or 1985 and were divorced in 1987. Together they had three children, David, Nikolet, and Rashel. 23 RT 2784:21-2787:15. Fernando admitted he treated Sandi badly. Id. at 2849:23-2851:2. He stopped paying child support in 1991. Id. at 2859:25-2860:1

Fernando first met David Folden when he attended the wedding between Folden and Sandi's mother, Dolores. 23 RT 2784:21-2785:28.

Fernando knew that Sandi later married Folden. In fact, he allowed Folden to adopt his three children at Sandi's suggestion. Id. at 2788:1-9, 2791:20-2792:27. After the marriage, Fernando had little contact with the children until Sandi's marriage to Folden broke up. At that point, in 1996, he had more contact. Id. at 2802:11-2805:11. In a letter dated May 22, 1997, Sandi mailed him a will and also requested he seek custody of the children if "something happens to me." Fernando thought this was "weird." Id. at 2813:26-2817:17; Exhs. 32, 33.

On June 24, 1998 Fernando received a call from Sandi telling him she was having an abortion. 23 RT 2822:20-2823:9. She sounded very down and depressed during the call. Id. at 2999:26 - 3002:21. She asked him to watch the children. Fernando picked up the children and returned them to Sandi on June 28. Id. at 2823:17-25. When he returned the children Sandi showed him legal papers filed by David Folden to "reverse" the adoption. Sandi was "furious." 23 RT 2823:26-2824:25, 3002:10-19, 3004:21-28, 3005:13-20. She was furious because Folden was trying to get out of paying child support. 24 RT 3006:3-4.

David Folden testified he first met Sandi through her mother. Sandi was 14 at the time. 24 RT 3046:2. Folden treated Sandi as a step daughter. She called him dad. 24 RT 3048:15-3049:1. Folden moved in with Sandi before he was divorced from Sandi's mother. 24 RT 3054:4-18, 3055:15-21. In 1989, he married Sandi. Id. at 3057:8-17. They had two children together, Kristl and Jaqlene, in addition to the three children he adopted. Id. at 3025:7-3026:19. They were divorced in August, 1997. Id. at 3027:18-3028:2. In May 1998 he went to a lawyer to set aside the adoption because Fernando Nieves had parental rights to see his biological children. Folden did not feel it was justified that he was required to support them if he could

not see them. Id. at 3035:1-14, 3094:25-3095:2. He had been paying $2400 a month child support, which was garnished from his wages. 25 RT 3175:9-3176:15.

On the weekend of June 27 and 28 he picked up Kristl and Jaqlene. He returned them to Sandi on June 28. On July 4 he went to his mailbox and found several letters from Sandi Nieves. 24 RT 3037:6-3039:28; Exhs. 36-A, 36-B, 36-C.[6] Sandi had sent back the motion papers. Exh. 36-C. The envelope was postmarked July 1. 24 RT 3038:15-16. The enclosed letter said, "Now you don't have to support any of us! Fuck you You are scum!" 24 RT 3097:28-3099:10; Exh. 36-B.

2. The Defense Case

The defense case started with law enforcement personnel. Michael Wilson testified he saw Sandi Nieves at Henry Mayo Hospital after she was taken there. He observed that she went in and out of consciousness several times during the 30 minutes he observed her. She was on oxygen. 28 RT 3679:10-3682:5. Robert Taylor, the detective, testified that he showed pictures of the dead girls to David Nieves at the hospital and asked David why he did not do anything to save his sisters. 28 RT 3690:8-3693:22.

Dan Skipper, an alarm company owner in Riverside, testified he went to Sandi Nieves's former home in Perris, California. He observed that

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[6] Forensic Analysis showed that the envelope was sealed by Sandi Nieves. 24 RT 3219:1-3219:6, 3237:26-3238:5 (testimony of Gary Harmor). Wesley Grose, a forensic document examiner with the Los Angeles Sheriff's Department, concluded that the letter, Exh. 36-A, was written by the same person who wrote Exhibits 20-B ("have a happy 4th" with the name Sandi at the bottom) and 26 ("Scott, I have always loved you."). 25 RT 3323:3-14, 3327:6-3328:16, 3334:13-19, 3374:26-3375:2. He concluded that Exh. 20-B was written on top of 36-B from the same writing tablet. Id. at 3337:17-3339:6.

she was very security conscious. Id. at 3717:17-26. Subsequently he went to the Santa Clarita house. Whenever he went there, the doors were locked. Sandi had dowels in the door and maybe some windows. Id. at 3721:16-3722:12. Sandi had a tendency to put on the alarm at night. Id. at 3722:28-3723:3.

Dr. Gary Ordog, a toxicologist from Henry Mayo Hospital, testified that he examined Sandi Nieves on July 1. He found evidence of phentermine, a diet drug. He checked for tricyclic antidepressants, but did not check for serotonin depressants, such as Zoloft. 29 RT 3793:7-3794:20. Phentermine can stay in the blood for as long as three to seven days. He did not check for quantity. 29 RT 3794:26-3795:1, 3795:28-3796:10.

Del Winter, a recently retired fire investigator for the City of Los Angeles Fire Department, testified that a small amount of gasoline was used to set the fire. He found oddities such as the fact the fire was set in locations that were not likely to cause any great amount of damage. The gasoline can was put back in its location. To him the fire did not make a lot of sense. Three fires were started on fire resistant carpet. Also flat surfaces cannot start a fire successfully because they do not burn very well. 29 RT 3809:12-3810:7. He had never heard of people leaving over half the gasoline when they use it to start a fire. If a greater amount of gasoline had been used, the gallon would have vaporized and had tremendous explosive combustion. Id. at 3812:6-20. He also found it strange that the lighter would have been put in the kitchen, if it had been used. Id. at 3816:11-23. However, he did say that in his opinion the fire had been intentionally set, meaning it was not accidental.[7] Id. at 3818:23-28, 3830:10-17. Winter did not believe that the

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[7] When Winter said the fire was set "ineptly," The court ordered the (continued...)

items scorched in the fire were intended to start the fire. Id. at 3855:21-3856:1.

Winter testified that carbon monoxide would affect judgment, similar to alcohol or a drug. It would cause disorientation or the making of poor choices. It would cause lethargy and would eventually lead to coma and death. 29 RT 3825:25-3826:24, 3857:23-3858:1. Because carbon monoxide rises, the air would be better at the bottom of a room. Id. at 3828:15-3829:4.

The trial court struck Winter's statement that "[t]his always seemed to be a fire that was set by a deranged person." 29 RT 3858:28-3859:8. After he was allowed to say that he would put the fire in a special category as a "psycho" fire, where the motive is obscure, the court sua sponte reconsidered and ordered the jury to disregard this characterization. Id. at 3864:13-3865:2, 3927:16-3930:3, 3954:12-23 ("I was wrong in allowing that answer to be given. I am striking the answer that it's a psycho category fire, and you're to disregard it.").

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[7](...continued)
answer stricken. 29 RT 3808:15-3809:11. Compare the Judge's treatment of prosecution expert Ament's testimony in which he at first said that the fire had been set ineptly and later changed that characterization to say the fire was excellently set. 19 RT 2032:7-10. Further, The court sustained all objections to questions asked of Winter as to whether Sandi Nieves intended to burn the structure. 29 RT 3815:25-3816:4, 3818:5-17, 2819:1-5, 3825:14-20, 3854:16-3855:1. On cross examination by the prosecution, however, he was allowed to say that there was "no question" this was arson. Id. at 3838:15-17. Compare 18 RT 1812:19-12 (The court allows over objection prosecution expert Ament to testify: " my opinion is that the person lit the fire with the intent to burn the house down.").

The court also ruled that it was irrelevant for the defense to ask whether this was a poorly set fire. 29 RT 3856:17-21.

Debbie Wood, Sandi's friend, testified that she lived in Perris. She knew Sandi since 1991. She was also a mother and part of the same Mormon church. 30 RT 3963:15-3964:23. Sandi was very active in the Church; she was always in the front row. Id. at 3965:24-3966:25. Wood described Sandi as a very caring, proud, active mother. Id. at 3967:15-3968:2, 3972:10-3973:3. She said Sandi's moods would flip flop from day to day. Id. at 3980:19-21.

She explained that a woman could be excommunicated from the Church for having an abortion. 30 RT 3975:11-20. Sandi told her on June 25 that she had had an abortion. Id. at 3980:22-3981:10. She saw Sandi after the abortion. She was "very sad, very depressed." She regretted having the abortion. Id. at 3981:18-3982:10. The following day Wood drove Sandi back to her home in Santa Clarita. She spent part of the weekend with her. Id. at 4016:19-27. At that time Sandi received annulment papers from David Folden. Id. at 3982:12-3983:7, 4015:11-20. Sandi was concerned the children would feel they were rejected by another father. Id. at 3983:8-25. She was also concerned that if she did not get child support she would not be able to survive, feeding the kids, paying the rent, being out of a job, the abortion, having bad relationships. Sandi "had a lot to worry about that was at stake." Id. at 3984:4-12. Wood said Sandi had told her of her "fear of dying and possibly leaving her kids here with the two fathers she had." 30 RT 4019:24- 4020:2.

On June 30 Sandi called Wood all day. She left voicemail and pager messages, briefing her on what she and Scott Volk were feuding about, including Scott's comment about Sandi being best man at his wedding. They spoke briefly. 30 RT 3988:9-3989:16. Late that evening about 10:30 - 11:00 p.m. they spoke for at least an hour. Sandi "was really upset." She

was drinking. She was upset about her financial status, her breakup with Scott, the abortion. "It was against her religion, and it was on her conscience that she did something that she did not believe in." She was unemployed. She said she was afraid to tell Alethea Volk about the abortion. Id. at 3989:25-3991:20. Sandi said she was going to write Alethea a letter because she wanted to express her sorrows and regrets. Id. at 3992:14-20. She mentioned that her children were sleeping on the floor and then said that she would call Wood the next day. Id. at 3992:14-3993:18.

Rhonda Hill, another friend of Sandi's, also testified that Sandi was an excellent, loving mother. 30 RT 4034:17, 4043:16-25. Sandi had sent out pictures of her children and she had pictures of her children on her walls at home. Id. at 4036:7-4037:17. Hill said that Sandi believed abortion was morally wrong; she was confused and very depressed about the whole situation. Id. at 4046:23-26, 4066:1-18. On June 25, Sandi had made a decision. Id. at 4056:1-19, 4074:3-28, 4076:3-15. She left the children with Rhonda before the abortion procedure. Id. at 4047:20-4048:15. After the abortion Sandi was in poor mental condition, depressed, and regretting what took place. She was crying. Id. at 4049:14-22, 4057:27-4058:22. On Sunday, June 28, Hill talked to Sandi about the annulment papers. Sandi was concerned and hurt that the children would be disappointed in Folden's decision to end support of them. Id. at 4050:9-24.

Albert Lucia, Sandi's stepfather, recalled how Sandi had talked of her concern for her children in the year before the fire. 30 RT 4089:17-4091:9. He last talked to Sandi by telephone on June 30, 1998. She was very concerned about the children, the annulment of the three oldest, where

she would be, and trying to get a job. Id. at 4091:19-4092:13. She was very concerned about money. Id. at 4096:15-4097:18.

Penny Lucia, Albert's wife, spoke to Sandi on the 30th after Albert. Sandi was upset because did not know how she would be able to tell the kids once again they had "a dad that didn't care for them." She was also concerned about how she would care for and support the children. 30 RT 4105:4-28, 4106:8-11.

Sandi Nieves testified on her own behalf. 35 RT 4782:19. She testified she was ten weeks pregnant on June 24. 35 RT 4785:24-4786:4. Although Scott Volk did not want the baby, she did. "It was against everything inside of me to get an abortion." Id. at 4786:5-15. Scott's mother, Alethea Volk, was encouraging her to have the baby. Id. at 4786:16-21. Sandi described a list of the "pros" and "cons" of abortion that helped her reach her decision. 35 RT 4787:6; Exh. T. She described how she felt after the abortion: she felt like she killed her own baby and would have to live with it the rest of her life. 35 4789:13-25. On June 25 she went to have the abortion. She called Fernando Nieves on the phone for comfort. Id. at 4827:9-4828:13. Rhonda Hill took the children. Id. at 4790:25-4791:26. Debbie Wood took her home to Santa Clarita after the abortion. Id. at 4791:19-26. Sandi got a tattoo on her chest the same night. Id. at 4793:4-6; 4832:9-4832:10. Someone also left the annulment papers at her house. She faxed them to Fernando Nieves. To her, the annulment papers felt like an abandonment by another man in her life. Id. at 4793:7-24.

Sandi testified she started taking diet pills in the week after the abortion. 35 RT 4795:24-4797:18. She recalled Scott Volk making the

phone call to her on June 29 or June 30 about standing in as the best man at his wedding. Id. at 4799:8-4800:17.

Sandi said she sent a check to the landlord for July because she expected to live there for a month. Id. at 4801:14-4802:18. Her sole income was child support from David Folden. Id. at 4803:10-17.

Sandi remembered writing a letter to Alethea Volk to explain the reason she had the abortion. She did not remember writing a letter to Scott Volk, although she admitted the handwriting on Exhibit 20-A was hers. Id. at 4803:20-4805:26. She also did not recall a second letter to Alethea Volk or the letter to David Folden. Id. at 4806:3-4807:14. She recalled drinking on the night of the 30th, but did not recall talking with Debbie Wood. Id. at 4809:6-4811:2. She recalled seeing her children asleep, but next remembered waking up in black smoke. She told the children to lay on their stomachs and breathe through the blankets. She yelled at the kids to lay on their stomachs. Id. at 4811:5-4812:21.

Sandi went outside when it was daylight, then she went to the bathroom, and then called 911. Id. at 4813:21-4815:3. She had no recollection of starting a fire. Id. at 4817:12-14.

On cross-examination, Sandi said she did not recall why she got the tattoo. 35 RT 4834:6-17. She admitted she went to the Del Mar fair with Debbie Wood, another woman, and their daughters, but without her children, on June 29. Id. at 4856:5-4857:8, 4858:12-26, 4860:3-15. Sandi said she self medicated her depression by taking Zoloft on Sunday or Monday. Id. at 4876:14-4877:4, 4879:27-4880:8, 4914:3-4. She admitted that she had had thoughts of suicide her whole life. Id. at 4900:9-18.

As for the fire, Sandi had no recollection of what she said to the children other than to stay down. Id. at 4916:1-4917:18, 4916:1-4932:20.

Sandi did not recall stepping over her children to get out of the house. Id. at 4931:17-4932:20. When she refused to look at photographs of the dead children, Exh. 3, the trial court told the prosecutor: "Put it in front of her then." The court then ordered her to look at the photographs: "Miss Nieves, you're ordered to turn around and look at the photographs." Id. at 4933:3-11. She refused. 35 RT 4934:11-4935:9.

Albert Lucia was recalled as a witness. He attempted to lay a foundation for Sandi's psychological defense by testifying about Sandi's childhood. He said Sandi would hold her breath for about 30 seconds and pass out. This occurred most frequently when Sandi's mother was physical with her. He observed this until Sandi was young. 37 RT 5058:1-5059:11, 5088:4-5089, 5091:13-17, 5095:19-5096:4. He also described an incident when Sandi was two years old. She had a seizure and was then hospitalized for ten days. Id. at 5059:12-5061:2, 5079:1-5081:28. Lucia described physical abuse by Sandi's mother occurring on a daily basis. "Her favorite was in the back of the head." Id. at 5065:18-25. Sandi's mother also subjected her to verbal abuse. She told her she was ugly and looked like Howdy Doody. Id. at 5067:3-19. Sandi's fainting spells as a child occurred more often during verbal or physical abuse from her mother. Id. at 5095:19-5096:4.

Lorie Humphrey, Ph.D., a licensed clinical psychologist was the next defense witness. 37 RT 5122:12-25. She had performed neuropsychological testing to determine whether there were brain abnormalities and their causes. Id. at 5127:12-26, 5138:4-5140:10, 5140:14-5141:8, 5234:3-5235:24. She testified that Sandi's history was consistent with a seizure disorder, such as epilepsy. Id. at 5147:14-23. She offered the opinion that Sandi's history was consistent with a brain

malfunction, which would impede her coping skills. Id. at 5148:1-11, 5149:2-16. She stated that the test results showed that "something might be going on" and that Sandi had the most difficulty with executive functioning. Id. at 5167:24-5170:19, 4175:22-5178:5. She noted particularly that Sandi's test scores dropped regarding problem solving abilities and the ability to do two things at the same time. Id. at 5187:4-5188:19. This characteristic would make her vulnerable if stressed out and needing to solve problems. Id. at 5188:20-5190:16, 5191:6-10, 5198:4-27. The court did not allow the defense to elicit questions as to the cause of any brain damage or whether there was brain damage prior to carbon monoxide exposure from the fire. Id. at 5207:7-5210:17. Despite the fact the defense had not completed its direct examination, the court then abruptly told defense counsel in the jury's presence: "sit down. I am going to let the prosecutors cross-examine at this point." Id. at 5210:18-5211:1.

Cross-examination attacked Humphrey's methodology and the basis for the opinions she had expressed. 37 RT 5211:3-5231:13, 38 RT 5279:18. Dr. Humphrey admitted that she had made some methodological mistakes in reporting some of the test results in her written report. Id. at 5221:26-5229:27, 5303:24-5305:10. The prosecutors vigorously developed the theme that Humphrey's findings were not accurate and that she had misinterpreted information from third parties. Humphrey testified that she had called a Dr. Paul Satz, a developer of the newest normative data on the MMPI-II. 5299:11.[8]

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[8] After belittling and humiliating her, the court threatened Dr. Humphrey with prosecution for perjury due to her mistaken testimony regarding the norms for one of the tests she had given. Dr. Humphrey testified that this test did not play a significant part in her determination that

(continued...)

Through Dr. Humphrey the prosecution was able to bring in evidence from earlier testing, such as a report from Dr. Robert Suiter in 1997, which said Sandi Nieves presented herself in a remarkably favorable light to the extent that her psychological profile was likely invalid. 38 RT 5335:18-5340:1. The prosecution also asked Humphrey about a 1999 report by Dr. Alex Caldwell in which he said individuals with Sandi Nieves's profile are likely to attempt suicide by drastic and violent means to dramatize the intensity of unreleased anger. Id. at 5340:2-5346:4. At this point, the court sua sponte instructed Humphrey to read the hearsay from Dr. Caldwell's 1999 report. Id. at 5346:15-5347:8. Humphrey was then cross-examined on notes taken during a phone call with Dr. Nancy Kaser-Boyd, who had worked as a defense consultant and examined Sandi Nieves. Through this portion of the examination, the prosecution was able to show through hearsay that the notes indicated Kaser-Boyd said Sandi Nieves was angry and very controlling, with no evidence of a psychotic state. Id. at 5349:19-5351:5.

Dr. Phillip Ney, from Victoria, Canada, a psychiatrist and member of the Royal Society of Physicians, was the next witness. He had conducted research into the postpartum effect of hormones on women who have abortions, including the effects of abortion on mothers, children, and families. After forty years of clinical practice, he had experience in pharmacology, serotonin syndrome, epileptic seizures, and dissociative symptoms. 40 RT 5739:3-5743:14.

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[8](...continued)
Sandi Nieves had abnormalities. 39 RT 5523:2-11. The Court then excluded her from the court room and said she had lied. Id. at 5559:22-5560:1. See also 5572:3-5.

Although defense counsel attempted to have Dr. Ney address whether Sandi Nieves consciously attempted suicide the night of the fires, and to address her mental condition on the night of the fires, the trial court sustained objections to this line of questioning. 40 RT 5746:19-5749:8, 5755:8-20, 5756:23-5757:8. Next the court sustained an objection to whether Sandi had serotonin syndrome the night of the fire. 40 RT 5759:15-5760:18. Serotonin is a neurotransmitter. Id. at 5761:17-25. Ney testified about the potential side effects of mixing the drug Zoloft with the diet drug Phentermine, especially for someone who has seizures. He explained that mixing Zoloft and Phentermine causes serotonin syndrome, which can be lethal (40 RT 5762:8-5763:14), but can also cause a seizure (40 RT 5763:15-5764:2).

The court did allow Ney to testify he was 80% certain Sandi was depressed on the night of the fire. 40 RT 5767:10-5769:23. He also attempted to lay the foundation to show Sandi Nieves was in a dissociative state the night of the fire. (This is a fugue state caused by a seizure triggered by depression, serotonin syndrome, and the loss of placenta. Id. at 5773:21-5779:13.) He testified that an organically induced dissociative state can last an hour or two. Id. at 5786:25-5787:4, 6282:16-6283:3. A psychologically induced dissociative state can last for several months. Id. at 5787:5-11. It is usually associated with overwhelming stress. Id. at 5787:25-5788:6. With an organically induced dissociative state, a person cannot recover memory because there is no memory being formed. 43 RT 6282:16-6283:3.[9]

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[9] "A dissociative state psychologically, the people can do very, very complex things. They may go on for days, or even months. They could travel, take a job, do something totally

(continued...)

Ney stated that in his opinion Sandi Nieves's symptoms fit a dissociative state, the diagnosis of a major depression, postpartum depression, and serotonin syndrome. Id. at 6370:2-16.

However, the court would not allow Dr. Ney to give an opinion as to whether dissociative states are consistent with mothers who kill themselves or their children because it would address the "ultimate issue." 40 RT 5788:7-13. Likewise, the court would not allow Ney to testify whether Nieves was in a dissociative state when the fire occurred (id. at 5792:23-5793:15, 5794:8-22), again because it addressed the "ultimate issue." Ney testified he evaluated Nieves for malingering, but in his opinion, she did not "have the intelligence to do a good job at that." 42 RT 6027:28-6028:10, 6267:5-6268:10. He said the abortion led to the cessation of a very large number of hormones with a chemical effect leading to depression. 43 RT 6262:7-6267:4. On cross-examination he said that an abortion may interfere with a mother's instinctive restraint toward hurting her young children. 42 RT 6200:8 -6201:14, 43 RT 6389:27-6390:21. But see 43 RT

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[9](...continued)

> differenct [sic]. In the organically determined ones set off by seizures, people are clumsy. They are not aware of what they're doing. They're not aware of how they are behaving, and they have absolutely no memory, because there is no memory being formed. It's like the fact that you're doing something in your sleep and you have no memory of what you did in your sleep, or what you said in your sleep. Somebody has to tell you you were snoring, or whatever it is. In the psychologically determined one you can be questioned, and particularly by hypnosis. You can recover the memory. But in the organically determined dissociative state there is absolutely no way you can get at the memory. It's not there."

42 RT 6282:12-6283:3 (testimony of Dr. Ney).

6370:17-6371:19 (Ney said this was a misstatement: he was referring to the "fine balance" in how mothers look after their young.").

Ney explained that Sandi's lack of recollection of events the night of the fire may have been due to a dissociative state caused by carbon monoxide poisoning. Id. at 6420:16-6421:20.

The prosecution challenged Ney's qualifications. 42 RT 6096:16-6099:5. The prosecutors also attempted to show that Ney was evasive in answering. Id. at 6100:18-6110:21, 6117:12-28. And, the prosecutors used Ney's cross-examination to show that there was no preexisting documentation of mental disorder, a seizure disorder, or a previous dissociative state. 42 RT 6136:4-6142:3, 6147:10-25, 6172:5-11. Although he testified that in his opinion Sandi Nieves was not malingering during his examination of her (id. at 6155:22-6174:20), the prosecutors challenged the foundation for many of his conclusions (id. at 6174:10-6181:17, 6192:24-6198:28).

3. Prosecution Rebuttal

The prosecution first called Dr. Robert Brook, a clinical psychologist with a specialty in neuropsychology, during Dr. Lorie Humphrey's testimony. Brook challenged Dr. Humphrey's opinion as to cognitive impairment because in his view there were too many internal contradictions in the test data and this raised questions regarding authenticity. 38 RT 5377:20-5380:10, 5382:19-25, 5383:6-20, 5391:19. He believed she had consciously distorted the presentation of herself to Dr. Humphrey. Id. at 5387:18-5398:5, 5424:4-24. Dr. Brook said it was significant that there were no medical records of brain injury (id. at 5404:19-5405:8), and disputed Humphrey's reliance on various tests (id. at 5405:9-5412:28). In his view, Sandi Nieves's cognitive processes were all within normal limits.

Humphrey's conclusions could not be relied upon. Id. at 5414:26-27, 5420:1-5420:9-5422:10. In his opinion, Nieves engaged in impression management. Id. at 5423:10-5424:24.[10]

Dr. Robert Chang testified he treated Sandi Nieves on July 7, 1998, at the medical psychiatric unit of the County hospital and took a medical history at that time. 43 RT 6323:18-6324:20. She denied any prior history of depression, insomnia, or hedonia (zero zest for life). She denied thoughts about guilt or suicidal ideation. Id. at 6317:10-6319:22. She also denied taking Zoloft the week before the fire. Id. She said she had taken Zoloft for two months in 1995 or 1996. Id. at 6320:2-6. He testified that she appeared "to be genuinely remorseful about the loss of her children." Id. at 6321:17-6322:17.

John Dehaan, a fire reconstruction expert, testified that separate pours of gasoline in three rooms, plus the hallway, indicated an "intent" to destroy the house by setting fire to it. 44 RT 6482:9-18, 6503:7-6504:3. In his opinion, the irregular shapes were indicative of an intentionally set fire. Id. at 6486:21-26.

Dr. Alex Caldwell, a clinical psychologist who scored the MMPI given by defendant's consultant, Dr. Nancy Kaser-Boyd, described his interpretation of Sandi Nieves's MMPI scores. 44 RT 6576:9-6587:1. His

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[10] After eleven minutes of cross-examination, The court began threatening to cut off the examination of Dr. Brook because defense counsel was not using his time "efficiently." 38 RT 5433:5-5434:12. When Dr. Brook was evasive regarding the insignificance of some criticism of Dr. Humphrey's test results , defense counsel asked him to answer the question. With the jury present, The court imposed monetary sanctions on defense counsel. 38 RT 5614:1-5615:17. After the jury was sent out of the courtroom The court set the sanctions in the amount of $1,100. 40 RT 5615:23-5619:4.

objective was to look for deviations from normal. Id. at 6587:15-6588:20. He found that Sandi Nieves made a large number of unusual responses. In his view, she set out to present herself much more negatively than would be expected. Id. at 6590:20-6593:27. He offered the opinion that she was malingering. Id. at 6597:9-13. He interpreted her results as consistent with someone who is prone to cover over and deny the intensity of resentments. Id. at 6597:14-20. He testified that people with Sandi Nieves's profile often are violent and drastic during suicide attempts. Id. at 6598:16-6599:11. Her profile was consistent with someone in a victim life role– a tendency to feel unfairly hurt, martyred. "It comes about often when the person has been beaten or hurt or severely punished as a child." Id. at 6600:10-22. See id. at 6615:26-6616:7.

Dr. Caldwell interpreted the letters Sandi Nieves wrote to Scott and Alethea Volk, Exhs. 20-B, 28, 36, as "all suicidal goodbye notes to my mind." Id. at 6612:22-6615:10.

Diana Barrows, an obstetrician who had worked at the Ladies Choice Women's Medical Center and performed the abortion on June 25, 1998, identified the health history filed out by Sandi Nieves. She noted that Nieves had not noted a history of epilepsy, blackouts, fainting, drugs or medications. Dr. Barrows said she had not seen Nieves crying in the clinic, nor did she recall any incident of hyperventilation. 46 RT 6864:1-6869:22.

Fernando Nieves, called in rebuttal, testified that Sandi Nieves had never told him she had been emotionally abused by her mother. Sandi never said she had passed out as a child and she had not mentioned blackouts, fainting spells, epilepsy or epileptic seizures, or medication. Id. at 6913:20-6916:24. He also said he received a call from her on the

morning of the abortion, but she was not crying or hysterical. Id. at 6922:9-6923:21.

Dr. Robert Sadoff, a clinical psychiatrist from Pennsylvania (47 RT 7058:22-7062:1), said Sandi Nieves did not fit any of the five recognized states of dissociative disorders (Id. at 7073:2-6). He testified that few people are in a state of dissociation at the time of a traumatic event. Dissociation usually comes later, in the form of repression. Id. at 7076:12-7077:1, 7077:6-14. He testified Sandi Nieves's statements at trial and to others was not consistent with a dissociative state. Id. at 7077:15-7078:2, 7078:11-7079:18. He said there was almost no medical probability of acting in a dissociative state. Id. at 7087:7-12. On cross examination, he did admit that a person could have a dissociative state only one time in their life. It can be caused by stress, hormonal imbalance, a combination of drugs, and a severe major depression. Id. at 7108:25-7109:19. He admitted that many women want to protect their children from others, "so they would have to kill them if they killed themselves." Id. at 7186:10-19. However, he concluded that Sandi Nieves did not fit the categories of major depression, psychosis or dissociative state. Id. at 7199:19-22.

Dr. Edward Amos, a physician who treats patients with epilepsy, 48 RT 7269:5-7272:1, testified that because a child has had a seizure is not necessarily indicative of epilepsy. Id. at 7277:18-24. He found nothing in the medical records indicating that Sandi Nieves had a history of seizures. Id. at 7285:14-19; 7291:23-7292:2, 7297:8-7298:2, 7318:23-7319:3. He said serotonin syndrome cannot cause homicidal behavior. Id. at 7327:18-20, 7337:25-27. He also testified that there was no connection between abortion and homicidal behavior or dissociative states. Id. at 7339:4-7. Dr. Amos said that he had reviewed Sandi Nieves's trial testimony and that he

did not believe her memory deficits are neurologically based. Id. at 7303:6-15.

Dr. Scott Phillips, a medical toxicologist, testified that serotonin syndrome does not cause homicidal or suicidal behavior. 49 RT 7462:25-7463:2. He confirmed that Sandi Nieves had a prescription for Zoloft (49 RT 7469:23-28, 7498:1-8; Exh. 92), but he disagreed that Zoloft and Phentermine could cause serotonin syndrome (id. at 7470:18-7471:5). He found no evidence that Sandi Nieves had had serotonin syndrome. Id. at 7464:5-13, 7476:4-13, 7567:20-7568:15. He further testified he found evidence Sandi Nieves had mild carbon monoxide poisoning in the aftermath of the fire, along with soot and plastic byproducts. Id. at 7478:17-7482:24, 7571:17-7572:12.

4. Defense Surrebuttal

Dr. Gordon Plotkin, a psychiatrist with board certifications in psychiatry and neurology, testified for the defense on surrebuttal. 48 RT 7376:20-7379:13. He testified an individual with two or more serotonin drugs in his or her system can suffer from serotonin syndrome which can include delirium. 48 RT 7413:18-28. He testified Phentermine and Zoloft mixed together can cause serotonin syndrome and increase the risk of seizures. Id. at 7414:1-12, 7419:4-8.

Although The court sustained objections to most of his testimony, Dr. Plotkin was able to testify that a person can go for a long time between seizures, but that one seizure increases the risk of another seizure at some later point in life and that stress would increase the risk of a seizure. Id. at 7406:26-7408:10, 7413:3-7. He further testified that serotonin syndrome lowers the seizure threshold. Id. at 7419:4-8. Most complex partial seizures would last seconds to minutes with a residual effect afterward, the

postictal period. This can last a full day. Id. at 7420:7-18. The postictal period is a lot like delirium – an altered level of consciousness. It affects awareness and reasoning, a person is not aware of actual acts. A person may recall bits and pieces but not the event. Id. at 7420:21-7421:10. Plotkin found Sandi Nieves's lab results from the Henry Mayo hospital after the fire to "be very suggestive of her, in fact, having a recent seizure." Id. at 7425:14-7428:12. Seizure and then carbon monoxide poisoning could affect one's recall. Id. at 7845:24-7847:19.

Dr. Plotkin testified that a dissociative state is generally a psychological condition caused by stress (52 RT 7828:22-26), and that stress will increase the risk of seizure (id. at 7998:2-7998:8), including the stress factors facing Sandi Nieves in the days before the fire (53 RT 8163:24-8164:12). Although the data in this case suggested that something neurological was going on (52 RT 7975:17-18), Plotkin did not believe Nieves had been in a dissociative state but rather in a state of delirium (53 RT 8100:6-8102:15).

5. Further Rebuttal

As their final witness, the prosecution recalled Dr. Amos (54 RT 8274:13), to give the opinion that the record was clear Sandi Nieves had not had seizures (id. at 8279:19-8280:3). He agreed that there was no evidence of dissociation or delirium. Id. at 8296:18-8297:8.

6. Guilt Phase Closing Arguments and Verdict

Following closing arguments and instructions, the jury found Sandi Nieves guilty of first degree murder (four counts), attempted murder, arson, and found true all special circumstances. 20 RCT 5160-5162; 58 RT 9026-9032.

C. Penalty Phase

1. Prosecution Victim Impact Evidence

The prosecution penalty phase evidence consisted of the circumstances of the crime and victim impact evidence.

Minerva Serna, Fernando Nieves's mother (the grandmother to three of the children) testified that the deaths were like a knife that tore her heart out. 60 RT 9298:23-9300:17. She also testified about her son Fernando's intense grief. 60 RT 9301:4-12. She proceeded to give a graphic description of seeing her granddaughters' dead bodies at their funeral. 60 RT 9305:3-22.

Throughout her testimony, Serna repeatedly disparaged Sandi Nieves. She lashed out, calling Sandi Nieves "vicious and malicious." Id. at 9302:24-9303:1, 9308:16, 9311:14. Serna gave her opinion that what Nieves did is "just beyond a human . . . ." Id. at 9305:10-11. She also described Sandi Nieves as a person who was "evil all the time." 60 RT 9311:13. Serna gave her own dramatic and disturbing account of the victims' deaths even though she was not a percipient witness. Without any personal knowledge, Serna testified that the girls had suffered "a miserable death that lasted for hours and hours." 60 RT 9307:9-17. She repeated, "It was for hours," and then said, "She [Nieves] heard them crying. She heard Nikolet say she wanted to go to the bathroom. She made her vomit right there." 60 RT 9307:18-20.

Fernando Nieves described his experience the day after the fire. 60 RT 9317:3-9319:8. Fernando testified that when he and his mother got to the hospital and learned the girls were dead, he felt "like my life was over," and his mother "went hysterical." 60 RT 9319:9-18. He also described the impact on his son, David Nieves. 60 RT 9320:26-9324:5. He described the

victims' funeral. 60 RT 9320:11-25. He described "happy times" that were depicted in photographs in several of the memorial posters on display in the courtroom, including ones devoted specifically to Fernando's daughters Nikolet and Rashel. Id. at 9324:27-9327:3, 9331:21-9335:1; Exhs. 98, 100, 101, 103. Like Serna, Fernando also offered his own chilling but wholly hypothetical account of the crime. He speculated about what would have happened if David had tried to leave the house the night of the fire. Fernando testified Sandi "would have stopped him forcibly, I think, from leaving that house." 60 RT 9359:1-2.

David Folden, father to Jaqlene and Kristl, described how he found out his daughters had died and urged the jurors to imagine themselves in his place. He explained that the pain he felt "just doesn't end" and Nieves had taken "everything" from him, leaving his life empty. 60 RT 9370:13-9371:3. Like Serna and Fernando Nieves, Folden described the funeral. 60 RT 9372:8-21. Folden described each photograph in a memorial photo-collage titled "Fun Times Together" which showed, among other things, Folden bobbing for apples and dancing with the girls. 60 RT 9376:14-9378:16; Exh. 103. Folden closed by describing a photo-collage titled "In Remembrance" that depicted a shrine to the girls Folden maintained in his home. 60 RT 9378:24-9379:21; Exh. 106. Folden repeatedly disparaged Sandi Nieves. He testified that she had tried to turn her children against him: "She took them from me. She told them stories about me." 60 RT 9371:15-16. He told the jury Sandi "wanted to control and manipulate everyone around her," and that she was "trying to do it now" to the jurors as well. 60 RT 9371:21-23. In his view, Sandi had always "won everything," and it was time for her to pay: "This time it stops." 60 RT 9371:13-25.

The prosecution's final victim impact witness was Fernando's second wife, Charlotte Nieves, whom he married after abandoning Sandi Nieves and the children. 60 RT 9401:3-9415:7, 61 RT 9444:8-9466:10. She described the impact of the victims' deaths on her husband and children and on David Nieves. Charlotte testified that her own children were still suffering two years later and that "[t]hey lost their innocence" as a result of the murders. 60 RT 9408:27-28.

Charlotte proclaimed her intention to raise her own children as "independent, caring, respectful people," adding to the chorus of witnesses asserting that Sandi Nieves had not shared or promoted those positive values. 60 RT 9403:9-28. Charlotte also testified about the death of her own daughter Jessica soon after birth. 61 RT 9445:16-9446:24.

The prosecution exhibited a photographic display that included eight large posters memorializing the victims. Each poster was approximately 24" by 36" and included multiple, enlarged photographs of the victims. People's Exhs. 98-101, 103-06. Four of the posters resembled gravestones. The prosecution asked each family member to narrate the events depicted and identify the victims by name in nearly every one of the 54 photographs on display. 60 RT 9302:20-9304:24, 9324:27-9327:3, 9331:21-9335:1, 9376:14-9378:16, 61 RT 9444:23-9445:3.

The jury also saw a video compilation of the victims created by Charlotte Nieves from a series of home movies. 60 RT 9260:6-9261:19, 9295:10-14. It depicted the four victims enjoying themselves at various family events. 61 RT 9443; People's Exh. 107A. In several scenes, the victims were shown interacting playfully with one another and with Fernando, Charlotte, or their brother David. Id. Sandi Nieves was present at most of the events shown in the video (61 RT 9455:10-13), but she

appeared in only one scene in the edited version shown to the jury. Exh. 107A. Charlotte confirmed that she "cut her [Nieves's] face" out of several scenes in which Sandi Nieves had participated. 61 RT 9455:10-9457:26.

2. Defense Evidence

Shirley Driskell, Sandi Nieves's childhood friend, testified that they had gone to school together and lived for some time in the same apartment complex. She generally described what she had observed in the relationship between Sandi and Sandi's mother: verbal and physical abuse, criticism, a strict dress code, and bruises and bumps. 61 RT 9473:11-9477:6. She had attended the wedding between Dolores and David Folden. Id. at 9477:7-16. She testified, based on a year she lived with Dolores, Sandi's mother, that something was "terribly wrong' with Dolores. Id. at 9477:17-9478:25. Driskell testified she kept in touch with Sandi, that Sandi was a very good mother, who was caring and concerned about her children. Id. at 9478:26-9480:25. She testified she believed Sandi to be a good human being. Id. at 9493:26-28.

Tammy Pearce testified she had known Sandi Nieves through the Mormon church and saw her regularly until 1993. Id. at 9515:9-11. Sandi had been an excellent Cub Scout troop committee chairperson and regularly attended church. She was a good example of a good mother. Id. at 9505:11-9507:14, 9508:14-24, 9509:15-17, 9510:20-9511:7.

Henry Thompson, Shirley Driskell's father, described Sandi as a loving, devoted parent. Id. at 9547:14-9553:2. Lynn Jones, a bishop in the Perris Ward of the Church of Jesus Christ of Latter Day Saints, testified Sandi had been very active in the Church. Id. at 9580:20-9582:28. She worked well with the Cub Scout program. Id. at 9584:2-9584:12. He testified that the only time the Church would recognize abortion at that time

was in case of rape, incest, or if mother's life was in severe danger. It was against Church rules to have an abortion under other circumstances. Id. at 9586:22-9587:19.

Carl Hall said that he had observed a warm loving relationship between Sandi and her children. Id. at 9657:21-9659:24. Lenora Frey, Sandi's aunt, described Sandi's mother, Delores, as having married six times. Delores was not a warm or nurturing woman. Her children "got smacked" regularly. 62 RT 9680:27-9682:28. She testified Sandi did not have a mean bone in her body. Id. at 9687:8-19. Sandi tried "really hard" not to be like Dolores. Id. at 9707:3-4. Cindy Hall also described Sandi as a loving and kind to her children. Id. at 9725:1-9726:14. Albert Lucia, one of Sandi's mother's husbands, testified that Sandi did not get the attention he would expect from a mother. Sandi was mistreated, made fun of, and accused of trying to get attention when she passed out as a child. Id. at 9750:13-22.

Dr. Robert Suiter, a clinical psychologist, had conducted a court ordered evaluation in 1997 concerning child custody between David Folden and Sandi Nieves (62 RT 9760:5-9762:2) to make recommendations to the court about custody and visitation of the five children. It started as a visitation evaluation. Then David Folden wanted custody of the two younger children. Id. at 9762:3-9763:5. Dr. Suiter found Sandi open and frank in many contexts regarding her difficult childhood, problems in her marriage, prior depression, and psychotropic medications. Id. at 9764:11-9765:14. Sandi felt positive about her children and desired to remain as primary caretaker. Id. at 9768:1-6. Although Sandi was a dependent, needy person, he had no information that she was abusive and no information that she was not a loving and caring mother. Id. at 9772:7-9774:1. Although

the court asked Dr. Suiter, in the jury's presence, if Suiter would change his opinion now, if he could, Dr. Suiter appropriately testified that he based his opinion on his 1997 evaluation, not in retrospect. Id. at 9786:26-9787:11. See also 62 RT 9807:12-27.

Shannon North, a friend who had known Sandi since they were six years old, also testified that Sandi was a loving and caring mother. 63 RT 9854:28-9856:21. She was followed by Tricia Mulder, who knew Sandi when they lived in Perris, California. Mulder testified Sandi had helped her through her marriage and that she was a loving, caring mother, who set an example for her. Id. at 9866:28-9874:19.

Lelia Mrotzek, who had been the protestant chaplain at the twin towers jail in Los Angeles County where Sandi Nieves had been held since her arrest, testified Sandi had participated in Bible study and expressed remorse in the jail. She said Sandi was not a person who found "jailhouse religion" as a convenience. 63 RT 9885:6-9889:19.

3. Prosecution Rebuttal

In rebuttal, the prosecution called Elaine Hoggan, the principal at Palms Elementary School in Perris. She said that Sandi's daughters had been students at the school. She would not describe Sandi as kind, loving, and caring. She found her to be very controlling. 63 RT 9933:5-9934:6. There were 950 children in the school; she had seen Sandi once. She based her testimony on what other teachers had said. Id. at 9937:17-9939:10.

Marilyn Boyd, a teacher at the school, said Sandi was abrasive with the staff and manipulative. She had not seen physical affection from Sandi. Id. at 9941:13-9948:2.

Phillip Rogers, a neighbor from Perris, testified Sandi was over protective of her children. She limited their freedom to participate in the

world. In later years he came to believe Sandi had lied and exaggerated. He testified that he believed that Sandi tried to turn the children against David Folden. 63 RT 9976:11-9984:7, 9988:3-10.

Patricia Rogers had been Sandi's friend from Perris. She said she would not describe Sandi as a warm, kind, caring mother; she was controlling and overbearing and spoke badly of David Folden. 63 RT 10010:10-10012:24-10027:26. She said to the jury that "As far as protecting them, she murdered them." Id. at 10030:2-10031:16. She did agree, however, that her previous opinion that Sandi had been an excellent mother only changed after Sandi was convicted. Id. at 10037:12-10054:12. She formulated her new opinion from the news reports of the deaths. Id. at 10055:3-6.

4. Penalty Verdict

Following closing arguments (64 RT 10096-10171), instructions (65 RT 10196-10205), and deliberation, the jury returned a death verdict (21 RCT 5422; 65 RT 10216:11-10218:28).

This appeal follows.

III. THE TRIAL JUDGE'S MISCONDUCT, BIAS, AND PREJUDICE AGAINST DEFENDANT AND HER COUNSEL RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL, DENIAL OF THE RIGHT TO A MEANINGFUL DEFENSE, DENIAL OF THE RIGHT TO CONFRONTATION, DENIAL TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND RESULTED IN AN UNRELIABLE SENTENCING VERDICT

The trial of Sandi Nieves was stained with unmistakable and persistent bias by the trial judge.

The fundamental unfairness of the trial judge that permeated the trial proceedings included:

- Disparaging defense counsel before the jury;
- Threatening a defense expert with perjury and threatening to remove another from the county's indigent defense panel;
- Threatening a lay defense witness with contempt for failing to give appropriate answers during cross-examination;
- Calling defense counsel and defense experts "liars";
- Disparaging the defendant before the jury;
- Engaging in Internet investigation of defense experts during trial and sharing the results with the prosecution;
- Curtailing defense opportunities to confront prosecution witnesses;
- Failing to apply the law evenhandedly regarding defense experts and defense evidence;
- Sanctioning defense counsel for making speaking objections, but ignoring comments from the two prosecutors;
- Ex parte contact with the prosecution and arbitrary and excessive payment of prosecution experts out of court funds;

- Refusing simple accommodations to several defense witnesses and refusing to make accommodations for defense counsel;
- Aligning itself with the prosecution.

Many of the pervasive instances of misconduct took place in front of the jury. Others took place outside the jury's presence. But the judge's bullying plainly affected defense counsel, defense strategy, and witness testimony. "It is obvious that under any system of jury trial the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest work or intimation is received with deference, and may prove controlling." Starr v. United States (1884) 153 U.S. 614, 626, quoted in Carter v. Kentucky (1981) 450 U.S. 288, n. 20. Through the eyes of the jury here there could be no question of the judge's disdain for the defendant and the judge's view that the defense was not to be distrusted.

We recognize that this portion of the argument, which applies to both the guilt and penalty phases, is lengthy. The sheer volume and variety of improprieties by the trial judge cannot be conveyed without a lengthy, detailed description so that the context is clear. Some improprieties affected the trial on multiple levels. For example the judge's ruling or comment may have been demeaning and disparaging but also an abuse of discretion by disallowing admissible evidence.

Many of the improprieties are relevant not only as cumulative instances of bias and unfairness, but also as separate stand alone errors requiring reversal because they were demonstrably prejudicial. Some of the descriptions will be recounted again in other substantive portions of this brief because they are relevant to free standing substantive issues raised by defendant as separate bases for reversal.

Because the judge's improprieties were not restricted to any one witness or any single issue, they occur throughout the proceedings. We have therefore omitted from this section some context and instances of misconduct that are more thoroughly described in the other substantive portions of the argument. To the extent that they are addressed in more detail later, we incorporate them here by reference.[11]

Sandi Nieves was entitled to a 'fair trial in a fair tribunal," In Re Murchison (1955) 349 U.S. 133, 136, "before a judge with no actual bias against the defendant or interest in the outcome of [her] particular case." Bracy v. Gramley (1997) 520 U.S. 899, 904-05. See Johnson v. Mississippi (1971) 403 U.S. 212, 216; Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 288 ("The right to a fair trial is "a basic requirement of due process" and includes the right to an unbiased judge."); Lyell v. Renico (6th Cir. 2006) 470 F.3d 1177, 1186-1189; Cooper v. Superior Court (1961) 55 Cal. 2d 291, 301 ("The judge's function as presiding officer is preeminently to act impartially."); People v. Mahoney, (1927) 201 Cal. 618, 626 ("Every defendant under such a charge is entitled to a fair trial on the facts, and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence.").

California law requires a fair trial before a fair judge in every court proceeding, but particularly when the irrevocable death of a human being is at stake. People v. Sturm (2006) 37 Cal. 4th 1218, citing People v. Zamora

[11] Unlike most appellate transcripts, the reporter's transcript in this case is particularly difficult to follow due to the constant and unceasing intervention of the judge and the ensuing bickering among defense counsel, the court, and the two prosecutors.

(1944) 66 Cal.App.2d 166, 210 ("Trial judges 'should be exceedingly discreet in what they say and do in the presence of the jury lest they seem to lean toward or lend their influence to one side or the other.'"). "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." Pacific etc. Conference of United Methodist Church v. Superior Court (1978) 82 Cal.App.3d 72, 87-88, citing Pratt v. Pratt (1903) 141 Cal. 247, 252; Wood v. City Civil Service Commission (1975) 45 Cal.App.3d 105, 110. See People v. Perkins (2003) 109 Cal.App.4th 1562; People v. Hefner (1981) 127 Cal.App.3d 88.

Canon 3B(4) of the California Code of Judicial Ethics requires that

> "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control."

Similarly, Canon 3B(5) requires that

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status or other similar factors, or (2) sexual harassment.

As this Court stated in People v. Rigney (1961) 55 Cal.2d 236, 241, the trial judge, "must not become an advocate for either party or under the guise of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness."

> Both Penal Code, section 1122, and Code of Civil Procedure, section 611, provide that the judge must admonish the jury not to form or express any opinions on any subject connected with

> the trial until the case is finally submitted to them. A judge must not defeat the purpose of these provisions by comment on the evidence during the trial but must also keep an open mind until he has had an opportunity to hear all the evidence. Moreover, comment should be expressly labeled as the judge's opinion, and the jury advised that it may be disregarded; questions are not so labeled, and when they convey the judge's opinion of the credibility of a witness, there is grave danger not only that they may induce the jury to form an opinion before the case is finally submitted to them, but that the jury will substitute the judge's opinion for their own. The judge, therefore, may not ask questions to convey to the jury his opinion of the credibility of a witness. (People v. Huff, 134 Cal.App.2d 182, 188 [285 P.2d 17].) Nor should he intervene so extensively in behalf of the prosecutor as to align himself with the prosecutor in the minds of the jury. (People v. Robinson, 179 Cal.App.2d 624, 633-637 [4 Cal.Rptr. 50].)

Id. See also, McCartney v. Commission On Judicial Qualifications (1974) 12 Cal.3d 512, 533 ("A trial judge may not, however, in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness."). Kloepfer v. Commission On Judicial Performance (1989) 49 Cal.3d 826, 845 quoting People v. Carlucci (1979) 23 Cal.3d 249, 258 ("It is fundamental that the trial court . . . must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias."). "There is never an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant or jurors." Etzel v. Rosenbloom (1948) 83 Cal.App.2d 758, 762.

The judge that presided in this case, Superior Court Judge L. Jeffrey Wiatt, was, among other things, impatient, undignified, and discourteous to the defendant, defense counsel, and defense witnesses. He showed a rare

bias and prejudice that is not often encountered in California courtrooms. He acted as a third prosecutor. And he undermined Sandi Nieves's defense at both the guilt and penalty phases of the trial by hamstringing the defense and signaling to the jury that he believed her defense and her defense counsel were neither credible nor persuasive. Because the judge's misconduct permeated the trial and was unfairly prejudicial, the convictions and the death penalty must be reversed.

A. Standard of Review

The denial of a fair trial by a fair judge is a structural error which requires per se reversal, "Because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply." Gray v. Mississippi (1987) 481 U.S. 648, 668. "Some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California (1967) 386 U.S. 18, 23. "The right to an impartial adjudicator, be it judge or jury, is such a right." Id., at 23, n. 8. See Tumey v. Ohio (1927) 273 U.S. 510; People v. Mahoney (1927) 201 Cal. 618. Under California law, when "the appearance of judicial bias and unfairness colors the entire record," reversal is required. Hernandez v. Paicius (2003) 109 Cal.App.4th 452, 461.

But even if the trial judge's improper comments and behavior did not constitute immeasurable structural error, the misconduct must be evaluated for prejudicial error, with the State having the burden of persuasion under Chapman. See People v. Sturm (2006) 37 Cal.4th 1218, 1244. Under Chapman the question is whether the court is "able to declare a belief that [any error] was harmless beyond a reasonable doubt." 386 U.S. at 24.

B. Objections in the Trial Court

In this case, as we will demonstrate, defense counsel, Howard Waco, repeatedly objected to Judge Wiatt's conduct. He made numerous motions for mistrial and he sought mid-trial to disqualify Judge Wiatt from presiding. But even if these efforts had not been made, Sturm clearly holds that it is not necessary that a defendant object every single time a trial judge engages in misconduct. "[A] defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by such misconduct, or when objecting would be futile.'" 37 Cal.4th at 1237. Here, the misconduct was so pervasive and so intensive that even those objections that were made were ultimately futile.

C. The Trial Judge's Comments and Behavior

From the defendant's opening statement at the guilt phase to the defense closing argument at the penalty phase, Judge Wiatt clearly expressed a deep hostility to defense counsel and the defendant.

In this respect Judge Wiatt's conduct is similar to that of the judge in Offutt v. United States (1954) 348 U.S. 11. After the Court of Appeals reversed the defendant's conviction due to the judge's conduct,[12] the Supreme Court also reversed findings of contempt against defense counsel. Justice Frankfurter's words are especially fitting. Over fifty years later they apply just as well to the trial of Sandi Nieves:

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[12] Peckham v. United States (D.C. Cir. 1953) 210 F.2d 693, 702 ("excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury: . . . this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.")

> The record discloses not a rare flareup, not a show of evanescent irritation – a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury."

Id. at 17.

The judge's behavior here tipped the scales against Sandi Nieves marking her as guilty, while condemning her to death.

1. Disparagement of Defense Counsel

"A 'trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution.' . . . 'Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trial'. . . . 'When "the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary."'" People v. Sturm (2006) 37 Cal.4th 1218, 1233, citations omitted.

a. Guilt Phase – Disparagement Before the Jury

Beginning with defense counsel's opening statement at the guilt phase of the trial, Judge Wiatt started disparaging counsel in front of the

jury. Toward the end of the opening statement this colloquy occurred. It set the tone of Judge Wiatt's behavior toward counsel throughout the trial.

> Mr. Waco: What happened? Why did it happen? Sandi still doesn't have all the answers. The D.A. would have you see Sandi as a murderer, which she is not, and the evidence will show it. Pictures don't show the complete story of anything. My job is to show both sides of the story so you get a complete picture. I will do that, and not let you down and not let Sandi down.
>
> Mr. Barshop: I will object. That is argumentative again.
>
> The Court: That entire last statement is stricken. It's argumentative, and you are to disregard it.
>
> Mr. Waco: The evidence will show that some of us have demons to overcome, just like Sandi.
>
> Mr. Barshop: Objection. That's argumentative.
>
> The Court: Sustained, sustained. That is stricken.
>
> Mr. Waco: Sandi --
>
> The Court: You're going to present evidence about demons being in the court and not in the court?
>
> Mr. Waco: I meant it figuratively.
>
> The Court: You're going to present evidence of a demon?
>
> Mr. Waco: I meant it figuratively, your honor.

15 RT 1446:8-1447:4.[13]

The disparagement continued. Bruce Alpern, a fire fighter paramedic was called by the prosecution to describe what he observed when he responded to the scene of the fire. On cross-examination he testified he was surprised when Sandi Nieves answered the door and then went back

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[13] There were two prosecuting attorneys throughout the trial, Deputy District Attorney Kenneth Barshop and Deputy District Attorney Beth Silverman. Each was permitted to make objections and address the court. They frequently objected in tandem.

into the house, which was filled with soot and smoke. 16 RT 1532:22-1535:21. When defense counsel asked whether he was amazed "that anybody of sound mind would stay in such environment," the court sustained the prosecutor's objection and sarcastically said, "he's not qualified to testify as to whether somebody has a sound mind or not." 16 RT 1534:20-28. Next, when counsel asked the court the number of a particular exhibit, Judge Wiatt responded: "Look at the tag on the front; it might give you a clue." Id. at 1562:16-19.

As defense counsel was showing Alpern photographs and asking the court's permission to mark them, this colloquy occurred:

> Q At any rate, the -- if I can have these marked a-1, 2, 3 and 4, your honor?
>
> The Court: They have been.
>
> Mr. Waco: I did, but I just wanted to make sure it was okay with the court. With the court's permission, it's difficult to hold it here, but I'll do the best I can with regards to the view of this particular location and the spill, and hopefully the jury can see it.
>
> The Court: All right. Mr. Waco, everything you just said is stricken, and the jury will disregard it. If you want to show something, you can pass it out, but don't say anything while you're doing it.
>
> Mr. Waco: Okay.
>
> The Court: Because then you're testifying. If you want to testify, you can do that.

16 RT 1566:20-1567:8.

Later during further cross-examination of Alpern, defense counsel asked about a statement Alpern had made at the preliminary hearing regarding a conversation with Sandi Nieves immediately after the fire. Alpern said: "Again, this is going on two years, and apparently that is

better to go by than a year later." Defense counsel attempted a brief transition by saying, "All right. I appreciate the fact that –." Without giving defense counsel a chance to finish, Judge Wiatt sarcastically interjected: " All right. What your appreciation level is, is not pertinent or helpful." 16 RT 1594:17-28.

When defense counsel attempted to read from the preliminary hearing transcript, the court interrupted, saying the reading was incomplete, implying counsel was misleading the jury. Judge Wiatt then said, "so I will [read it] to make sure it's accurate." 16 RT 1964:21-1965:20. When defense counsel cross-examined one of the neighbors, Gregg Lewison, the trial court began sustaining questions as argumentative. When defense counsel asked the court whether the tenor of the questions was the problem, the court ridiculed him:

> Mr. Waco: Is it the manner in which I'm asking the question? I'm trying to abide by the court's rule.
>
> The Court: It's a ridiculous question, Mr. Waco. If he's 43 miles away in Inglewood, there's no way he can see what is going on in his neighborhood. Maybe in comic books or the movies or something, but not in the real world.

16 RT 1712:5 - 1713:4.

During the cross-examination of the fire department investigator, John Ament, defense counsel attempted to impeach the witness with his preliminary hearing testimony. After one of the prosecutors made a speaking objection without admonishment from the court, the judge interjected to help the prosecution by implying that the defense counsel's question was inaccurate and misleading:

> Q [By Mr. Waco] do you recall your testimony now with regards to saying that if it's a foot or two away from the wall and the door frame it would not have ignited either one?

A I don't recall that I said that, but I read it, so I must have. But there's a factor that plays in that, and that is the quantity of gasoline in that area.

Mr. Barshop: It's also not the complete answer.

Mr. Waco: I would like to be able to ask my own questions, if I can.

The Court: You may do that, but they should -- if you're reading back an answer, it should be the entire answer.

Mr. Waco: I'm asking about a specific portion of testimony.

The Court: You don't want to do it, so I will to make sure it's accurate.

18 RT 1964:10-27.

During the cross-examination of David Nieves, Sandi Nieves' son, defense counsel asked whether Sandi had kept calendars. Counsel attempted to refresh David's recollection about the calendars. Judge Wiatt gratuitously denigrated defense counsel before the jury:

[Mr. Waco:]Q If I showed you the calendar, would that help refresh your memory?

A Maybe.

Q Again, I have a calendar to show him which the district attorney provided me.

The Court: Show it to the prosecutors, same as any exhibit. If you want to show something, show it to them first.

Mr. Waco: I understand. I believe the district attorney has it.

The Court: Mr. Waco, don't talk, except to ask a question. Get on to something else then, Mr. Waco. If you don't have what you need, then get on to some other area of your questioning.

Mr. Waco: I have a copy of the calendar. I wonder if I could use that. The district attorney has the original, your honor.

The Court: You don't listen, do you?

21 RT 2451:15-2452:8.

As defense counsel was cross-examining Alethea Volk, the trial judge again chastised him in front of the jury.

> Q By Mr. Waco: Were there any instructions on the use of the phone, to the best of your knowledge, by anybody in the family?
>
> Ms. Silverman: Objection. Calls for speculation.
>
> The Court: Sustained.
>
> Mr. Waco: I am just asking to the best of her knowledge.
>
> The Court: How could she possibly know that, unless she heard it from somebody else? If you want to try to lay a foundation that she was living with your client at all times and every time she was on the phone -- don't ask questions that call for speculation please.

22 RT 2674:4-16

The trial judge was quick to claim defense counsel had misstated simple facts, even when the court made the misstatement. This is an example from the cross-examination of Fernando Nieves:

> Q By Mr. Waco: Now, the District Attorney – let's see. Two weeks after this is when she sent you a copy of a will, right? I think it's people's 33, your honor.
>
> A Yes.
>
> Q Dated May the 22nd, '97?
>
> The Court: Is that correct?
>
> The Witness: It's May 24th.
>
> Mr. Waco: I thought the will was dated the 22nd.
>
> The Court: Well, you're wrong, Mr. Waco. Why don't you just ask questions rather than expressing your beliefs.
>
> By Mr. Waco: On top of the will, isn't it dated May the 22nd?
>
> Mr. Barshop: I object. The document speaks for itself.

The Court: Sustained. I thought you said the 27th. But the document speaks for itself, Mr. Waco.[14]

24 RT 2959:20-2960:9.

Midway through the prosecution case, the trial judge started accusing defense counsel of violating court orders in front of the jury. For example, when defense counsel was cross-examining forensic document examiner Wesley Grose and asked a foundational question, both prosecutors objected in tandem and the trial judge chastised defense counsel:

> [Mr. Waco:] Now, with regards to your -- is it the habit and custom to be asked for your honest opinion?
>
> Mr. Barshop: Objection.
>
> Ms. Silverman: Objection.
>
> Q By Mr. Waco -- by the sheriffs?
>
> The Court: What's the objection?
>
> Mr. Barshop: It's irrelevant.
>
> The Court: What grounds?
>
> Ms. Silverman: It's irrelevant.
>
> The Court: Sustained.
>
> By Mr. Waco: Is it the habit and custom to speak honestly and open to the sheriffs that come in here?
>
> The Court: Why are --
>
> Mr. Barshop: Objection.
>
> The Court: Whose habit and custom? This witness'?
>
> Mr. Waco: Is it the habit and custom as far as --
>
> The Court: I am going to sustain the objection. It's vague and may be irrelevant.

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[14] See People's Exhibit 33, page 1 of 3 (first line) (May 22, 1997).

> Q By Mr. Waco: Has it been your experience in dealing with the sheriff's department that their habit and custom is to ask you for your honest opinion about things?
>
> Mr. Barshop: Objection. It's irrelevant.
>
> The Court: Sustained. And it's in violation of the court's order at the 402 hearing. So get onto something else, Mr. Waco.[15]

26 RT 3377:23-3378:22.

When the defense paralegal was assisting counsel and played a tape of a conversation of detective Robert Taylor, the trial judge chastised the paralegal for stopping the tape at the point pertinent to the cross-examination:

> (Whereupon a portion of the tape was played.)
>
> Mr. Waco: I wonder if I can have the court's permission to play that one more time?
>
> The Court: No, you may not. You played it once and there's a transcript.
>
> Mr. Barshop: I am going to object. We have a transcript of additional portions on the tape.
>
> The Court: Pardon?

---

[15] Similarly, when defense counsel examined Dan Skipper, a burglar alarm installer about Sandi Nieves' home, defense counsel asked: "and in going into the house, did you see pictures of the kids on the wall?" The trial judge sustained a relevance objection. Defense counsel tried to explain:

> I believe it goes to the lack of intent, your honor. State of mind.
>
> The Court: All right. You just violated the court's order that there are to be no speaking objections. The objection remains sustained.

28 RT 3716:24-3717:10.

> The Witness: He didn't play the whole tape.
>
> The Court: Why did you stop it then?
>
> Ms. Katz [defense paralegal]: I thought the pertinent part was over.
>
> Mr. Waco: Play whatever is there. It's fine.
>
> The Court: Mr. Waco, you provided a transcript, and if you don't play the whole thing, we'll strike it. Who stopped it?
>
> Ms. Katz: I did.
>
> The Court: Why did you stop it?
>
> Ms. Katz: I'm sorry. I thought the pertinent part was over.
>
> The Court: It's not for you to decide what's pertinent and not pertinent, Miss Katz. Just start where it left off.

26 RT 3482:5-28.

When defense counsel attempted to show through cross-examination that detective Taylor had attempted to withhold evidence from the defense, the trial judge imposed an ultra high level of specificity and then chastised defense counsel when counsel did not meet it.

> By Mr. Waco: Did you and/or your partner, in your presence, tell them at the lab "if you have" – basically, "if you have any evidence that might help the defense, we want it off the record"?
>
> Mr. Barshop: Objection. That's speculative and argumentative.
>
> The Court: Sustained.
>
> Q By Mr. Waco: Did you and/or your partner, in your presence --
>
> The Court: When you say "his partner," you're asking for the partner's state of mind. Don't ask it, because it would be calling for speculation.

> Q By Mr. Waco: Did you and/or your partner, in your presence, make any statements that "if you are not sure, or if you're inconclusive, we'd like that off the record"?
>
> Mr. Barshop: Objection. Speculative and argumentative.
>
> The Court: Sustained. You're paraphrasing, Mr. Waco. That's the problem. You're not referring to a direct statement or direct quote.

26 RT 3474:8-3475:1.

The judge told the jury mid-trial that the defense was to blame for a delay in the proceedings, implying that inconvenience was the fault of the defense.

> All jurors are back. Ladies and gentlemen, under the law in California, the laws of discovery require that the prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial. The reason for doing that is to promote the ascertainment of truth, save court time, and avoid surprise which may arise during the course of trial.
>
> Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. This morning, and in one case this afternoon, Mr. Waco provided the prosecution for the first time statements of witnesses that should have been disclosed 30 days before trial. Because it is late disclosure the court is going to give the people sufficient time to prepare as to one witness, and the court will consider what will happen as to the other two or more witnesses.

28 RT 3709:22-3710:26. (The court hardly missed a chance to disparage defense counsel. Judge Wiatt later told the jurors on June 21: "The reason we are breaking now is because of the defense failure to have their witnesses available in a timely manner." 37 RT 5104:4-6).

The court chastised defense counsel for saying, "okay." 26 RT 3437:5-8 ("Don't say 'okay' anymore."). Next, as defense counsel

continued cross-examining detective Robert Taylor, the court chastised counsel for saying, "Ah."

Q And what about Mr. Nieves, Fernando?

The Court: What about him, what?

By Mr. Waco:

Who interviewed him?

A Both myself and detective Perales.

Q And both of you were present at the supposed crime scene and giving directions to each of the people you mentioned, right -- crime lab people and fire people, sheriff people, photo people, and coroner personnel?

A Yes. We were giving directions to different individuals.

Q And you also participated in the various observations that Mr. Ament made from the fire department, both at the -- on July 1st and afterward when you went back there again; right?

A I made observations, yes.

Q Ah. But you both interviewed and talked to Mr. Ament when you went to the location at the various times; isn't that also correct?

A I don't recall interviewing detective Ament. He was working along with us on this case.

Q Ah. You gave him questions and gave him directions; right?

A We exchanged information.

Q Okay. With regards to other people, with regards to, for example, Mr. Scott, Scott Volk, he was interviewed by both yourself and Miss Perales; right?

A No, sir.

Q Who was he interviewed by?

A Me.

Q You alone?

A Yes.

Q Ah. With regards to –

The Court: Stop saying "ah" every time you get an answer.

26 RT 3417:2-3418:10.[16]

When defense counsel was examining Dr. Phillip Ney on direct, he attempted to use an illustration and have it marked as an exhibit. The trial judge gratuitously demeaned counsel before the jury:

> [Mr. Waco:] I wonder if we can have not only a -- to mark the overhang, but also to mark a "hard copy" of the same designation as the overhang, with the court's permission. Is that okay?
>
> The Court: I don't know why you're asking me this, Mr. Waco. A witness can use demonstrative evidence. It doesn't necessarily have to be marked as an exhibit. So for right now, you can continue on with your questioning.

37 RT 5183:3-15.

As defense counsel was cross-examining Dr. Robert Brook, a prosecution expert, the witness gave a non-responsive answer. Counsel tried to get him to answer the question asked. Judge Wiatt then told the jury that counsel violated a court order and that the trial judge was imposing monetary sanctions against defense counsel.

> Q If Dr. Humphrey had made -- say put down the maximum score of, let's say, even a lower score than 15. Let's say six out of 12, it would have made Mrs. Nieves look like she got half of them right?
>
> A It would be inaccurate information.

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[16] Later during a section 402 hearing outside the jury's presence, the court lectured defense counsel" "I don't want to hear 'Thank you, your honor' if I rule on something." 42 RT 6165:15-16.

Q But it would make it look like she got half of them right; is that correct, sir?

A You're talking about impression management, and that's not what psychological testing is about. Psychological testing is about accuracy.

Mr. Waco: I'm asking the witness to answer the question.

The Court: Mr. Waco, you violated the court's rule about no speaking objections. I am imposing monetary sanctions against you.

I am going to ask the jury to go back in the jury room.

40 RT 5614:27-5615:15[17] [18]

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[17] During the cross-examination of Dr. Alex Caldwell, the court admonished defense counsel to allow him to finish an answer. The prosecutor immediately said, "Let the witness finish the answer." There was no admonishment to the prosecutor about editorializing or speaking objections. 45 RT 6784:4-10.

[18] After the jury was sent out, Judge Wiatt chastised counsel, imposed sanctions, denied him a hearing, and denied him the opportunity to have counsel. When defense counsel attempted to explain the objective of his cross-examination of Dr. Brook, that is, to rehabilitate Dr. Lorie Humphrey's testimony, Judge Wiatt cut off further cross-examination on the subject altogether:

[The Court:] Dr. Humphrey made a mistake. Argument can be that had she done it right, it would have made the defendant look better than worse.

Mr. Waco: Can't I cross-examine on that point?

The Court: That's argument at this point. Bring back the jury. No further questions in this area. Under 352 the probative value is outweighed by the undue consumption of time. Bring the jury back.

Mr. Waco: Your honor, I would also object to the fact that the court chastised me in front of the jury and cited me in front of the jury.

(continued...)

During cross-examination of the prosecution fire expert, John Dehaan, Judge Wiatt not only helped out the prosecution by interposing and sustaining his own objection to a question, he denigrated defense counsel before the jury as well.

> Q By Mr. Waco: In planning a fire, do you -- would you take into consideration the fact that someone did or didn't try to ignite flammable material all around the house, including boxes filled with paper?
>
> Ms. Silverman: Objection. Asked and answered.
>
> The Court: Assumes facts not in evidence. Sustained. There's no evidence of any flammable material around the house other than the remaining gasoline in the gas can.
>
> Mr. Waco: Well, I used the word "flammable materials"?
>
> The Court: *Well, that's the word you used and you're stuck with it.*

44 RT 6556:24-6557:9 (italics added).[19]

During the cross-examination of Dr. Caldwell, defense counsel asked about various letters Sandi Nieves had sent to David Folden. Defense counsel clumsily formulated a followup question by asking:

> "What letter are you referring to to Mr. Folden that shows Mrs. Nieves felt guilty, or felt love, and had a problem with regards to Mr. Folden? What letter? I'm not aware of any."

45 RT 6680:17-20. After the prosecution objected and the trial judge sent the jury out of the courtroom, the judge chastised defense counsel for

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[18](...continued)
40 RT 5618:27-5619:11.

[19] Plainly, defense counsel was referring to flammable material in the home, such as papers and such. He was not referring to an accelerant, such as gasoline. 44 RT 6557:10-20.

stating personal beliefs before the jury. When the jurors returned, the judge told them that counsel had been chastised:

> The jury is instructed to disregard Mr. Waco's last question, particularly the last part of it, which was an expression of his personal belief. He's not supposed to do it. I admonished him not to do it again.

Id. at 6683:1-6.[20]

Even in an instance when the trial judge sustained a prosecution relevance objection to a question defense counsel put to Dr. Caldwell, the judge suggested that defense counsel had misrepresented facts.

> Q By Mr. Waco: Do you have any conclusions with regards to your 1999 report about the diagnosis of depressive and paranoid psychosis are [sic] typical with the pattern of results that you received?
>
> Ms. Silverman: Objection. Irrelevant.
>
> The Court: Sustained. He did not make a diagnosis, Mr. Waco.
>
> Q By Mr. Waco: Did you make a diagnostic impression, sir?
>
> Ms. Silverman: Objection. Improper question.
>
> The Court: Overruled.
>
> The Witness: One of the four sections in the report is labeled "diagnostic impression."

45 RT 6782:1-13. When defense counsel continued cross-examining Dr. Caldwell, the witness at first said that counsel was confusing two reports. Through cross-examination, Dr. Caldwell admitted that what was said in a

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[20] During the prosecution closing argument during the penalty phase, prosecutor Beth Silverman said "I will be satisfied and justice will be done if you show her again the same mercy that she showed to her own children." The defense objected, but the Judge Wiatt overruled the objection, allowing this personal statement by the prosecutor. 64 RT 10122:20-25. See 64 RT 10130:1-10131:4 (renewed objection overruled). See Part XXIII infra.

1997 report was actually repeated in the 1999 report. At that point counsel asked, "I didn't mislead you, though?" 45 RT 6783:20. The trial judge lost little time in chastising counsel before the jury:

> The Court: Mr. Waco, I've warned you repeatedly, don't editorialize. Don't make gratuitous comments.

Id. at 25-26.

At the end of the cross-examination of Fernando Nieves, Judge Wiatt abruptly cut off the examination and excused the jury. The judge admonished defense counsel regarding his examination.[21] When the judge finished, he offered defense counsel an opportunity to make an offer of proof when he was done with his other questions as to what was said at the hospital. Defense counsel responded: "I would like to take the opportunity, with the court's permission, to talk about that at this time." The judge then said, "Not at this time. Let's buzz the jury back in." 46 RT 6935:16-6936:26.

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[21] In open court, defense counsel had asked Fernando Nieves: "For example, do you recall her [Sandi] going to the doctor during one of her pregnancy times and feeling dizzy in the office, for example, I believe, and lie down for a half hour or more?" The prosecution objected on the ground that the question called for speculation and assumed facts not in evidence. After the jury was sent out, the judge sustained the objection with the comment: "don't ask any more questions that call for speculation as to what your client may have told this witness.

> Mr. Waco: I am asking --
>
> The Court: And furthermore, when you said the words 'I believe,' it is misconduct on the part of an attorney to state his or her personal belief about the evidence, or to suggest that there is evidence."
>
> So don't use the word 'I believe' anymore."

46 RT 6935:16-6936:12. But see note 20 supra.

When the jury returned defense counsel announced that he had no further questions, subject to the offer of proof. The judge then disparaged defense counsel again.

> The Court: Then why didn't you say that when the jury was out, Mr. Waco?
>
> Mr. Waco: I tried to, your honor.
>
> The Court: No, you didn't.
>
> All right. If would you please go back in the jury room. Remember my admonition.

46 RT 6937:9-15. Outside the jury's presence counsel protested that Judge Wiatt gratuitously made him "look bad in front of the jury." Judge Wiatt responded by saying, "you're making yourself look bad, Mr. Waco. You don't need my assistance in that regard." Id. at 6937:21-25.

While cross-examining Dr. Amos, defense counsel mistakenly referred to the psychological state Dr. Ney had described as a "disassociative" state, instead of "dissociative state." 48 RT 7350:3-11. The witness interjected, "I think that's what he probably means." Id. at 12-13. The court then chided defense counsel again. "It would be helpful if you used the right term." Id. at 16-17. The record shows the district attorney then laughed. Id. at 7351:5-7352:15.[22]

During Dr. Plotkin's direct examination, Judge Wiatt again accused defense counsel in the presence of the jury of violating a lawful court order. This time it was predicated on counsel's citation of a page of prior transcript to show that a question he had put to Dr. Plotkin was based on

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[22]Later, outside the jury's presence, defense counsel used the term "dissociated state." Judge Wiatt interjected, "Why can't you say it the way it's supposed to be said? Dissociative. Is that so difficult?" 50 RT 7610:2-7622:28.

facts that were in evidence. 48 RT 7409:20-7410:21 ("Mr. Waco, I have already advised you that you can't say that, and you're disobeying a lawful court order."). See also, 52 RT 7827:18-19 ("And this is a violation of the court's order before the jury came in.").

During the cross-examination of Dr. Scott Phillips, defense counsel asked about antagonists versus agonists as antidotes for drug treatment. He then asked, "with regards to the antagonist, as opposed to agonist, those are rather tongue-twisting type words aren't they?" Both prosecutors objected in tandem. After sustaining the objection, the trial judge gratuitously added, "I guess it depends on whose tongue is wagging at the time. Let's get on to something meaningful, Mr. Waco." 45 RT 7521:23-7522:5. Defense counsel tried to explain that he was trying to show that Dr. Ney could have confused the terms during his testimony. This explanation only resulted in more disparagement.

> Q It's a type of term that could be easily misunderstood, isn't it?
>
> Ms. Silverman: Objection. Calls for speculation, if we're talking about a physician.
>
> The Court: Why don't you state it in the context of a psychiatrist and a psychologist, if that's what you are -- if you're talking about Dr. Ney.
>
> Mr. Waco: I'm talking about whether it be Dr. Ney misspeaking himself, or the court reporter, or somebody else listening who is not a doctor. I'm asking him: is that a type of terminology that can be easily misunderstood?
>
> The Court: Your speaking objection is stricken, and the jury will disregard it.
>
> Don't shake your head, Mr. Waco, when I rule against you.

Id. at 7522:7-20.

Later during cross-examination of Dr. Scott Phillips, Judge Wiatt told the jury that defense counsel was lying even though the Judge's comments were contradicted by the facts. Counsel attempted to show that he did not have much opportunity to obtain discovery from Dr. Phillips due to Phillips' late appointment as a prosecution expert in the case. The judge quickly sustained an objection to a yes or no question and then condemned counsel for stating a falsehood.

> Q [by Mr. Waco:] And with regards to the only opportunity we had to talk was two minutes before the jury arrived about 10:00 o'clock; is that correct?
>
> Mr. Barshop: I am going to object. That's a misstatement of the facts.
>
> The Court: It is. It's false and misleading. It is a misstatement. The jury will disregard it. The jury will disregard it. He was here yesterday and he was here at 8:15 this morning, Mr. Waco.

49 RT 7486:27-7487:8.[23] After the judge insinuated that defense counsel was lying, the witness actually answered a rephrased question, stating, "We did talk this morning just for a few minutes. I don't know exactly if it was two minutes or three minutes or four minutes, but we spoke briefly." Id. at 7487:14-17. See 52 RT 7827:7828:10.

Near the end of the redirect examination of Dr. Plotkin, Judge Wiatt again became impatient:

> "How much more do you have, Mr. Waco?
>
> Mr. Waco: A bit. I'm not going to be able to finish this morning.

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[23] See 49 RT 7449:16-7452:10 for the background of the attempt to interview Dr. Phillips. Judge Wiatt allowed very little time for the interview and then blamed defense counsel for failing to anticipate when Dr. Phillips would be in the prosecutor's office or arrive in the courtroom.

> The Court: Well, maybe if you get to some questions that are proper, you might finish sooner rather than later."

53 RT 8163:2-7.

b. Penalty Phase – Disparagement Before the Jury

When defense counsel started his opening statement during the penalty phase, after uttering only 39 words, the district attorney objected and the trial judge lost little time in denigrating counsel, despite counsel's attempt to humanize the situation:

> By Mr. Waco: Ladies and gentlemen, it seems like we've gone through a lifetime, at least for me, over these past three months. And, of course, two years since I have had this case. Your decision obviously is disappointing to me as –
>
> Ms. Silverman: Objection. Improper argument.
>
> The Court: Sustained. Let's just confine ourselves to what you expect the evidence will show.
>
> Mr. Waco: It's very difficult to appear here again after my statements and arguments have been rejected.
>
> Ms. Silverman: Objection. Inappropriate argument.
>
> The Court: Sustained.
>
> Mr. Waco: I presume and assume that your decision was made soberly.
>
> Ms. Silverman: Objection. Inappropriate argument.
>
> The Court: Sustained. If you can't tell us what you expect the evidence will show, sit down and don't say anything more.

60 RT 9270:21-9271:17.

Several minutes later, the trial judge threatened to terminate the opening statement, as if it was a waste of time, because defense counsel said he could appreciate why David Folden, who was paying the bills, was jealous after Fernando Nieves decided to begin seeing his children again.

> [Mr. Waco:] And this frustrated, I can appreciate that, Mr. Folden. He was paying the bills.
>
> Mr. Barshop: I am going to object. That's improper opening statement.
>
> The Court: Sustained. That part is stricken. Mr. Waco, I am not going to warn you again. Confine yourself to what you expect the evidence will show, not what you personally believe.
>
> Mr. Waco: He was paying the bills, Mr. Folden, and was not enamored –
>
> Mr. Barshop: I am going to object. This is improper opening statement.
>
> Mr. Waco: I believe the evidence will show this.
>
> The Court: Sustained. How much more do you have?
>
> Mr. Waco: I don't know. I didn't time it out, your honor. I would respectfully ask for the court's. I am trying to put in what I believe –
>
> The Court: Just don't explain to me what you are trying to do. I am telling you what you cannot do. If you continue to do it, I will terminate your opening statement. Continue.

60 RT 9281:15-9282:11. After what amounts to ten pages of trial transcript in this death case, the judge was already threatening to terminate opening statement. In addition to breaking up counsel's presentation, this undoubtedly caused the jury to view anything counsel said disfavorably.

When Fernando Nieves was cross-examined during the penalty phase, defense counsel attempted to ask him about the signatures on several cards written by the children to Sandi Nieves. 63 RT 9928:23-9930:10 (comparing exhibits VV-9 and VV-10). When defense counsel prefaced a question by saying the signatures looked the same to him, the trial judge once again cited him in front of the jury.

> The Court: Mr. Waco, I'm citing you for misconduct for making that comment, and I'll cite you later for contempt. It occurred in the direct presence of the court. I have warned you repeatedly about stating your opinion in front of this jury. You did it. Don't do it again.
>
> Mr. Waco: I apologize, your honor.
>
> The Court: The jury will disregard his comments.

Id. at 9939:13-21.

During the direct examination of Shirley Driskell, Sandi Nieves's childhood friend, defense counsel tried to show her some greeting cards Sandi had received from her children. One of the prosecutors objected on relevance grounds. Then he said the prosecution had not seen them. When defense counsel pointed out that they were among the exhibits, the trial judge said, "Sustained. Sustained. Sustained." 61 RT 9494:1-12.[24] Defense counsel asked for an Evidence Code section 402 hearing, but the judge instead cut off further questioning. He then asked the prosecution if it wanted to begin cross-examination immediately. Mr. Barshop, one of the prosecutors, responded: "I'd love to start cross-examining her now." There was no admonishment from the court for this gratuitous personal statement. 61 RT 9495:6-7. Instead the court allowed the cross-examination to begin at once. Id. 9495:8-12.

See also Part XXII infra (court chastises counsel during closing argument for arguing that there are multiple Penal Code § 190.3 factor (k) factors).

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[24] Compare the trial judge's treatment of the defense when counsel objected to victim impact evidence it had not seen in advance, such as the posters placed in the courtroom and the 13 minute memorial videotape played for the jurors. In those instances, the court found no unfairness from the surprise; nor did the court see any reason to exclude the evidence. See Part XVII infra.

c. Disparagement Outside the Presence of the Jury

From beginning to end, outside the presence of the jury, Judge Wiatt acted even worse. It is not surprising that twice the judge called the case as People v. Waco, instead of People v. Nieves. 40 RT 5789:6-9 ("We'll go back on the record in People versus Waco – People v. Nieves."); 59 RT 9296:12-26 ("People v. Waco").[25] Early in the case, Judge Wiatt said to defense counsel, "I think you are not being helpful to your cause, if you have a cause." 22 RT 2581:16-18. At the end of the case during a hearing on the restitution fine, after counsel argued that the death penalty was severe enough, the judge said, "It may seem strange to your office, Mr. Waco, but maybe following the law might seem strange to your office, because that's the only way you can explain it." 65 RT 10407:5-8.

Judge Wiatt accused defense counsel of "acting the fool." 23 RT 2915:20-2916:1. Then he accused counsel of trying to inject error and acting like a "clown." 24 RT 3010:1-14 ("I agree with Mr. Barshop's analysis. You're trying to inject error into this case. You're acting like a clown half of the time with some of your questions."); 61 RT 9469:2-3 ("The Court: Mr. Waco, stop acting like a clown, and start acting like a lawyer when we resume."). He called defense counsel a liar. 23 RT 2862:8-10 ("I don't believe they're asked in good faith. I think you're lying to me. You don't know the difference, that's what I think."). When counsel moved for a mistrial based on the court's animosity and failure of impartiality (18 RCT 4638-4639), the motion was denied. 27 RT 3550:23-27; 3569:1-3578:10.

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[25] At least one juror explicitly conflated the defendant with defense counsel. After the case ended, the juror wrote: "I feel disappointed that the defendant feels we didn't do our job to his liking. I thought thats(sic) what he supports. = The Justice System=" 21 RCT 5528 (emphasis added).

At one point the judge chastised counsel over this exchange during the cross-examination of Dr. Robert Brook.

> [Mr. Waco] Q Sir, isn't the consequence of her giving a lower maximum --
>
> The Court: Return to the podium.
>
> Mr. Waco: I'd like to use the -- my chart there to show something, to mark it.
>
> The Court: What chart?
>
> Mr. Waco: I believe there's a set of papers here, and I'd like to make a demonstration to the jury by writing on it.
>
> The Court: No. You can have the witness write.
>
> Mr. Waco: Then I'll have the witness write on it. Can you put it down, sir.
>
> The Court: I am going to ask the jury to go back into the jury room.

40 RT 5612:22-5613:7. Based on this exchange, the Court chastised counsel for communicating his "disagreement with the court." Id. at 5613:20-5614:4.

At one point, Judge Wiatt threatened to report Mr. Waco to the State Bar and to write a letter to the Public Defender. 43 RT 6377:4-17.

d. Sanctions and Contempt

During the course of the trial the judge cited defense counsel for contempt or imposed monetary sanctions. Some of those citations occurred in the presence of the jury. Judge Wiatt first imposed sanctions of $500 against defense counsel for failing timely to turn over discovery. 31 RT 4163:8-10. At the hearing on the discovery sanction Deputy Public Defender Terri Towery said she was unable to locate a lawful order that Mr. Waco was accused of violating. Judge Wiatt said the order was "the Penal

Code." 31 RT 4159:15-17.[26] See 18 RCT 4596-97 (order for sanctions); 19 RCT 4847-4880 (order for sanctions). After the hearing, Judge Wiatt accused Ms. Towery of being a liar: "That was a lie. Miss Towery lied to the court saying there was no such order." 34 RT 4668:11-17.[27] The court also accused Mr. Waco of being untruthful for just standing by when Ms. Towery made her statement in his defense. Id.[28]

On June 21, 2000, during the defense direct examination of witness Albert Lucia, counsel asked about Sandi's upbringing by her mother: "With regards to the mother's actions toward the child, was that a daily, weekly, or pretty constant basis?" The following then occurred.

> Ms. Silverman: Objection. Vague.
>
> Mr. Barshop: Vague.
>
> Mr. Waco: I object to the dual team.
>
> The Court: Sustained. I am going to ask the jury to go back into the jury room, and don't form or express any opinion about the case or talk to anyone about the case.

37 RT 5062:6-15. After the jury was excused, the judge told defense counsel, "you have violated the court's order about no speaking objections." Id. at 5062:22-23. The judge asked defense counsel to explain his conduct and then imposed monetary sanctions pursuant to Code of Civil Procedure §

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[26]Counsel filed a petition in the Court of Appeal challenging the sanctions. The Court of Appeal issued a stay and a notice, pursuant to Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171, indicating that it was contemplating issuing a peremptory writ to set aside the sanction. Waco v. Superior Court, B142821.

[27] An amended discovery order is in the record at 11 RCT 2560-61.

[28] Compare Judge Wiatt's general view of the prosecution. "I am going to just accept Miss Silverman's representation. I don't think she's going to misrepresent anything to the court." 49 RT 7510:10-13.

177.5 in the amount of $750 for "making a speaking objection in the presence of the jury." The judge proceeded to deny counsel a hearing and then ordered the jury back into court and resumed the trial. Id. at 5062:21-5064:16.[29] See 18 RCT 4647-48 (order for sanctions).

Defense counsel was sanctioned a second time a few days later, again for making a speaking objection. Prosecutor Beth Silverman had been cross-examining Dr. Lorie Humphrey, who admitted that she had not turned over all of the data she had used in preparing her opinion regarding Sandi Nieves's mental state. After making her point, the following occurred.

> [Ms. Silverman] Q You understand that this case that you're testifying in right now is a multiple murder case?
>
> A I do.
>
> Q Do you understand really the seriousness of the case –
>
> Mr. Waco: Objection. Lecturing by the district attorney. It's argumentative.
>
> The Court: I am going to ask the jury to go back into the jury room.

38 RT 5295:7-16.

After the jury left the courtroom, Judge Wiatt said defense counsel had made a speaking objection in the presence of the jury. Counsel apologized, explaining that "it's hard to think of the right words exactly at the appropriate time." Id. at 5296:21-22. Judge Wiatt then sanctioned him

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[29] Defense counsel petitioned the Court of Appeal for a writ of mandate. Waco v. Superior Court, B142288. The Court issued a stay of Judge Wiatt's order a Palma notice.

After Judge Wiatt withdrew the sanction Sandi Nieves had been sentenced to death. 65 RT 10227:28-10229:8. See id. at 10228:3-4 ("given the jury's verdict in this case, I think that's probably enough.").

in the amount of $1,050, again denying a further hearing. Id. at 5297:1-16.[30] [31]

While counsel was cross examining Dr. Brook, he attempted to show that Dr. Humphrey's numbers could be interpreted in several ways. He asked Dr. Brook a hypothetical. When Dr. Brook deflected the question with a nonresponsive answer, counsel objected. Judge Wiatt then sanctioned him in the jury's presence. 40 RT 5615:4-15. Judge Wiatt imposed sanctions of $1,100, payable within five days. (See 19 RCT 4687-94 (showing sanctions of $100); Id. at 4792-4800 (showing sanctions of $1,100). He then cut off any further cross-examination of Dr. Brook on the subject. Id. at 5615:23-5619:11.[32]

Dr. Diana Barrows performed the abortion on Sandi Nieves. She testified for the prosecution. Defense counsel was cross-examining her when the following occurred:

Q So the more you do, the more you get paid?

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[30] A petition challenging the sanction was filed in the Court of Appeal. The court stayed imposition of the sanction and issued a Palma notice. Waco v. Superior Court, B142433. Judge Wiatt withdrew the sanction after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8.

[31] When the jury returned, Ms. Silverman asked another rhetorical question: "That is at this moment pending before this jury, that they have been sitting through and listening to for two months now?" Defense counsel objected on the ground that the question was argumentative. Judge Wiatt overruled the objection. 38 RT 5299:4-9.

[32] Counsel filed a petition in the Court of Appeal challenging the sanctions. The Court of Appeal issued a stay and a Palma notice. Waco v. Superior Court, B142477. Judge Wiatt withdrew the sanction after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8.

> A Believe it or not, I'm not in it for the money. I'm a pro-choice person, and I have been since I can remember.
>
> Q But one of the motivations for you working at the clinic is to make money, to make a living?
>
> A I work part-time. I only work three days a week. I'm semi-retired, I guess.
>
> Q Well, I assume you're doing it to get paid, though, aren't you?
>
> A That's one of my motivations. That's not the only motivation.
>
> Q I'm not saying anything is wrong with the motivation.
>
> The Court: I am going to ask the jury to go back into the jury room.

46 RT 6887:1-17. The court continued:

> The Court: Mr. Waco, that is not a question. That's a comment. I warned you repeatedly not to make comments and editorialize. What is your explanation as to that gratuitous comment?
>
> Mr. Waco: I thought that the witness had made a statement with regards to the -- in the nature that she was feeling guilty about having made money out of this abortion procedure, and so I wanted to --
>
> The Court: Comfort the witness; is that what you're trying to do?
>
> Mr. Waco: Pardon?
>
> The Court: Comfort the witness; make her feel at ease; is that what you were trying to do?
>
> Mr. Waco: I wanted her to understand the nature of my question, and that my question had nothing to do with whatever her motivations were. That's fine.
>
> The Court: I warned you not to do that. You violated a court order, and I am going to impose sanctions pursuant to the code of civil procedure.

Id. at 6888:2-21.[33] After a hearing the next morning, Judge Wiatt imposed sanctions of $100. 48 RT 7252:26-7253:4. See 19 RCT 4812-4827.[34] Immediately prior to the resumption of testimony, counsel asked to have

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[33] In comparison, the prosecutors made similar comments with no admonishment from the court, let alone sanctions. A few minutes after defense counsel was sanctioned for making his comment regarding Dr. Barrows's motivation, Ms. Silverman asked her: "you said one of your motivations is to obviously receive payment; *nobody works for free*. Do you have another motivation?" 46 RT 6900:27-6901:1. There was no sanction against the prosecutor for the italicized comment.

See also 48 RT 3520:9-10 (cross of Sandi Nieves by Ms. Silverman: "Ma'am, I am not asking you about the lock on your garage door." No admonition, no sanction); 37 RT 5220:24-5221:7 (cross of Dr. Liorie Humphrey by Ms. Silverman: "Now, doctor, I understand that as you're appointed in a criminal case, which is a very serious case dealing with the death of four little girls and the attempted murder of a fifth child, that you would take –." Defense counsel's objections to the narrative overruled); 37 RT 5222:6-15 (cross of Dr. Humphrey by Ms. Silverman: "there are a number of questions I'd like to ask you about your testing of the defendant, your analysis of the neuropsychological testing and your conclusions regarding the defendant and how you reached those conclusions, but before I do that, let me ask you:" Defense counsel's objection to the narration overruled); 37 RT 5224:22-27 (cross of Dr. Humphrey by Ms. Silverman: "if you could just let me finish before you answer, so we don't repeat." Defense counsel's objection to argument with witness overruled.); 39 RT 5525:19-23 (cross examination of Dr. Humphrey by Ms. Silverman: "Ma'am, you're being evasive. Just answer the question." Not only was there no admonition or sanction, but defense counsel was ordered to "sit down' when he objected.); 39 RT 5541:2-10 (redirect of Dr. Humphrey, objection by Mr. Barshop: "I am going to object. That's exactly opposite of what this witness just testified to." No admonition; no sanction despite this speaking objection).

[34] Counsel filed a petition in the Court of Appeal challenging the sanctions. The Court of Appeal issued a stay and a Palma notice. Waco v. Superior Court, B142821. Judge Wiatt withdrew the sanction after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8

"the last question before the last answer read back." The Court said, "No." 46 RT 6890:23-24.

During cross examination of Dr. Robert Sadoff, the witness testified Sandi Nieves did not have to be in a dissociative state to put dowels in her windows. Defense counsel said, "I don't disagree with your concept here." 47 RT 7118:14-20. After the jury was sent out counsel was sanctioned. After a hearing Judge Wiatt imposed sanctions of $100. 48 RT 7252:26-7253:4. See 19 RCT 4828-37.[35]

Later the same day during the cross-examination of Dr. Sadoff, the following occurred:

> Q By Mr. Waco: So would it be consistent with an altered state of consciousness with someone fainting and becoming oblivious to the world for 30 seconds to a 4 minute, or two minutes?
>
> Ms. Silverman: Objection.
>
> Q By Mr. Waco: Is that one of the forms that an altered state of consciousness can take?
>
> Ms. Silverman: Objection. Asked and answered.
>
> Mr. Barshop: And assumes facts not in evidence.
>
> The Court: Sustained.
>
> Mr. Waco: I respectfully object to the multiple objections.
>
> The Court: I'll ask the jury to go back into the jury room.

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[35] Counsel filed a petition in the Court of Appeal challenging the sanctions. The Court of Appeal issued a stay and a Palma notice. Waco v. Superior Court, B142821. Judge Wiatt withdrew the sanction after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8

47 RT 7170:20-7171:6.[36] Counsel tried to explain that "I object only on the grounds because I don't know which objection the court is sustaining when the court says "I sustain the objection," when there are different people making different grounds. I don't know how to change the question, or figure out what the problem is." Id. at 7171:22-27. Judge Wiatt proceeded with sanctions in the amount of $100 after a hearing. Id. at 7171:28-7174:1; 48 RT 7252:26-7253:4; 19 RCT 4886-4903.[37] When there was a dual objection on different grounds, Judge Wiatt refused to tell counsel on what ground or grounds he had sustained the objection. See e.g., 52 RT 7878:7-14.[38]

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[36] Despite Judge Wiatt's permissive attitude toward the two prosecutors interposing seriatim objections ("it's entirely appropriate for the prosecutors to do that"), he did not have the same position when two defense counsel attempted to make a point. See 61 RT 9610:11-13 ("I'm going to hear from either Mr. Fisher or Mr. Waco. I am not going to hear from both of you, back and forth."); See also 34 RT 4744:23-4745:10; 61 RT 9607:24-9610:15. Compare, 37 RT 5261:15-24: "Your quarrel is with the concept that the prosecutors would at the same time raise an objection. They've done that countless times in this case. I have not told the attorneys that only one can talk at a time. I've made no limitation on them. They are both attorneys in this case. They're counsel of record. Either one of them can object and state whatever they want at any time."

[37] Counsel filed a petition in the Court of Appeal challenging the sanctions. The Court of Appeal issued a stay and a Palma notice. Waco v. Superior Court, B142821. Judge Wiatt withdrew the sanction after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8.

[38] "Mr. Barshop: Objection. Calls for speculation.

Ms. Silverman: And asked and answered.

The Court: Sustained.

Mr. Waco: May I ask on what ground?

(continued...)

During the prosecution's cross-examination of defense expert Dr. Gordon Plotkin, Mr. Barshop complained that he had not been provided Dr. Plotkin's CV. He then asked: "can I get a CV from anyone?" The witness offered to retrieve one from his car. Then defense counsel said: "I don't -- I believe it was sent downtown." Judge Wiatt then sent the jury out of the courtroom. He expressed an intention to impose sanctions on defense counsel for making a speaking objection. Counsel responded that he was attempting to answer Mr. Barshop's question to "anyone" as to the location of the CV. The court then threatened contempt. 52 RT 7901:20-7904:11. (Later the court decided not to impose sanctions for this incident. 58 RT 9049:6-23.)

When defense counsel was cross examining Fernando Nieves during the penalty phase, he asked the witness if he had the original of a letter that Sandi Nieves had sent him in Germany. The witness answered that he had given it to the district attorney. Defense counsel then said, "we only have a xerox here." The court immediately sent the jury out and proceeded to give defense counsel oral notice that he would be held in contempt of court for making this comment. 64 RT 9461:17-9463:28. Judge Wiatt withdrew the citation after Sandi Nieves was sentenced to death. 65 RT 10227:28-10229:8.

Midway during the guilt phase defendant sought a mistrial. 34 RT 4681:1-4683:11, 4684:15-4685:5.[39] This was followed by a series of

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[38](...continued)
The Court: Sustained. Just listen to the objections, and you will know the grounds."

[39] "[Mr. Waco:]: In the middle of the testimony early on the court banged its gavel when I was examining one of the witnesses, and

(continued...)

subsequent mistrial motions. 35 RT 4771:8-4773:7 9 (denying written motion); 38 RT 5264:16-5266:8 (denying oral motion); 40 RT 5631:19-5633:15(denying oral motion); 41 RT 5821:20-5827:19 (oral motion denied); 44 RT 4465:13-6466:24 (oral motion denied); 44 RT 6574:19-24 (no ruling); 49 RT 7430:12-7532:3 (oral motion denied).

During a discussion about foundation for evidence of mental impairment, defense counsel again sought a mistrial. He attempted to defend himself against charges he was purposely injecting error into the case and attempting to use inadmissible hearsay. After a joint attack from the two prosecutors and lectures from the judge, defense counsel finally said: "well, you know, it gets to the point, you know, it's -- it hurts too much to cry, and all you can do is sort of sit here and almost grin and bear it as best one can, and let the chips fall where they may." 34 RT 4724:27-4725:2.

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[39](...continued)
throughout the trial the court's accusations and total demeanor indicate to me that the court seems to have a personal vendetta against myself, and maybe the entire defense team. And because of that, I reluctantly, respectfully ask for a mistrial, because I no longer feel that the court can look at these motions independently and give an independent evaluation. The whole tenor of the court's rulings and the way it denies the defense an opportunity to respond, whether it be in cross-examining witnesses or in motions being filed, and throughout the entirety of the case seems to be extremely one-sided, and my client is not getting a fair trial.

"I mean, that's my basic job. The court is obligated -- it's obligated to be fair and independent to assure Mrs. Nieves a fair trial and due process of law, and if the court looks within its own soul, it seems to me that your feelings towards me personally and the defense team has taken such a tenor, such a flavor, such an attitude that the court can no longer look at these things in a fair and independent way and make its rulings accordingly, instead of having a bias."

34 RT 4682:26-4683:6.

Counsel was even chastised for accusing the court of being unfair: "You're warned about accusing the court of being unfair or backslapping or aligning itself with the prosecution." 37 RT 5055:3-5. As the trial proceeded and the disparagement and bias continued, counsel said he had become "very anxious and quite upset, so my ability to articulate in a slow, succinct, and more cohesive fashion has been affected by my agitation by the court's seemingly -- seemingly, I emphasize the word "seemingly" -- agreeing with everything the district attorney has done." 42 RT 6059:22:27.

In fact, defense counsel said that he was directed at one point by his supervisor "to go to UCLA, to get a checkup mentally and physically, and see if I can continue with this case, because he was concerned I may not be doing the job, or cannot do the job at this time, or any further." 42 RT 6056:1-6.

At 11:45 a.m. on July 7, 2000 when defense counsel asked for a break because he had a headache and asked "to go to the office to relieve it" since he did not "feel he [could] continue at this time," Judge Wiatt not only refused to recess, but he belittled counsel. The judge ordered counsel to continue. At noon, he ordered counsel back at 1:30 p.m. "with or without a headache." 45 RT 6735:16-6740:2.[40]

Despite the motions for mistrial and defendant's motions to disqualify Judge Wiatt pursuant to Penal Code § 170.1(a)(6), all motions were denied. The judge continued presiding. 19 RCT 4663-4668, 4673-

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[40] Compare Judge Wiatt's solicitous treatment of Ms. Silverman. "Ms. Silverman: To be quite honest, I'm exhausted at this point. I can't think straight. It's going on like this for several days. . . . Can the court give me maybe five minutes? Maybe I can sit here quietly and cut out a substantial portion [of cross-examination]. ¶The Court: Yes you can do that." 42 RT 6182:19-6183:15.

4680, 4774-4781, 4801-4809, 4838-4844; 20 RCT 5005-5060, 5075-5082, 5164-5168; 21 RCT 5280-5358, 5365-5372, 5457.

2. Disparagement and Threats to Defense Expert Witnesses

a. Dr. Lorie Humphrey

Lorie Humphrey, Ph.D., a defense psychologist, had a particularly difficult time with Judge Wiatt – so difficult that after he threatened her with prosecution for perjury, she never returned to testify, leaving the defense in need of a substitute neuropsychologist.[41] See 61 RT 9610:19-9624:19 ("[A]nd under the circumstances of her being called a liar and a perjurer, and the distress she was in over all of that, we didn't think we could bring her back and that she would be a good witness at that point. So I, at least, started thinking in terms of trying to find an independent person to evaluate all this evidence" (61 RT 9618:22-9619:1).)

As Humphrey was cross-examined by one of the prosecutors, she was asked about a fourteen page report she had prepared and several tests she had given to Sandi Nieves. At one point the court reporter complained that Dr. Humphrey was interrupting the questions and the court reporter was having a problem recording both speakers. 53 RT 5319:1-3. The judge then dismissed the jurors. He threatened Dr. Humphrey with sanctions.

> The Court: Dr. Humphrey, the court reporter has just brought to my attention that you're interrupting the prosecutor in the questioning. I don't know what issues of divided attention or other psychological issues are at hand here, but you test people on this. Just from my perspective, it's not helpful when you're talking on top of somebody else, because these are excellent court reporters we have reporting this trial, but

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[41] See Part XIX infra.

> it's an insurmountable burden on them to try to write down two people simultaneously. It's very difficult, and that's why we have rules against it.
>
> If you do it again, I am going to impose sanctions against you for violating a lawful court order. You are ordered not to step over the words of counsel or the court, and if it means pausing and taking a breath before you answer, that's what you are going to have to do.
>
> The Witness: That's a good idea.
>
> The Court: I warned you about this a number of times, and it's gotten to the point, unfortunately –

Id. at 5319:13-5320:7.

Dr. Humphrey's testimony was then truncated so that Dr. Robert Brooks, a prosecution expert, could be taken out of order.[42] 38 RT 5364:5-20, 5369:2. Although Dr. Humphrey was in the courtroom with the notes while Dr. Brook testified, at the end of the day, after the jury was dismissed, she was nonetheless threatened with sanctions for failing to turn over the notes earlier.[43]

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[42] In the meantime, Dr. Humphrey went across Los Angles County to retrieve her notes, as ordered by Judge Wiatt. She got stuck in traffic coming back to court. The judge refused to delay the proceedings for even a few minutes to allow Dr. Humphrey to assist defense counsel as the prosecution expert, Dr. Brook, was attacking Humphrey's earlier testimony. 38 RT 5381:13-23 ("I am not going to delay for her.").

[43] Compare the treatment of prosecution witness Dr. Brook. When Dr. Brook stated that he had notes he had not given to the district attorney to show the defense:

> Q With regards to the notes you took yesterday, you say you have those with you. You have not turned that over -- did you turn it over to the district attorney?
>
> A No.

(continued...)

> The Court: All right. I will tell you, counsel are ordered here at 9:00 o'clock tomorrow, and however long it takes, that's how long we'll be in session. Now, I want Dr. Humphrey to be here tomorrow regarding the issue of sanctions for non-compliance with discovery. She is ordered to be here tomorrow at 9:00 a.m.
>
> Ms. Silverman: Can we get those notes that she went to get at her office? I am assuming copies were made.
>
> The Court: She was ordered to provide them to you at 1:30.
>
> Ms. Silverman: No, she hasn't, and it's 5:00 o'clock.
>
> Mr. Waco: She's been sitting here waiting to turn it over. She hasn't had an opportunity.
>
> The Court: Well, what is it about bringing it here and giving it to the prosecutors at 1:30 that she didn't understand?
>
> Mr. Waco: In all due respect, she was told to be back here. We're not hiding anything. She has the material.
>
> The Court: Well, that's not true. You are hiding things and have hid things in the past. Dr. Humphrey is here. She is ordered to be here tomorrow at 9:00.

38 RT 5489:22-5490:20.

The next day proceedings were delayed until the afternoon because the defendant had not been brought to court by the bailiff. After the trial judge blamed the delay on defense counsel, he ordered Dr. Humphrey back at 2:30 p.m. when the defendant would be present.[44] "Dr. Humphrey, you're

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[43](...continued)

> Mr. Waco: Your honor, I would respectfully ask for a recess to see them.
>
> The Court: That request is denied. It's untimely.

38 RT 3486:17-25.

[44] See 39 RT 5491:1-5503:13. "So the delay, once again, is

(continued...)

ordered back at 2:30. Call your babysitters and dog sitters and everybody else, and tell them we'll be here as late as it takes." 39 RT 5503:26-5504:1.

When the proceedings resumed, the prosecution was permitted to question Humphrey about a six page document she had received from a Dr. Satz, which Humphrey believed had new norms for scoring the color trails test that she had referred to in her trial testimony. The prosecution was also permitted, over objection, to cross-examine Humphrey as to a phone conversation she had had with Satz the previous day. Humphrey admitted that she learned from the conversation with Satz that the color trails norms she had used and testified about were not the newest norms. 39 RT 5507:1-5511:7; Exh. 73. At that point Judge Wiatt became the inquisitor:

> Q And were you told that the norms that are in the color trails manual are now outdated by Dr. Satz?
>
> A No.
>
> Q Isn't that what you testified to yesterday?
>
> A Yes. That's what I believed to be true at that time.
>
> The Court: Well, what's changed to correct your belief?
>
> The Witness: I've gotten more information.
>
> The Court: So what you said yesterday was untrue, even though you thought it was true?

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[44](...continued)
attributable to Mr. Waco, and I will just have to order counsel to come back with the witnesses at 2:30." Id. at 5501:23-25. See also, id. at 5505:12-17 ("Mr. Waco: My client also gives me a notice that she requested to come here this morning at 9:55. She's been telling the -- she was woken up at 7:00 o'clock to come here, and she told deputy McVey downtown, and I have here a computer readout. The Court: Forget about that right now.").

The Witness: Yeah. It was the -- what to the best of my knowledge yesterday was true, and today I have more information.

Id. at 5511:8-21. More questions were then asked by Ms. Silverman about Humphrey's telephone conversation with Dr. Satz. Id. at 5511:22-5522:27. The prosecutor then asked an open-ended question: "Did Dr. Satz say anything else to you?" After Dr. Humphrey answered that she did not think so, the following exchange occurred, ending with Judge Wiatt threatening her with prosecution for perjury.

Q Did Dr. Satz tell you that you shouldn't be mucking around in areas you are not qualified in? Was that his language?

A No.

Q That wasn't?

The Court: You're under oath, Dr. Humphrey.

Q By Ms. Silverman: Do you understand that?

The Court: If you're not sure, you can say that. But if you specifically deny that and it's not true, you have a problem.

39 RT 5523:2-11.

The prosecutor continued asking questions about the norms used by Dr. Humphrey and whether she had attempted to mislead the court. When defense counsel objected to the form of the questions and that most questions had been asked and answered previously, the trial judge overruled every objection. The interrogation ended with another insult from the judge.

Q By Ms. Silverman: Were you wrong in using the norms that you used in this case in testifying before this jury? Were you wrong?

A No, I do not believe I was.

> Q You still are telling this court that you were correct in using unpublished, experimental norms, the ones contained in people's 73?
>
> Mr. Waco: There is no evidence those are experimental norms, your honor.
>
> The Court: I have overruled that objection a number of times. You don't have to make it again.
>
> Q By Ms. Silverman: Is that yes? It's a simple question.
>
> The Witness: Repeat the question once more.
>
> The Court: *Doctor, why don't you just listen to the question the first time.*
>
> The Witness: There is a lot going on, and I lost track of it. I'm sorry.
>
> The Court: Read it back.
>
> (Record read.)
>
> The Witness: The question misstates what I have stated by referring to these as unpublished, experimental norms. I am not at all certain that these are unpublished, experimental norms.

39 RT 5530:1-27 (emphasis added). The judge did not relent during the defense examination, where he also took over some of the questioning.

> The Court: And sometimes you use the results and sometimes you don't in forming your opinion; is that what you're saying?
>
> A I use the results if they fit -- you look – when you do a neuropsych examine, you get some scores sort of in isolation.
>
> The Court: Why don't you just answer my question yes or no.

Id. at 5532:21-28. See also, id. at 5546:10-5547:18, 5548:7-14.

When Dr. Brooks was called by the prosecution out of order to rebut Dr. Humphrey, the court ordered Humphrey out of the courtroom. Id. at 5558:13-26. After defense counsel objected, Judge Wiatt stated, "if

somebody lies in a courtroom, it would be more appropriate that they not be in the courtroom when there's impeachment evidence on that." Id. at 5559:22-26. After Dr. Brook testified, the court stated that: "frankly, based on what Dr. Humphrey has said, I mean, *she is just an out-and-out liar*, Mr. Waco." Id. at 5572:3-5 (emphasis added).[45] [46]

The prosecution asked that she be precluded from providing further testimony. Judge Wiatt said he would not preclude her from resuming her testimony, but he then gave a direct threat to the defense and advice to the prosecution:

> Ms. Silverman: But we don't want her to be recalled, your honor. This is a witness who clearly, I believe, has misrepresented and lied in a court of law, and should not be allowed to resume the stand knowing that.
>
> The Court: Well, I am not going to preclude her from getting back on the stand. *If she wants to get back on the stand, you may want to have somebody from the Office of the Attorney*

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[45] The lie, according to the court, was that "she characterized People's 73 as the newest normative data when, in fact, it's in this '93 booklet." Id. at 5572:8-10.

[46] The record shows that among the numerous tests Dr. Humphrey administered to Sandi Nieves, she used the wrong set of norms in scoring the color trails results. Mistakenly, Humphrey thought the faxed norms, prepared in 1993, were the most recent. Her testimony before the jury covered a broad range of testing and results. The color trails was a small part of it, but the prosecutors and court latched onto the color trails issue as a means of undermining Dr. Humphrey's entire testimony.

The effect of Dr. Humphrey's use of older norms is debatable at best. In fact, if she had relied on the correct norms, they would have shown Sandi Nieves to be even more abnormal than Dr. Humphrey's results disclosed. 39 RT 5572:23-5573:1. See also 40 RT 5609:4-27, 5611:18-25 (Dr. Brook testifies that norms in the manual would have led to the same result).

> *General here.* You probably would have a conflict in prosecuting her. Maybe not. But it's clear to me that she's perjured herself.

Id. at 5517:6-17.[47] The threat itself violated Sandi Nieves' rights to a fair trial. See Webb v. Texas (1972) 409 U.S. 95 (trial judge threatened defense witness with prosecution for perjury). This requires reversal.

b. Dr. Philip Ney

During the course of Dr. Phillip Ney's testimony, the court took a recess for the Fourth of July holiday. Dr. Ney was from Victoria, Canada and had an active patient practice there. 40 RT 5739:3-4. Judge Wiatt ordered him back at 10:00 a.m. on July 5, 2000. Dr. Ney respectfully asked the court if he could return to court at 11:30 a.m. so that he could fly round trip in one day and continue treating his patients. Judge Wiatt insisted he come to court at 10:00 a.m. and threatened him with an arrest warrant if he did not come back. 42 RT 6208:11-20 ("This court proceeding is going to take precedence over his personal life."); 6213:1-6214:6 ("If he doesn't come back and he's ordered back, I'll issue a warrant for his arrest. And I'm sure the Canadian authorities will cooperate.").

During cross-examination of Dr. Ney, one of the prosecutors continually asked Dr. Ney what he had testified to during the prior week in the case. Dr. Ney could not recall precisely without a transcript, Judge

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[47] Judge Wiatt's visceral use of the term "perjury" was a direct threat. It was not any sort of unbiased analysis of criminal culpability or fair trial procedure. The crime of perjury requires a wilfully false material statement. See Pen. Code § 118; People v. Hedgecock (1990) 51 Cal. 3d 395, 405; People v. Pierce (1967) 66 Cal.2d 53, 61. It is highly doubtful Dr. Humphrey wilfully, as opposed to carelessly, misrepresented anything. Even so, the wrong norms in scoring a color trails test were not material to the outcome of this case or even Dr. Humphrey's opinions. See note 46 supra.

Wiatt implied in the presence of the jury that the prosecutors could show Ney was lying simply by use of the transcript after Ney testified. 42 RT 6093:6-6096:9; 6096:12-14 ("just ask a direct question, and if it's inconsistent then you can impeach him with the transcript.").[48]

c. Dr. Gordon Plotkin

When Dr. Gordon Plotkin, a defense expert, was testifying about a literature search he had conducted, Judge Wiatt gratuitously took over the examination in order to undermine Dr. Plotkin by making him appear to be shallow and incompetent.

> The Court: Wait, wait. Please. When you say you found volume of articles, do you mean to say that you found volumes of abstracts of articles?
>
> The Witness: That's correct.
>
> The Court: And you haven't read any of the articles themself; is that correct?
>
> The Witness: Right. All from the same search.
>
> The Court: Did you do this on the internet?
>
> The Witness: Yes.
>
> The Court: Didn't you see when you were online on the internet that you can simply log on and order the document by e-mail.
>
> The Witness: Well, I did this Saturday.
>
> The Court: Didn't you see that when you were online that all do you have do[sic] is log on and become a user and you can order the articles online? Did you see that?

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[48] Judge Wiatt made it clear to the attorneys, outside the presence of the jury, that he believed Dr. Ney, like Dr. Humphrey, to be a "liar." 46 RT 7004:26-7006:4; 51 RT 7738:14-7739:28. He also disparaged defense expert Dr. Kaser-Boyd, who ultimately did not testify, that "I don't have a lot of confidence in her declarations under oath." 36 RT 5012:18-22.

The Witness: I don't think you can log on on a Saturday to become a user. But it didn't phase me to do that. I had enough data, I felt, to make that opinion. I should say that I would like to read the article, that would be the ideal way of doing it, but it's not -- the previous expert testified that he based his opinion on a pubmed search and not reading articles which explained it.

The Court: Which expert are you referring to?

The Witness: This was, I believe, [prosecution expert] Dr. Phillips talked about the PubMed search.

The Court: But he is a board certified toxicologist, correct?

The Witness: This is about serotonin syndrome.

The Court: All right.

The Witness: He's not an expert in that.

52 RT 8008:13-8009:19.

When Dr. Plotkin, was cross-examined by the prosecution, he was asked why he had not interviewed the defendant. Explaining that he was retained shortly before his testimony was presented, and further explaining the time constraints he worked under, Dr. Plotkin said it would be preferable to have interviewed the defendant beforehand. 53 RT 8104:6-27. The Court then gratuitously disparaged him by asking: "then why did you accept the appointment?" Id. at 8104:28-8105:4.

After explaining that he generally enjoyed this type of work, Plotkin said that this was the most adversarial case he had seen. 8105:19-8106:12. He expressly noted that "I believe that the defense experts have been suggested as liars to begin with, and had I known that, I wouldn't have taken on the personal insults the way I have." Id. at 8105:22-25.

On cross-examination, Judge Wiatt consistently refused to allow Dr. Plotkin to explain his answers. See e.g., 52 RT 7949:19-7950:7; 8092:6-17.

When Plotkin finally protested, with the jury out, Judge Wiatt threatened to have him taken off the Los Angeles County approved expert panel.

> The Court: Now, Dr. Plotkin, I want a word with you.
>
> The Witness: Sure.
>
> The Court: Dr. Plotkin, you have not been denied an opportunity to explain your answers. What you don't perhaps understand is when you're being cross-examined by somebody, they ask you questions and you're expected to answer those questions. If you feel you need to explain it further, when redirect is done by Mr. Waco he can bring out the things that you felt were not explained. Every time there's been a limitation on your explanation, it's the court that has done it. *Now, if you have some problem with me, or if you have some problem being an expert on our panel, let me know, and I will contact the head of the panel and I will have you taken off.* But I don't want you arguing with the court in front of the jury, and when the jury comes in here I am going to tell them that. Bring in the jury.

53 RT 8119:8-28 (emphasis added). The judge then told the jury "There has been no limitation on this witness in his ability to explain anything." 53 RT 8120:28-8121:1.

On the other hand, Judge Wiatt freely allowed prosecution experts to explain their answers and answer leading questions from the prosecution. See e.g., 18 RT 1904:26-1905:3 (leading questions from prosecutors to prosecution experts permissible); 40 RT 5609:4-5610:5 ("let him finish, Mr. Waco"); 44 RT 6607:15-23 (leading questions from prosecutors to prosecution experts permissible); 54 RT 8279:11-8282:10 (lengthy explanation to "yes" and "no' questions); id at 8304:4-8305:21 (same); 45 RT 6711:18-6713:1 (over objection, court allows prosecution lengthy explanatory answer).

Later, as Dr. Plotkin was testifying, Judge Wiatt again denigrated him in front of the jury, doing the work of the prosecutors.

[Mr. Waco] Q And with regards to Ney calling it a "dissociative state" after a seizure, you call it – it's your terminology that it would be better termed a "delirium state." Is that correct?

. . .

A I believe that he was confused during some parts of his testimony where he --

Ms. Silverman: Objection. Move to strike, nonresponsive.

The Court: Overruled.

The Witness: I would more be apt to describe that as a delirium state after a seizure. Where he, I believe, misspoke and called it a dissociative state.

The Court: When you say you believed he misspoke, you never talked to him, did you?

The Witness: No. From reading his testimony.

The Court: For all you know, he said exactly what he meant to say and he just doesn't know what he's talking about.

You don't know that, do you?

The Witness: That's correct.

The Court: That's a possibility?

The Witness: Sure.

The Court: *So why don't you confine your answers to that, and don't assume what is in Dr. Ney's mind if you're*(sic) *never spoken to the man.*

53 RT 8186:6-8187:10 (italics added).

3. Disparagement and Threats to Defense Lay Witnesses

When lay witness Carl Hall testified at the penalty phase on behalf of the defendant, Judge Wiatt was equally demeaning – essentially taking advantage of Mr. Hall's lack of courtroom sophistication. Hall was explaining his "yes" and "no" answers. The judge would strike the explanations. Then this occurred:

> [Mr. Waco] Q The -- did you also go to the funeral of the children?
>
> A I was able to attend the funeral. And at that time I had witnessed some hostilities between --
>
> Mr. Barshop: I am going to object.
>
> Ms. Silverman: Nonresponsive.
>
> The Witness: -- Mr. Folden.
>
> The Court: All right. I am going ask the jury to go back in the jury room. Remember my admonitions.

62 RT 9659:19-28. Outside the jury's presence Judge Wiatt threatened the witness with money sanctions and jail.

> The Court: Wait. That calls for a yes or no answer, does it not? Does it not?
>
> The Witness: It could.
>
> The Court: It does, doesn't it? If you answer another question like you just did, I am warning you, if you answer a question other than yes or no when it calls for a yes or no answer and try to get before this jury improper evidence that I've already ruled upon, *I will hold you in contempt of court, put you in jail for five days, fine you up to $1000 or impose monetary sanctions of up to $1,500. Those are the options I have. Do you understand that?*
>
> The Witness: I do.

Id. at 9660:12-27 (italics added).[49] Judge Wiatt then informed the jury that Hall had been admonished "not to get anything else before the jury that is not responsive to the question." Id. at 9664:17-20. Next Hall was chastised for answering a question while a question was pending. Judge Wiatt again showed his lack of patience and bias toward this defense witness:

> Q By Mr. Waco: What is there about Sandi's character that you believe benefits yourself?
>
> Ms. Silverman: Objection. Irrelevant.
>
> The Witness: Sandi has been inspirational to me in raising my children.
>
> By Mr. Waco: You have to wait.
>
> Mr. Barshop: Move to strike.
>
> The Court: Do you understand when there's an objection, you're not supposed to answer the question? Do you understand that?
>
> The Witness: Okay.
>
> The Court: Do you understand that?
>
> The Witness: Okay.

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[49] Previously Judge Wiatt held an Evidence Code § 402 hearing regarding the testimony of Carl and Cindy Hall. However, neither witness was present for the hearing. The court's ruling was less than clear and neither witness was informed by the court as to what was and was not the proper scope of their testimony. The only evidence pertaining to Hall that Judge Wiatt had previously ruled on related to defense Exhibit SS-7 concerning David Folden's repossession of a car from Sandi Nieves's home after the fire. Hall was not even present when this ruling was made. Hall's testimony, which was the subject of Judge Wiatt's disparagement before the jury, did not even begin to touch on the precluded subject matter. See 62 RT 9331:15-9638:24, 9631:1-9638:24.

The Court: Then why did you just make that response when there was an objection raised? Why did you just make that response when there was objection? You don't know, do you? The answer is stricken.

By Mr. Waco: Are you nervous up there?

A Yes, I am, very much so.

Id. at 9666:12-9667:4.

Direct examination ended abruptly. On cross-examination, Judge Wiatt was not finished humiliating Hall and undercutting the mitigating force of his testimony.

By Mr. Barshop: Do you think someone who kills their children is a warm, loving, caring parent?

A Not a person that might be in their right mind.

Q Oh. Who told you she wasn't in her right mind?

A Sandi would not do this if she had not been.

Q Who told you she wasn't in her right mind?

A Sandi would not have done that had she been –

The Court: Why don't you just answer the question. Who told that you?

The Witness: Nobody told me.

The Court: Then why didn't you just answer the question that way?

Id. at 9668:19-9669:7.

Judge Wiatt's conduct undercut Hall's testimony and prejudicially undermined Sandi Nieves's defense. "In this incident, as in others, the manner in which [he] addressed lay witnesses reflects impatience, anger, and an intimidating lack of courtesy in explaining court procedure." Kloepfer v. Commission On Judicial Performance (1989) 49 Cal.3d 826, 844. See also, id. at 846, 857-858 (prejudicial misconduct for judge to tell

witness, "You can be punished with a fine or jail. Keep your mouth shut.").[50]

4. Disparagement and Threats to Sandi Nieves

Judge Wiatt was no less cruel and unfair when Sandi Nieves testified on her own behalf at the guilt phase. 35 RT 4783-4939. He threatened her, he disparaged her, and he branded her with an "unmistakable mark of guilt." See Holbrook v. Flynn (1986) 475 U.S. 560, 571; Estelle v. Williams (1976) 425 U.S. 501.

After brief direct examination in which Nieves testified she remembered very little from the night of the fire, she was vigorously cross-examined by deputy district attorney, Beth Silverman. At the end of the cross-examination, Nieves said that "I sit here and wonder every day what I could have done different and what happened there, period. I have no idea." Id. at 4932:4-6. The prosecutor then asked if she had opened the sliding glass door in the morning after the fire to go into the backyard. Nieves answered that "I would have had to have." Id. at 4932:9. Next

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[50] Judge Wiatt was clearly suspicious and biased against the defense witnesses in general. Sometimes this manifested itself in pettiness, such as stating on the record that he needed to review the motel bill submitted for Mr. and Mrs. Lucia, Sandi Nieves's stepparents, because it might include "x-rated movies and room service and all kinds of things." 58 RT 9060:18-9061:14; 9114:3-7.

When Dr. Gordon Plotkin was testifying, Judge Wiatt asked him if he was referring to any notes. Dr. Plotkin answered," No. Your honor." 52 RT 7863:13-15. After the witness informed the Court that he was not referring to notes, in the jury's presence, Judge Wiatt peered over at him as if to verify that for himself. Then, the subtle glance apparently being insufficient to satisfy him, the Judge stood up, leaned over, and carefully scrutinized the witness area to be sure that the witness was indeed not referring to any notes as he had expressed to the Court. See Declaration of Howard Waco and Tina Katz, 22 RCT 5590.

Nieves said she did not remember stepping over her children. Id. at 4932:19-20. At that point, the prosecutor asked Nieves to "turn around" and look at the photographs marked as Exhibit 3, showing the four dead girls on the floor. Nieves answered, "if it's of my children, I'm not." Judge Wiatt abruptly said in the jury's presence: "Put it in front of her then." Defense counsel objected. The objection was overruled. Id. at 4932:21-28.

When the photos blocked the jurors' view, Judge Wiatt ordered that they be put back. He then ordered Nieves to look at the photographs:

> [The Court:] Miss Nieves, you're ordered to turn around and look at the photographs.
>
> The Witness: I am not looking at my children if they're dead.
>
> The Court: I am ordering you to turn around and look at the photos.
>
> The Witness: I am not looking at my kids.

Id. at 4933:4-10. Judge Wiatt sent the jury out of the courtroom. Without any exhortation from the prosecution, or asking for a showing of relevance, or making inquiry whether the prejudicial effect might outweigh the probative effect under Evidence Code § 352, Judge Wiatt threatened Nieves with contempt of court.

> The Court: I am ordering you look at the photographs, Miss Nieves. You can put them front of her, if they'll fit on the table, and you're going to have to look at the photographs and be questioned on them. If you don't and you violate an order of the court, I will find in you contempt of court. Let's bring out the jury.

Id. at 4933:20-27. Defense counsel asked for "a couple minutes for the witness to compose herself?" Judge Wiatt responded with an emphatic, "no." Id. at 4933:28-4934:2. Trial before the jury resumed.

The prosecutor then asked if Nieves was telling the jury she thought her children were asleep when she stepped over them. A defense objection was overruled. Nieves answered:

> I don't remember my kids at all on the floor. I don't remember them at all, and I am not going to look at my kids when they're deceased. I don't want to remember my kids like that. I want to remember my kids alive.

Id. at 4934:21:25. The prosecutor then asked if Nieves had looked at the "vomit, foam, and things" that were coming out of the children's mouths as she stepped over them. Nieves denied any recollection. Id. at 4934:26-4935:4.

Defense counsel asked for a recess because "the witness is distraught." Without any prompting from the prosecution, Judge Wiatt overruled the request. He ordered defense counsel to "sit down." At that point, the prosecutor announced that she was finished. Id. at 4935:6-12.

Nieves had not looked at the photos, but the failure to do so did not impede the prosecutor's ability to make her point (that is, that Nieves had to step over the children to get out of the house), and provided ammunition for an unfair attack on Nieves's character and honesty. Id. at 4935:28-4936:19.[51]

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[51] See Prosecution Guilt Phase Rebuttal Closing Argument (57 RT 8857:22-8858:3):

> We know the sliding gas door was closed and the kitchen window was closed during the fire, because there was no soot outside. Remember that testimony?
>
> The house was sealed up. We know from her testimony, as well as the physical evidence, that she opened the patio door and that she went out to the kiddie pool, as she said.

(continued...)

After the jury was dismissed defense counsel made further objections to the use of the photos and Judge Wiatt's orders. The prosecutors did not have to argue their position because Judge Wiatt advocated for them. 35 RT 4935:28-4936:16. Judge Wiatt overruled all objections and he briefly turned to scheduling matters. The bailiff then asked Judge Wiatt if he could take Nieves out of the courtroom because "she's going to throw up." The judge said, "all right," and adjourned the proceedings for the day. Id. at 4936:25-4939:15.

There was no reason that Sandi Nieves needed to be forced to look at photographs of her dead children. Looking at the photos would not have proved anything relevant to her guilt. The jury had already seen the photos when they were introduced and described by prosecution witness Bruce Alpern. 16 RT 1509:13-1510:3; Exh. 3. Sandi Nieves admitted that she had to open the glass doors to get out of the house. 35 RT 4811:21-25 (direct), 4932:7-12 (cross). Since the photos were admitted in evidence (26 RT 3568), they could have been published to the jury and used in the prosecution's closing argument to the jury, as they were, even though Nieves had not looked at them during her cross-examination. See 54 RT 8447:3-22 ("I would ask you to look at People's 3."); 57 RT 8858:1-8859:24 (Nieves' hysteria "was all done to put on a dramatic show for you".).[52]

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[51](...continued)
And that when she did so, when she walked out and when she walked back in, she walked over the bodies of her children and claimed she didn't notice them.

[52] Defense counsel's rebuttal argument is found at 55 RT 8620:4-8621:24; 56 RT 8686:7-28.

There was no need for Sandi Nieves to be ordered to look at the photos and for them to be forced in front of her as Judge Wiatt ordered. Forcing Sandi Nieves to look at the photos was nothing more than dramatic argument by the prosecution to the jury. Every point the prosecution made through cross-examination could have been made, and was made, in a manner that was less cruel and less prejudicial than the mechanism used by Judge Wiatt.[53]

It is inconceivable that any witness, even a criminal defendant– who must be treated as "innocent until proved guilty," Deck v. Missouri, (2005) 544 U.S. 622, 630 – would be humiliated and disparaged in the manner Sandi Nieves was treated by Judge Wiatt. She should have been treated the same as any other witness due to "the presumption of innocence that survives until a guilty verdict is returned." Portuondo v. Agard (2000) 529 U.S. 61, 76 (Stevens, J., concurring).[54]

In fact, the prosecutors had previously told Judge Wiatt that they did not want the fathers – Fernando Nieves and David Folden – to see the photos in order to identify the girls. 27 RT. 3566:2-5. It is inconceivable on this record that Judge Wiatt would have forced the fathers to look at the

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[53] Judge Wiatt did not let the incident pass when it came time to settle the instructions. He argued that CALJIC 2.62 (telling the jury it could draw inferences from a defendant's failure to explain or deny evidence produced by the prosecution) was warranted by Nieves's refusal to look at the photos of the children. He read the instruction to the jury. 54 RT 8383:14-8384:14; 20 RCT 4932 (instruction); 46 RT 7010:27-7013:17 (instruction conference). The instruction was unwarranted inasmuch as Nieves admitted she "would have had to have" opened the sliding glass door. 35 RT 4932:9.

[54] There was never any evidence that she had any criminal record whatsoever.

photographs to identify the girls if either the prosecution or the defense had asked either of them to do so and the fathers had shown any reluctance. In his bias toward the defendant and her counsel, Judge Wiatt lost all perspective.

Judge Wiatt's treatment of Sandi Nieves when she testified was one element of the structurally unfair trial she received. Standing alone and in combination with other acts of misconduct it also was prejudicial.

First, it took the jury away from consideration of guilt or innocence. Instead it appealed to emotion and courtroom drama, with the judge figuratively pointing at Nieves's guilt and humiliation. "The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to 'dispensing with jury trial because a defendant is obviously guilty.'" Giles v. California (2008) __ U.S. __, 128 S.Ct. 2678, 2686 (quoting Crawford v. Washington (2004) 541 U.S. 36, 62).

The judge's treatment of the defendant turned the jurors' attention to a power struggle between Judge Wiatt and the defendant over whether she would look at the photos or defy an order to do so. It deflected the jury from its proper role: assessment of the evidence. See People v. Williams (1942) 55 Cal.App.2d 696, 703 ("Such remarks deflect the minds of jurors from the evidence actually before them and cause them to reach conclusions based upon feeling, bias, and prejudice, rather than upon the evidence which has been properly received and from which alone they should arrive at verdicts under the law.")

Second, the judge's order, the abrupt manner in which it was given, and the refusal to allow Sandi Nieves to compose herself, "conveyed to the jury disdain" for her and her testimony. Judges must seek to maintain a judicial process that is a dignified process. "The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." Deck v. Missouri (2005) 544 U.S. 622, 630. "Litigants, witnesses and attorneys alike are entitled to have a court function as a court of justice in fact as well as in theory. In exercising the firmness necessary to the dignity and efficient conduct of court proceedings, a judge's attitude should not reflect undue impatience or severity toward either counsel, litigant, or witnesses. . . . Justice should not be moulded by the individual idiosyncrasies of those who administer it." People v. Black (1957) 150 Cal.App.2d 494, 499;[55] see People v. Sturm (2006) 37 Cal.4th 1218, 1240.

Third, the prosecution used Sandi Nieves's refusal to look at the photos and the defendant's objections to them to great advantage in closing argument. In fact, the prosecution argued that "[t]he defense doesn't want you to look at those photos." 57 RT 8937:22-23.

> The defense doesn't want you to look at those photos. They say -- you know what they say? That shows passion, prejudice to show you photos. Those photos are the best evidence of what she did. We didn't create the photos. The sheriff's department didn't create what's in those photos. She did. She's a murderer.

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[55] The quotation is from the Canons of Judicial Ethics adopted by the Conference of California Judges. Id. at 499.

And in her rebuttal argument the prosecutor argued that Sandi Nieves's emotional reaction when ordered to look at the photos of her dead children was all an act, implying that her maternal horror was dishonest, that she was in fact not grievously distraught and jarred out her state of denial, and that she was in fact a manipulative killer. See 57 RT 8858:1- 8859:24.

Fourth, Judge Wiatt's conduct also marked Sandi Nieves with guilt by gratuitously forcing her to perform an unnecessary act before the jury and suffer humiliation before the jury in a manner that no witness should endure under our system of justice in the absence of a compelling reason. In this respect it was prejudicial to the administration of justice and a fair trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Sandi Nieves, like "every defendant" who is brought to court should have been given "the appearance, dignity, and self-respect of a free and innocent man." People v. Duran (1976) 16 Cal.3d 282, 290. See Giles, 128 S.Ct. at 2686; Deck v. Missouri (2005) 544 U.S. 622.[56] "[T]he criminal process presumes that the defendant is innocent until proved guilty." Deck at 630. In a reverse of this basic principle, Judge Wiatt's treatment branded Sandi Nieves with an "unmistakable mark of guilt." Holbrook v. Flynn (1986) 475 U.S. 560, 571. This alone requires reversal of the convictions.

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[56] Deck concerned the shackling of a defendant at the penalty phase of a capital trial. The Court held that shackling violates due process in the absence of a compelling reason to do so. Because shackling sends a message to the jury that undercuts the presumption of innocence and violates human dignity, the shackling cases are fully applicable here.

5. The Trial Judge So Skewed the Proceedings Against the Defendant That She Could Not Obtain a Fair Trial of Either Guilt or Penalty

An elementary rule of due process requires that trials be conducted evenhandedly. A court may not tip the scale of justice either toward the prosecution or the defense. Due process guaranteed by the Fourteenth Amendment and the Right to a Fair Trial Guaranteed by the Sixth Amendment require that justice "be a two-way street." Wardius v. Oregon (1973) 412 U.S. 470, 476. Mutuality is the touchstone of fairness. Here Judge Wiatt manifested his bias by treating the prosecution and defense entirely differently in the day to day conduct of Sandi Nieves's capital trial.

a. The Court Curtailed the Scope of Defense Questioning

Judge Wiatt was hyper technical in curtailing defense questioning of prosecution witnesses, frequently sustaining objections to questions on cross-examination on the ground that they constituted argument. The following is a small sampling of examples in which Judge Wiatt ruled defense questions were impermissibly argumentative during the guilt phase of the trial: 19 RT 2035:18-22 ("So your testimony at the preliminary hearing under oath is incorrect?"); 19 RT 2143:20-23 ("How were the kids able to get out of the car if your truck was only two feet away if her van was face-in when your truck was parked next to it?"); 20 RT 2275:25-2276:2 ("And isn't it also correct that from time to time she covered her face with her hands and turned away from the outside world, you or anybody else, as well as cry?"); 21 RT 2431:12-21 ("So if Scott said that he broke up with your mother two weeks or a month before that, would that be a true statement or an inaccurate statement?"); 22 RT 2628:17-21 ("This was a rehearsed thing that you had yesterday, wasn't it?); 22 RT 2688:27-2689:3 "So she was concerned that she might die if she had -- went through with

the pregnancy?"); 22 RT 2690:12-16 ("That seemed -- did that seem inconsistent with anybody trying to commit suicide?"); 23 RT 2877:8-11 ("We didn't see your letters. What were your letters like?); 24 RT 2951:5-7 ("So your affairs were only on the weekend?"); 24 RT 2961:13-19 ("Didn't she even tell you that in the will?" Hearsay objection withdrawn, court sustains objection sua sponte as argumentative).

Additional examples of questions which were objected to and sustained include: 24 RT 2965:2-8 ("Are you saying you don't remember whether Sandi told you she loved you and only wanted your friendship and love and respect in May of 1997?"); 24 RT 2998:6-10 ("So she was left with less than $1,000–" No objection, court interjects sua sponte "That's argument counsel."); 24 RT 3055:21-26 ("A. We weren't living together as a couple. Q. Just loving friends?"); 24 RT 3099:17-20 ("A. That's correct. No verbal communication unless she was yelling at me for some stupid reason. Q. Part of the stupid reasons were to make sure Maynard, David Maynard, stayed away from the kids?"); 26 RT 3449:3-7 (When I said "the gas can was almost half full," did you say "yes, maybe, or no"? The Court: it's already been read, Mr. Waco. Anything else would be a matter of argument to the jury."); 26 RT 3469:15-23 ("So he, in fact, did tell you that the last thing he remembers is his mother laying down on the floor next to him, between himself and the stove?"); 26 RT 3521:21-24 ("When you and your partner went this to the crime lab – The Court: Mr. Waco, that's argumentative. Mr. Waco: I haven't finished the question."); 26 RT 3524:13-20 ("So he had not given you any opinions? [No objection.] The Court: That's argument, counsel."); 26 RT 3525:17-23 ("Isn't it a fact that the A&E taping was just a small portion, fraction, of the time that you participated with your partner in an investigation of this case?"); 30 RT

4030:22-27 ("Do you feel you're testifying here as honestly as you can on the subjects you're being asked?"); 30 RT 4090:10-13 ("And how would you describe her as a mother?"); 43 RT 6355:12-19 ("If you did not know how to make a proper diagnosis, then you may have been incorrect when you evaluated her as not being depressed or needing antidepressants, or even being remorseful?"); 45 RT 6748:13-18 ("Also would it be fair to say that we should also take your computer readout on face value, because it has limitations in the -- which you put into your own report?"); 45 RT 6801:18-26 ("With regards to accuracies, you made a statement here about my client saying 'have a happy life while I'm dead.' Where did you find that? What letter did you find that in? I missed that.").

And there are more examples: 45 RT 6802:17-23("That particular note doesn't say "have a happy life while I'm dead"? Court sustains objection sua sponte as argumentative: "The letter is in evidence, and you can argue it."); 46 RT 6886:19-23 ("If there aren't any patients there, there isn't going to be any business to get paid; isn't that true?"); 46 RT 6903:19-28 ("The bottom line is, isn't it true the doctors want the initials on there in order to protect themselves? Isn't that what they want?"); 46 RT 6907:14-18 ("So if a person is having problems, physically or mentally, and doesn't call, it wouldn't show up in your charts; right?"); 46 RT 6931:4-10 ("And with regards to the mother abusing her, you told the district attorney on direct examination that you have no personal recall at this time; is that right?"); 46 RT 6953:27-6954:3 ("And so if there was a lighter and you didn't take notice of it, then it doesn't mean the lighter was or wasn't there on July the 1st; isn't that true?"); 46 RT 6954:4-8 ("If you took no note with regards to seeing the pills, it doesn't mean the pills weren't there, either, does it, sir?"); 46 RT 6965:6-13 ("Q. Did you ever ask her to sign off on

any document that she would agree that this is the conversation that she had with you? A. No. You could have done so had you wished to; is that correct?"); 52 RT 7866:2-8 ("If a particular drug were not tested, one would not know the amount that would be in the system; is that correct?").

On the other hand, the reporter's transcript is replete with instances in which the prosecutors were given substantial leeway in asking aggressive argumentative questions of defense witnesses. The judge's leeway in favor of aggressive, argumentative cross-examination is especially pervasive in Deputy District Attorney Silverman's cross-examination of Sandi Nieves and defense experts Dr. Lorie Humphrey, Dr. Phillip Ney, and Dr. Gordon Plotkin. It was also evident in her cross examination of all defense lay

witnesses in the penalty phase.[57] See also Part XX infra (prosecutor

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[57] See e.g., 61 RT 9566:1-9567:22 (Cross-examination of Henry Thompson):

> [Mr. Barshop:] Sir, didn't you just say that your daughter told you that Delores had kicked her out? Didn't you just testify to that a few moments ago?
>
> Mr. Waco: Asked and answered, Your Honor.
>
> The Court: Overruled.
>
> Mr. Waco: Also, argumentative.
>
> The Court: Overruled.
>
> The Witness: Okay. Possibly I should rephrase that to where she maybe didn't physically kick her out. But she made it so untenable for her to live there, she left on her own. That possibility exists, if you want to play with words.
>
> By Mr. Barshop:
>
> Q Sir, you chose the words; that you said that your daughter –
>
> Mr. Waco: The D.A. is argumentative –
>
> The Court: Overruled.
>
> By Mr. Barshop:
>
> . . .
>
> Q Is it now your testimony that you don't recall? I'm just trying to get what you're trying to say.
>
> Is it you don't recall? Is it that your daughter was kicked out?
>
> Mr. Waco: Objection to the voice of the District Attorney, shouting at the witness.
>
> The Witness: You have cast doubt in my mind, sir. You twisted things around so much, I have trouble sorting them out.
>
> The Court: Any other questions of the witness?

(continued...)

assumes defendant committed "perjury" in questions; objections overruled).

b. The Court Continually Truncated Defense Questioning

Throughout the trial Judge Wiatt truncated defense counsel's examination of witnesses and argument. He did so in a disparaging and often rude manner, exhibiting a bias and impatience with the defense that infected the trial proceedings. For example, the judge told defense counsel 70 times in the presence of the jury to "move on," get onto "something

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[57](...continued)
By Mr. Barshop:

Q Do you have the same trouble sorting out whether the defendant was a good, loving, and caring mother?

A Absolutely not.

Mr. Waco: Object to the form of the question. Sarcastic and argumentative.

The Court: It's overruled.

61 RT 9566:1-9567:22.

else," or get into "some other area."[58] He made similar comments to the prosecution five times.[59]

The court's truncation of the defense testimony and cross-examination violated the defendant's right to a meaningful defense, the right to confrontation, the right to a fair trial, and the right to a reliable verdict in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments

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[58] See 16 RT 1582 (Bruce Alpern cross), 1586 (Bruce Alpern cross), 1638 (John Harm cross); 17 RT 1782 (James Ribe cross), 1791 (James Ribe cross); 18 RT 1951 (John Ament cross), 1961 (x2) (John Ament cross); 19 RT 2026 (John Ament cross), 2037 (John Ament cross); 21 RT 2451 (David Nieves cross), 2458 (David Nieves cross), 2529 (x2) (David Nieves cross), 2553 (David Nieves cross); 23 RT 2752 (David Nieves further recross), 2848 (Fernando Nieves cross), 2887 (Fernando Nieves cross); 24 RT 2964 (Fernando Nieves cross), 2979 (x2) (Fernando Nieves cross), 2983 (Fernando Nieves cross), 2984 (Fernando Nieves cross), 3097 (David Folden cross); 26 RT 3373 (Wesley Grose cross), 3374 (Wesley Grose cross), 3378 (Wesley Grose cross), 3433 (Robert Taylor cross), 3445 (Robert Taylor cross), 3466 (Robert Taylor cross), 3468 (Robert Taylor cross), 3508 (Robert Taylor cross); 29 RT 3832 (Del Winter direct); 38 RT 5461 (x2) (Robert Brook cross), 5475 (Robert Brook cross), 5482 (Robert Brook cross); 40 RT 5623-5624 (Robert Brook cross); 44 RT 6515 (John Dehaan cross), 6558 (John Dehaan cross); 45 RT 6694 (Alex Caldwell cross), 6730 (Alex Caldwell cross), 6760 (Alex Caldwell cross), 6761 (Alex Caldwell cross), 6774 (Alex Caldwell cross), 6775 (Alex Caldwell cross); 47 RT 7102 (x2) (Robert Sadoff cross), 7103 (x2) (Robert Sadoff cross), 7104 (Robert Sadoff cross), 7155 (Robert Sadoff cross), 7158 (Robert Sadoff cross), 7211 (Robert Sadoff recross); 48 RT 7394 (Gordon Plotkin direct); 52 RT 7827 (Gordon Plotkin direct), 7879 (x2) (Gordon Plotkin direct); 53 RT 8138 (Gordon Plotkin redirect), 8151 (Gordon Plotkin redirect), 8178 (Gordon Plotkin redirect), 8182 (x2) (Gordon Plotkin redirect), 8221 (Gordon Plotkin further redirect); 61 RT 9458 (x2) (Charlotte Nieves cross), 9489 (Shirley Driskell direct), 62 RT 9766 (Robert Suiter direct), 9819 (x2) (Robert Suiter redirect).

[59] See 43 RT 6400 (Philip Ney further recross); 53 RT 8089 (Gordon Plotkin cross), 8098 (Gordon Plotkin cross); 62 RT 9715 (Lenora Frey cross); 62 RT 9719 (Lenora Frey cross).

to the United States Constitution. Crane v. Kentucky (1986) 476 U.S. 683, 690; Delaware v. Van Arsdall (1986) 475 U.S. 673, 679; Davis v. Alaska (1974) 415 U.S. 308, 315-316; Chambers v. Mississippi (1973) 410 U.S. 284; Skipper v. South Carolina (1986) 476 U.S. 1, 4; Gardner v. Florida (1977) 430 U.S. 349, 362.

c. The Court Assisted the Prosecution in Presenting its Case by Improperly Engaging in Its Own Internet Research

Judge Wiatt assisted the prosecution in presenting its case by suggesting themes for closing argument, by sustaining objections on grounds not articulated by the prosecutors, by asking leading questions of witnesses, by guiding the prosecution in its cross-examination of defense witnesses, by stymying the defense presentation, and by giving "star" status to a prosecution expert. Rather than repeat ourselves later, we refer to instances where the court aided the prosecution as they are addressed in the course of other substantive arguments in this brief. Those instances are incorporated here.

During the presentation of evidence in the guilt phase, Judge Wiatt improperly conducted his own Internet research on defense expert witnesses and the subject matter of the witness's testimony. First, Judge Wiatt conducted an Internet search in chambers into the background and organizational affiliations of defense expert Dr. Phillip Ney. Second, Judge Wiatt conducted his own Internet search using the PubMed search engine to disparage defense expert Dr. Gordon Plotkin.

Judge Wiatt's Internet research compromised the adversarial nature of the trial and aided the prosecution.

i. Internet Search on Defense Expert Dr. Phillip Ney

The defense called Dr. Phillip Ney, a psychiatrist with expertise in abortion and postpartum depression as well as pharmacological effects on patients' neuropsychological state of mind. 40 RT 5676:22-5678:8. He also had expertise in diagnosing seizures and the neurological effects of seizures. 40 RT 5678:9-5679:12.

The judge held an Evidence Code § 402 hearing outside the presence of the jury during which he allowed the prosecution to question Ney about a meeting with Sandi Nieves. 40 RT 5801:10-5802:5. After the prosecution questioned Ney for some time, Judge Wiatt announced, "I have a few questions for Dr. Ney." 41 RT 5846:1-2.

The judge asked Ney a series of questions related to the International Institute of Pregnancy Loss and Child Abuse Research and Recovery (IIPLCARR) of which Dr. Ney had testified he was president. 41 RT 5846:3-18. Judge Wiatt asked for the names of the other officers, overruling a defense relevance objection. 41 RT 5846:19-23. The judge then asked whether Dr. Ney ran a ministry called "Centurians." 41 RT 5847:26-28. Judge Wiatt questioned Dr. Ney about the purpose of the Centurians. 41 RT 5848:8-12. The judge asked Ney about his personal view on abortion and whether he had lectured at "pro-life" organizations. 41 RT 5848:13-25.

After the hearing, Judge Wiatt stated, "I'm going to have marked as People's 78 three documents that I found in researching Dr. Philip Ney on the Internet early this morning. I'll give a copy to each counsel." 41 RT 5873:13-18.

The documents marked as People's 78 included three items. The first was a document with the heading "Human Life International's 17th

World Conference on Love, Life and the Family, 1998 Houston," which included what appeared to be a description of a talk entitled "The Post-Abortion Syndrome" given by Drs. Phillip and Marie Ney. Exh. 78 at 1. The second was an article entitled "World conference glows with special events," by Jim Vittitow and Marianna Alpha, CV. Id. at 2. The article stated that Dr. Phillip Ney founded the International Institute of Pregnancy Loss and Child Abuse Research and Recovery (IIPLCARR) and a ministry called "Centurions." Id. The third item was a speech entitled "Word Power: the Use of Language to Dehumanize and Rehumanize," by Margaret H. (Peggy) Hartshorn, Ph.D., in which the author thanks Dr. Phillip Ney as the founder of IIPLCARR for the opportunity to speak. Id. at 3.

This information was obtained by the judge, not the parties.

ii. PubMed Internet Research Regarding Dr. Gordon Plotkin

The defense called Dr. Gordon Plotkin, a psychiatrist and a Ph.D. in Biochemistry. 41 RT 7376:1-7378:7. He testified during cross-examination he conducted research to prepare for his testimony using the PubMed search engine that searches the National Library of Medicine. 52 RT 7926:7-28. He explained he had only retrieved abstracts of the articles he relied on because it was a Saturday, he had accepted appointment to the case on very short notice, and he was unfamiliar with a way to retrieve the full article via the Internet. 52 RT 7929:2-12. Normally to get the entire article he would go to UCLA's Bio-Med Library. 52 RT 7929:12-14.

Directly following this testimony, the court excused the jury for lunch. 52 RT 7929:16-17.

Cross-examination of Dr. Plotkin continued in the afternoon. 52 RT 7934:26. He testified that he did not agree with prosecution expert Dr. Scott Phillips' testimony that phentermine does not induce serotonin. 52

RT 8004:9-26. Plotkin said that he found a volume of literature using the PubMed search engine that supports the finding that Phentermine raises serotonin levels and acts as a monoamine oxidase inhibitor. Id. He indicated he found a report involving tests on rats that identified the particular monoamine oxidase inhibitor. 52 RT 8007:12-17. The prosecution attacked Plotkin for relying on an abstract of an article as opposed to the entire article. 52 RT 8007:18-8008:5. Then Judge Wiatt interrupted and the following exchange took place:

> The Court: Wait, wait. Please.
>
> When you say you found a volume of articles, do you mean to say that you found volumes of abstracts of articles?
>
> The Witness: That's correct.
>
> The Court: And you haven't read any of the articles themself; is that correct?
>
> The Witness: Right. All from the same search.
>
> The Court: Did you do this on the internet?
>
> The Witness: Yes.
>
> The Court: Didn't you see when you were online on the internet that you can simply log on and order the document by e-mail?
>
> The Witness: Well, I did this Saturday.
>
> The Court: Didn't you see that when you were online that all you have do is log on and become a user and you can order the articles online? Did you see that?
>
> The Witness: I don't think you can log on on a Saturday to become a user. But it didn't phase me to do that. I had enough data, I felt, to make that opinion. I should say that I would like to read the article, that would be the ideal way of doing it, but it's not -- the previous expert testified that he based his opinion on a PubMed search and not reading articles which explained it.

52 RT 8008:13-8009:11.

As Dr. Plotkin looked through his materials to find the abstract of the article at issue, Judge Wiatt pulled out a copy that he announced to the jury he had "downloaded on the Internet during the lunch hour." 52 RT 8011:1-5.

iii. Judge Wiatt's Internet Research was Improper and Showed His Bias in Favor of the Prosecution

Judge Wiatt improperly used the Internet to conduct his own investigation into facts not in evidence before the court. His independent Internet research violated the California Code of Judicial Ethics that prohibits the trial judge from "independently investigat[ing] facts in a case." Advisory Com. Com., Cal. Code of Jud. Ethics, Canon 3B(7). A trial judge "must consider only the evidence presented, unless otherwise authorized by law." Id. See also People v. Jackson (1990) 218 Cal.App.3d 1493, 1505 (impermissible for judge to visit property involved in a hearing without the presence of the parties and counsel); People v. Handcock (1983) 145 Cal.App.3d Supp. 25, 32 (judge's independent investigation of accident and calling of own witness was prejudicial error); People v. Andrews (1970) 14 Cal.App.3d 40, 44, 92 (judge's reference to prosecution witness's lie detector test not yet in evidence was prejudicial error).

Judge Wiatt took on the role of prosecutor when he conducted independent research into facts at issue but not yet in evidence before the court and the jury.

First, the judge searched and discovered background information about defense expert Dr. Ney that the prosecution had not brought to the court's attention. He used this information to cross examine Dr. Ney on areas meant to discredit Dr. Ney or show bias. 41 RT 5846:3-5848:13-25.

His inclination to call the documents a People's exhibit, as opposed to a court exhibit, demonstrated his alignment with the prosecution. Exh. 78.

Second, after hearing testimony from defense expert Dr. Plotkin about his research using the search engine PubMed, Judge Wiatt performed his own PubMed search during the lunch hour. 52 RT 8011:4-5. He then used his search results to disparage Dr. Plotkin in front of the jury. 52 RT 8008:13-8009:11.

The defendant raised the impropriety of the judge's independent research in her motion for a new trial. 22 RCT 5535-5588 (motion denied in its entirety, 65 RT 10348). With respect to the judge's research during Dr. Plotkin's testimony, the motion pointed out that "Certainly the District Attorney had every opportunity to conduct the same research as the court, and there is no justification for the court to conduct its own independent research, and then to provide the fruits of that research to the District Attorney to aid in the prosecution of the case." 22 RCT 5577-5578.

By conducting his own Internet research, Judge Wiatt compromised the adversarial process. His actions were no different from the judge who improperly visited the scene of an incident without the presence of parties. Jackson, 218 Cal.App.3d at 1505. "Unilateral investigation by a trial court, although consistent with the role of an advocate, appears contrary to the primary responsibilities of a neutral judicial officer, and once started, invites abuse." Handcock, 145 Cal.App.3d Supp. at 32. See also Du Pont de Nemours v. Collins (1977) 432 U.S. 46, 56 (Court of Appeals erred because it employed a university professor to assist the court in understanding the record and to prepare reports and memoranda for the court "which had not been examined and tested by the traditional methods of the adversary process").

The areas that Judge Wiatt independently investigated were for the benefit of the prosecution. He conducted his own credibility determination of defense expert witnesses, and then provided his research as ammunition to the prosecution. He inserted himself into the role of prosecutor, and therefore showed his bias against Sandi Nieves. In the case of Dr. Plotkin's testimony, Judge Wiatt improperly aligned himself with the prosecution in front of the jury. People v. Robinson (1960) 179 Cal.App.2d 624, 633-637. The Supreme Court has held that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." In re Murchison (1955) 349 U.S. 133, 137. As a result of Judge Wiatt's improper unilateral Internet research, Sandi Nieves was denied a "fair trial in a fair tribunal" which is "a basic requirement of due process." Id. at 136.

Further, while the judge's biased behavior obviates the need for a prejudice inquiry, in this instance, given that the defense expert testimony went to the very heart of the defense, the judge's improper assault on the credibility of that testimony can not be considered harmless beyond a reasonable doubt. Chapman v. California, supra, 386 U.S. at 24.

d. The Court Refused to Accommodate the Scheduling of Defense Witnesses, but Freely Accommodated and Allowed Prosecution Experts to Testify During the Defense Case

Judge Wiatt was biased and unfair in his treatment of the scheduling of prosecution and defense witnesses. He broke up the defense case by allowing prosecution witnesses to testify out of order. He was disparaging and unaccommodating with respect to the scheduling of defense witnesses.

Del Winter was the defense arson expert. Defense counsel asked to schedule him out of order because he was going to leave for Minnesota for three months. 20 RT 2199:17-2202:5. Judge Wiatt responded, "look,

you're the one that wants to call him as a witness. You have to make arrangements to have him available as a witness. It's not the court's obligation. . . . Look, his vacation schedule is not of great concern to me, nor should it be to you." Id. at 2201:6-9, 26-27. Winter did not testify until the prosecution case was complete. 28 RT 3659:1 (People rest); 28 RT 3756:9-18 (Winter); 29 RT 3808:8-10.

Later, after the court ordered a two week continuance in the middle of the trial to allow the prosecution to analyze the defense experts' reports, the defense was caught off guard in scheduling one of its prime neurology experts, Dr. Michael Gold. The prosecution and the court insisted on examining Dr. Gold first in an Evidence Code § 402 hearing outside the presence of the jury. See Part VIII infra. When that hearing ended, one of defendant's attorneys asked for an accommodation for Dr. Gold due to the fact that he was scheduled to go on a short vacation in Europe the following week, when he was likely to be needed as a witness. The court denied the accommodation with the comment: "the convenience of witnesses is not good cause to continue. The request to continue is denied." 31 RT 4230:12-4233:4. Id. at 4233:28-4234:8 ("he will have to cancel his vacation. I am ordering that he be here."); id. at 31 RT 4285:5-4291:16 (court refuses to order conditional examination); id. at 4331:27-4333:2 (defense raises issue of scheduling Dr. Gold again); id. at 4334:16-4335:13 (defense counsel asks to have Dr. Gold testify briefly out of order, court responds: "I am going [to] run the courtroom not you."); 31 RT 4443:1-4444:24 (renewed request for conditional examination of Dr. Gold denied); id. at 4446:1-9 (court insists that Dr. Gold appear); 38 RT 5272:13-5273:3 (court will not accept defense counsel's representation that Dr. Gold's trip was prepaid).

On Tuesday, June 27, 2000, Dr. Phillip Ney was questioned outside the presence of the jury in advance of his trial testimony pursuant to Evidence Code § 402. During this proceeding, the judge announced that Dr. Ney would have to be back in court on Thursday, June 29, 2000, because the court took an unscheduled recess on Wednesday, June 28, 2000. Defense counsel and Dr. Ney protested several times, explaining that the doctor had to attend to patients that day. They requested that he be permitted to return the next court day of the following week. 41 RT 5929-5933:20. See id. at 5929:26-28 ("he can be here Thursday, because I can order him to be here. And if I order him to be here, he will be here."); id. at 5996:18-5997:17 ("I am ordering Dr. Ney to be in this courtroom this Thursday at 10 a.m.").[60] Dr. Ney came back on Thursday, but the prosecution did not finish cross-examining him. Defense counsel again raised the issue of scheduling regarding Dr. Ney's patients (6142:17-6145:28), but at the end of the day the judge announced that they would reconvene on July 5 (42 RT 6186:6-13, 6205:14-6206:13).

The judge gave the defense the choice of foregoing re-direct or bringing Dr. Ney back on the fifth despite Dr. Ney's scheduling problems. Id. at 6207:8-6209:20. Dr. Ney asked to speak. He asked if he could come at 11:30 a.m. in order to be able to fly in from Victoria the same day, saying he had "very, very ill patients." Id. at 6211:8-12. Judge Wiatt threatened him with an arrest warrant and threatened the defense with an adverse

[60] The reporter's transcript for volume 41 shows Tuesday as June 27, 2000, and shows that the court adjourned until Thursday, June 28, 2000. 41 RT 6000:3-5. Wednesday was June 28, 2000, and Thursday was June 29, 2000. Volume 42 shows a date of June 27,.2000. It actually covers Thursday, June 29, 2000. The date printed on the transcript is erroneous. There was no court session on Wednesday, June 28, 2000. See 19 RCT 4669-70, 4685-86.

instruction in the event that Dr. Ney failed to return on time. Id. at 6212:6-6213:10. Dr. Ney was ordered to return at 10:00 a.m. on July 5. Id. at 6214:6. When the prosecution failed to finish with its recross-examination on the fifth, Dr. Ney was told to come back the next day. He protested: "your honor, I have a patient that almost died." Judge Wiatt's response was to say: "whatever that means." 43 RT 6425:26-6426:1. The record shows a brief recess and then the defense rested, allowing Dr. Ney to return to Victoria and his patients, without the testimony it had anticipated. 43 RT 6427:2-28.[61]

There was one exception when the judge took a defense witness out of order. The judge allowed the defense to call immediately after she testified for the prosecution one of the owners of the burned home Sandi Nieves rented, Clare Csernay, because her husband would be unavailable for two weeks due to vacation and a serious medical problem. Since Mrs. Csernay had, in any event, already testified as a prosecution witness at that

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[61] Even when defense counsel was sick for a day with the stomach flu, Judge Wiatt had no sympathy: "Well, my view is unless it's a life threatening illness, an attorney representing somebody in a capital murder case should be present for the trial." 36 RT 4941:4-7. See id. at 4941:8-14.

> [The Court:] "I am ordering Mr. Waco to be here at 1:30.
>
> [Supervising Deputy Public Defender] Mr. Lessem: Well, your honor, I am going to -- as Mr. Waco's supervisor, I would tell the court if he can be here, he can be here. You can't order a man who is ill if he can't be here. He will make an endeavor.

Id. at 4945:28-4926:5. Later the judge ordered Mr. Waco back the next day. The judge said that would appoint a medical expert to have him examined if he did not return. Id. at 4954:24-28.

(Judge Wiatt called in sick and did not appear in court on Tuesday, June 6, 2000. 31 RT 4841:7.)

point, this was not much of an accommodation to the defense. 20 RT 2306:1-3; 20 RT 2338:5-2341:9.

The Attorney General may argue that these scheduling conflicts were within the court's discretion. However, the treatment of the prosecution witnesses was much different, demonstrating that this was not discretion. It was an expression of bias.

Over a defense objection, the court allowed the prosecution to call David Nieves, defendant's son, out of order, breaking up the defense cross examination of Althea Volk. Id. at 2380:4-2383:9.

Over defense objection, the judge allowed the prosecution to call Dr. Robert Brook, a prosecution psychologist, as a rebuttal witness, in middle of the defense case. The prosecution's reason for calling Dr. Brook in the middle of the defense case – he had a prepaid vacation planned. 37 RT 5108:14-5111:7. See 38 RT 5364:5-20, 5369:12 (prosecution calls Dr. Brook out of order).

Similarly, over a defense objection, the judge allowed Dr. Robert Chang, a physician who treated Sandi Nieves following the fire, to testify out of order because "he's not being compensated." 43 RT 6310:18. See 43 RT 6309:8-6311:19, 631319-6314:24, 6315:15. Dr. Chang broke up Dr. Ney's testimony, added to Dr. Ney's time in the courthouse, and forced him to come back for an additional day so that the prosecution could continue its recross-examination. Id. at 6425:24-6426:20. Scheduling of prosecution and defense witnesses was not a "two way street" as required by the Fourth Amendment. See Wardius v. Oregon (1973) 412 U.S. 470, 476.

e. The Court Aggressively Enforced Discovery Obligations Against the Defendant, But Relaxed and Ignored Disclosure Obligations of Prosecution Witnesses

i. Disparities in Producing Discovery

Judge Wiatt was aggressive in requiring the defense to meet its reciprocal discovery obligations under Penal Code §§ 1054.3 and 1054.7. The judge cited defense counsel for contempt for failing to meet discovery deadlines. 31 RT 4163:8-10. The judge also gave a jury instruction, CALJIC 2.28, in both the guilt and penalty phases telling the jury the defendant had failed to meet her discovery obligations and that "the weight and significance of any concealment and delayed disclosure are matters for your consideration. " In Parts XIII and XXIV of this argument we challenge the court's substantive rulings and show that the court's conduct was prejudicial under California law and the United States Constitution. We incorporate that argument here by reference.

But the judge's failure to make the same discovery obligations a "two-way street" was also something more. It was part of the overall unfair trial given to Sandi Nieves.

For example, the judge denied a defense motion for mistrial or to strike the testimony of Dr. Ribe, from the coroner's office, even though materials were not disclosed in advance of his testimony in discovery.[62]

[62] Following testimony of the coroner, Dr. Ribe, the defense moved for a mistrial or, in the alternative, to strike Dr. Ribe's testimony on the ground that the prosecution had not disclosed a tape recording of Dr. Ribe's statements or another doctor's report that Dr. Ribe relied on. 19 RT 1991:22-1993:20, 1995:26-1996:4. Judge Wiatt denied both motions. 19 RT 1995:26-1996:4.

When defense counsel challenged the failure of the prosecution to produce the results of gas chromatograph readout results that witness Phil Teramoto used as a basis for his testimony, the judge responded, "So what?" 28 RT 3656:14-3658:22.

When defense counsel asked to see the notes that Dr. Robert Brook prepared the day before his testimony, Judge Wiatt denied the request as "untimely." 38 RT 5436:17-25.

The judge denied the defense the opportunity to review, the prosecution's arson expert, Dr. Dehaan's notes. 44 RT 6444:24-6445:17, 6452:20-6453:20

Again, the defendant was given disparate treatment.

ii. Disparities in Requiring Transcriptions of Notes

The prosecutors claimed they could not read the file notes of Drs. Lorie Humphrey, Phillip Ney, Gordon Plotkin, and Nancy Kaser-Boyd. 29 RT 3911:28-3912:2, 3937:17-3939:23, 3939:28-3941:15; 48 RT 7362:28-7367:12; 49 RT 7442:7-7444:11. Judge Wiatt ordered them to prepare new, typewritten versions of their notes for the prosecution or to read their notes to a court reporter for transcription. 29 RT 3937:17-3939:23, 3959:12-3961:16; 31 RT 4142:1-4, 4144:28-4145:4. See also 48 RT 7371:7-11; 49 RT 7442:7-7444:11; 7811:23-7812:6 (defense witness, Dr. Gordon Plotkin).[63] As he granted a two week continuance at the request of the prosecution, he told the jurors the defense experts' notes were

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[63] Defense counsel objected to the prosecutors' request that the experts transcribe their notes because the discovery statutes do not require experts to prepare new versions of notes they have generated in connection with the case. 29 RT 3915:28-3916:17. The defense nonetheless offered to have its experts assist with any words or phrases the prosecutors could not read. Id.

"indecipherable to a great degree. . . ." 30 RT 4112:23-4113:10. Id. at 4112:28-4113:5

The judge even gave the jury an instruction at the end of the guilt phase of the trial, telling the jurors that the defense had failed to produce "[r]eadable notes," among other things. 30 RT 4113:28-4114:16. In Part XIII of this argument we challenge the court's substantive rulings requiring the defense to transcribe the experts' raw notes. We will show that the court's conduct and instructions were prejudicial under California and federal law. We incorporate that argument here by reference. But the judge's ruling was something more: it was completely one-sided.

When the defense later requested transcriptions of a prosecution expert's notes (35 RT 4849:1-4850:7, 36 RT 4947:23-27, 4952:7-13), Judge Wiatt denied the request because "[t]here is not a need to have a transcription of notes" (Id. at 4953:8-10). 44 RT 6444; see 39 RT 5587:21-25 (court again refuses to order transcription of Dr. Brook's notes). See also 44 RT 6444:7-6452:26 (court refuses to order transcription of prosecution expert Dr. John Dehaan's notes).

g. The Court Provided the Prosecution with Funding for Its Experts, While the Defense was Limited to Penal Code 987.9 Restrictions

All the defense experts were funded in accordance with procedures required by Penal Code § 987.9. Although the trial was held in the North Valley District of the Los Angeles County Superior Court located in San Fernando, defense attorneys were required to go downtown to the Central District in Los Angeles and make their case for expert funding. For example, defendant attempted to use a psychologist with expertise in trauma and the Mormon religion to assist the defense. This psychologist was located in Northern California. The psychologist was initially appointed by

Judge Larry Fidler at the rate of $150 per hour not to exceed $5,250.00. Supplemental CT II (confidential) 55, 93. When counsel returned to Judge Fidler asking for an additional $22,100, the judge held a hearing and stated on the record that he found the supplemental request "exhorbitant" and "outrageous." The judge said that he would probably never appoint an out of county expert again. Id. at 120-121. Judge Fidler extensively questioned defense counsel and required that the defense provide specific information exactly as to the scope of work and the justification. Id. at 118-137 (Oct. 18, 1998 RT (987.9 hearing)) .

The defense was required to make applications and submit information through the county's formal Penal Code § 987.9 process. The defense had the burden of actually demonstrating the need for particular experts and the need for particular funds. People v. Guerra (2006) 37 Cal.4th 1067, 1085; People v. Beardslee (1991) 53 Cal.3d 68, 100; Corenevsky v. Superior Court (1984) 36 Cal.3d 307.

As far as the record on appeal shows,[64] Judge Wiatt, the trial judge, appointed most prosecution experts without any hearings at all.[65] The submissions by the prosecution were minimal at best. Some experts were appointed at high hourly rates up to $500 per hour. And some were appointed at court expense from Pennsylvania, Colorado, and Toronto without even submitting curriculum vitae for the court's review. It appears

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[64] See Supp. III RCT 337.

[65] Appellant sought a settled statement from the Superior Court to clarify the process by which the prosecution obtained the appointment of their experts, but the Superior Court denied the motion in post trial record correction proceedings. June 7, 2007 RT. On June 25, 2008 this Court denied appellant's Motion for an Order requiring additional Superior Court proceedings pertaining to the funding of prosecution experts.

from the record the trial judge was automatically approving the prosecution's requests for appointment and funding of its experts, while the defense had to go through the more stringent Penal Code § 987.9 procedures.[66] See 10 RCT 2337 (appointment of Dr. Barry Hirsch at $100 per hour; no application or other showing of necessity or qualifications); 11 RCT 2530-2532 (appointment of Dr. Robert Brooks at $100 per hour; half page application without showing qualifications); 11 RCT 2533-2335 (appointment of Dr. Roger Bertoli at $250 per hour; half page application without showing qualifications); 11 RCT 2557-2559 (appointment of Dr. Edwin Amos at $350 per hour; half page application without showing qualifications); 11 RCT 2562 (appointment of Serological Research Institute, Richmond, California at $180 per hour; no application or other showing of necessity or qualifications); 11 RCT 2563-2564 (appointment of John DeHaan, Ph.D. at $200 per hour; half page application without showing qualifications); 11 RCT 2585-2586 (appointment of Catherine Koverola, Ph.D. at $150 per hour; no application or other showing of necessity or qualifications); 18 RCT 4471-4473 (appointment of Dr. Robert Sadoff, Jenkintown, Pennsylvania at $500 per hour); 18 RCT 4527-4528

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[66] The record as certified by the trial court contains one transcript of an ex parte in camera conference about the appointment and compensation of prosecution expert Robert Sadoff, M.D. May 22, 2000 RT 2926-2932 (approving hourly rate of $500.00 per hour). It also contains one transcript of an ex parte in camera conference in which the trial judge substantially increased the hourly rate for prosecution expert Robert Brook, M.D. June 23, 2000 RT 5498:3-5499:13.

The record does not contain any other transcripts or written records of any hearings, conferences or communications regarding the appointment and/or compensation of Dr. Sadoff, Dr. Brook or any of the nine other prosecution experts appointed by the court, including the six other prosecution experts who testified at trial.

(appointment of Dr. Alex Caldwell at $450 per hour; half page application without showing qualifications); 18 RCT 4548-4550 (appointment of Dr. Helen Mayberg, Toronto, Canada, at $300 per hour; half page application without showing qualifications)[67]; 18 RCT 4598-4600 (amended appointment of Dr. Barry Hirsch at $200 per hour; half page application without showing qualifications);[68] 19 RT 4784-4786 (appointment of Dr. Scott Phillips, Denver, Colorado at $300 per hour; half page application without showing qualifications); 21 RCT 5384-5385 (amended appointment

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[67] During cross examination of Dr. Mayberg, defense counsel attempted to make the point that she could be paid as much as $10,000.00. Without objection from the prosecution, Judge Wiatt sarcastically responded:

> [Mr. Waco] Q And that's up to $10,000 in this case?
>
> The Court: Mr. Waco, it's not necessary, especially -- I am the one that signs the order. I am the one that's going to sign the bill.
>
> Mr. Waco: I would like the record to reflect what the price tag is on this witness.
>
> The Court: Well, how about the price tag on all your witnesses? Are we going to get into that?

32 RT 4363:16-23.

[68] The half page declaration in support of Dr. Hirsch's second appointment is dated the day after Judge Wiatt signed the order of appointment. Compare 18 RCT 4598, with 18 RCT 4600. Further, the declaration in support of the appointment said that "The amount of work expected to be performed by Dr. Hirsch will be massive as he will not only testify, but will act as liaison between all experts and the prosecution. He is also responsible for the distribution of all discovery to the experts." Id. at 4600.

Compare the treatment of defense counsel when they attempted to obtain additional funding for their psychologist. Oct. 18, 1998 RT (987.9 hearing) 118-137 ("exhorbitant" and "outrageous").

of Dr. Edwin Amos at $350 per hour; half page application without showing qualifications); 21 RCT 5387-5389 (amended appointment of Dr. Robert Brook at $200 per hour). In fact, during an ex parte hearing midway through the trial that was sealed and not available to the defense, Judge Wiatt sua sponte raised the "previously imposed limits on [all] the experts for the prosecution in this case." 39 RT 5498:11-19 (previously sealed) ("I think it's fairly clear that due to the history in this case, that more time would be needed, other than that that was previously authorized.").

For all that is shown by this record, the judge was working hand and hand with the prosecutors appointing whatever experts they requested pursuant to Evidence Code §§ 730, 731 – all at court expense. See 38 RT 5439:13-17 (prosecution expert Robert Brook testifies that he is being paid by the court); 47 RT 7103:25-27 (trial judge states that "All experts in this case are being paid by the court"); 56 RT 8791:12-8792:3 (prosecutor states that prosecution expert Scott Phillips was "paid by the court").[69]

At trial, the defense objected to this imbalance. 39 RT 5578:11-5579:11. Noting that the District Attorney already had a fund for payment of experts, defense counsel objected that the court was giving the prosecution "carte blanche" to appoint experts and have them paid for by the court because "then the court becomes an agent" of the prosecution. Id. at 5579:6-7. For example, at one point, Ms. Silverman characterized Dr.

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[69] For reasons that are not apparent on the record, Judge Wiatt requested to see the Pen. Code § 987.9 file, which was supposed to be confidential. People v. Anderson (1987) 43 Cal.3d 1104, 1131-1133. See 2 Supplemental II RCT (Confidential) 503 ("Judge O'Neill: I got a call from Kim, Judge J. Wiatt's clerk of San Fernando, Dept. J. He wants 987.9 file on Sandi Nieves by tomorrow. I also got a call from John Brock. The issue is on Dr. Ney. He wants a hearing if you would allow the file to be sent to San Fernando.").

Robert Brook in the course of a question on direct examination "as a professional appointed for the court to present both sides." 38 RT 5423:18-21.[70] The judge dismissed counsel's objections as "the stupidest thing I've ever heard in a courtroom." 39 RT 5578:22-23; see also 5579:8-9 ("Mr. Waco, that's absurd. I'm not going to consider that at all. That's ridiculous.").

When the case was over and the jury had returned its death verdict a juror asked Judge Wiatt: "Do the defense and prosecution get the same amount of money–." The judge answered, "Yes." 65 RT 10224:28-10225:2.

But the actual disparity of treatment in funding in favor of prosecution experts was not the 'two-way street," required by the United States Constitution. Aiding the prosecution, without requiring any showing comparable to Penal Code § 987.9 procedures, violated Sandi Nieves's Sixth Amendment right to a fair trial, her right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, and the equal protection of the law, guaranteed by the Fourteenth Amendment. Wardius v. Oregon (1973) 412 U.S. 470, 476. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois (1956) 351 U.S. 12, 19.

Similarly, there can be no equal justice when the trial judge aids the prosecution in funding its experts without requiring the same showing demanded of the defendant. Discrimination in the administration of justice is constitutionally impermissible. This is "a country dedicated to affording

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[70] "Q And would that be something that in your profession, as a professional appointed for the court to present both sides and not skew data one way or the other, that you would address in such a report?" 38 RT 5423:18-21.

equal justice to all and special privileges to none in the administration of its criminal law." Griffin, 351 U.S. at 19.

6. The Trial Judge's ex Parte Communication with the Prosecution

On June 20, 2000, during the on-going guilt phase, defense counsel was absent due to illness. 36 RT 4958:7. The Minute Order for June 20, 2000, states that the court held "a chambers conference with the People on the issue of discovery." 18 RCT 4646. The transcript of the conference was ordered sealed and prepared under separate cover. 36 RT 5016:6-7. The sealed transcript reveals that the court met with the two district attorneys and two of the prosecution experts, Dr. Hirsch and Dr. Brook, in chambers without the defense, about a number of issues including discovery, witness order, the highly-contested topic of a PET [Positron Emission Tomography] scan, and the character and integrity of one of the defense experts, Dr. Kaser-Boyd. 36 RT 5017-5026. A subsequent previously sealed transcript shows a follow-up meeting on June 23, 2000. 39 RT 5497-5500.

The trial court's ex parte communications with the prosecution were improper. Among other things, deputy district attorney Silverman told Judge Wiatt that the defense expert, Dr. Kaser-Boyd "attempted apparently to be untruthful to a court in this county." 36 RT 5020:26-28. Further, the court gave the district attorney legal advice. Id. At 5022:17-25 ("You may want to look at the case of People versus Tillis, 18 Cal.4th 284. I don't know if you are aware of that.").[71]

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[71] In People v. Tillis (1998) 18 Cal. 4th 284, this Court held that the prosecution had not violated discovery rules by failing to disclose evidence concerning an arrest and other unlawful conduct of the expert witness used
(continued...)

a. The Trial Court Exploited Defense Counsel's Absence Due to Illness to Conduct an Ex Parte Chambers Conference with the Prosecution and Its Experts

On the day of defense counsel's absence due to illness, the trial court granted the prosecution's request for a "chambers conference regarding the discovery." 36 RT 5017:21-23. The prosecution brought three items to the attention of the court. First, the prosecution sought guidance on how it should proceed with information in its possession relevant for impeachment of defense expert Dr. Nancy Kaser-Boyd. 36 RT 5018:15-5019:20. Second, the prosecution requested that it be allowed to call witnesses out of order, in the middle of the defense case. 36 RT 5023:15-19. Third, the prosecution asked about sealing its motion for a gag order regarding the PET scan administered to Sandi Nieves, an issue of significant contention between the parties in the case. 36 RT 5024:18-5025:7.

The first item on the prosecution's agenda for the ex parte meeting was the discovery issue. Ms. Silverman announced to Judge Wiatt she had received information from another district attorney that Dr. Kaser-Boyd had testified untruthfully in a previous case. 36 RT 5018:15-5020:28. Ms. Silverman alleged that Dr. Kaser-Boyd had testified that she received approval from a nationally renowned MMPI expert, Dr. James Butcher, to alter the instructions on the MMPI before administering it to the defendant in the prior case. 36 RT 5018:22-5019:1. Dr. Hirsch, who was also the opposing expert in the prior case, explained to Judge Wiatt that he had personally discussed the situation with Dr. Butcher. 36 RT 5020:13-15. Dr. Butcher supplied Hirsch with a copy of an email from Dr. Kaser-Boyd

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[71](...continued)
for impeachment purposes.

in which she purportedly sought approval for what she had done after she already had given her testimony. 36 RT 5020:7-18.

The prosecution stated that the material the defense turned over in discovery in Sandi Nieves's case indicated that Dr. Kaser-Boyd altered the instructions on the MMPI in the same manner. 36 RT 5020:19-24. Ms. Silverman said, "I have concerns about disclosing the information to counsel in this case, to opposing counsel, given that it may give Dr. Kaser-Boyd the opportunity to try and cover her tracks on this case." 36 RT 5021:1-8.[72]

The prosecution then took the opportunity to ask the court if it would allow the prosecution to call witnesses out of order, "in the middle of the defense case," if the prosecution ran into time problems "based on the problems with disclosure and Mr. Waco's issue today." 36 RT 5023:15-19. Judge Wiatt responded, "Well, look, I can control the order of witnesses. And if there's good – if there is good cause to alter the normal procedure, I can do that, and I have done it. . . . In this case and other cases." 36 RT 5023:28-5024:5.

Ms. Silverman then brought up the following issue related to the PET scan which the prosecution had already successfully moved to exclude:

> There is another thing that I am going to want to take up tomorrow, since there continues to be reference to a PET scan in this case, irrelevant to any of the proceedings that have been going on. They've been mentioned in court day after day.

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[72] None of these inflammatory and prejudicial allegations against Dr. Kaser-Boyd by the prosecutors and their witness was ever proved or verified in this proceeding. Without hearing from the defense or Dr. Kaser-Boyd it is impossible to imagine that the allegations did not further fuel Judge Wiatt's manifest bias toward the defense and the defendant.

> I was wondering whether or not the court actually sealed my request for a gag order, along with the court's order, the court's emergency protective orders.
>
> Were those orders also sealed, my request, as well as the court's order?
>
> So in other words, when the media is looking through your files they are not seeing that and knowing there is some issue there with regards to a PET scan.
>
> I tried to be very general in my motion, but I am not sure if one could look at that and make assumptions.

36 RT 5024:185025:7

The trial court discussed the feasability of sealing the motion with the prosecution. 36 RT 5025:14-23. The following exchange took place:

> The Court: And I am not so sure that I can keep the press from seeing what's in the court file.
>
> Ms. Silverman: Other than what's sealed.
>
> The Court: You may want to talk to Robin and see whether anybody from the media has had access to the court file.
>
> Ms. Silverman: I know they've been copying transcripts.
>
> Well, there was somebody sitting in the back of the courtroom one day that was looking at the transcript and typing it on a computer. So I will find out.

36 RT 5025:24-5026:11. The court sealed the transcript of the ex parte meeting, but ordered a copy given to the prosecutors. 36 RT 5024:16-17.

Judge Wiatt did not mention the ex parte chambers meeting to the defendant or her counsel the next day. Nor is there any indication on the record that Judge Wiatt ever informed the defense that the meeting occurred.

However, a second meeting was held on June 23, 2000. Both prosecutors were present, along with Dr. Hirsch and the prosecutors' paralegal assistant. The defense was not present and not informed of this

meeting, either. The transcript was sealed. 39 RT 5497-5500. This time the judge told the prosecutors he had reviewed materials submitted to him ex parte and that they did not have to disclose it to the defense. Id. at 5497:15-28. He even discussed cross-examination tactics, which might not require disclosure at trial. Id.

It is practically axiomatic that ex parte communications between a judge and counsel, a party, and witnesses are improper under most circumstances. Fletcher v. Commission on Judicial Performance (1998) 19 Cal.4th 865. See Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal.App.4th 994, 1002 (citing In re Hancock (1977) 67 Cal.App.3d 943, 947-949). The California Code of Judicial Ethics explicitly prohibits a judge from initiating, permitting or considering ex parte communications except "where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: (I) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond." Cal. Code of Jud. Ethics, Canon 3B(7)(d). The canons reflect a judicial consensus regarding appropriate behavior. Fletcher 19 Cal.4th at 883 n.5. See People v. Williams (1988) 45 Cal.3d 1268, 1327-1328; In re Fisher (1982) 31 Cal.3d 919, 920.

When a judge gives "advice to any party in the present proceeding upon any matter involved in the action or proceeding" the judge is disqualified and must recuse him or herself, if a reasonable person "might entertain a doubt that the judge would be impartial." Code Civ. Pro. §§

170.1(a)(2), 170.1(a)(6)(iii). See People v. Mendoza (2000) 24 Cal.4th 130, 196-197.[73]

Here, Judge Wiatt entertained ex parte discussions about issues with two prosecutors and two prosecution experts. They discussed issues of obvious concern to the defense. In addition, the district attorney was allowed to impugn the integrity of a defense expert to the judge.

Discovery matters are fundamental to the "truth seeking process" of a criminal trial. Taylor v. Illinois (1988) 484 U.S. 400, 419 (Brennan, J., dissenting). "Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence." Id. During the ex parte meeting, Judge Wiatt provided legal advice to the prosecution concerning its discovery obligations. He pointed the prosecution to relevant legal authority, and went so far as to provide the specific citation for People v. Tillis. 36 RT 5022:17-19. He also gave his analysis of the issue raised.[74]

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[73] In Mendoza, unlike this case, "The record [did] not indicate any bias whatsoever on the part of the trial judge." Id. At 197.

[74] The Attorney General may argue that this ex parte contact was permissible under Pen. Code § 1054.7 (second paragraph), which permits some in camera good cause showings for the denial or regulation of discovery disclosures. While the section permits in camera proceedings, it says nothing about ex parte proceedings. In Alvarado v. Superior Court (2000) 23 Cal.4th 1121, an ex parte hearing was held, but the Court did not rule on the propriety of the procedure, holding instead that the superior court properly withheld some information from pretrial discovery because the information was the type covered by the statute. Accordingly, Alvarado is not authority for something that was not decided.

Substantively, section 1054.7 limits the subject matter of such proceedings to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." Id. (first paragraph).

(continued...)

The judge therefore aided the prosecution in its legal strategy and departed from his obligation to remain impartial, a violation of due process in and of itself. Johnson v. Mississippi (1971) 403 U.S. 212, 216 ("Trial before 'an unbiased judge' is essential to due process."); Cooper v. Superior Court (1961) 55 Cal. 2d 291, 301 ("The judge's function as presiding officer is preeminently to act impartially.")

An additional outrageous aspect of the ex parte communication regarding discovery matters was the participation of the prosecution's experts, Dr. Hirsch and Dr. Brook. Dr. Hirsch, a psychologist who was not an officer of the court, nonetheless addressed the court directly. 36 RT 5019:28-5020:18.[75] He was not under oath, nor was he responding to a question from the court or the prosecution. But he, like the district attorney, cast aspersions on the credibility and integrity of a prospective defense expert – one who was on the other side of a prior case and who he expected to oppose in this case as well.

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[74](...continued)

A whole lot more occurred in the secret proceeding before Judge Wiatt than simply a showing and ruling on a discovery disclosure. The prosecutor impugned a witness, two non lawyer witnesses were present, the court gave legal advice, and the ex parte participants, including the judge, discussed additional matters. No ruling was made and there was no formal motion or other presentation showing good cause to withhold disclosures from pretrial discovery.

[75] Compare Judge Wiatt's treatment of Dr. Ney during a colloquy regarding Ney's disclosure obligations with respect to giving discovery to the prosecution. When Dr. Ney attempted to speak up, he asked, "May I speak?" Judge Wiatt responded: " There is no reason for you to address the court. You are not an attorney. I am not going to hear from you. You're excused." 43 RT 6435:1-9.

The prosecution's request to call witnesses out of order also exceeded the mere scheduling of witnesses because the prosecution wanted to call witnesses in the middle of the defense case, breaking up the defense presentation. Although the prosecution brought up the matter in open court the following day, 37 RT 5108:14-18, it had successfully previewed the issue with advance notice of its position to the court without notice to the defense. When the issue was brought up in open court, the judge did not disclose his earlier ex parte meeting. The judge granted the prosecution request over defense objection. 37 RT 5110:11-5111:7.

By exploiting defense counsel's absence due to illness and improperly engaging in ex parte communications with the prosecution, Judge Wiatt denied Sandi Nieves her statutory right to a fair trial before a fair judge Code Civ. Pro. § 170.1(a)(6)(iii). Because the defendant only learned of the secret meeting with the prosecutors and their experts when the sealed transcript was produced at record correction proceedings on this appeal, the defense could not move for disqualification at an earlier time. See May 11, 2007 RT 3; Supplemental IV RCT 143-144. However, disqualification occurs when the facts creating disqualification arise, not when disqualification is established. Christie v. City of El Cerrito (2006) 135 Cal.App.4th 767, 776; Code Civ. Pro. § 170.3(b)(4).

Sandi Nieves was also denied her Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial before a fair judge. Bracy v. Gramley (1997) 520 U.S. 899, 904; Mayberry v. Pennsylvania (1971) 400 U.S. 455, 466; Gray v. Mississippi (1987) 481 U.S. 648, 668; Withrow v. Larkin (1975) 421 U.S. 35, 46; In Re Murchison (1955) 349 U.S. 133; Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 287. Because the ex parte communication here violated her constitutional rights to a fair trial in a fair

tribunal, the error is structural and requires automatic reversal. Gray, 481 U.S. at 668.

But even if the error is not considered structural, the "burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Rosales-Rodriguez (9th Cir. 2002) 289 F.3d 1106, 1109. See also United States v. Hackett (9th Cir. 1980) 638 F.2d 1179, 1188 ("not every ex parte communication would require reversal, but 'the burden of proving lack of prejudice is on the (prosecution), and it is a heavy one'") (quoting Haller v. Robbins (1st Cir. 1969) 409 F.2d 857, 860). Because the prosecution cannot meet this heavy burden, and what occurred here compromises the integrity of the judiciary, judgment must be reversed.

D. The Trial Judge's Pervasive Bias in Favor of the Prosecution and Against the Defendant Requires Reversal of the Convictions and Penalty

We have addressed countless instances of misconduct by the trial judge. However, in the course of argument on the remaining claims of error in this brief, by quoting the trial judge's comments, and by pointing to disparities in treatment of the prosecution and defense, we will point out countless more instances in which the judge unfairly gave disparate treatment to the prosecution and defense. Given limitations of space, and the risk of repetition and cumulation, we have not assigned each and every occurrence a separate claim of error. Taken cumulatively, however, the instances we have described, and will describe further, and the record as a whole, unmistakably demonstrate that this is a rare case in which the trial judge favored the prosecution to such an extent that the defendant was denied her federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fair trial, to present a meaningful defense, to

the effective assistance of counsel, to confront the witnesses against her, and to a reliable sentencing determination.

The United States Constitution therefore requires reversal of the convictions and the penalty. Wardius v. Oregon (1973) 412 U.S. 470, 476; People v. Sturm (2006) 37 Cal. 4th 1218, 1238.

Under California law reversal is required because "the appearance of judicial bias and unfairness colors the entire record," and therefore the defendant is not required to "make an affirmative showing of prejudice." The test is whether a reasonable person would doubt the impartiality of the judge or the judge's conduct would cause a court to lack confidence in the fairness of the proceedings such as would necessitate reversal. Hernandez v. Paicius (2003) 109 Cal.App.4th 452, 461. ""Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided [citation], but should reverse the judgment and remand the matter to a different judge for a new trial on all issues." Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal.App.4th 994, 1009, quoting Catchpole v. Brannon (1995) 36 Cal.App. 4th 237, 247.

IV. THE TRIAL COURT PREJUDICIALLY FAILED TO CONDUCT OR PERMIT ADEQUATE VOIR DIRE

A. Introduction

That a mother might kill her offspring for revenge evokes extremely strong emotion. "Few crimes generate greater public reaction than that of a mother who murders her child." McKee, Why Mothers Kill (Oxford 2006) page 5. It is a classical crime, cursed from the earliest times in Western Civilization. "The curse of our sons' avenging spirit and of justice, that calls for blood, be on thee." Euripedes, Medea, E.P. Coleridge (trans) (Jason to Medea, following Medea's slaying of their sons).[76]

It is difficult to imagine that the members of the public who reported for jury duty in the San Fernando branch of the Los Angeles Superior Court on the week of April 24, 2000, did not have a classically intense reaction upon reading the statement of charges that the trial court distributed to them. The document explained the defendant was accused of four counts of murder and that the victims were her own four young daughters. 11 RCT 2579-2580. These charges strike at the heart; they speak to primal emotions, sadness, and tragedy.

Even in a trial court that was no stranger to capital cases (see People v. Gay (2008) 42 Cal.4th 1195), few prior cases likely involved as many emotionally charged allegations as a mother accused of killing her own children. By the time voir dire began in this case, the parties had already informed the trial court the evidence would involve other emotionally loaded topics such as religion, abortion, and betrayal. If ever a court needed to proceed with caution and care to protect against manifest and hidden

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[76] See http://classics.mit.edu/Euripedes/medea.html (accessed December 1, 2008).

biases to ensure the defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair and impartial jury, this was such a case.

Unfortunately, the trial court conducted a rushed, careless, and inadequate voir dire, which was not suited for a fair DUI trial much less a death penalty case, particularly one that ran a high risk of jury bias due to the potential emotional responses to a mother accused of killing her little girls, like Medea, as revenge against her ex-husbands and boyfriend.

The trial court insisted on drafting its own jury questionnaire which quickly proved inadequate for obtaining prospective jurors' attitudes towards the death penalty. Significantly missing from the questionnaire were specific directed questions concerning the jurors' ability to follow the law if the evidence showed the multiple murder of children. Nonetheless, the trial court relied heavily on this flawed questionnaire and repeatedly refused defense counsel the opportunity for follow up voir dire.

As a result, the abbreviated voir dire prevented the fully informed, intelligent exercise of challenges for cause and peremptory challenges. The inadequate process deprived the defendant of her constitutional rights to due process of law, a fair and impartial jury, and fair and reliable guilt and sentencing determinations under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the California Constitution, Article 1, §§ 7, 15, 16, 17, 24, and 29. See Rosales-Lopez v. United States (1981) 451 U.S. 182, 188; Ham v. South Carolina (1973) 409 U.S. 524, 527.

The perfunctory voir dire process in this case prevents anyone from knowing whether the jury that sat in judgment on Sandi Dawn Nieves was in fact fair and unbiased when it found her guilty of first degree murder with special circumstances. Further, the superficial and hurried process of

picking the jury prevented acceptable scrutiny of death qualification for the penalty phase.

B. Significant Facts

1. The Trial Court Insisted on an Abbreviated Voir Dire, Relying on an Inadequate Jury Questionnaire

In the months leading up to Sandi Nieves's trial, it was increasingly clear that the trial court intended to conduct an abbreviated voir dire, relying heavily on a jury questionnaire drafted by the court. Defense counsel repeatedly sought to address specifically directed questions to prospective jurors about their attitudes toward the death penalty in a case involving multiple murders where the victims were children. The defense argued that the court could not ignore the increased potential for bias in this case involving a mother accused of killing her own children. The defense was unsuccessful. The court distributed an inadequate questionnaire to the prospective jurors.

a. The Trial Court Rejected the Jury Questionnaires Proposed by the Parties

On September 8, 1999, approximately nine months before the beginning of the trial, the defense filed a proposed 18-page jury questionnaire. 10 RCT 2118-2138. It included 63 general questions in addition to a section dedicated solely to death qualification. 10 RCT 2118-2138.

The death qualification section included a page-long explanation of the duties of a juror in a death penalty case, followed by 36 questions directed to elicit a prospective juror's attitude toward the death penalty. 10 RCT 2132-2135. The first 15 questions explored general feelings about the death penalty. 10 RCT 2132-2135. The next questions addressed whether the prospective juror's views about the death penalty would interfere with

his or her ability to follow the law. 10 RCT 2135-2136. The proposed questionnaire then included a series of questions about the meaning of life without parole. 10 RCT 2136. It also provided a short explanation of the need to weigh aggravating and mitigating circumstances in death penalty cases, followed by several open ended questions that further explored a prospective juror's ability to perform his or her duties. For example:

> 26. What factors would be important to you in determining whether a person who committed murder should be sentenced to death or not?
>
> . . .
>
> 28. What sorts of circumstances would you consider "mitigating" in deciding whether or not a person should die by execution?
>
> 29. What would you consider "aggravating"?

10 RCT 2136-2137.

The trial court did not adopt the proposed questionnaire. During a hearing on December 13, 1999, the court announced that it would be using a jury questionnaire of its own design. 6 RT 185:14. The court denied the defense request for permission to submit a mutually acceptable draft questionnaire. 6 RT 185:25-186:2. The court stated that it would allow input from the two sides, but that it would use its own questionnaire. Id.

Although it was not included on the record, at some point shortly following the December 13, 1999, hearing, the court supplied the parties with a copy of its proposed jury questionnaire. On January 5, 2000, the defense filed a request to amend the court's jury questionnaire to add several questions regarding death qualification. 10 RCT 2230. The defense sought to include questions missing from the court's version that asked the jurors directly whether they would be able to follow the law even if the evidence showed that there were 1) multiple murders (proposed question

64), and 2) that the victims of these murders were all children (proposed question 65). 10 RCT 2234.

At a hearing on January 20, 2000, the defense argued that its original proposed jury questionnaire was better suited for the case than the court's version; but in the alternative, the defense argued for its proposed amendment. 7 RT 197:12-19. The trial court did not accept the proposed questionnaire or its amendment. Instead it ordered the two sides to submit a compromise. 7 RT 199:21-27.

However, during a pre-trial conference on February 24, 2000, the court ordered the two sides to work with the court's version of the questionnaire and to come to an agreement or identify the areas where they could not agree. 7 RT 208:5-12.

Subsequently, the prosecution proposed its own jury questionnaire. 10 RCT 2263. Its proposed questions included 107 questions, 18 of which were directed specifically at death qualification. 10 RCT 2263-2275. Of those questions, at least two addressed the issue of whether a prospective juror would automatically vote for death in the case of someone who had intentionally killed more than one person (proposed question 85) or if a person was convicted of murdering a child (proposed question 97). 10 RCT 2273-2275. The trial court similarly rejected this more comprehensive jury questionnaire and again elected to go forward with its own version.

b. The Trial Court Deliberately Limited Voir Dire

In addition to rejecting the parties' proposed jury questionnaires, the court made it clear that it did not intend to provide any significant time for voir dire. At the next pre-trial appearance by the parties on February 28, 2000, the prosecutors informed the court that they expected the trial to last

at least three months. 7 RT 196:13-15. Nevertheless, the trial court stated that voir dire should not take up the court's time:

> .... Mr. Barshop [The Prosecutor]: It will take some time to pick a jury in this case.
>
> The Court: It'll take three or four days to pick a jury at maximum.
>
> Mr. Barshop: The court will not then do individual questioning of any of the jurors?
>
> The Court: There is no need to do individual questioning.
>
> Mr. Barshop: I understand that, under Hovey.[77]
>
> The Court: The Hovey is done by the questionnaire that's the Hovey. There is no need to do any individual questioning, unless the juror wants to be questioned individually.

7 RT 237:21-238:5.

During a March 2, 2000 hearing on a different matter, discussion turned again to the jury questionnaire. 7 RT 250:15. Defense counsel raised his concerns about the court using its own version of the questionnaire. 7 RT 250:25-28. Upon reviewing it, defense counsel said he believed Sandi Nieves was better off without any questionnaire at all, than the trial court's version. Id. The court stated that it wanted to use the questionnaire to avoid questioning each individual. Id.

During the pretrial conference on March 23, 2000, defense counsel again raised his objection to the proposed jury questionnaire, arguing that it

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[77] In Hovey v. Superior Court, (1980) 28 Cal.3d 1, this Court held that voir dire on death-qualifying questions should be done in a sequestered setting. California Code of Civil Procedure § 223, which took affect on June 6, 1990, abrogated Hovey. Trial courts are no longer required to conduct individual sequestered voir dire. People v. Stitely (2005) 35 Cal.4th 514, 536-537 ("the statute provided that the voir dire of prospective jurors in capital cases 'shall, where practicable, occur in the presence of the other jurors'") (quoting Cal. Code Civ. Proc. § 223).

would prove more harmful than helpful in obtaining a fair jury for the defendant and that the defense was willing to forgo it entirely. 8 RT 323:4-14.

Ignoring the defense concerns, the court pushed forward with the questionnaire, stating that it was "contemplating" allowing counsel an opportunity to voir dire the prospective jurors. 8 RT 332:3-4. However, the court said that any time given to counsel for voir dire would be "finite." 8 RT 332:26. Although the record contains discussion about selecting a jury without conducting any oral voir dire whatsoever (8 RT 332:27), the two sides did not stipulate or otherwise agree to waive oral voir dire.[78]

As the two sides went through the proposed jury questionnaire with the court, defense counsel continued to argue for the inclusion of specific, directed questions about whether a prospective juror would automatically vote for death in the case of the murder of two or more children. 8 RT 343:12-345:26. Defense counsel pointed out that the court had rejected his suggested specific questions and instead only mentioned that the case involved allegations of the multiple murder of children in the questionnaire preamble. 8 RT 943:19-20. The court concluded that it did not need to ask the specific question, "Would you automatically find the death penalty for someone who kills two or more children?" 8 RT 345:24-25. Instead, the court settled on including a "brief, neutral statement of the case." 8 RT 846:11-12.

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[78] Once voir dire was underway and it became clear that the questionnaire alone did not suffice to provide counsel with adequate death qualifying information about prospective jurors, defense counsel actively sought oral voir dire when prospective jurors gave unclear or equivocal answers to the questionnaire. See Section 3 below.

c. The Trial Court Provided Prospective Jurors with an Inadequate Jury Questionnaire

On March 24, 2000, the court filed its updated version of the questionnaire. 11 RCT 2414. It included 59 general questions and only 11 death-qualification questions. 11 RCT 2414-2431. The first four death penalty related questions read as follows:

> 60) Please circle the answer that *best describes* your feelings on how the death penalty is used: Too often? Too seldom? No change necessary? Please explain your answer.
>
> 61) Have your views on the death penalty changed over the years? Yes / No. If "yes", please explain.
>
> 62) Do you belong to any group that advocates increased ***use*** of the death penalty? Yes / No. If "yes", please answer questions a) through e).
> a) What group(s)?
> b) Do you share the views of this group(s)? Yes/No.
> c) How strongly do you share these views?
> d) Describe the views of this group.
> e) Are your views based on a religious consideration? Yes / No.
> If "yes", please explain.
>
> 63) Do you belong to any group that advocates ***abolition*** of the death penalty? Yes / No. If "yes", please answer questions a) through e).
> a) What group(s)?
> b) Do you share the views of this group(s)? Yes / No.
> c) How strongly do you share these views?
> d) Describe the views of this group.
> e) Are your views based on a religious consideration? Yes / No.
> If "yes," please explain.

11 RCT 2425-2426 (emphasis in original).

Preceding questions 64 through 70, the trial court included a general instruction about the guilt versus penalty phases and an explanation of how jurors are to weigh aggravating versus mitigating circumstances during the

penalty phase. 11 RCT 2426. The court also included the following statement: "Also, assume for the purposes of questions 64 through 67, that the evidence may tend to show that the four deceased victims were the children of the defendant and ranged in age from age five to age twelve." Id. These questions followed:

> 64) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved murder of the first degree beyond a reasonable doubt and you believe the defendant is guilty of murder of the first degree. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilty of murder of the first degree, although you personally believed the defendant to be guilty of murder of first degree, just to prevent the penalty phase from taking place? Yes / No. If your answer is "yes," please explain your answer, including whether based upon a personal, religious, philosophical, or other belief.
>
> 65) Assume for the sake of this question only that in the guilt phase the prosecution has proven to be true one or more special circumstances beyond a reasonable doubt and you personally believe the special circumstance(s) to be true. Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, although you personally believed it (them) to be true, just to prevent the penalty phase from taking place? Yes / No. If your answer is "yes," please explain your answer, including whether based upon a personal, religious, philosophical, or other belief.
>
> 66) Assume for the sake of this question only, that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors (on which you will be instructed) regarding the facts of the

crime and background and character of the defendant? Yes / No. If your answer is "yes," please explain your answer, including whether based upon a personal, religious, philosophical, or other belief.

67) Assume for the sake of this question only, that the jury has found the defendant guilty of first-degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (on which you will be instructed) regarding the fact of the crime and the background and character of the defendant? Yes / No. If your answer is "yes," please explain your answer, including whether based upon a personal, religious, philosophical, or other belief.

68) If your answer to either question number **66** or question number **67** was "yes," would you change your answer to either if the court has instructed and ordered you that you *must* consider and weigh the evidence and the aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of a penalty? Yes / No. If "yes," please explain.

69) Could you set aside your own feelings regarding what the law ought to be and follow the law as the court explains it to you? Yes / No. If "no," please explain.

70) What does a sentence of life in prison without the possibility of parole mean to you?

11 RCT 2426-2429 (emphasis in original).

Absent from the questionnaire were the specifically directed questions regarding a juror's ability to follow the law if the facts showed that the defendant had killed her own children. On March 29, 2000, defense counsel again filed a request with the court to add into the jury questionnaire the following questions:

> Assume for the sake of this question only, that in the guilt phase, the prosecution has proven to be true one or more special circumstances beyond a reasonable doubt and you personally believe the special circumstance(s) to be true, would you vote for the death penalty if the victims were minor children, no matter what mitigating evidence was presented? Yes or No.
>
> Assume for the sake of this question only, that in the guilt phase, the prosecution has proven to be true one ore more special circumstances beyond a reasonable doubt and you personally believe the special circumstance(s) to be true, do you understand that the law requires that the aggravating circumstances substantially outweigh the mitigating ones before considering applying the death penalty? Yes or No.
>
> Could you apply such a test even though the four victims were all minors? Yes or No. If not, why not?

11 RCT 2529.

Defense counsel argued that the parties had agreed to these questions but that the court had excluded them. 11 RCT 2529. He pointed out that these specifically directed questions served a purpose that the court's brief mention only in the preamble that the victims were minors did not achieve. "While the jurors may have the opportunity to read the court's directive, they will not necessarily believe or feel that they are answering the MINOR issue in answering any specific question." Id. (capitalization in original). The defense argued that without these specifically directed questions, the defense would be "in the blind as to whether any juror could not fairly and impartially deal with an accused who may have caused the death of four (4) minors." Id.

Once again, the trial court rejected defense counsel's request to include these questions. 10 RT 552:16-18. Instead, the court elected to repeat before question 67 the following statement from the preamble to questions 64 through 67: "Assume for the purposes of question 67 that the

evidence may tend to show that the four deceased victims were the children of the defendant and ranged in age from age five to age twelve." 10 RT 568:19-27.[79]

2. The Trial Court Empaneled the Jury after a Cursory and Superficial Voir Dire

The entire voir dire lasted less than five days. The first two panels entered the courtroom on Monday, April 24, 2000. 11 RT 633:11. The second two panels came in on Tuesday, April 25, 2000. Court was in session for less than four hours, from 9:00 a.m. until 12:00 p.m., then from 1:40 p.m. until 2:00 p.m. 11 RT 687:1-743:2; 744:1-763:8. Wednesday, April 26, 2000, court commenced at 9:50 a.m. and after a lunch break was adjourned for the day by 3:00 p.m. 11 RT 764:1-819:13. The court spent these first three days, Monday through Wednesday, interviewing prospective jurors with hardship claims and passing out questionnaires to those who were not excused. 12 RCT 2928; 15 RCT 3585. Court was not in session on Thursday, or Friday, April 27 and April 28, 2000. 11 RT 819.

Monday through Wednesday approximately 77 prospective jurors filled out the 15 page questionnaire. 12 RCT 2655-18 RCT 4381. Once the questionnaires had been filled out and returned to the court on Wednesday, April 26, 2000, the court gave the parties two days to review the completed questionnaires and submit written follow up questions. 11 RT 715:15-20.

Court resumed voir dire on Monday, May 1, 2000. 12 RT 820:1. By Tuesday, May 2, 2000, a jury and four alternates were sworn in before court adjourned at 4:00 pm.[80] 13 RT 1225:15; 1234:28. With the exception of a

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[79]See 12 RCT 2655 (final version).

[80] The prospective jurors discussed in this brief are identified by (continued...)

single prospective juror questioned on Tuesday, April 25, 2000 (11 RT 749:3-756:12), the entire death qualification voir dire of the jury panel took place in less than two days.

3. The Trial Court Denied Counsel Follow up Voir Dire

The parties had two days to review the jury questionnaires and submit written follow up questions for each of the jurors. 11 RT 715:15-20. The defense submitted follow up questions for specific jurors, in addition to a list of questions directed at the jurors who indicated on their questionnaire that they were against the death penalty. The defense also submitted a list of questions directed toward "death oriented" prospective jurors. 18 RCT 4384-4385. For those against the death penalty, defense counsel's questions included potentially rehabilitating questions such as:

> Do you think there are some Crimes so Deplorable, like Hillside Stranger [sic], Manson Killings or the Oklahoma Bombing where 100+ Died, that qualify as Heinous crimes?
>
> Don't you think that a person commits such Heinous Killings should be Given Society [sic] Highest Penalty?

18 RCT 4384 (capitalization and emphasis in original). For the death-orientated prospective jurors, defense counsel's follow up questions included:

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[80](...continued)
their random juror identification number used by the trial court. The final jurors, from seat one to 12, were jurors numbered 4685 (13 RT 1059:10), 0763 (13 RT 1067:2), 5067 (13 RT 1092:1), 6491 (13 RT 1124:17), 4698 (13 RT 1041:26), 3225 (13 RT 1092:26), 2489 (12 RT 1010:12), 9371 (12 RT 1012:10), 7591 (12 RT 1005:21), 8318 (12 RT 972:27), 1763 (12 RT 875:28), 7029 (13 RT 1103:26). The alternate jurors, one through four, were 2133, 6974, 6049, 2945. 13 RT 1225:7-13.

> Would conviction of 187-1st of a <u>Heinous</u> act with premeditation & Deliberation require you to vote for D.P.?
>
> If you found that a person was guilty of 187-1st and with Premeditation & Deliberation murdered her 4 <u>minor</u> children, would that qualify as a Heinous Act?
>
> . . .
>
> Would you consider <u>LWOP</u> as a Sufficient choice, instead of the D.P., If you were satisfied that minor children were killed with Premeditation & Deliberation, Or Would you feel the D.P. is the <u>Only Proper</u> Verdict in your Opinion?

18 RCT 4385 (capitalization and emphasis in original).

By the morning of Monday, May 1, 2000, the court had reviewed the completed juror questionnaires as well as the written follow up questions submitted by the parties. 12 RT 820:18-20. The court stated that most of the jurors had answered the death qualifying questions in an "unequivocal, straightforward" manner. But where the answers were equivocal, it was willing to ask follow up questions. 12 RT 821:16. However, the court announced that it did not intend to ask a number of the follow up questions submitted by the defense. 12 RT 823:16-17. Defense counsel argued for follow up with those jurors who indicated that they would vote for death if the facts showed that the defendant committed multiple murders and that the victims were children:

> The Court: Just keep in context that the voir dire must seek to ascertain the views of prospective jurors about capital punishment in the abstract. Inquiry directed to whether without knowing the facts of the case, the juror has an open mind on penalty.
>
> Specific examples are asking them to consider the facts in this case is inappropriate, and some of your questions deal with that, Mr. Waco.

> Mr. Waco: Because some of the jurors have said that in this type of case where children are involved they're more inclined -- they think they would give the death penalty rather of an automatic nature, and others said because of the multiple murders in this particular case.
>
> So those -- I would only ask those questions in response to those jurors who answered questions and brought up that particular subject and brought up this particular case.
>
> I just can't ignore it, and I don't think the court can. If the particular jurors, as several of them did, said in this particular type of case where there are multiple murders and minors involved that they thought they would have to give the death penalty. So I can't ignore them.

12 RT 823:27-824:22.

The trial court also rejected questions the defense submitted as follow up to specific jurors. The record shows that there was a "no" marked next to the defense's hand-written proposed follow up questions to several prospective jurors, particularly those questions asking a prospective juror if he or she would automatically vote for death in the case of the multiple murders of children. See e.g. 12 RCT 2693, 2774, 13 RCT 3139.

Before any oral voir began on the morning of Monday, May 1, 2000, the court also announced it's "inclination" to dismiss for cause jurors 9633, 0292, 6519, 8413, and possibly also 8180, 9478, 0857, 4451, 6322, and 8386.[81] 12 RT 824:27-825:13. The court said it was ready to excuse these jurors for cause without further inquiry and without a challenge from either side. 12 RT 824:23-825:17. Defense counsel objected and argued that each juror on the court's list had expressed in their questionnaire reluctance to sentence the defendant to death and that the court had not suggested

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[81] The trial court identified the last four jurors by their seat number, 69, 70, 71, and 75 respectively. 12 RT 825:11.

excusing any of the jurors who had indicated that they would automatically vote for death under circumstances involving children or multiple murders.[82] 12 RT 830:5-7. For example, prospective juror 2214 answered on her questionnaire that, yes, she would automatically vote for a penalty of death because "[c]hildren are children and shall not be murdered for any reason." 14 RCT 3320. However, the trial court did not include her on the list of prospective jurors that it was inclined to excuse without further voir dire.

Defense counsel argued that upon reading the answers to the questionnaires, it had become apparent that the only question that succeeded in eliciting any information from the jurors on their views of the death penalty was question 60: "Please circle the answer that best describes your feeling on how the death penalty is used: Too often? Too seldom? No change necessary? Please explain your answer." 11 RT 748:7-9; see e.g. 13 RCT 3011. Defense counsel pointed out to the court that the other questions were not achieving any meaningful answers. 11 RT 748:17-18.

Once oral voir dire of the prospective jurors started on Monday, May 1, 2000 the trial court did not ask prospective jurors any of the follow up questions defense counsel had submitted. The court repeatedly cut off defense counsel's questions of prospective jurors or denied him the opportunity to ask any at all.

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[82] The court never reached prospective jurors 9478, 0857, 4451, 6322 and 8386, but ultimately excused for cause the other prospective jurors it had indicated it was inclined to dismiss. These were prospective jurors 9633 (12 RT 900:3-4), 0292 (12 RT 987:22-992:28), 6519 (12 RT 854:20-22), 8413 (13 RT 1127:8-1129:15), and 8180 (13 RT 1159:8-1166:28).

The trial court prevented defense counsel from further questioning of those prospective jurors who expressed in their answers to the questionnaire or to the court potential bias against the defendant. For example, defense counsel argued that he needed an opportunity to further question prospective juror 6707 about her inclination not to consider a doctor's testimony based on what she had seen in movies. 12 RT 896:13-24. The trial court did not ask the follow up questions defense counsel had previously submitted in writing for this juror. 12 RCT 2774. The trial court did not allow defense counsel to further question this juror despite his repeated requests. 12 RT 891:4-8, 895:25-896:24. The trial court then denied the defense challenge for cause. 12 RT 900:8-9. Defendant had to use a peremptory challenge to excuse this juror. 12 RT 923:2.

Prospective juror 0300 indicated on the questionnaire that "The death penalty is used too seldom. I feel that if someone has committed multiple murders, then they should be subject to the death penalty if they are convicted." 12 RCT 2826. The trial court did not ask this prospective juror any of the follow up questions defense counsel submitted, including a question as to whether, in the juror's view, the murder of four minor children automatically qualifies a defendant for the death penalty. 12 RCT 2834. Defense counsel argued for the opportunity to ask this juror follow up questions. 12 RT 896:25-27. Again, the trial court did not allow him to do so and denied the defense challenge for cause. 12 RT 900:8-9. Defense had to use a peremptory challenge to excuse this juror. 12 RT 966:24.

As voir dire continued, the trial court refused to slow down the process and allow proper voir dire, despite objection from the defense. In a rare instance, the trial court indicated that the defense could question

prospective juror 8595, but as soon as defense counsel began his questions, the court cut him off:

> . . . . Mr. Waco: You have not sat on any prior case before?
>
> Prospective Juror No. 8595: No.
>
> Mr. Waco: And you understand the differences in the rules with regards to the burden of proof in a civil case versus a criminal case?
>
> The Court: Mr. Waco, I will interrupt you at this point. This doesn't go to cause. This is unnecessary. Why don't you have a seat. We'll go back into chambers right now.

12 RT 908:17-26. Immediately afterwards in chambers, the following exchange took place:

> The Court: All right. I can't trust you to ask a proper question at this point. So you're going to have to be specific so I can make a finding as to good cause why you should be allowed to ask any questions. Those are indoctrination-type questions. They have nothing to do with challenges for cause.
>
> Mr. Waco: Well, you know, it's kind of hard to get to the $64[,000] question without some lead up.

12 RT 909:5-13. Discussion continued and defense counsel argued that he could not make challenges for cause without proper voir dire:

> The Court: Any other challenges for cause?
>
> Mr. Waco: Not without trying to ask further questions to see if there are other grounds for cause at this time. I mean, I can't say -- I can't ask for any others without follow-up questions –
>
> The Court: You had the opportunity to put in writing questions, and you had days to do it, and you haven't done it, and I'm only asking those questions that were put in writing that I think were appropriate. And there's nothing new that's been developed that would generate any further questions.

> I'm not going to ask any other questions. Simple as that. We'll go back in the court. And the people will have their first peremptory.

12 RT 911:13-28.

Defense counsel had in fact submitted written follow up questions for juror 8595. 12 RCT 2674. Again counsel had sought to ask whether the juror's views with regard to the death penalty would impair the juror's ability to perform his duties if the evidence were to show multiple murders and that the victims were minors. Id. The defense had to use a peremptory challenge against this juror. 13 RT 1051:24.

The court continued to deny defense counsel's requests to ask follow up questions of prospective jurors who expressed bias. The court denied defense counsel voir dire to explore the potential bias of juror 7166 (12 RT 945:28-954:6), a former correctional officer who stated on his questionnaire, "the punishment should fit the crime." 13 RCT 3130. The trial court also cut off defense counsel's voir dire of prospective juror 3801 (12 RT 954:15-962:2), despite her equivocal answer "I'll try" when asked if she could put aside her bias. The trial court denied challenges for cause to prospective juror 3801 and another prospective juror, 8318, who also said that the best she could do was "try" to put aside her self-professed bias against the defendant because the allegations involved the murder of children. 12 RT 960:14-21, 981:16-21.

During voir dire on Monday, May 1, 2000, and Tuesday, May 2, 2000, the court also denied defense counsel's repeated requests to question the prospective jurors who expressed reluctance to apply the death penalty. As discussed in more detail in Section D below, the trial court excused prospective juror 6519, a teacher who had tried and failed to be excused for hardship, without allowing defense counsel the opportunity to ask any

follow up questions. 12 RT 847:6-849:24. After juror 9633 expressed opposition to the death penalty, defense counsel argued that he should be allowed to ask the juror if there were particular kinds of crimes that he might consider so heinous, as compared to others, that he may consider appropriate for the death penalty. 12 RT 894:22-28. The court excused this juror without allowing any follow up questions from counsel. 12 RT 900:3-4. The trial court also cut off defense counsel in the middle of his voir dire of juror 7300, then excused the prospective juror for cause over a defense objection. 13 RT 1167:1-1175:21.

Although none of the alternate jurors were ultimately seated on the jury during the trial, the court's treatment of the prospective alternates illustrates the hurried, superficial approach to the process of separating fair jurors from those with biases. The trial court refused to allow defense counsel follow up voir dire in an attempt to rehabilitate prospective alternate 8413 who expressed hesitancy to sentence a criminal defendant to death. 13 RT 1128:16-1129:8. Instead, the court excused this prospective alternate juror on its own motion. 13 RT 1128:23-1129:8. Death-reluctant prospective alternate 8180's responses in open court unambiguously indicated that she could carefully consider all the evidence during the penalty stage of the trial. 13 RT 1163:2-1164:2. However, the court allowed the prosecution to ask the potential juror if she could "look the defendant in the eye and tell her that the penalty of death is appropriate" to which the juror said, no. 13 RT 1164:7-10; 17-25. The court overruled the defense objection to this loaded question and then based its ruling to dismiss her for cause partially on the fact that she was in tears. 13 RT 1164:16; 1166:10-28.

Prospective alternate 2133 stated in her questionnaire she believed the defendant was guilty because of what she heard in the media and that she was "not sure" if she could put her feelings aside and follow the law as the court explained it. 17 RCT 4346-4347. The court conducted the oral voir dire of this prospective alternate and did not allow defense counsel to ask follow up questions. 13 RT 1221:2-1222:10, 14 RT 1236:26-1237:14. The court denied defense counsel's challenge for cause, and because the defense had exhausted all peremptory challenges, she was sworn in as Alternate Juror 1. 13 RT 1224:6.

C. The Inadequate Voir Dire Deprived Defendant of Her Constitutionally Protected Rights, Resulting in Reversible Error

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." United States Const., Amend. 6. The Fourteenth Amendment extends the right to an impartial jury to criminal defendants in all state criminal cases. Duncan v. Louisiana (1968) 391 U.S. 145. The Due Process Clause of the Fourteenth Amendment independently requires an impartial jury. Morgan v. Illinois (1992) 504 U.S. 719, 726 (citing Irvin v. Dowd (1961) 366 U.S. 717, 721-722). A fair and impartial jury is critical in a case where the defendant's life is at stake because in such cases there is a special need for fair and reliable guilt and sentencing determinations under the Sixth, Eighth, and Fourteenth Amendments. Johnson v. Mississippi (1981) 486 U.S. 578, 584; Beck v. Alabama (1980) 447 U.S. 625, 633. The trial court's inadequate voir dire conducted in this case deprived Sandi Nieves of these constitutionally protected rights.

Faced with the possibility of conviction of first degree murder with special circumstances and death, Sandi Nieves had a right to be judged by an impartial jury. Morgan, supra; Uttecht v. Brown (2007) ___ U.S. ___, 127 S.Ct. 2218, 2231. A criminal defendant is entitled to an unbiased jury. A capital defendant cannot be put to death by a jury that has been purged of all persons who have voiced general objections to the death penalty or religious scruples against its infliction. Witherspoon v. Illinois (1968) 391 U.S. 510, 522.

If the death penalty is sought, a prospective juror may properly be excused for cause if "the juror's 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. The Witt standard applies to both prosecution and defense challenges. People v. Riggs (2008) 44 Cal.4th 248, 282. Therefore, the jury cannot be made up of individuals who refuse to follow the law, regardless whether they are personally for or against the death penalty. "At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." Id.

Ultimately the question is whether the juror can be fair and impartial by setting aside temporarily whatever abstract views he or she may hold concerning the death penalty. Lockhard v McCree (1986) 476 U.S. 162, 176. In a death penalty case, one purpose of voir dire is to identify whom among the prospective jurors will be able to follow the law when and if the case reaches the penalty phase. Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Morgan, 504 U.S. at 729. '"Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially

to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" Id. at 729-730 (quoting Rosales-Lopez v. United States (1981) 451 U.S. 182, 188 (plurality opinion)).

Although there is no constitutional right to a particular voir dire process, it is the means by which to achieve the constitutional goal of an impartial jury. People v. Robinson (2005) 37 Cal.4th 592. "Hence, '[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." Morgan, 504 U.S. at 730 (quoting Aldridge v. United States (1931) 283 U.S. 308, 310). Here, the trial court exceeded the boundaries of fairness because the voir process was inadequate to meet the emotional underpinnings, and circumstances, of this death penalty case.

1. The Trial Court Erred When it Insisted on a Deficient Questionnaire That Did Not Include Clear or Comprehensive Death Qualification Questions

The trial court's insistence on its own version of the jury questionnaire doomed the voir dire process from the outset. Refusing to use the more comprehensive and straightforward questionnaires submitted by the parties, the trial court used its convoluted version. It was inadequate to choose a fair guilt phase jury under circumstances where the defendant was charged with killing her children. It also was inadequate for death qualification because it contained only 11 death qualification questions, many of which were compound and practically unintelligible. See e.g. 12 RCT 2666-2670.

Under the Judicial Administrative Standards recommended by the Judicial Council and incorporated in the California Rules of Court, "The examination of prospective jurors in a criminal case should include all questions necessary to insure the selection of a fair and impartial jury." Cal.

Stds. Jud. Admin., Std 4.30(a)(2) (formally § 8.5(a)(2), language unchanged as amended Jan. 1, 2004, Jan. 1, 2006, and renumbered Std 4.30 and amended, eff. Jan. 1, 2007). The model jury questionnaire currently endorsed by Judicial Administrative Standard 4.30, form MC-002 (Rev. 7-1-06), "Juror Questionnaire for Criminal Cases, Capital Case Supplement," differs in several important ways from the questionnaire that the trial court used in this case. The model questionnaire, created as a guide for trial courts, serves here to show by comparison that the court's questionnaire was inadequate and confusing. See People v. Bolden (2002) 29 Ca.4th 515, 538 (trial courts advised to "closely follow the language and formulae for voir dire recommended by the Judicial Council in the California Standards of Judicial Administration Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner") (internal quotations omitted).

The model jury questionnaire goes far beyond the questions covered in the death-qualification section of the trial court's questionnaire. For example, the model includes the following questions that were absent from the court's questionnaire:

> 2.1 Which do you think is the more severe punishment? The death penalty or life in prison without parole. Why?
>
> 2.2 Which would you say accurately states your general belief regarding the death penalty? Strongly in favor / Strongly opposed / Moderately in favor / moderately opposed / Neutral. Please explain in more detail your beliefs about the sentence of death.
>
> 2.3 Which would you say accurately states your general belief regarding the sentence of life without the possibility of parole? Strongly in favor / Strongly opposed / Moderately in

> favor / Moderately opposed / Neutral. Please explain in more detail your beliefs about the sentence of life in prison without the possibility of parole.
>
> 2.4 What purposes, if any, do you believe that life imprisonment without the possibility of parole serves?
>
> 2.5 What purposes, if any, do you believe the death penalty serves?

In addition, the model questionnaire asks some of the same questions the court's questionnaire did, but in a straightforward, non-compound fashion. For example, the model questionnaire asks:

> 2.13 If you find the defendant guilty of the crime, would you automatically in all cases vote for a sentence of death regardless of the evidence concerning aggravating and mitigating factors? Yes / No.

Id.

The court's own compound question attempted the same inquiry but used loaded and confusing language:

> 67) Assume for the sake of this question only, that the jury has found the defendant guilty of first-degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (on which you will be instructed) regarding the facts of the crime and the background and character of the defendant? Yes / No. If your answer is "yes," please explain your answer, including whether based upon a personal, religious, philosophical, or other belief.

12 RCT 2669.

The court's formulation was problematic for several reasons. First, the phrase "without considering any of the evidence, or any of the

aggravating and mitigating factors" preconditions a disqualifying answer on the prospective juror's stating that he or she would not consider any of the evidence, instead of asking whether he or she would vote for death regardless of the evidence of aggravating and mitigating factors.[83] Second, the court's compound question undoubtedly confused some members of the jury panel. Prospective juror 5013, for example, wrote on her questionnaire that she did not understand question 67. 18 RCT 4378.

The trial court's use of compound questions interfered with the constitutional objectives of voir dire. See United States v. Littlejohn (D.C. Cir. 2007) 489 F.3d 1335, 1346 (the trial court's use of compound questions denied the defendant "a full and fair opportunity to expose bias or prejudice on the part of the veniremen"); Cabe v. Superior Court (1998) 63 Cal.App.4th 732, 742 ("the evils of the compound question are just as real during voir dire as they are during adversarial proceedings").

Here the court drafted the death-qualification questions, particularly questions 64 through 67, using long, convoluted and interrelated syntax that read like legalese. The form of the questions showed insensitivity to the average educational level of the jury pool. Notably, the 2000 census showed less than 25% of the Los Angeles County residents over age 25 have a bachelor's degree or higher. Cal. Postsecondary Edu. Com.,

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[83] In the preceding question, number 66, the court asked if prospective jurors would automatically refuse to vote in favor of the death penalty, and automatically vote for a penalty of life imprisonment without the possibility of parole. 12 RCT 2669. But the court constructed the question differently from question 67, using the phrase, "without considering any of the evidence of the aggravating and mitigating factors." 12 RCT 2669. The trial court altered the wording of question 67 in a way that allowed death-orientated prospective jurors to avoid answering whether they would vote for death regardless of the aggravating and mitigating factors.

Education and Demographic Profile, Los Angeles County (Feb. 2004) page 6.[84] Of the 77 prospective jurors that completed questionnaires in this case, only 29 (or 37.7%) had a bachelor's degree or higher.[85] Nonetheless, the trial court used legalese that would be challenging to comprehend for anyone, regardless of their training or education. Furthermore, the court used a 10.5 font size, making the questions even less accessible to prospective jurors.[86]

Responses to the death qualification questions exposed the confusion the questionnaire caused for members of the jury panel. Three prospective jurors, 1791, 2214, and 5090, left several of the death qualification questions blank. 15 RCT 3690-3691, 14 RCT 3317-3321, 3378-3382. Prospective jurors 5090 and 6322 responded to questions 66 and 67 with "I don't know." 15 RCT 3381, 17 RCT 4152-4154. Prospective juror 8821 responded "can't answer" to question 66. 16 RCT 3892-3896. As defense counsel pointed out to the court, the only answers that managed to give any insight into the prospective jurors' views on the death penalty were in

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[84] Judicial notice of education and demographic facts contained within the report, available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/aa/8f.pdf (accessed December 6, 2008), is appropriate because the report is a publication of a state agency. <u>See</u> <u>Serrano v. Priest</u> (1971) 5 Cal.3d 584, 591. Appellant requests that the Court take Judicial Notice of this data pursuant to Evid. Code §§ 452(c), 453.

[85] This information is available through a tally of responses to question 20, "Your Education," on the jury questionnaire. (See e.g., 12 RCT 2660.)

[86] The 10.5 font size is based on a comparison of the jury questionnaire, (see e.g. 12 RCT 2655), with printed samples using Times New Roman 10.5 font size.

response to question 60: "Please circle the answer that best describes your feeling on how the death penalty is used: Too often? Too seldom? No change necessary? Please explain your answer." 11 RT 748:7-9; see e.g. 13 RCT 3011. Otherwise, the other questions were not eliciting any meaningful information. 11 RT 748:17-18. The lack of responsiveness on the part of the prospective jurors demonstrated the confusion that the deficiencies in the court's questionnaire created.

Because the court's questionnaire did not serve effectively to elicit information from the prospective jurors as to their ability to serve fairly and impartially, follow up voir dire was even more important.

After the prospective jurors turned in their completed forms, defense counsel lacked sufficient information to make meaningful challenges during voir dire. The defense was left to rely on follow up questions in order to determine who to challenge for cause or how to exercise its peremptory challenges. However, the trial court refused such follow up, exacerbating the detrimental effects of using a deficient questionnaire on the right to a fair and impartial jury.

2. The Trial Court Erroneously Prohibited Voir Dire Regarding the Emotionally Charged Circumstances Particularly Evident in this Case

Without direct questions to prospective jurors that touched on the emotionally charged circumstances specific to this case – that the defendant was accused of killing her four young girls – the defense could not effectively determine whether to challenge biased prospective jurors.

The trial court's questionnaire did not include any specifically directed questions focused on whether a prospective juror would automatically vote for death if the defendant were convicted of the multiple murders of children. The court repeatedly rejected defense counsel's

attempts to include such specifically directed questions. 7 RT 208:5-10. The court elected instead to include only a reference to the fact that the victims were children in preambles which did not, as defense counsel argued, succeed in uncovering potential bias. 10 RT 553:16-17. The court's explicit death-qualifying question for pro-death leaning jurors, question 67, asked only about the potential disqualifying impact of the juror's "views . . . concerning capital punishment."[87] 12 RCT 2669. No question asked whether the juror's views concerning a mother's murder of her four children would lead the juror to "automatically vote for a penalty of death."

3. The Wholly Inadequate Voir Dire Could Not Uncover Bias

Voir dire must be adequate to uncover bias. Morgan, 504 U.S. at 2230. A voir dire procedure that effectively impairs the defendant's ability to exercise intelligent challenges violates the defendant's constitutional rights to a fair and impartial jury and requires reversal. See State v. Williams (N.J. 1988) 113 N.J. 393, 435; see also United States v. Underwood (7th Cir. 1997) 122 F.3d 289, 392-395 (recognizing the right to intelligent use of peremptory strikes).

Rushing the jury selection process in this case, the trial court did not allow defense counsel to ask followup questions of many of the prospective

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[87] This was consistent with the court's overly narrow view of the scope of permissible death-qualifying voir dire, as stated on the record and noted above:

> The Court: Just keep in context that the voir dire must seek to ascertain the views of prospective jurors about capital punishment in the abstract. Inquiry directed to whether without knowing the facts of the case, the juror has an open mind on penalty.

12 RT 823:27-824:3.

jurors. In doing so, the trial court prevented defense counsel from uncovering bias against the defendant. This practice precluded defense counsel from exercising meaningful challenges to biased jurors. In addition, the trial court denied challenges to death-orientated jurors who did not provide the court with unequivocal assurances that they could put aside their bias against the defendant.

a. The Trial Court Rushed the Voir Dire

Trial courts presiding over capital cases are instructed to proceed with great care, clarity, and patience in the examination of potential jurors. People v. Heard (2003) 31 Cal.4th 946, 968. "The conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion." Id. at 966.

Although it is appropriate to use questionnaires to streamline the "long and tedious business" of jury selection, this Court has warned that trial courts should err on the side of caution because of the interests at stake and the vital constitutional concerns when a defendant faces the possibility of death. People v. Wilson (2008) 44 Cal. 4th 758, 790. "[T]rial courts must, before trial, engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard, thus protecting an accused's right to a fair trial and an impartial jury." Id. at 779.

The trial in this case lasted almost four months. The length and emotionally-charged nature of the trial required jury voir dire that was far more careful and cautious than provided by the trial court here. Follow up questions or observations by the court would not have been unduly burdensome. See Heard, 31 Cal.4th at 968.

b. The Trial Court Restricted Counsel's Participation in Voir Dire

At the time of trial in this case, California Code of Civil Procedure § 223 stated, "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. 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." People v. Stitely (2005) 35 Cal.4th 514, 531 n.11. Effective January 1, 2001, an amendment to this statute gave counsel expanded rights to examine prospective jurors through direct oral questioning. Id. The California Legislature passed the amendment, AB Bill No. 2406, to eliminate the problem that occurred in the present case: "AB 2406 is a matter of justice. No one is better prepared than the prosecution and the defense to discover potential juror bias and conflict of interest. According to prosecutors and defense attorneys, when attorney voir dire is denied, jury selection becomes erratic." Sen. Com. on Public Safety, Analysis of AB Bill No. 2406 (1999-2000 Reg. Session) [proposed amendment] p.3.

In People v. Lenix (2008) 44 Cal. 4th 602, 625 n.16, this Court expressed support for a more thorough voir dire that gives counsel the opportunity to ask questions. "Undue limitation on jury selection . . . can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." Id. at 625. Even though this Court restricted its opinion in Lenix to cases subsequent to the 2001 amendment of § 223, id., the constitutional implications for a fair and

impartial jury are the same today as they were when Sandi Nieves faced trial in 2000.

The trial court's hurried jury selection and exclusion of counsel's participation denied defendant the opportunity to learn of or explore potential bias. Compare People v. Brasure (2008) 42 Cal.4th 1037, 1051 ("Each prospective juror was then examined on his or her attitudes and ability to fairly judge the case, with counsel, rather than the court, conducting the bulk of the examinations. Counsel thus had full opportunity, through questioning, to discover a prospective juror's biases, if any, regarding the death penalty and its application.").

The trial court's treatment of prospective juror number 7166, a former correctional officer, illustrates how it thwarted defense counsel's ability effectively to exercise challenges to biased jurors. In response to question 60, "Please circle the answer that *best describes* your feelings on how the death penalty is used: Too often? Too seldom? No change necessary? Please explain your answer," prospective juror 7166 responded that no change was necessary to how the death penalty is used. The prospective juror wrote as an explanation to his answer, "Punishment should fit the crime." 13 RCT 3130.

During oral voir dire of prospective juror 7166, the court did not question the juror about this answer. 12 RT 946-947. The court rejected defense counsel's written follow up questions, including further inquiry into this juror's answer to question 60. The proposed questions included whether the juror's answer meant that the death penalty was therefore the appropriate punishment for four counts of murder of children, and whether there was anything the defense could present that would change the juror's

mind. 13 RCT 3139. The trial court marked "no" next to these questions and did not ask them. Id.

The trial court refused to engage in any further inquiry of this juror. 12 RT 950:17. The court stated that it was satisfied with the juror's answers of "no" to questions 66 and 67 of the questionnaire regarding whether his views on capital punishment would cause him to automatically vote for death or automatically vote for life without the possibility of parole. 12 RT 949:2-6. However, as defense counsel correctly pointed out, at least one other prospective juror had also answered those questions in the negative, only to state otherwise when questioned further. 12 RT 949:7-12.[88]

Another example is juror 6519. She was excused for cause because she indicated she was against the death penalty. The record does not provide enough information to support the trial court's decision to excuse prospective juror 6519. Although she had expressed religious beliefs

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[88] Juror 8209 answered "no" to questions 66 and 67. 13 RCT 3014. Yet, during oral voir dire, she gave the following answers:

> . . . .The Court: Are you telling me that you're automatically going to vote for the death penalty in every case and disregard any of the evidence that you hear by the defendant, the defendant's background and the circumstances of the crime?
>
> Prospective Juror No. 8209: If it shows that the defendant was found guilty for murder and that's one of the choices for the penalty, yes, I am going to pick that.
>
> The Court: You're always going to pick the death penalty?
>
> Prospective Juror No. 8209: Right.
>
> The Court: Regardless?
>
> Prospective Juror No. 8209: Right.

11 RT 755:1-14.

against the death penalty, the court did not ask the prospective juror, a school teacher, whether she would be open to considering death if the facts showed the defendant killed her four young children. Defense counsel, over objection, was not allowed to ask her any questions of this nature. 12 RT 847:22-849:7. Instead, the trial court pushed forward, excusing this prospective juror for cause despite defense counsel's showing that the juror's failed attempt to be excused for hardship purposes due to her teaching job may have been the motivation behind her answers to the death-qualification questions. Id.

The trial court brought juror 7166 back for additional questions. However, the court did not ask follow up death-qualifying questions. 12 RT 953:5-24.

"When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges." Bolden, 29 Cal.4th 515, 537. Defense counsel did not challenge prospective juror 7166 for cause, but exercised a peremptory challenge to this juror. 12 RT 953:25-954:2. Defense counsel had to exercise a challenge without sufficient information.

If a juror has already formed an opinion on the merits, "the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." Morgan, 504 U.S. at 729. The bias or prejudice of even a single juror is enough to violate the Sixth Amendment guarantee to a verdict by an impartial jury. United States v. Gonzalez (9th Cir. 2000) 214 F.3d 1109, 1111 (citing Dyer v. Calderon (9th Cir. 1998) 151 F.3d 970, 973).

In the cases of prospective jurors 3801 and 8318, the trial court prevented adequate voir dire of two jurors who gave equivocal answers when questioned directly about their expressed bias against the defendant.

During the voir dire of prospective juror 3801, a registered nurse who worked with newborn children, defense counsel managed to ask directly about whether the juror would be able to apply and follow the law in a case where the allegation of the multiple murder of children was proved, especially considering the nature of her job as a nurse. 12 RT 957:13-27. In response, the juror gave the equivocal answer, "I would try." 12 RT 960:21. This exchange between the judge, prospective juror 3801, and defense counsel occurred:

> .... Prospective Juror No. 3801: So let me just understand the law. It doesn't necessarily -- if someone is convicted of doing this, this and this, doesn't mean that [the death penalty] is what they're going to have as punishment?
>
> The Court: If it's first-degree murder and there are one or more special circumstances -- you start with the proposition that not all murders result in application of the death penalty, because that would not be constitutional. It's only certain kinds of murder, what they call special circumstances.
>
> In other words, there is a limitation on the types of murders that are subject to the death penalty. Assuming that that is the case in this case, and the jury finds the defendant guilty of murder in the first degree and one or more of the special circumstances, at that point we have the second part of the trial, and the only thing the jury decides is which of the two penalties to impose, either life without parole, which means the defendant dies in prison, or execution.
>
> Prospective Juror No. 3801: And we decide that?
>
> The Court: And you decide that.
>
> Prospective Juror No. 3801: Okay.
>
> The Court: The question is --

Prospective Juror No. 3801: I see what you're saying. Now I understand the question.

The Court: The question is can you select either one of those penalties?

Mr. Waco: Or would you be prejudged because of the nature of the type of work you do? We didn't say the questions are easy.

Prospective Juror No. 3801: It's not an easy question. I would try. I would try.

The Court: Well, that's -- all right. I think we have heard enough at this point.

12 RT 959:16-960:23. The trial court then gave the prosecution a chance to conduct further voir dire, but did not allow defense counsel to ask any more questions. The defense objected:

. . . . Mr. Waco: That's the -- that's where I left off here, and I wanted to follow up with a couple of questions before the juror left, and we let her go out.

The Court: I think I've heard enough. Is there a challenge for cause?

Mr. Waco: Yeah, there is a challenge for cause.

The Court: It's denied.

12 RCT 961:24-962:2.

Prospective juror 8318 was equally equivocal in her responses. First, she expressed deep concern about the allegations involving the murder of children. 12 RT 977:9-14. She stated that she was not sure she could be unbiased because the crimes at issue involved children. Id. She gave the following equivocal answer when the court pressed her:

The Court: Can you set aside your opinions and base the case on the evidence and the law?

Prospective Juror No. 8318: I think it would be very difficult. But you know, I could try. I mean, you know, that's the best I can say.

The Court: All right.

12 RT 981:16-21.

The defense challenged prospective juror 8318 for cause, but the trial court remarkably denied the challenge, implicitly finding that this juror would not be substantially impaired in the performance of her duties. 12 RT 983:10-12.

"I will try" is not an affirmative answer. In United States v. Gonzalez (9th Cir. 200) 214 F.3d 1109, 1114, the Ninth Circuit held that a juror who stated "I'll try" in response to repeated requests for assurances that she would serve fairly and impartially, has not indicated that she can "'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict." The Gonzalez court indicated that, "Despite the government's best efforts to characterize the response 'I'll try' as unequivocal, we cannot agree, ... If a parent asks a teenager whether he will be back before curfew, that parent is highly unlikely to find 'I'll try' an adequate, satisfactory, or unequivocal response." Id. at 1113 n.5.

Prospective jurors 3801 and 8318 gave equivocal answers when questioned about their bias against the defendant. Their answers indicated only that they were willing to "try." These responses did not provide the court with an assurance that they could "lay aside" their bias if and when the cause reached the penalty phase.

Unable to elicit unequivocal answers from these jurors, the trial court improperly denied defense counsel's challenges for cause. "'Doubts regarding bias must be resolved against the juror.'" Gonzalez, 214 F.3d at 1114 (quoting Burton v. Johnson (10th Cir. 1991) 948 F.2d 1150, 1158.

Although defense counsel used a peremptory challenge against prospective juror 3801, he did not do so with 8318 who was seated as Juror 10. 12 RT 972:27.

4. The Inadequate Voir Dire Prevented the Selection of an Impartial Jury

The trial court unconstitutionally prevented voir dire that would have explored the potential bias of the prospective jurors in light of the uniquely emotional circumstances involved in this case. In other capital cases where the victims were children, courts have been careful to address the heightened risk of bias. In People v. Alfaro (2007) 41 Cal.4th 1277, 1312, for example, this Court did not find prejudicial error because the record revealed the fact the victim was a child was "discussed exhaustively throughout the voir dire." The Court stated, "All of the prospective jurors repeatedly were made aware of the unusual circumstances of this case, and numerous prospective jurors revealed that the victim's young age would prevent their serving as fair and impartial jurors." Id.

Similarly, in People v. Box (2000) 23 Cal.4th 1153, 1180, the trial court questioned jurors directly regarding their strong emotional reaction to the fact that the case involved a small child's murder. This Court stated it would be difficult to imagine a prospective juror not having a strong emotional reaction to a three-year-old's murder. Id.; see also People v. Earp (1999) 20 Cal.4th 826, 853 (voir dire constitutionally satisfactory because jury questionnaire asked whether the allegations of sexual misconduct involving the death of a child would affect the juror's sentencing decision).

Here, the trial court repeatedly denied the defense an opportunity to learn from the prospective jurors whether they could be fair and impartial and not automatically seek death if the victims were minor children. The trial court denied repeated requests for inclusion of direct questions on the

subject in the juror questionnaire. During oral voir dire, the trial court admonished the defense not to ask questions that the court considered specific to the facts of the case. 12 RT 823:27-824:6. Defense counsel argued at that point that he simply sought to follow up with those who had in some way indicated that they would automatically sentence a defendant to death because children were involved or there were multiple murders. 12 RT 824:7-9.

The trial court was wrong. It is the court's responsibility to conduct or permit adequate voir dire to eliminate from the panel any prospective jurors who will be unable to perform their duty fairly and impartially and to uncover bias and prejudice. Morgan, 504 U.S. at 729-730. "[E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." People v. Cash (2002) 28 Cal.4th 703, 720-721. See also People v. Zambrano (2007) 41 Cal.4th 1082, 1202 (conc. & dis. opn. of Kennard, J.) (because trial court refused to ask prospective jurors about their views on dismemberment, record does not reveal whether anyone serving on the jury held disqualifying views that the death penalty should be automatically imposed against a defendant who had dismembered the body of his victim).

Federal courts have also indicated that a deeper probe is required when a higher risk for bias exists: "The nature of the controversy or the relationship and identity of the parties may involve matters on which a number of citizens may be expected to have biases or strong inclinations. If an inquiry requested by counsel is directed toward an important aspect of

the litigation about which members of the public may be expected to have strong feelings or prejudices, the court should adequately inquire into the subject on voir dire. The court must not be niggardly or grudging in accepting counsels' requests that such inquiries be made." Darbin v. Nourse (9th Cir. 1981) 664 F.2d 1109, 1113. See United States v. Laird (6th Cir. 2007) 239 Fed.Appx. 971, 975 (trial court abused discretion in failing to ask whether jurors harbored strong feelings about violations of narcotic laws when defendants faced charges of possession and intent to distribute cocaine-based substance).

The trial court committed reversible error when it prohibited voir dire on the important, emotionally-charged circumstance that the victims in this case were the defendant's own young girls. In People v. Cash, this Court held that the trial court erred when it prohibited voir dire on the issue of prior murder, a fact "likely to be of great significance to prospective jurors." Id. at 721. The Court stated, "Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it cannot be dismissed as harmless." Id. at 723.

The same is true in the present case. It was impossible, without the opportunity to voir dire on the issue, to know if members of the jury could be fair to a mother accused of killing her own children or held the disqualifying view that Sandi Nieves should be automatically sentenced to death because the crime appeared to them to be inexplicable. Refusing defense counsel the opportunity to prove bias, infringed on Sandi Nieves's constitutional right to an impartial jury. Morford v. United States (1950)

339 U.S. 258, 259 (per curiam) (reversing conviction because defendant had been denied "the opportunity to prove actual bias," which is "a guarantee of a defendant's right to an impartial jury" (internal quotation marks omitted)). Furthermore, preventing inquiry into potential bias related to the specific facts of the case, the trial court infringed upon Sandi Nieves's Eighth Amendment right to an individualized determination of penalty. Woodson v. North Carolina (1976) 428 U.S. 280, 304.

This Court has said a defendant cannot be "categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment." People v. Carasi (2008) 44 Cal.4th 1263, 82 Cal.Rptr. 265, 286. In Carasi, this Court found it safe to assume that because the trial court had instructed the prospective jurors on case-specific factors, namely premeditated multiple murder, lying in wait, and financial gain, before death-qualification voir dire, they had answered the questions with those case-specific factors in mind. Id. Here, such an assumption is not appropriate because of the deficient questionnaire and the trial court's insistence on including the fact the murder victims were all children only in the preambles to the death qualification questions. It was never clear to the prospective jurors that they were being asked if they would automatically vote for death in the case of a mother accused of the multiple murder of her children.

Furthermore, the case-specific facts at issue in Carasi did not carry the same risk of bias as the allegations against Sandi Nieves. A mother accused of killing her own children, four of them, tears at primal emotions. In Carasi, the issue was whether a prospective juror may express his intention to automatically vote for death upon hearing that the murders

involved lying in wait and financial gain. Here, any juror biased against Sandi Nieves due to strong emotional reaction to the allegations would have tainted the entire trial, not just the penalty phase.

Unlike the trial court in Carasi, which had included case-specific facts in its questionnaire, and also reviewed them with the prospective jurors before conducting oral examination, in the present case, the trial court informed defense counsel that inquiry into the specific facts would not be allowed. 12 RT 823:16-824:22. The court systematically refused to ask the follow up questions on the matter that the defense had submitted in writing. See e.g. 12 RCT 2693, 2774; 13 RCT 3139. During oral examination, the trial court only rarely discussed the specific allegations of the multiple murder of the defendant's own children when, as with prospective juror 3801, defense counsel managed to ask the question directly.[89] More often, the trial court prevented such questions or promptly cut them off. Examples include defense counsel's attempts to ask case-specific questions to uncover bias of those death-orientated prospective jurors such as 0300 (12 RT 900:8-9), 8595 (12 RT 908:17-909:5-13), and 7166 (12 RT 945:28-954:6), as well as defense counsel's attempts to rehabilitate death-hesitant prospective jurors who may have considered such allegations so heinous as to make an exception and permit the death penalty, such as prospective jurors 6519 (12 RT 845:7-849:24), 9633 (12 RT 893:2-895:15), and 7300 (13 RT 1167:1-1175:21) .

The trial court's refusal to probe into the subject that the victims were the defendant's young children denied defense counsel the opportunity

[89] Defense counsel managed on limited occasions to ask jurors about the case-specific facts, but these rare occurrences (i.e. prospective juror 3801 (12 RT 954:15-962:2)) do not cure the overwhelming number of incidents where the trial court violated appropriate standards for voir dire.

for the intelligent exercise of challenges for cause and peremptory challenges. Voir dire in a capital case must be sufficiently probing to permit counsel intelligently to exercise challenges for cause and to permit the court to rule on the challenge. Morgan, 504 U.S. at 733-734. "Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia (1991) 500 U.S. 415, 431. See Darbin v. Nourse 664 F.2d at 1113 ("The trial court must conduct voir dire in a manner that permits the informed exercise of both the peremptory challenge and the challenge for cause."); Williams, 113 N.J. at 435 ("At numerous points, [the voir dire] failed to provide the information necessary to enable the effective formulation of challenges for cause and the intelligent exercise of peremptory challenges.").

The refusal to ask potential jurors specific questions denied defendant her right to intelligent and effective use of both challenges for cause and peremptory challenges, a recurring problem made even worse by the generally cursory nature of the trial court's jury selection process.

5. Reversal of the Convictions and the Penalty is Required Because the Voir Dire was Not Adequate to Assure a Fair and Impartial Jury and Meet the Demands of the Eighth Amendment

It is irrelevant that the defense had not exhausted its peremptory challenges when the final jury was sworn. "When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues

regarding the adequacy of voir dire." People v. Bolden (2002) 29 Cal.4th 515, 537-538. Here, reversal of the judgment is appropriate because voir was so inadequate that the resulting trial was fundamentally unfair. Bolden, 29 Ca. 4th 515, 538 (citing People v. Holt (1997) 15 Cal.4th 619, 661); State v Williams (N.J. 1988) 113 N.J. 393, 435; United States v. Underwood (7th Cir. 1997) 122 F.3d 389, 392-395; United States v. Rucker (4th Cir.1977) 557 F.2d 1046, 1049.

A defendant only has to show prejudice when challenging an excusal for cause after adequate voir dire. Because deficient voir dire shelters jurors who are potentially excludable, both for cause or by peremptory challenge, reversal is required. United States v. Baldwin (9th Cir.1979) 607 F.2d 1295, 1298 ("[Where] the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error.") See United States v. Hashimoto (9th Cir. 1989) 878 F.2d 1126, 1133 (when voir dire was inadequate, only a "'significant risk of prejudice'" must be present to require reversal).

When the process is examined as a whole, it is apparent that the voir dire in this case was inadequate, superficial, and unconstitutional. Because of the flawed process that included the deficient questionnaire, the trial court's refusal to examine prospective jurors about the emotionally charged case-specific facts, and the rushed and limited process that failed to uncover bias, it was impossible to know if the members of the empaneled jury were fair and impartial. Where, as here, the trial court's inadequate voir deprived the defendant of her constitutional rights to due process of law, a fair and impartial jury, and fair and reliable guilt and sentencing determinations under the federal and state constitutions, the convictions must be reversed.

In the alternative, the sentence of death must be reversed. Morgan, 504 U.S. 719, 738 ("Because the 'inadequacy of *voir dire*' leads us to doubt the petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand.") (quoting Turner v. Murray (1986) 476 U.S. 28, 37 (plurality opinion)).

D. Conclusion

During voir dire, the trial court deliberately avoided the most emotionally-charged issue inherent to the allegations against Sandi Nieves, that she was accused of intentionally killing her own children. The trial court conducted a rushed, careless, and superficial voir dire that did not meet the constitutional requirements when death is at stake. The trial court prevented the fully informed, intelligent exercise of challenges for cause and peremptory challenges.

As a result of the inadequate process, the trial court deprived the defendant of her rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the California Constitution, Article 1, §§ 15, 16, 17, 24, and 29. Morgan v. Illinois (1992) 504 U.S. 719, 739, Duncan v. Louisiana(1968) 391 U.S. 145, Turner v. Louisiana (1965) 379 U.S. 466. See also Rosales-Lopez v. United States (1981) 451 U.S. 182, 188; Ham v. South Carolina (1973) 409 U.S. 524, 527. Accordingly, the defendant's convictions and sentence of death must be reversed.

V. THE TRIAL COURT PREJUDICIALLY REFUSED ACCESS TO EVIDENCE RELEVANT TO IMPEACH THE TESTIMONY OF THE EYEWITNESS TO THE FIRE

Sandi Nieves's had a right to confront the witnesses who testified against her, including her own son, David Nieves, and to have access to materials and to call witnesses relevant to her defense under the Sixth and Fourteenth Amendments. The trial court violated her rights to compulsory process, confrontation, and due process when it refused to enforce subpoenas of psychiatric records and witnesses critical to her ability to conduct a meaningful cross examination of David Nieves.

The trial court denied the defense motion to enforce subpoenas for the records of Dr. Jacobs and Dr. Wheatley, psychologists who had treated and evaluated David Nieves, on the grounds that the information was privileged. 9 RT 447:9-16. However, Fernando Nieves, David's biological father and purported holder of the privilege, had waived the privilege when he voluntarily disclosed the confidential information to the Riverside County Superior Court in a separate matter related to the legal guardianship of David.

The court also refused to enforce defense subpoenas of Department of Children and Family services employees, allowing them to claim privilege and not testify. 11 RT 619:24-26. These witnesses and their records were relevant to impeach the testimony of David Nieves, a key prosecution witness, and the only witness to the fire, other than the defendant.

The trial court's refusal to enforce the defense subpoenas violated Sandi Nieves's constitutionally protected rights under the Sixth and Fourteenth Amendments. Crane v. Kentucky (1986) 476 U.S. 683, 690; Chambers v. Mississippi (1973) 410 U.S. 284, 294.

A. The Trial Court Denied Defendant Access to Impeachment Evidence Related to Her Son, David Nieves, Who Provided Damaging Testimony Against Her

Approximately two months before the trial, defendant filed a Motion for Order for Disclosure of Psychiatric Records from the psychologists who had examined her son, David Nieves. 10 RCT 2286-2301. Defendant sought records from Dr. Catherine Koverola of the Violence Intervention Program, Dr. Alan Jacobs, and Dr. Debra Wheatley. She attached, in support of her motion, a declaration of Howard C. Waco, a copy of Dr. Koverola's Report (Exhibit A) and a copy of a letter from Alan H. Jacobs, Psy.D., to the Riverside County Superior Court (Exhibit B). Id.

Defendant argued in her moving papers: "The son is the only percipient witness other than the defendant herself. His testimony in his mother's trial is likely to carry more weight with the trier of fact than any other single witness." 10 RCT 2289. The defense had been denied the opportunity to interview David Nieves. Id.; 3 RT 91:1-5; 7 RT 223:10-11. However, psychotherapists had seen David Nieves within only weeks of the fire. Id. The motion further stated: "The defense has a legitimate interest in determining if this impressionable witness' statements made immediately after the fire are consistent with those made almost two years later. We have no means of determining credibility and/or the likelihood that he has been unduly influenced absent an opportunity to review his psychiatric records." 10 RCT 2289. Defendant requested all records, tests, scores, assessments, notes, and raw data relating to David Nieves. Id.

Defendant also argued in her moving papers that if any privilege had once existed, it had been waived under Evidence Code § 912. 10 RCT 2290. Furthermore, the defense argued, Sandi Nieves's right to confront witnesses against her under the Sixth Amendment far outweighed David

Nieves's privacy rights, "In our case, the defendant does not seek these records frivolously; she is literally fighting for her life." 10 RCT 2291. The court heard the motion on March 28, 2000. 9 RT 424-447.

Fernando Nieves was present at the hearing. He testified he sought family therapy from Dr. Jacobs and Dr. Wheatley after the death of the children. 9 RT 439:25-440:1. He said that he had sought legal guardianship of David Nieves in December of 1998 and that Dr. Jacobs had written a letter to the court expressing an opinion about the custody of David Nieves. 9 RT 440:18-24.

Defendant contended that if a privilege had existed with respect to Jacobs and Wheatley, it had been waived when they submitted the letter to a third party, particularly a court. 9 RT 441:11-19. She contended the state interest outweighed the need to protect confidentiality. 9 RT 444:3-6. Defendant further argued she needed the information for impeachment purposes, to learn of possible inconsistencies in David Nieves's statements about events. 9 RT 444:25-445:5.

The court asked Fernando Nieves if he was claiming a privilege with respect to communications between David Nieves and Dr. Jacobs and/or Dr. Wheatley. Nieves responded, "Yes, I am." 9 RT 445:9-14. The court ruled then that a psychotherapist-patient privilege applied to these communications and that the letter sent to the court in Riverside County was not a waiver. 9 RT 447:9-16.

On May 17, 2000, the prosecution called David Nieves as a witness. 21 RT 2388-2570. Before he testified, defense counsel asked to interview him, explaining that the defense team had not been given an opportunity to speak to him in two years, nor was defense counsel provided information on

where or how to contact him. 21 RT 2285:5-17. The court denied defendant's request as untimely. 21 RT 2385:18-26.

David testified about his mother's actions on the night of June 30, 1998, leading up to the fire. He said that it was her idea to have a slumber party in the kitchen (21 RT 2392:3-14); that he did not want to sleep in the kitchen; but that she made him (21 RT 2392:21-2393:2). He also testified to seeing his mother put wooden dowels in the windows and sliding glass door that night. 21 RT 2394:18-28.

David Nieves then recounted his memories of what happened in the middle of the night. He said he woke up coughing in a smoke-filled room (21 RT 2396:21-2397:7), he could hear his sisters coughing (21 RT 2396:21-2397:7); but when he asked his mother if he could go outside, she said no (21 RT 9397:9-11). He said he obeyed his mother because he and his sisters always did what she told them. 21 RT 9397:17-25. He also testified that his sister, Nikolet, asked to go to the bathroom to throw up, but that his mother told her to "puke next to her." 21 RT 9398:19-22. He said he could hear his sister throwing up. 21 RT 9399:8-10. He also testified that his mother instructed him and his sisters to put their heads down and breathe into their pillows. 21 RT 9399:13-18.

Next, David Nieves testified to his mother's behavior in the morning after he woke up. He said that she was in the restroom when he got up (21 RT 9408:14-17), that when she came out she would not answer when he asked what happened (21 RT 9409:2-8); but that she told him he could have a popsicle (21 RT 9409:21-22), and that she was drinking grape juice out of a pitcher from the refrigerator (21 RT 9411:24-9412:3).

During cross-examination, David Nieves confirmed he had not met defense counsel before that day, nor had he met with a defense investigator.

21 RT 2428:8-24. He also testified that his father and the police had "helped piece things together" for him about the night of the fire. 21 RT 2501:16-19.

Defendant also sought to enforce a subpoena duces tecum for records related to David Nieves from the Department of Children and Family Services ("DCFS"), as well as subpoenas for the personal appearances of employees Susan Celentano and Alison Willis. 11 RT 614:20-615:1; 619:24-26. During a hearing on April 24, 2000, the court declared that to the extent the defendant was trying to obtain information contained within the juvenile court file of David Nieves, she would have to file a petition with the juvenile court. 11 RT 620:18-21.

On May 30, 2000, Willis and Celentano appeared before the court, but asserted privilege, stating that Welfare and Institution Code §§ 827 and 10850 dictated that they not divulge information absent an order from the presiding judge of the juvenile court. 28 RT 3671:3-3673:2. Defense counsel explained that these witnesses had interviewed both David Nieves and Fernando Nieves within one to two days after the fire, and that he wanted to question them about inconsistencies with testimony David provided to the jury. 28 RT 3673:25-3674:16. However, the court sustained the privilege. 28 RT 3674:21-22. Defense counsel argued without success that theses witnesses had supplied their report to the prosecution, as well as the defendant, and therefore waived any privilege if one existed. 28 RT 3674:4-7; Exh. BB (report of DCFS interviews with David Nieves and Fernando Nieves). Defense counsel also explained that defendant had submitted a petition to the juvenile court presiding judge, but no response had been received. 28 RT 3675:23-3676:3.

It was not until June 8, 2000 – several weeks after David Nieves testified – that defendant finally received an answer to her petition for records from the juvenile court. 32 RT 4449:5-23. Judge Jerry B. Friedman, Presiding Judge of the Juvenile Court, granted the petition with regards to DCFS and the records of Dr. Jacobs and Dr. Wheatley. Id.; Exh. JJ (copy of endorsed petition). Defense counsel attempted to bring the approved petition to the court's attention, but the court stood by its statement that "these witnesses have come and gone." 32 RT 4448:16.

Defendant raised the issue again in her Motion for a New Trial, objecting to the court's application of privilege as to Dr. Jacobs and Dr. Wheatley as well as to Willis and Celentano of DCFS . 22 RCT 5569-5570. Defendant explained that even after defendant had received the juvenile court's approval, the trial court improperly continued to sustain the privilege. Id.

B. Dr. Jacobs's Letter to the Court in Riverside Waived Psychotherapist-Patient Privilege

The psychotherapist-patient privilege between David Nieves and Dr. Jacobs and Dr. Wheatley of the Alpha Treatment Centers had been waived prior to the trial of Sandi Nieves. Evidence Code § 912(a) states:

> . . . [T]he right of any person to claim a privilege . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

A disclosure of privileged communications by the psychotherapist constitutes a waiver of privilege under § 912 when done with the consent of

the patient. See Roberts v. Superior Court (1973) 9 Cal.3d 330, 341. Citing section 912, courts have held "the patient waives the privilege when he calls the psychotherapist as a witness in an unrelated trial and elicits information disclosing a significant part of the communications." People v. Superior Court (Broderick) (1991) 231 Cal.App.3d 584, 590; People v. Garaux (1973) 34 Cal.App.3d 611, 612-613. But see San Diego Trolley v. Superior Court of San Diego County (2001) 87 Cal.App.4th 1083, 1093 (later use in entirely unrelated proceedings of privileged information previously waived must be carefully limited).

Likewise, federal courts have held that disclosure of privileged communications at a previous proceeding waives the privilege for later proceedings. "A waiver at a former trial should bar a claim of the . . . privilege at a later trial, for the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only." Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co. (8th Cir. 1987) 819 F.2d 1471, 1479 (quoting 8 J. Wigmore, Evidence § 2389(4) (McNaughton rev. 1961)); In re Grand Jury Proceedings (3rd Cir. 1979) 604 F.2d 804, 805 ("Once waived, [a] privilege cannot be asserted at a later date.").

Fernando Nieves, who the court assumed was the holder of the privilege for David Nieves, waived the psychotherapist-patient privilege when he requested Dr. Jacobs to submit a letter to the Riverside court in support of his efforts to obtain legal guardianship of David. Dr. Jacobs's letter, written on Alpha Treatment Centers letterhead, read as follows:

To Whom It May Concern:

> The Nieves family have been in treatment at this center since July 1998 due to trauma endured following the alleged murders of the two of the family members and the alleged attempted murder of David Nieves.
>
> Since the onset of treatment we have observed David integrating easily and quickly into the family unit. He has responded well to the care and love of his father, step-mother, and half-sisters. The entire family system appears to be progressing through the grieving process without complications.
>
> It appears there is a deep bound [sic] forming between father and son, step-mother and step-son, and siblings.
>
> David's maturation is progressing within normal limits due to the stability of his home life, continuity of his education, and exposure to social, cultural and familial events resulting from good parenting as established by Fernando and Charlotte Nieves.
>
> David has expressed a heart felt need to remain with his family. Any changes in his current placement are contraindicated. In order to prevent future trauma, loss, stress or upheaval in David's life the status quo should be maintained.

10 RCT 2301. Dr. Jacobs obtained the information he articulated in this letter through his evaluation of David Nieves. Dr. Jacobs's mention of David's grieving process, deep bond with his father and other family members, and that his "maturation" was progressing within "normal limits" represents significant parts of confidential communications with David.

The letter was tantamount to having Dr. Jacobs testify before the Riverside Court. Fernando Nieves therefore waived any pre-existing psychotherapist-patient privilege with respect to the Alpha Treatment Centers. He could not, then, attempt to re-assert the privilege during the trial of Sandi Nieves. The trial court erred when it ruled that the Alpha Treatment Center records of Dr. Jacobs and Dr. Wheatley were privileged.

C. The Trial Court Violated Sandi Nieves's Sixth and Fourteenth Amendment Right to Records and Testimony Relevant to Impeach Key Prosecution Witness David Nieves

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Sandi Nieves's Sixth Amendment right to confront the witnesses against her included the right to conduct meaningful cross-examination. Davis v. Alaska (1974) 415 U.S. 308, 315. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Id. The Sixth Amendment also guarantees the defendant the right to "the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie (1987) 480 U.S. 39, 56.

Furthermore, due process guarantees the defendant access to evidence that is favorable to the accused and "material to guilt or punishment." Ritchie, 480 U.S. at 57; Brady v. Maryland (1963) 373 U.S. 83, 87. Material evidence favorable to the accused includes impeachment evidence. United States v. Bagley (1985) 473 U.S. 667, 676; In re Sassounian (1995) 9 Cal.4th 535, 544.

In People v. Hammon (1997) 15 Cal.4th 1117, 1127, this Court held that the Sixth Amendment does not confer a right to discover privileged psychiatric information before trial. See also People v. Gurule (2002) 28 Cal.4th 557, 592; People v. Anderson (2001) 25 Cal.4th 543, 577 n. 11. However, this Court also said it was not revisiting "the question of whether a defendant may generally obtain pretrial discovery of unprivileged information in the hands of private parties." Hammon 15 Cal.4th at 1128. The Court noted, "That the defense may issue subpoenas duces tecum to

private persons is implicit in statutory law (Pen. Code §§ 1326, 1327) and has been clearly recognized by the courts for at least two decades." Id.

Therefore, the limitations of the Sixth Amendment discussed in Hammon do not apply to the records of Dr. Jacobs and Dr. Wheatley because privilege was waived as explained in Section B, above. Defendant had a right under both the Sixth Amendment and the due process protections of the Fourteenth Amendment to have the court enforce the subpoena for David Nieves's psychiatric records in order for defendant to conduct a meaningful cross-examination of him. Defendant also had a right to subpoena Jacobs and Wheatley to testify as impeachment witnesses.

As for the records and testimony from employees DCFS, when the state seeks to protect privileged information from disclosure to a criminal defendant, the court must examine the information in camera to make a determination whether it is material to guilt or innocence. Ritchie, 480 U.S. at 58-60; People v. Webb (1993) 6 Cal.4th 494, 517. In Ritchie, 480 U.S. at 58-60, the defendant sought records from Pennsylvania's children and youth services agency, a state agency similar to DCFS. The Court held that due process principles required the trial court to review the agency records in camera to determine whether the information was "material" to the defense of the accused. Id. Here, the court should have taken similar action. Defendant had no objection to an in camera inspection. 9 RT 444:28-445:1. However, the issue of privilege soon became moot when the juvenile court granted defendant's petition. Nonetheless, the trial court continued to sustain the privilege and never gave the defendant her opportunity to introduce the impeachment evidence.

Here, the court allowed witnesses to stand behind privilege, which no longer existed. Even in the context of a civil case, the Supreme Court

has held that any privilege must be strictly construed unless it promotes sufficiently important interests to outweigh the need for probative evidence. See University of Pennsylvania v. E.E.O.C. (1990) 493 U.S. 182, 189. The trial court denied defendant probative evidence in violation of her federal constitutional rights. The compulsory process and confrontation clauses of the Sixth Amendment and the due process clause of the Fourteenth Amendment guarantee every criminal defendant "'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. at 690. See also Holmes v. South Carolina (2006) 547 U.S. 319, 324; Washington v. Texas (1967) 388 U.S. 14, 19. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process," and are essential to a fair trial. Chambers, 410 U.S. 284, 294; Pointer v. Texas (1965) 380 U.S. 400, 404.

D. The Trial Court Improperly Allowed the Prosecution to Intervene in Third Party Discovery Matters

During the hearing on defendant's motion to enforce its subpoenas of Dr. Koverola, Dr. Jacobs, and Dr. Wheatley, defense counsel challenged the prosecution's standing to oppose the motion because it concerned third party discovery. 9 RT 434:14-15. The court dismissed the defense argument, responding that the prosecutor had the same standing as the defendant. 9 RT 434:16-17. The court stated, "The way he can get over the standing in a New York second is he could join in your motion for disclosure." 9 RT 434:17-19. However, the prosecution did not do so. Nonetheless, the trial court allowed the prosecutor to act as an advocate for the privacy rights of a third party, creating a conflict of interest.

This Court held in People v. Superior Court (Humberto S.) (2008) 43 Cal.4th 737, 749, that prosecutorial participation in third party subpoena hearings is not always prohibited. However, this Court expressly refused to

endorse the actions of a prosecutor who assumes the formal representation of third party interests. Id. at 754. Humberto S. warned, "A prosecutor who has undertaken an attorney-client representation of the victim in a case might in the future feel pressure from the loyalty owed his or her client to pursue the case more vigorously than the merits otherwise dictate." Id.

Here, the court allowed the prosecution to represent the interests of David Nieves. The prosecution filed opposition papers, seven pages in length, to the defense motion for the disclosure of David Nieves's psychiatric records. 11 RCT 2488-2494. Jacobs and Wheatley referred defense counsel to Mr. Barshop, the prosecutor, when the defense attempted to speak with them. 9 RT 424:25-28.

After defendant challenged the prosecution's role, the prosecution suggested that the court appoint someone to represent these third party interests. 9 RT 434:24-27. However, the court refused to appoint anyone. Such an advocate would have been appropriate to protect the interests of David Nieves who was a minor.[90] 9 RT 434:28-435:1. Instead, despite the conflict of interest, the court held the hearing and ruled against the defendant in violation of her constitutional rights to due process and a fair trial.

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[90] Although the prosecutor did not specify here under what statutory scheme such an appointment would be possible, in People v. Superior Court (Humberto S.), 43 Cal.4th 737, 752, the prosecutor sought to have a guardian ad litem appointed to represent the interests of the minor pursuant to California Code of Civil Procedure § 373.

E. The Trial Court Allowed Fernando Nieves, Who Had a Conflict of Interest, to Assert Privilege on Behalf of David Nieves, While Improperly Ignoring the Parental Rights of the Defendant

When the trial court held the hearing on the issue of privilege related to David Nieves's records, it ignored the parental rights of Sandi Nieves and allowed Fernando Nieves, a prosecution witness, to assert privilege on David's behalf.

When a parent has a conflict of interest, he or she may be disqualified from asserting a privilege on behalf of a minor child. People v. Superior Court (Humberto, S.), 43 Cal.4th at 753. See e.g. Williams v. Superior Court (2007) 147 Cal.App.4th 36, 48 (independent guardian ad litem appropriate where father had conflict of interest with daughters in wrongful death action brought after the loss of their mother).

Fernando Nieves had a conflict of interest because Fernando was a witness for the prosecution. In fact, he testified for the prosecution during both the guilt and penalty phase of the trial. 23 RT 2784-2899, 24 RT 2942-3018; 60 RT 9316-9367. Therefore, he had a conflict of interest that should have prevented him from asserting a privilege on behalf of David.

Sandi Nieves, on the other hand, never relinquished her parental rights to records related to her son, David Nieves. When requesting that the court enforce defendant's subpoenas for records related to David, defense counsel argued: "And I am asking this court, I believe balancing requests with regards to the rights of the parent, which my client still is, with regards to the nature of the case, that the court order them to comply in every manner . . . and that they comply in giving us all the documents we're requesting." 11 RT 618:21-27.

Sandi Nieves had a right to access her son's records under California Family Code § 3025 which allows for parental access to a minor child's records even if the parent is not the custodial parent. Furthermore, as mother, who had not at that time been convicted of anything, Sandi Nieves was just as much a holder of the psychotherapist-patient privilege for David Nieves as his father. Cal. Fam. Code § 3083 (unless a joint custody order specifies otherwise, consent of one parent is sufficient).

The charges filed against Sandi Nieves did not function to terminate her parental rights. Even a criminal conviction does not mean automatic termination of a mother's rights with respect to her child. See In re Baby Girl M. (2006) 135 Cal.App.4th 1528, 1532 (parental rights terminated only where a parent's unfitness is demonstrated by the facts underlying a felony conviction). See also In re Lauren Z. (2008) 158 Cal.App.4th 1102, 1116.

But the trial court did not consider that Sandi Nieves retained her parental rights with respect to David Nieves. The trial court should have granted Sandi Nieves access to records related to her minor son, David, based on her rights as his parent. In the alternative, a proper course of action for the court would have been to appoint an independent guardian ad litem (Humberto, S., 43 Cal.4th at 753; Williams, 147 Cal.App.4th at 48), rather than allow Fernando Nieves, who had a conflict of interest, to assert a privilege on his behalf.

F. The Trial Court's Error Prejudiced the Defendant

The trial court's erroneous ruling to uphold privilege and prevent access to crucial information about David Nieves deprived Sandi Nieves her Sixth and Fourteenth Amendment rights to compulsory process, confrontation, and due process substantially restricting the tools she had to cross-examine David Nieves. The court's error was not harmless under

Chapman v. California (1967) 386 U.S. 18, 24. The prosecution put great emphasis on the testimony of David Nieves during closing argument. 54 RT 8414:8-10; 8424:2-11. The jury, also, likely gave it great weight.

David Nieves was the prosecution's only eyewitness, other than the defendant. David gave a damaging account of his mother's behavior before, during, and after the fire. His testimony about his mother's idea for a slumber party (21 RT 2392:3-14), was critical to the prosecution's case for premeditation and deliberation. His statements that his mother made him and the girls sleep in the kitchen (21 RT 2392:21-2393:2), and that she told them not to go outside (21 RT 9397:9-11), supported the prosecution's case for the lying in wait special circumstance. Jurors were also likely affected by his testimony about his mother's strange behavior the next morning. 21 RT 9408:14-9409:22; 21 RT 9411:24-9412:3.

Sandi Nieves had a right to impeach David Nieves with prior inconsistent statements made closer in time to the fire because the accuracy and truthfulness of his testimony were "key elements" in the prosecution's case. Davis, 415 U.S. at 317. If the materials sought by defendant contained any inconsistencies in David Nieves's account of the events that took place the night his sisters died, the jury never heard them. Keeping this information from the defendant, and therefore the jury, was prejudicial because impeachment evidence can make the difference between conviction and acquittal. See Napue v. Illinois (1959) 360 U.S. 264, 269.

The information contained in the records of the doctors who met with him during the relevant period would have provided the defense a chance to cross-examine him regarding his truthfulness, but also to detect undue influence, which was especially important because he was a minor. David Nieves admitted that his father had helped him prepare his testimony.

In addition, the Jacobs letter indicated that a strong bond had already formed between David Nieves and his father, Fernando Nieves, and his step-mother, Charlotte Nieves. 10 RCT 2301. The defendant had a right to learn if these two individuals, both prosecution witnesses hostile toward the defendant, see Part XVII infra, had unduly influenced David's testimony.

The court wrongly held that privilege applied here. But even if the information defendant sought was privileged, the trial court's proper course of action would have been an in camera review of the information, which it was unwilling to perform. In People v. Webb (1993) 6 Cal.4th 494, 515-516, the defendant claimed that the trial court had erred in refusing to release subpoenaed psychiatric records pertaining to the treatment of his girlfriend and key prosecution witness, Sharon, and that this error had prevented him from effectively cross-examining her at trial. This Court held that any error would have been harmless because the lower courts in that case examined the records sought by the defendant in camera on three occasions and found that they did not contain information relevant enough to overcome the psychotherapist-patient privilege. Id. at 518. Here, the state cannot show the trial court similarly confirmed that the materials sought by the defendant were not material to her defense.

The judgment must therefore be reversed under Chapman, 386 U.S. at 24. Even if the judgment is not reversed, the death sentence must be reversed under the Eighth Amendment because failure to permit access to this critical information resulted in an unreliable sentence. Such a result is unacceptable when death is at stake. Beck v. Alabama (1980) 447 U.S. 625, 637 ("there is a significant constitutional difference between the death penalty and lesser punishments"); Woodson v. North Carolina (1976) 428 U.S. 280, 305 (Eighth Amendment requires heightened "need for reliability

in the determination that death is the appropriate punishment in a specific case"). Cf. Kyles v. Whitley (1995) 514 U.S. 419, 454 (government's suppression of evidence in capital murder case undermined "confidence in the verdict").

VI. THE TRIAL COURT PREJUDICIALLY ORDERED DEFENDANT TO SUBMIT TO PSYCHOLOGICAL AND NEUROLOGICAL EXAMINATIONS BY THE PROSECUTION

A. Introduction

In Verdin v. Superior Court (2008) 43 Cal. 4th 1096, 1116, this Court held that a "trial court's order granting the prosecution access to [a defendant] for purposes of having a prosecution expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes or any other statute, nor is it mandated by the United States Constitution." The trial court in this case therefore committed prejudicial error when it required defendant to submit to mental examinations by the prosecution, instructed the jury that she was obligated to submit, and allowed the prosecution repeatedly to bring before the jury defendant's refusal to submit to unconditional examination. The trial court compounded the prejudice by inviting and permitting the prosecution to argue the refusal should be used by the jury to discredit the defense experts, discredit the validity of the defense claims, discredit the information the defendant gave to defense experts, and to view the refusal as an attempt to suppress or conceal evidence. See e.g., 56 RT 8806:5-18 (prosecution closing argument).

1. The Trial Court's Order

During pretrial proceedings, the prosecution asked the court to "order or allow," or that the defense allow, prosecution experts to examine the defendant. 10 RT 553:4-5. Defense counsel responded:

> I beg your pardon? I believe under the law the prosecutor does not have a right to have statements directly from my client concerning anything, as such, as far as pretrial discovery.

Id. at 553:7-10. The court asked what the prosecution had in mind. It then asked the prosecutors to be specific so that if the defense refused and the prosecution later commented to the jury, the defense should know "exactly what you had in mind." Id. at 553:21-554:11. Mr. Barshop explained that Dr. Barry Hirsch, a prosecution mental health consultant, wanted to examine the defendant about matters brought up in the defendant's experts' reports. Id. at 554:6-555:8. He explained that Dr. Hirsch wanted to interview Sandi Nieves about her mental state at the time of the incident. Id. at 557:22-559:12. Although defense counsel indicated that he might agree to a limited examination under some conditions (id. at 559:17-21), he asked for proper notice "like the district attorney has been requiring me throughout this proceeding" (id. at 559:24-26). The court responded that "notice is not an issue, as far as I am concerned." Id. at 560:1-2.

The defense filed written opposition to any psychiatric interview of the defendant by prosecution experts, arguing that Penal Code § 1054.3, case law, and the State and Federal Constitutions preclude the prosecution or its agents from pretrial examination of the defendant. 11 RCT 1272, 1275. But the prosecution countered that it would have the right to interview the defendant once she put her mental state at issue. 10 RT 562:25-563:10. Defense counsel offered a compromise (id. at 566:12-

567:13),[91] but the prosecution insisted that, once the defendant put her state of mind at issue, it needed to discuss with the defendant "what she recalls up to the date of the incident" (id. at 563:18-564:10, 567:14-26).

After the trial started, Mr. Barshop argued that the court needed to decide "whether I will be allowed to interview the defendant through my experts." 29 RT 3585:47.[92] He also said that his experts would need to examine the defendant before the prosecution could cross-examine the defense experts. Id. at 16-25. The court responded by requiring the defense to make an offer of proof as to what the defense intended to show. Id. at 3586:1-3587:24. Defense counsel stated he would allow Dr. Hirsch to interview the defendant so long as defense counsel or his investigator, along with one of the defense experts, Dr. Kaser-Boyd, was present. Id. at 3604:4-7. Mr. Barshop replied that "the law is clear" and that "I will not accept any conditions that Mr. Waco wishes to set forth on the interview." Id. at 3606:18-25. See also, id. at 3783:1-10. Mr. Barshop stated that the interview would be with Dr. Hirsch and "perhaps one of the neurologists." Id. at 3607:8-17.

The next day, during argument concerning the disclosure by the defense of expert reports pursuant to Penal Code § 1054.3, the court

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[91] Counsel offered to allow the prosecution to interview the defendant "pretty much unbridled" up through, but not including, the incident, provided a third party was present, the interview was audio taped, and the interview stopped at the abortion. 10 RT 566:12-567:13.

[92] The trial court's ex parte orders appointing Dr. Barry Hirsch as a prosecution expert and authorizing his payment as a court appointed expert also granted him ex parte permission to "perform a face-to-face interview of the Defendant, Sandi Nieves." 10 RCT 2337 (March 20, 2000); 18 RCT 4595 (June 15, 2000). No hearing was held before these orders were issued. They were not directed to the defendant. They merely authorized expert payment and set out the scope of the expert's services.

announced that it could preclude the defense experts from testifying altogether or continue the trial so the prosecution could prepare to examine them. The court announced that "[t]he People have a right to interview – have their experts interview defendant for as long as necessary." Id. at 3782:9-11. The court's apparent preference would have precluded all defense experts "from testifying altogether" (id. at 3782:22-24, but Mr. Barshop was more temperate and rejected that option. Id. at 3782:25-26. Defense counsel again offered to submit Nieves for examination, provided his expert, Dr. Kaser-Boyd was unobtrusively present. Id. at 3783:21-24.

The court then threatened to issue an order requiring the examination without conditions. Nonetheless, it ordered a hearing as to the impact the presence of third parties might have on the validity of the examination of the defendant. Id. at 3783:11-3785:26. The court gratuitously blamed defense counsel for delaying the trial "by the way you've conducted this thing." Id. at 3786:1-4.[93] The trial court held a hearing to determine whether to continue the trial in order to afford the prosecution time to examine the defendant.

> The Court: The court is going to go forward with a hearing to determine what is necessary for a need to continue this case. I am going to conduct a hearing initially. [To Mr.

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[93] The Court to Mr. Waco: "You are the sole – all of the responsibility for this falls on your shoulders as to why this case is going to get continued.

> Mr. Waco: Your honor, I followed the procedures with the disclosing the doctor's reports.

> The Court: I understand that. And maybe you have a procedural advantage in doing that. But at the end of the day, the reason for a continuance is because of what you've done."

29 RT 3786:5-13.

> Waco:] This has all been occasioned by your tactics, Mr. Waco, so you're really not in a position to dictate now how this procedure is going to go.

Id. at 3867:21-27.

The court proceeded to interrogate Dr. Nancy Kaser-Boyd, the defense mental health consultant, who had interviewed Sandi Nieves and submitted her report to the prosecution previously. 29 RT 3781:2-12, 3868:2-3873:26. When the court finished interrogating her regarding how many hours she had spent with the defendant, how she was appointed, whether anyone else was present, when she interviewed Nieves, whether having another person present for prosecution interviews would interfere with testing, and the like, the court turned the examination over to the prosecution. Id. at 3873:27-3879:24. The prosecution asked Dr. Kaser-Boyd about her notes, her interviews, and her report. When defense counsel attempted to clarify some of the matters, the court interrupted, "I don't need to hear from you right now, Mr. Waco." Id. at 3879:26-27.

Following the examination of Dr. Kaser-Boyd, the court called Dr. Barry Hirsch, the prosecution's mental health consultant. The court asked him how much time he would need to prepare for the prosecution's mental health presentation. Hirsch responded he would need approximately 28 working days for a full complete package for the prosecution experts to be ready to go forward of which 25 to 30 hours would be face to face with the defendant. Id. at 3896:1-3906:19.[94] Following the testimony of Dr. Hirsch, the court made its order.

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[94] See, id. at 3901:14-19 ("I am talking about a full, complete package of being ready for trial and where everybody is competent and qualified to -- on the people's behalf for the experts, go forward.").

> The Court: Well, based on what I've heard, I am going to order the defendant to submit to testing by Dr. Hirsch and others with those people alone. Kaser-Boyd – Nobody else for the defense is going to be present, period, end of story. I don't think it's necessary, and it's not going to happen.

29 RT 3907:9-11. The court added that if defendant did not submit, then her experts could not testify. Id. at 3907:14-15. Apparently believing this threat by the judge went too far, even for the prosecution, the prosecution instead asked for a consciousness of guilt instruction regarding refusal to permit evaluation by prosecution experts. Id. at 3907:20-3908:26. After further discussion, the defense again attempted a compromise offering to allow the examination of defendant so long as Dr. Kaser-Boyd was present. Id. at 3908:2-3909:28. But the trial court would not order any compromise, because "there is no need for a monitor, based on what Dr. Kaser-Boyd said." Id. at 3910:1-2.

The following day the court reiterated that "It's my view that the prosecutor has the right to have unfettered, unconditional access to the defendant for purposes of an interview." Id. at 3925:21-24. See id. at 3925:27-3926:4. When defense counsel said he was not "inclined" to permit testing and an examination by Dr. Hirsch and other prosecution experts, the court said it considered this to be a refusal "because I said they're entitled to unfettered, unconditional interviews, and you're not willing to go along with that." 30 RT 3951:3-25. Defense counsel then confirmed that he was "objecting." Id. at 3952:2-4. As a result the court continued the trial for two weeks to give the prosecution time to prepare. Id. at 3955:19-3956:16.

2. Presentation to the Jury of the Refusal to Permit Examination by Prosecution Experts

When Dr. Robert Brook, a prosecution expert, testified before the jury during the prosecution's guilt rebuttal case, Ms. Silverman asked him whether he made a request "of the court to interview the defendant personally." Dr. Brook told the jury, yes. He explained he wanted to interview the defendant to do "a direct evaluation." 38 RT 5375:13-24. Over a defense hearsay objection, Dr. Brook was asked why he had not examined the defendant. The court overruled the objection, as well as objections to the question as leading, suggestive, and irrelevant. Id. at 5375:26-5376:11. Dr. Brook testified he requested of the court to evaluate the defendant personally, but was not allowed to do so. Id. at 5375:13-5376:16. He was told that defendant refused to be evaluated by him. The court would not permit cross-examination as to whether Dr. Brook would have had a problem if another professional had been in the same room. Id. at 5383:22-5485:8. Then the court instructed the jury:

> I am going to tell the jury at this point that the defendant – when the defendant submits their mental state as an issue in the case, the defendant must submit to examination by the prosecution experts without any conditions. That was not forthcoming in this case.
>
> Get into some other area, Mr. Waco.

Id. at 5485:9-15.

Defense counsel objected to this instruction, but the court said: "to the extent that you're objecting to what the court did, your objection is overruled, and I will not change that." 39 RT 5575:20-5577:11.

When Dr. Robert Sadoff a prosecution witness and psychiatrist was asked during rebuttal whether he sought to interview Sandi Nieves, Dr. Sadoff said he was told he was not permitted to examine her. Ms.

Silverman then asked Dr. Sadoff if Sandi Nieves had refused. But after a defense objection was overruled by the trial court, she did not even bother to wait for an answer before going on to the next question. She had already made her point with the jury by simply asking the question. 47 RT 7066:24-7067:17. The question did not need an answer.

Dr. Edwin Amos was asked by the prosecution during rebuttal whether he requested to do a neurological examination of the defendant and whether he was told the defendant refused. The defense objected on hearsay grounds. The objection was overruled. Dr. Amos answered, "Yes I was." 48 RT 7873:1-9.

On cross-examination of the defense surrebuttal expert, Dr. Gordon Plotkin, the prosecution was permitted to ask, over objection, whether he was "aware that the defendant refused to allow the prosecution's experts to interview her?" Dr. Plotkin answered, "No." The court ruled the question was beyond the scope of cross-examination but only struck the answer. 53 RT 8215:22-8216:2. Again, the prosecution had made its point without needing an answer to its question. The answer did not matter. It made no difference whether Dr. Plotkin answered yes or no, because the prosecution succeeded in hammering home the message that Nieves had refused a lawful obligation and was hiding from the prosecution experts.

At the guilt phase instruction conference, the defense requested an instruction that would inform the jury the defense agreed to permit an MRI and CT scan of the brain, but the district attorney refused. 19 RCT 4918. The defense explained that it wanted the instruction, defense No. 16, in order to neutralize the prosecution's comments that the defendant had refused to submit to any mental examination by prosecution experts. 51 RT 7759:16-7760:7761:5. The court refused the instruction, stating "she is

required to submit to, you know, all reasonable medical examinations by the People." Id. at 7761:9-10, 26-27. The court then considered and rejected defense proposed instruction No. 17 (19 RCT 4919), which would have explained the defense agreed to allowed a mental examination under certain conditions. Id. at 7761:28-7767:9. Again, the court reiterated its view that no legal authority is needed to compel a defendant to submit to a mental examination "because it's so obvious on its face[.]" Id. at 7765:19.

The prosecution then argued for its proposed instruction, entitled "Wilful Refusal by Defendant." 29 RCT 4753; 51 RT 7768:9-25.[95] The defense objected. The court suggested that it give an instruction telling the jury that defendant's refusal should be considered in assessing the credibility of defense experts. Id. at 7768:26-7770:3. Later, the defense submitted its proposed instruction, No. 20 (19 RCT 4955), which would have told the jury the defense had agreed to allow neurological testing. But the court refused it, too. 52 RT 8040:18-8041:3.

The prosecution, however, proffered its own additional instruction, following the lead given by the court. The prosecution instruction would have informed the jury that Sandi Nieves was obligated to submit to a mental examination by the prosecution and the jury "may consider [her] refusal in determining the weight to be given the testimony of the defense experts." Id. at 8041:26-8042:14. The defense objected. Id. at 8042:15-27. See 19 RCT 4958.

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[95] The Prosecution submitted instructions which included language instructing that "such refusal is not in itself sufficient to prove the existence of any required mental state or specific intent element, and its weight and significance, if any, are for you to decide." 19 RCT 4753 (prosecution proposed instruction).

The court refused the prosecution instruction, but expressly told the prosecutors they could argue the position in closing that the judge had formulated earlier:

> If you find that the defendant placed her mental state in issue and refused to submit to unconditional examination by our experts, you may consider that refusal in determining the weight to be given the defense testimony, in light that it may have had some impact on what the people were able to present in rebuttal.
>
> Something to that effect. You can argue that.

Id. at 8043:4-18.

During the guilt phase closing argument, Ms. Silverman took up the court's invitation. She told the jury Dr. Brook had requested "to evaluate the defendant personally in this case through the D.A.'s office, but the defendant refused." 56 RT 8767:18-25. She told the jury Dr. Sadoff "made a request to evaluate the defendant. And, of course, it was refused. She didn't want to be examined by any of the People's experts in this case." Id. at RT 8771:25-28. Ms. Silverman stated that Dr. Amos "made a request, again through the district attorneys, to the court to do an independent neurological exam on the defendant which she refused." The defense objected; but the court overruled the objection. Id. at 8782:17-8783:8.[96]

Toward the end of her closing argument Ms. Silverman reminded the jurors that the court had given them an instruction "about the defendant's

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[96] Out of the jury's presence defense counsel argued that Ms. Silverman's statement was untrue because the defense agreed to a prosecution neurological examination, but the district attorney withdrew it. The court did not care. "The court will allow it to stand, because the concept is your client had to submit to all exams unconditionally. Submitting to one and not the other is basically not submitting." 56 RT 8813:19-22.

refusal to be evaluated by any of the independent experts appointed by the prosecution. And that once a defendant admits their mental state as an issue in a case, such as this case, the defendant has to submit to examination by prosecution experts without any conditions, and he told you that was not forthcoming in this case." Id. at 8805:24-8806:4. She went several steps further and argued that:

> You can take it into account in determining the weight to be given to the opinions of the defense experts in this case, the credibility of those opinions.
>
> You can take it into account in determining how valid the defenses or claims actually are in this case, because if they were so valid, why is she hiding for all of these experts, true experts?
>
> And you can take into account as to the validity of the information the defendant gave to the defense experts.
>
> You can consider this actually as an attempt to suppress or conceal evidence against her – against herself.

Id. at 8806:5-18.[97]

B. There Was No Lawful Basis to Compel Defendant to Submit to Examination by Prosecution Experts

1. No Statute Authorized Compulsory Examination of the Defendant

Verdin v. Superior Court (2008) 43 Cal. 4th 1096, 1116, unequivocally held that a trial court has no authority under California Penal Code § 1054 or the Constitution to compel a defendant to submit to mental examinations by prosecution experts. The trial court was therefore clearly wrong when it ordered Sandi Nieves to submit unconditionally to

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[97] In her Motion for a New Trial Defendant reraised some of the issues regarding the prosecution's use of defendant's refusal to submit to mental health examinations by prosecution experts. 22 RCT 5535, 5570-5571. But the court denied the motion in its entirety. 65 RT 10348.

examination by prosecution experts. See People v. Wallace (2008) 44 Cal.4th 1032 (trial court authorization for defendant to submit to psychiatric examination by the prosecution is contrary to Verdin, but no prejudice found on the facts of the case). The trial court's position in this case that no legal authority is needed to compel a defendant to submit to a mental examination "because it's so obvious on its face" was clearly wrong under California law. 51 RT 7765:19.

2. The Compulsory Mental Examination and Resulting Presentation of Refusal to the Jury Violated Sandi Nieves's Right to Due Process Guaranteed by the United States Constitution

The trial court failed to follow California law and denied the defendant a fair trial by taking the shield of not being compelled to submit to unauthorized examination by the prosecution and turning it into a sword for the use of the prosecution. The court did so with its erroneous instruction to the jury and by inviting and permitting the prosecution to comment on the exercise of the right not to be examined by prosecutors and their agents. By compelling Sandi Nieves to submit to examination by prosecution experts without statutory authority and then using her denial against her, and allowing the prosecution to do so, the trial court denied Nieves a fair trial. Like prosecutorial comment on the exercise of the Fifth Amendment right to silence, Griffin v. California (1965) 380 U.S. 609, the instruction and comment here "to all intents and purposes," made the defendant "[an] irrefutable witnesse[] against [herself]." Chapman v. California (1967) 386 U.S. 18, 29.

Under California law, when a defendant has a right "to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall

arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." Evid. Code § 913. See People v. Coddington (2000) 23 Cal.4th 529, 604-605 (establishing the principle that adverse comment on choices protected by statute are improper).[98]

Here, the prosecution's use of defendant's lawful refusal to submit to examination by the prosecution experts, and the court's treatment of the refusal, wilfully distorted the fact-finding process. The jury was asked to draw the inference defendant was concealing her true mental state and the jury was asked to draw the inference that her defense lacked credibility because she refused to submit to mental examinations.

The prosecution's exhortations and the court's treatment of the issue was compounded by the fact the jury was told by both the prosecution and the court that the defendant had personally refused to submit to examination by the prosecution experts. There is no evidence in the record that Sandi Nieves herself made any such decision.[99] All the evidence shows that her

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[98] The precise holding in Coddington was criticized in People v. Zamudio (2008) 43 Cal.4th 327, 355-356, because the definition of work-product had changed with the enactment of Penal Code § 1054.6 in 1990. But the opinion remains good law with respect to the Evidence Code § 913 principle that the trier of fact cannot be exhorted by the prosecution to draw adverse inferences from information that the law says a defendant can lawfully withhold from disclosure.

[99] There are a variety of reasons a competent defense attorney might advise against submitting to a psychological examination by prosecution experts, or, at least, attempt to set some conditions. These reasons have little to do with concealing evidence. A defense lawyer with a fragile, mentally stressed client facing a potential death sentence who might be subjected to 25 hours or more of testing and questioning by hostile examiners without a judge present to assure fairness might wisely decide

(continued...)

counsel attempted to work out a compromise that the prosecution and the court were uninterested in pursuing. Ultimately, defense counsel made the decision, which was a correct one under Verdin, that she had no obligation to submit to examinations and that she would not do so. To impute the decision to the defendant when it was obviously based on her counsel's correct interpretation of the law had the effect of creating an irrebuttable presumption that defendant was concealing evidence.

Because the fact-finding process was distorted and the prosecution used Nieves's counsel's lawful refusal to submit her to examination as a sword against her and against her mental health experts, Nieves was denied a fair trial and a full opportunity to present a complete defense in violation of her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Crane v. Kentucky (1986) 476 U.S. 683, 690; Holmes v. South Carolina (2006) 547 U.S. 319; Ake v. Oklahoma (1985) 470 U.S. 68. "[A] fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees." Kentucky v. Whorton (1979) 441 U.S. 786, 790 (Stewart, J., dissenting).

3. Failure to Caution the Jury That the Refusal to Submit to Examination Was Insufficient to Prove Any Required Mental State Element Deprived Sandi Nieves of Her Right to Due Process by Lessening the Prosecution's Burden of Proof

When the trial court instructed the jury that Sandi Nieves had unlawfully refused to submit to mental examinations by prosecution

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[99](...continued)
the defendant should not unconditionally submit to examination. He or she might also want to make sure that the prosecution is put to its proof and meets its evidentiary burden without assistance from the defendant. And, of course, defense counsel would need to protect the client from making involuntary incriminating statements to the prosecution.

experts, and then allowed the prosecutor to argue that Nieves's concealment showed an actual attempt to conceal evidence against herself, it compounded its error. Without any cautionary instruction – which the prosecution actually sought – to the effect the refusal alone was insufficient to prove the existence of any required mental state or specific intent element, the court relieved the prosecution of its burden of proof of first degree murder with special circumstances as required by the Fourteenth Amendment to the United States Constitution. In re Winship (1970) 397 U.S. 358; Sandstrom v. Montana (1979) 442 U.S. 510, 519 (instruction susceptible to "persuasion-shifting effect" violates defendant's right to due process). "[A]n instruction to the jury which has the effect of reversing or lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process." People v. Saddler (1979) 24 Cal.3d 671, 679-680 (citing People v. Serrato (1973) 9 Cal.3d 753, 766-767); People v. Hardy (1948) 33 Cal.2d 52, 66; Smith v. Smith (5th Cir.1971) 454 F.2d 572.

Approved California jury instructions avoid this problem because they expressly admonish the jury that concealment alone is not a sufficient basis to find a defendant guilty. See People v. Jackson (1996) 13 Cal.4th 1164, 1224 (holding that former CALJIC instructions 2.03 and 2.06 on consciousness of guilt properly benefit the defense because they "admonish[] the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory."); People v. Coffman (2004) 34 Cal.4th 1, 102 (because the instructions "further informed the jury such evidence was not, in itself, sufficient to prove guilt, the

instructions properly guided the jury's consideration of the evidence and did not lessen the prosecution's burden of proof.").[100] [101]

Here there were no cautioning instructions from the court. There was just an instruction that Nieves had refused to submit to examination as required by law. The jury was therefore free to use the evidence of refusal and the prosecution's argument in any way, to prove anything, without limit or restraint. This violated the defendant's right to due process and a reliable verdict under the Eighth Amendment because it reduced the prosecution's burden of proof.

C. The Superior Court's Unauthorized Requirement that Defendant Submit to Unconditional Mental Examinations, Its Instruction to the Jury, and the Prosecutor's Questions and Argument to the Jury After the Defense Refused to Permit Examination, Were All Prejudicial and Not Harmless

Injection of defense refusal to have Sandi Nieves submit to unconditional examination by a battery of prosecution experts was not a minor and insignificant collateral error. The trial court' position that Sandi Nieves was required to submit to mental examinations by the prosecution's multiple experts was forcefully used by the prosecution during the rebuttal at the guilt phase of the trial. It undoubtedly carried over to the penalty phase. After the prosecution initially won its point with the court, "it's so

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[100] Former CALJIC 2.06 provided: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as [by concealing evidence] such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration." Present CALCRIM 371 similarly says: "[e]vidence of such an attempt [conduct] cannot prove guilt by itself."

[101] The prosecution's proposed instruction recognized this point (19 RCT 4753), but the prosecution's closing argument did not.

obvious on it's face" (51 RT 7765:19), the prosecution successfully and repeatedly hammered home the theme that defendant's entire defense should be discredited because she would not submit to mental examinations by the prosecution. Since defendant's guilt phase defense was based on her mental state, the court's instruction to the jury in the middle of trial that she must submit to a mental examination without conditions, and "this was not forthcoming" (38 RT 5485:9-15), put the court's imprimatur on the arguments later presented by the prosecutors. The instruction put the weight of the court on the prosecution's pervasive reminder to the jury that Sandi Nieves was concealing and hiding adverse evidence from them.

First, the court continually allowed the prosecutors to ask both prosecution and defense experts about Sandi Nieves's refusal to submit. The point was effectively brought home to the jury. 38 RT 5375:13-5376:11 (Dr. Brook); 47 RT 7066:2-7067:12 (Dr. Sadoff); 48 RT 7273:1-9 (Dr. Amos); 53 RT 8215:22-8216:2 (Dr. Plotkin). As Justice Brandeis once wrote, "Silence is often evidence of the most persuasive character." United States ex rel. Bilokumsky v. Tod (1923) 263 U.S. 149, 153-154. The jury could not forget this point and could continually draw adverse inferences.

Second, the trial court did not side step the defense refusal to submit Sandi Nieves unconditionally to examination by prosecution experts. The court told the jury outright that Nieves was obligated by law to submit and that "this was not forthcoming." 38 RT 5485:9-15. It did not even caution the jury that hiding evidence "was not of itself sufficient to prove a defendant's guilt." Compare People v. Jackson (1996) 13 Cal.4th 1164, 1224.

In this case, the jury was told Nieves was a law breaker and that the jury could draw adverse inferences from her decision to defy the court. The

prosecution was then free to argue, as it did, that "You can consider this actually as an attempt to suppress or conceal evidence against her – against herself." 56 RT 8805:24-8806:18. This inculpatory argument was particularly devastating because a major theme of the prosecution's case was that Sandi Nieves was a manipulator, dishonest, and engaged in "impression management." 54 RT 8459:24-8460:2; 56 RT 8808:4-10, 8846:7-10; 8856:18; 35 RT 4885:22-4886:18 (defendant's testimony); 30 RT 5393:3-5394:13 (Dr. Brook); 5396:23-5398:5 (Dr. Brook) 5421:1-16 (Dr. Brook); 5423:10-13 (Dr. Brook: "issue of impression management extremely significant with regards to this particular defendant"); 5423:24-5424:14 (Dr. Brook); 5446:7-11 (Dr. Brook); 5714:25-5715:6 (Dr. Brook: "it is my opinion that it is more indicative of malingering than of organic brain damage"); 5727:11-15 (Dr. Brook); 44 RT 6607:11-6610:11 (Dr. Caldwell); 56 RT 8746:1-7 (Prosecution closing re: defense expert Dr. Ney); 56 RT 8770:21-28 (prosecution closing re: defense expert Dr. Humphrey).

The argument that Sandi Nieves refused to submit to mental examinations, considered as part of the prosecution theme, added a powerful force to the prosecution argument. Joined with the other effects of the court's wrongful order that Nieves submit to mental examination, the prosecution's argument that she was hiding and concealing reinforced the view that Nieves was a manipulator, who had manipulated her children, her own mental health experts, and likely was trying to manipulate the jury.

Third, the argument that Sandi Nieves was suppressing or concealing evidence by refusing to submit to mental examinations dovetailed perfectly with the prosecution argument that she concealed and did not timely disclose witnesses and the resulting CALJIC 2.28 instruction given to the

jury at both the guilt phase and the penalty phase. See Parts XIII and XXIV infra. The theme once again was that she had something to hide (despite the fact the decision was made by her attorney) and therefore she would not abide by mandatory court rules: she failed to abide by discovery rules by concealing evidence and she failed to submit to mental examinations.[102]

Cumulatively, the court's instructions on failure timely to produce discovery and to submit to the mental examinations and the prosecution's exploitation of these instructions, bolstered the prosecution's case and devastated the defense at every phase of the trial, including the death phase.

Finally, the trial court expressly and unfairly coached the prosecution on how to make its closing argument that Nieves refused to permit prosecution experts to examine her. The prosecution was then encouraged and permitted to argue Sandi Nieves's refusal to submit to mental examinations discredited the defense experts, discredited the validity of the defense claims, and discredited the information the defendant gave to defense experts. Once the defense experts were discredited, there was not much left to the defense case. This was prejudicial by any standard.

The pervasive effect of the trial court's instruction, the prosecutor's questions, and the prosecution argument based on Nieves's attorney's decision that she would not submit to unconditional examination by prosecution experts is far removed from the situation in People v. Wallace (2008) 44 Cal.4th 1032, a case the Attorney General might cite in response. In Wallace the Court found that testimony by an expert that the defense

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[102] Of course, Nieves's decision to put conditions on submitting to prosecution mental examinations and the failure to produce some discovery in a timely way, were decisions made by her attorney. Nonetheless, the prejudice coming from the court's treatment of these decisions was borne by the defendant.

thwarted his attempts to conduct a psychiatric examination of the defendant was not prejudicial. In Wallace, however, the testimony involved a single expert. Further, the expert's testimony attacked the conclusions and methodology of defense experts. In this respect it was cumulative because another prosecution expert had already given substantially similar testimony without apparently alluding to defendant's failure to submit to examination. Therefore, the challenged expert's statements did not likely affect the outcome. 44 Cal.4th at 1087-1088.

The error here was prejudicial at every stage and requires reversal of the penalty even if the guilt verdicts could be upheld. Sandi Nieves's credibility, her character as a manipulator, or not, her character for impression management, or not, were crucial at both stages of the trial. The trial court's fundamental legal error in requiring the defendant to submit and the ensuing exploitation of her refusal was not harmless beyond a reasonable doubt as required by Chapman. For penalty phase purposes there is a reasonable possibility the jury would have rendered a different verdict if the jury without adverse inferences drawn against the defendant and her experts due to the defense failure to submit to examination by the prosecution. See People v. Brown (1988) 46 Cal.3d 432.

Reversal is therefore required.

VII. THE TRIAL COURT PREJUDICIALLY RESTRICTED THE SCOPE OF DEFENSE EXPERT TESTIMONY

A. The Court Precluded Defense Expert Testimony on Defendant's Mental Status and Motivations

Consistent with the trial court's effort to thwart the defense at every turn, the court precluded defense experts from testifying about the defendant's mental status and motivations in connection with the charges against her. Invoking Penal Code § 29, the court continually blocked the defense efforts to present evidence that would allow the jury to infer that Sandi Nieves actually did not have the requisite intent to commit first degree murder with special circumstances before or at the time of the fire. Except when it benefitted the prosecution, the court continually held that any testimony, by anyone, touching on Sandi Nieves's mental state or motivation was precluded because it addressed the "ultimate issue" for the jury. Given the court's rulings, the jury had no context in which to evaluate the defendant's conduct, except the context presented by the prosecution.

"A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." People v. Vieira (2005) 35 Cal.4th 264, 292; People v. Rodriguez (1999) 20 Cal.4th 1, 9-10. But a court has no discretion to violate defendant's Sixth Amendment right to present a defense and her Fourteenth Amendment right to a fair trial. "Few rights are more fundamental that of an accused to present witnesses in his own defense." Chambers v. Mississippi (1973) 410 U.S. 284, 302. A fair trial requires that a defendant is given "a meaningful opportunity to present a complete defense." Crane v. Kentucky (1986) 476 U.S. 683, 690; Washington v. Texas (1967) 388 U.S. 14. An effective defense includes a defense based on mental condition. Ake v. Oklahoma (1985) 470 U.S. 68.

On May 3, 2000, prior to defendant's opening statement, the prosecution asked "that no expert be allowed to testify or be asked regarding the ultimate issue of her state of mind, and whether she could form whatever intents are involved. Those go to the ultimate issue." 14 RT 1271:2-5. Defense counsel countered that "they're trying to gag the defense before we even get going." Id. at 1272:3-5. On June 12, 2000 the prosecution filed a motion to limit defense psychiatric testimony. Motion Regarding The Admissibility and Scope of Defense Psychiatric Testimony, 18 RCT 4551. The prosecution argued a defense expert may only testify "regarding manifestations of the defendant's alleged psychological impairment, but may not elicit testimony that in any way connects these manifestations to the mental states at issue in this case." Id. at 4553. The prosecution contended that an expert "may characterize a defendant's general state of mind if it is unrelated to defendant's mental state at the time of the crime." Id. at 4554 (italics omitted). Defendant filed a written response (18 RCT 4613), arguing that People v. Nunn (1996) 50 Cal. App. 4th 1357, 1365, clarified the scope of allowable testimony as to the defendant's mental state.

1. Arson Expert Del Winter

When Del Winter, defendant's arson expert, testified on May 31, 2000, the prosecution objected to Winter's characterization of the fire. On redirect, the following colloquy occurred:

> Q You talked about professional – the district attorney asked you about professional arsonists and motives.
>
> What, in your experience, what classifications of arsonists are there that you've come across?

Winter listed "insurance fraud fire-starters, pyromaniac, compulsion to set fires, crime cover-up fires," "vanity fires," and "spite fires." He then

said that "there's a classification that we in L.A. City Arson called psycho fires, and that would be where the motive is obscure.

Q What classification would you put this?

Mr. Barshop: Objection. Calls for speculation.

Mr. Waco: It was –

The Court: It's overruled.

The Witness: This would go in a psycho category.

Mr. Waco: Nothing further.

The Court: Anything further?

Ms. Silverman: No."

29 RT 3864:7-3865:5.

The next day, however, the court reconsidered – sua sponte, without further prompting by the prosecution. The Court: "Going through yesterday's proceedings, on redirect of Mr. Winter, . . . Mr. Waco asked the question: 'what classification would you put this in?' And there is an objection, which I overruled. And the answer was: 'this would be in a psycho category." Having reread it, I am going to sustain the objection. I'll strike it and so advise the jury." The court explained that "it goes to the intent and the ultimate issue and it's not relevant. Mr. Winter is not in a position to describe the intent that somebody used in starting the fire." 30 RT 3927:16-3928:7. Defense counsel protested. Id. at 3928:8-3929:11. Counsel also objected because Winter had been excused and had gone to Minnesota. As a practical matter he could not be recalled by the defense in order to answer the question in a manner that would satisfy the court. Id. at 3929:12-3930:3.

The court then briefly called the jury into the courtroom. The court told the jurors:

> Now, yesterday when Mr. Winter was testifying on redirect he started to talk about classification of fires. He said there were pyromaniac, vanity fires, and psycho fires. And the question was asked what classification would he put this fire in, and there was an objection by Mr. Barshop. I overruled the objection, and the answer was: "This would go in as a psycho category."
>
> I was wrong in allowing that answer to be given. I am striking the answer that it's a psycho category fire, and you're to disregard it.
>
> Okay.

30 RT 3954:12-24.

The admonition to disregard the Winter's characterization was wrong for several reasons. First, the prosecution originally objected to the question of classification of the fire on the ground that it called for "speculation." 30 RT 3864:27. The prosecution did not claim the question called for opinion on the ultimate issue in violation of Penal Code §§ 28 and 29. The prosecution did not even ask the court to reconsider its ruling initially allowing Winter to put the fire into a "psycho' category. The court raised the issue sua sponte at a time that it knew Winter would no longer be available to the defense.

Second, the question and answer did not violate Penal Code §§ 28 and 29. While Penal Code § 28(a) precludes the admission of evidence of "mental disease, mental defect, or mental disorder . . . to show or negate the capacity to form any mental state," such evidence "is admissible solely on the issue of whether or not the accused actually formed specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." Penal Code § 29 precludes an expert at the guilt phase of a criminal action from testifying "whether a defendant had or did not have the required mental states, which include, but are not limited to,

purpose, intent, knowledge, or malice aforethought, for the crimes charged." "Sections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of a charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." People v. Coddington (2000) 23 Cal.4th 529, 579, overruled on other grounds, Price v. Superior Court (2001) 25 Cal.4th 1046, 1069. "Only diminished actuality survives, i.e., the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime." People v. Steele (2002) 27 Cal.4th 1230, 1253. In other words, evidence may be introduced from which the jury may infer that defendant did not premeditate or deliberate the murders. Coddington, 23 Cal.4th at 580.

Further, a defense expert can properly testify as to the defendant's motivations for her actions. People v. Ward (2005) 36 Cal.4th 186, 209. Motive describes the reason a person commits a crime. People v. Hillhouse (2002) 27 Cal.4th 469, 504. In this instance, Winter was ascribing a mysterious lack of motive, that is, a psycho fire. This was relevant to Nieves's defense of unconsciousness, absence of premeditation, and lack of intention to commit the crimes underlying the special circumstance allegations, such as the intention to commit arson. Winter was not saying anything about Sandi Nieves's capacity to commit any crime. He was an arson expert.

By bringing the issue up specially before the jury and singling out Winter's characterization of the fire, the trial court called additional attention to its view that the jury must disregard whether the fire was a "psycho" fire. As a practical matter this specially undercut the defense

claim that the motive was mysterious at best and actually missing due to defendant's mental state.

Penal Code sections 28 and 29 were not designed to deprive defendant of a defense. But that is the practical effect of the trial court's reconsideration of the question and admonition to the jury as applied to the facts here. The instruction to disregard Winter's answer prejudicially violated Sandi Nieves's right to a defense and a fair trial. Crane v. Kentucky (1986) 475 U.S. 683, 690; Chambers v. Mississippi (1973) 410 U.S. 284, 302.

2. Mental Health Experts

Before it even considered the prosecution's formal motion or the defense argument on the application of Penal Code § 29 in this case, the trial court signaled its hyperactive vigilance toward blocking any meaningful diminished actuality evidence during a colloquy regarding the admission of the PET scan. In the course of the argument over the admissibility of the scan data, defense counsel said, "you will hear from the doctors that occurred,[[103]] exacerbated the circumstance, the abnormalities, and caused this dissociative state, which resulted – was touched off by a complex partial seizure." 33 RT 4632:22-26. Although the prosecutors did not interrupt or object, the court said: "We're going to get to that. The doctors can't testify to what you just said. They can't form an opinion on the ultimate issue on mental state." Id. at 4632:27-4633:2. By the time the motion was heard, the court had already prejudged the issue without hearing from the defense. 34 RT 4660:24-4666:8 (prosecutor Silverman argues).

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[103] Defense counsel was here referring by "that occurred' to the sequence of events involving defendant's abortion and hormonal changes, taking Zoloft and diet pills, and experiencing great stress. 33 RT 4632;17-21.

After the prosecutor finished, the court told defense counsel, "I won't hear from you Mr. Waco, until I read your brief on this." Id. at 4666:24-25. Later the court ruled that the experts "can testify to a defendant's general mental condition so long as it's supported by reliable evidence." However, the court ruled that they "cannot testify to the ultimate issue. They can't talk about her being in a dissociative state. They can't testify she was in a dissociative state." The court claimed that the expert reports, expressed "the ultimate issue."

Then the court issued a threat directed to the defense experts, but not the prosecution: "To the extent you're going to call the experts, I will talk to them on the record and make sure that they understand the court's order. And I will advise them if they violate the court's order, they'll be subjected to sanctions in some form." Id. at 4734:1-21. Defense counsel objected that the court's ruling would violate the Fourth [sic], Sixth, Eighth, and Fourteenth Amendments. Id. at 4734:26-28.

The court then proceeded consistently to block the defense presentation, further skewing the trial toward the prosecution and its theory of culpability.

Defendant called Dr. Phillip Ney, who had been in clinical practice for over 40 years. He had worked with patients with serotonin syndrome, epileptic seizures, and dissociated states. He had also worked with patients in connection with postpartum biological effects of hormones, including the effects of abortion. 40 RT 5742:3-5743:14. He had examined Sandi Nieves twice and he had also given her a pregnancy loss questionnaire. Id. at 5744:13-16, 5745:23-5746:9.

Early in his direct testimony, Dr. Ney was asked whether he had formulated an opinion "that, in fact, Ms. Nieves did or did not consciously

attempt suicide at the time this fire started?" Id. at 5747:17-19. The prosecution objected. The trial court sustained the objection on the ground that the question violated Penal Code § 29. Id. at 5747:22-23. When counsel reformulated the question and asked whether Nieves's acts were consistent with a suicide attempt, first Ms. Silverman objected and then Mr. Barshop, objected. The court again sustained the objection on the same ground. Id. at 5747:25-5748:5. It proceeded to sustain all formulations of the questions touching on suicide. Id. at 5748:7-5749:8; see also 42 RT 6027:16-27. The court then dismissed the jurors. Id. at 5749:9-5751:26. After chastising defense counsel, the court sustained objections to "whether or not she was suffering epilepsy, or had an epileptic fit at the time of this fire?" Id. at 5757:1-9. When counsel asked whether Dr. Ney had formed an opinion as to whether Nieves had serotonin syndrome at the time of the fire or whether taking Phentermine and Zoloft "would have any effect upon her at all," the court again sustained the prosecution objections on the "ultimate issue" ground. Id. at 5759:16-23, 5759:24-5760:19.

The court allowed Dr. Ney to express an opinion as to whether Nieves was in a depressive state, but sustained objections to whether she showed "symptoms of dissociation symptoms," and whether she had a reduced "ability to cope with problems under stress." 40 RT 5767:17-5770:4; 5782:16-28. The court also sustained an objection to whether dissociative states are "consistent with women who are charged with trying to kill theirself [sic] and/or their children." Id. at 5788:8-14. See also 40 RT 5792:23-5793:4. And the court sustained an objection to whether Nieves had a severe depression due to her decision to abort her pregnancy. Id. at 5800:7-16.

The court sustained an objection when counsel asked whether Nieves's medical condition "could" have "resulted in her being unconscious, assuming she started the fire?" The objection was sustained as calling for the "ultimate conclusion." 42 RT 6076:18-24. Defense counsel then made an offer of proof outside the presence of the jury (42 RT 6077:10-6085:10), arguing that the questions were permissible under People v. Nunn, supra, because the answers "would assist the jury in understanding [Dr. Ney's] evaluation and opinion as to someone's mental state of mind and how it would have been affected under the conditions similar to that which Mrs. Nieves found herself, both mentally, physically, biologically and nature-wise" (Id. at 6081:15-20). The court did not change its view of the law. Id. at 6084:15-22 ('I have heard enough. I have heard enough."). When the jury returned, counsel asked whether Nieves's medical condition "would have affected her judgment." The court sustained an objection on the ground that the question called for the ultimate conclusion. Id. at 6085:17:24. Finally, the court sustained an objection as to whether Nieves had been in an "organically determined dissociative state." 43 RT 6283:8-17.[104]

Dr. Gordon Plotkin, another psychiatrist, with a Ph.D. in biochemistry and Board certifications in psychiatry and neurology, was called by the defense as a surrebuttal expert. 48 RT 7376:20-7379:13. He was asked the following hypothetical, followed by the prosecution's objection.

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[104] Later Dr. Ney testified that Nieves's "history and symptoms" fit the diagnosis of a "major depression," "postpartum depression," "dissociative state," and "serotonin syndrome." 43 RT 6370:2-16. The prosecution did not object.

Q By Mr. Waco: Assuming someone were in a state of dissociation at the time of lighting this fire in the early morning hours of July the 1st–

Mr. Barshop: I am going to object. This would call for the ultimate conclusion.

Mr. Waco: I am sorry?

Ms. Silverman: And no foundation.

The Court: You are going to have to listen, Mr. Waco. I can hear, and you're three feet from Mr. Barshop.

Mr. Waco: But his voice is going the other way, you honor.

The Court: Sustained.

52 RT 7889:1-14.

Despite Penal Code section 29, the prosecution was able to ask the prosecution arson rebuttal expert, Dr. John Dehaan, whether his analysis showed the fire was set by someone with the intent to burn down the entire structure. 44 RT 6503:7-6504:4. After the court overruled the defense objection, Dehaan said, that there was an intent to destroy the house." Id. at 6503:20-21.

Additionally, despite Penal Code sections 28 and 29, Dr. Amos, the prosecution rebuttal expert, testified defendant's acts were "inconsistent with any organic or neurologic dissociation." 48 RT 7316-7318:22. Dr. Sadoff another prosecution rebuttal expert was allowed to affirm that defendant's "behavior would be goal-directed, intentional, and purposeful" (47 RT 7084:25-26), "it's inconsistent with someone who is unconscious" (47 RT 7085:1-5),"it shows deliberation, purpose, and intent" (47 RT 7085:20-22), and "it is inconsistent with someone acting in a dissociative state"(47 RT 7085:25-26). But when prosecutor Barshop asked Dr. Plotkin during surrebuttal cross-examination whether Sandi Nieves's acts were deliberate and purposeful, including an intention to burn down the house,

the trial court overruled the defense objection and permitted him to answer. 53 RT 8132:21-8133:8. The prosecution was also permitted to have Plotkin state on cross-examination that Sandi Nieves was not in a dissociative state.[105] 53 RT 8123:23-8126:15, 8131:2-8133:6. If defense counsel's questions went to the "ultimate issue," a point we are not conceding, then these questions asked by the prosecution did so too. See People v. Nunn (1996) 50 Cal.App.4th 1357, 1365.

3. The Trial Court Abused its Discretion and Denied Sandi Nieves the Right to a Meaningful Defense, Due Process, and the Right to a Reliable Verdict

The trial court abused its discretion in finding that the expert testimony concerning mental state was inadmissible. See People v. Coddington (2000) 23 Cal.4th 529, 582. "The Sixth and Fourteenth Amendments to the United States Constitution also guarantee a defendant's right to present the testimony of these expert witnesses at trial." People v. San Nicolas (2004) 34 Cal.4th 614, 651.

The defense expert testimony of Del Winter, Drs. Ney, and Plotkin, did not conclude that Nieves did or did not have the requisite intent to commit the crimes charged or the special circumstances. It provided context and understanding for the jury question whether Nieves actually formed the required intent. The experts were not called on to give opinions as to whether she actually had the required intention. Moreover, after the prosecution successfully blocked mental state evidence on the ground that it was inadmissible under Penal Code § 29, the prosecution conceded during the conference to settle the guilt phase instructions, that serotonin syndrome, a dissociative state, and epilepsy are not mental diseases, mental

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[105] Plotkin clarified that in his opinion delirium was the more appropriate term. 53 RT 8101:11-21.

defects, or mental disorders, thereby undercutting their own argument that Penal Code §§ 28 and 29 did not preclude the opinions. 46 RT 7027:16-7029:2; 7036:6-12. Therefore these conditions did not come within the scope of Penal Code §§ 28 and 29, which each limit only evidence of "mental disease, mental defect, or mental disorder."

The trial court erred. If the evidence "offered a basis from which the jury could infer that [she] did not premeditate or deliberate the murders, that evidence could have been introduced into the guilt phase." Coddington, 23 Cal.4th at 580. Because the trial court failed to follow the law of California, Sandi Nieves's right to due process was violated. Chambers v. Mississippi, (1973) 410 U.S. 284, 302; Parle v.Runnels (9th Cir. 2007) 505 F.3d 922. Further, the trial court's arbitrary and one-sided misapplication of Penal Code section 28 and 29, which erroneously precluded admission of crucial defense evidence while allowing comparable evidence to come in when offered by the prosecution, deprived Sandi Nieves of her constitutional rights to due process, to a fair trial, to a fair opportunity to present a defense, and to reliable guilt and sentencing determinations in a capital proceeding, in violation of the Sixth, Eighth, and Fourteenth Amendments. Crane v. Kentucky, supra, 476 U.S. at, 690 (Sixth and Fourteenth Amendments guarantee "a meaningful opportunity to present a complete defense"); Holmes v. South Carolina, (2006) 547 U.S. 319, 324-329 (same); Chambers 410 U.S. at 302 (same); Ake v. Oklahoma, (1985) 470 U.S. 68 (right to present a defense includes defense based on mental condition); Wardius v. Oregon (1973) 412 U.S. 470, 474 (noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," and holding that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street"

as between the prosecution and the defense); Parle v.Runnels (9th Cir. 2007) 505 F.3d 922, 931-933 (cumulative effect of exclusion of mental state evidence violated due process by infecting trial with unfairness and undercutting the defense); Beck v. Alabama (1980) 447 U.S. 625, 637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense); Zant v. Stephens (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination); Woodson v. North Carolina (1976) 428 U.S. 280, 304 (same); Johnson v. Mississippi (1988) 486 U.S. 578, 584-85 (same).

4. Exclusion of the Evidence was Prejudicial

Sandi Nieves's defense was based on medical, psychological, and neurological evidence that she was unconscious or did not form the requisite intent necessary for conviction of each of the crimes charged beyond a reasonable doubt. When the trial court precluded arson expert Winter from testifying as to lack of apparent motive, and precluded Drs. Ney and Plotkin from testifying as to the psychological and medical forces affecting her, the court eviscerated the defense, leaving very little for the defense to work with.

The errors were all the more prejudicial because the prosecution was permitted to have its experts opine on the "ultimate issue," intent. And, the prosecution argued in closing, based on expert testimony, that each of the acts of the defendant were "goal-directed, intentional, purposeful acts, as testified to by Dr. Sadoff, as testified to by Dr. Phillips, as testified to by Dr. Amos. And, in fact, as testified to by Dr. Plotkin." 54 RT 8457:7-11.

The trial court's rulings, coupled with the prosecutor's argument, rendered whatever mental state evidence the defendant was able to produce

"far less persuasive." Parle v. Runnels (9th Cir. 2007) 505 F.3d 922, 933, quoting Chambers, 410 U.S. at 294. The fact that the prosecution experts said that Nieves's acts were "goal oriented, intentional, and purposeful," tipped the balance in favor of conviction and finding the special circumstances findings to be true.

The trial court's rulings went to the heart of the case and violated due process. First, the errors infected the trial with unfairness and prejudice. Parle, 505 F.3d at 233 (citing Chambers 410 U.S. 284, and Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643). Here, after the trial court blocked the most important testimony the defendant could present, there was not enough left of the defense evidence to determine whether exclusion of the defense expert testimony made a difference to the outcome of the case

Even if the errors did not affect the structural validity of the trial, it is reasonably probable that the errors affected the outcome because the trial court deprived the defense and the jury of useful evidence that might tend to negate the requisite intent required for first degree murder, attempted murder, arson, and the special circumstances. People v. Watson (1956) 46 Cal.2d 818, 836. Applying harmless error analysis to the federal constitutional claims, the prosecution cannot show that the exclusion was harmless beyond a reasonable doubt as required by Chapman v. California (1967) 386 U.S. 18, because the errors could have "been the weight that tipped the scales against [the defendant]." Krulewitch v. United States (1949) 336 U.S. 440, 445.

Second, the exclusion of defense evidence as to the defendant's mental state and the inclusion of evidence favorable to the prosecution on

the same issue, violated the federal due process principle of Wardius v. Oregon 412 U.S. at 475-476, that fair trials must be "a two-way street."

B. The Court Prejudicially Precluded Defense Experts from Relying On Any Out of Court Statements by the Defendant or Her Family

Ordinarily, hearsay evidence may be used by an expert in forming his or her opinion as long as the evidence relied on is reliable and explained to the jury. See People v. Gardeley (1996) 14 Cal.4th 605, 618; Evid. Code § 801(b). When an expert relies on inadmissible matter, testifying to the details is improper if it will bring inadmissible matter before the jury. People v. Price (1991) 1 Cal.4th 324, 416.

In this trial, the court limited the defense experts to "talking about proven evidence in this case based on observations, non-hearsay statements, and if there is any hearsay, it's got to be reliable." 34 RT 4740:7-15. Accordingly, at the request of the prosecution (18 RCT 4551), and over defendant's objection (18 RCT 4613, 4618; 34 RT 4734:26-4738:27), the trial court precluded all defense experts from basing opinion testimony on any out of court statements of the defendant or the defendant's family (34 RT 4732:8-4733:15). This included statements of the defendant, her mother, and Albert and Penny Lucia, her stepparents. Id. It included testimony regarding the level of drugs in defendant's system, except as to Phentermine. Id. at 4733:1-12.

Regarding reliance on the defendant, the court said, "[t]he only thing that they can talk about is facts that have been proven in this court based upon observations. For example, if you were going to make an effort to show the defendant had epilepsy or suffered from epilepsy, you need to have people here to describe what they saw." 34 RT 4739:7-13. See 42 RT 6023:2-5 ("if the doctor is going to be relying upon statements that the

defendant has not testified to in court, then it's inadmissible hearsay as far as the court is concerned"). Compare, 49 RT 7966:6-24 (defense objection overruled as to prosecution expert using hearsay: "an expert can rely on reliable hearsay").

The defense asked for a continuance "to have the experts come in here individually, to come into court and state their reasons why they believed the statements of my client, and why they thought that the statements of the other people had sufficient validity for the court to reconsider its previous ruling." 35 RT 4774:5-10. The motion was denied. Id. at 4774:11.

The effect of the court's ruling was that Dr. Kaser-Boyd, who had spent about 25 hours interviewing the defendant (29 RT 3781:21-24, 3869:5-7), could not testify about any opinions based on those interviews. Defense experts could not effectively give opinions on the defendant's mental state.

Rather than limit the scope of the experts' opinions depending on the character and tenor of specific inadmissible information, or relying on the limiting instruction to the jury, such as CALJIC 2.10 (statements made to defendant to physician), as requested by the defense (18 RCT 4618),[106] the court made a blanket exclusion order. It ruled all "the defendant's statements are unreliable." 34 RT 4733:28.

The record demonstrates that the court's order was motivated, in part, due to the defense refusal to have Nieves submit unconditionally to mental examinations by the prosecution. This had a direct "bearing on the court's view that the defendant's statements [to defense experts] are

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[106] See People v. Elliot (2005) 37 Cal.4th 453, 480 (CALJIC 2.10 properly limits jury consideration of hearsay relied on by defense expert)

unreliable," and the court's resulting decision to prohibit the defense experts from relying on anything Sandi Nieves had said to them.

> The fact these experts have spent, I mean, a massive amount of hours with the defendant, coupled with the fact that the defendant has refused to submit to interviews by the prosecution experts without the unreasonable conditions that were imposed, it has further bearing on the court's view that the defendant's statements are unreliable.

34 RT 4733.

Dr. Kaser-Boyd was therefore unable to testify to crucial conclusions in her report because they were based on interviews with defendant. See 10 RCT 2529a (confidential) (Dr. Kaser-Boyd's report); 41 RT 5925:23-25 (Kaser-Boyd will not testify). In fact, she did not testify at trial at all, either in the guilt or penalty phase. But Dr. Kaser-Boyd's report, for example, noted: "Sandi did not have very many developed coping resources. This deficit most likely is a result of the emotional deprivation in her family of origin, combined with sexual abuse and emotional abuse." 10 RCT 2529s. "Her deliberations over her pregnancy in the weeks preceding the homicide put her into a crisis which outstripped her coping skills." Id.

> In an individual with her background, such overwhelming emotion is often the precursor for a dissociative episode, which is here defined as the flooding of conscious awareness with intense emotions that are normally repressed, but which emerge as powerful determinants of behavior. Dissociative episodes are more common in individuals who have childhood histories of physical or sexual abuse. Frightening or painful memories of abuse get 'split off' and repressed as the individual struggles to cope and live a 'normal' life. When 'split off' and repressed, these painful memories and conflicts are not dealt with and resolved, and they have a potential to re-emerge in dramatic and explosive ways at new times of crisis, especially those which trigger the old emotions.

Id.

Dr. Humphrey was restricted essentially to reporting on tests she administered to Nieves, rather than using psychological history, as a basis for her opinions. 24 RCT 6190 (confidential) (Dr. Humphrey's report). See 37 RT 5254:2-5254:13 (testimony restricted to test findings). Dr. Ney was essentially restricted from relying on medical history as a basis for his conclusions. Court Exh. 1 (Ney report); Exh. LL (same). See 40 RT 4492:3-21 (prosecution asks to restrict Ney's testimony), 5700:17-5701:3-24 (court restriction).

Both Kaser-Boyd and Ney were restricted from testifying about sexual molestation of the defendant. See 40 RT 5701:5-8. Ney was largely limited to answering general and hypothetical questions. See 40 RT 5781:22-5782:27 (objection sustained as to coping skills), 5792:23-5793:15 (dissociative state), 5794:8-22 (same).

By the time the prosecution put on its rebuttal expert, Dr. Robert Sadoff, the court made the result of its prior rulings explicit to the jury. In response to defense counsel's attempt to cross-examine Sadoff regarding evidence of an altered state of consciousness earlier in Nieves's life contributing to the likelihood of a dissociated state at the time of the fire, the court told the jury outright: "there is no evidence of an altered state in the record in this case." 47 RT 7169:10-12.[107]

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[107] After the court questioned Dr. Sadoff further and the witness testified that "altered state" did not necessarily equate with "dissociated state," the court failed to correct its comment on the evidence. 47 RT 7170:7-20. Instead, the court dismissed the jury a few moments later and sanctioned defense counsel for objecting to the dual team objections of the prosecutors. Id. at 7171:5-7174:9.

Because defendant's background and history was essential to the development of her mens rea defense, the court erred in restricting the defense experts from relying on any hearsay statements of the defendant or her family. People v. Gardeley, supra. The court focused on defendant's refusal to submit to the mental examinations of prosecution experts as its basis for finding all of statements to the defense experts unreliable. Because the court's exclusion of opinions based on hearsay from the defendant was wrongly based in part on the defense's lawful refusal to submit to mental examination by prosecution experts, the court's decision is tainted by a factor which is irrelevant to the more important decision, whether defendant's statements were in fact reliable.

The court held many Evidence Code § 402 hearings, giving the prosecution an opportunity to preview the defense expert's testimony. It could easily have allowed the defense to show why they relied on the defendant's statements. Additionally, the court gave the jury CALJIC 2.10 to clarify for the jury that any hearsay from the defendant would go to the basis of the experts' opinions rather than the truth of the matters stated. 21 RCT 5111; 46 RT 6990:9-6992:18; 54 RT 8376:25-8377:12.

In a capital case, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi (1973) 410 U.S. 284, 302. There is a need for heightened reliability of the verdict. Beck v. Alabama (1980) 447 U.S. 625, 637. The court's exclusion of expert opinion based on the statements of defendant and her family violated the defendant's rights to a fair trial, to a meaningful defense, and a reliable death penalty verdict as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Crane v. Kentucky (1986) 476 U.S. 683, 690; Green v. Georgia (1979) 442 U.S. 95, 97. See Beck at 637 ("there is a

significant constitutional difference between the death penalty and lesser punishments"); Woodson v. North Carolina (1976) 428 U.S. 280, 305 (Eighth Amendment requires heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").

The court's blunderbuss approach was prejudicial because it went to the heart of the defense. Dr. Ney and Dr. Plotkin were reduced to giving abstract and disconnected testimony without linking their conclusions directly to defendant's history. Their testimony was therefore made far less persuasive than it would have been had they been allowed to say what their opinions were based on, other than their general knowledge and experience. Dr. Kaser-Boyd had nothing left to say, and therefore did not testify at all. The principal defense, that defendant was unconscious and did not have the required mens rea for either first degree murder or the special circumstances, was reduced to practically nothing. The errors, therefore, were not harmless beyond a reasonable doubt as required by Chapman v. California (1967) 386 U.S. 18, 24. With respect to the death sentence, the limitations on the defense experts were not harmless beyond a reasonable doubt and likely affected the outcome. People v. Brown (1988) 46 Cal.3d 432.

Reversal of the convictions and the penalty are therefore required.

VIII. THE TRIAL COURT PREJUDICIALLY EXCLUDED EVIDENCE OF THE PET SCAN AT BOTH THE GUILT AND PENALTY PHASES WHICH WOULD HAVE PROVIDED MEDICAL CORROBORATION FOR OPINIONS OF DEFENSE EXPERTS AND A BASIS FOR SYMPATHY

A. Significant Facts

On March 10, 2000, over a month before the trial began, the defense provided the prosecution with discovery relating to the results of a brain-imaging test called a positron emission tomography ("PET") scan performed on Sandi Nieves in February 2000. 11 RCT 2434, 2439; see Exh. EE.[108] The discovery materials provided to the prosecution included analyses of Nieves's PET scan results by Dr. Michael Gold, a neurologist, and by the radiologist who performed the PET scan. 10 RCT 2257 (Confidential), 2597 (Confidential); Exh. EE.

The reports showed abnormally diminished activity in certain areas of Nieves's brain. Specifically, Dr. Gold found "impairment in both frontal-subcortical pathways of the brain, and abnormalities on the PET-MCD scan in the posterior left temporal region and adjacent occipital region and also in the right orbitofrontal region and adjacent right anterior temporal lobe." Exh. EE at 3-4. Dr. King, the radiologist, observed "diminished tracer activity in the right orbitofrontal region and adjacent right anterior temporal lobe." Id. at 6. The doctors listed as possible causes of the abnormalities "abnormal intrauterine development, birth injury, childhood epilepsy, and prior head trauma, the latter being most likely." Id. at 4, see also id. at 6 (results "would indicate that there was most likely a coup contra coup injury").

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[108] PET scans produce computer-enhanced images showing metabolic activity in various parts of the brain. See Exhs. GG-1-3.

Nearly three months after receiving discovery relating to the PET scan, when the defense had just begun presenting its case, the prosecutors made an oral request for a Kelly-Frye[109] hearing on the PET scan evidence. 31 RT 4145:7-13. The prosecutors argued that this evidence should be excluded on the asserted ground that "it's not a test that is generally accepted in the medical and scientific community for the purpose it's being offered." Id.

The court was very receptive to the prosecutors' request. In fact, it announced it had conducted his own independent research into PET scans and located two cases indicating that the PET scan is "junk science." 31 RT 4145:16-21. The court did not provide names or citations for the two cases so the parties could review and address them. Without having heard any evidence or argument from the parties on the matter, he stated his conclusion – which could only have been based on his independent research – that the PET scan "does not withstand the rigors of the Kelly-Frye rule." Id. at 22-23.

Without waiting for a written motion or permitting any argument on the matter, the court scheduled a Kelly-Frye hearing the following week, on June 12, 2000, based on the availability of the prosecution's PET scan expert. 31 RT. 4145:24-27, 4146:6-7. Defense counsel requested an opportunity to consult with his experts about their availability before scheduling the proceeding. The court denied the request and ordered counsel to "[j]ust have them here." Id. at 4146:6-4147:4. The defense filed a motion asking the court to reconsider its order setting the hearing. 18 RCT 4530. In the alternative, the defense asked for additional time to

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[109] See People v. Kelly (1976) 17 Cal.3d 24; Frye v. United States (D.C.Cir. 1923) 293 F. 1013.

identify and prepare experts to testify about the complex issues presented by the Kelly-Frye challenge. Id. at 4535-36.

The prosecution challenged the PET scan on the asserted ground that it was not "generally accepted as reliable by the relevant scientific community for the forensic arena." 18 RCT 4560; see 31 RT 4152:3-14, 4562. The motion also sought to exclude the PET scan evidence as irrelevant based on the related assertion that "[t]here is no scientific connection between neuroimages of brain abnormalities shown on a PET scan and criminal behavior." Id.

The prosecution's motion did not challenge the PET scan evidence on the ground that the specific PET scan performed on Sandi Nieves was flawed in some way or that the results were generated in an improper manner. See id. at 4560-63. At the outset of the hearing, defense counsel stated his understanding that the hearing was limited to "whether or not the PET scan is accepted in the scientific community as an instrument to be used in a criminal trial to determine the functioning of the human brain." 31 RT 4177:7-13. The court responded reproachfully: "The issue is framed not necessarily by what you said, but by what the people put in their motion to exclude the evidence." Id. at 4177:26-28. Counsel asked for further clarification about the scope of the hearing. Id. at 4178:9-15. The court ignored the request and ordered the defense to call its first witness. Id. at 4178:16-17.

The first witness was Dr. Gold. See Exhs. EE (report), GG (Gold CV). Dr. Gold explained that a PET scan provides an image of metabolic activity in the brain:

> The PET scan is a device where actually glucose, which is the sugar used by the brain, is labeled or marked with a radioactive compound, and it's injected into the bloodstream.

> That glucose or sugar is taken into the brain attached to this radioactive particle. If there is a part of the brain that is not actively functioning, or not working normally, it's not using glucose or sugar like the rest of the brain, and as a result it will not release radioactivity from that spot. So if there is a cold or nonactive spot on the brain, a functionally inactive part of the brain, it will show up on the PET scan, but may not show up on other neuro-imaging tests.

31 RT 3184:12-26.

Gold testified PET scans have been in use since the 1970's and are regularly used by neurologists "around the country and around the world." 31 RT 4185:2-4. He listed a variety of conditions that can be evaluated with a PET scan, including epilepsy and "disorders of cognition" that might be secondary to a brain injury caused by trauma or disease. 31 RT 4186:22-28. He confirmed that the use of the PET scan has been endorsed by the American Academy of Neurology as a "useful diagnostic tool in neurology" (31 RT 4192:25-4193:13), and that it is a "universally and widely accepted way to evaluate the brain," as reflected in thousands of published articles (31 RT 4194:9-4195:27) See Exhs. GG-1-3. Gold also testified that acceptance of a medical test by insurance companies is a "marker of the acceptability and non-experimental nature of a test," and that "Blue Cross of California, the largest private insurer in California, approves PET scan as a diagnostic technique." 31 RT 4190:17-28.

A second neurologist, Dr. Arthur Kowell, also testified that PET scans were widely used in the scientific community (31 RT 4243:6-4245:4), and that many insurance companies pay for the procedure (31 RT 4242:4-10) See also Exh. HH (Kowell CV). He had testified regarding PET scans in over 25 criminal and civil cases and was not aware of the test being excluded in any of them. Id. at 4237:20-4238:11. Dr. Kowell explained that a PET scan is reliable evidence that there is a metabolic abnormality in

a person's brain. Id. at 4241:17-20. He also confirmed that it is an "accepted" tool for evaluating behavior. Id. at 4254:15-16; see also id. at 4248:11-4249:13.

Dr. Mark Mandelkern, a doctor of nuclear medicine who had been running the PET scan center at the West Los Angeles VA hospital for 15 years and had published articles on PET scan diagnosis of epilepsy, dementias, AIDS, and functional brain illnesses, testified "there's no doubt that people believe in PET. They know that PET demonstrates the functioning of the human brain" and that this was "the prevailing view in the neurological scientific community." Id. at 4269:16-18, 4270:14-20. He also confirmed that PET scans are approved for coverage by several insurance companies and government agencies, including the federal Health Care Financing Agency. 31 RT 4267:15-20.

Over objections by the defense (31 RT 4199:23-4200:14, 4213:2-8), the court allowed the prosecutors to cross-examine the defense witnesses about matters well beyond the scope of their Kelly-Frye motion. The prosecutor asked Dr. Gold, "In this case the history and physical, did that present any indications to you that you would need to order a PET [scan]?" 31 RT 4199:16-18. Defense counsel objected

> With regards to the specifics of my particular client, it's really not relevant at all for this particular hearing. [¶] It's whether or not this – the PET scan is a scientifically acceptable tool in the neurologic community as a device to measure the functions of the brain. If it is, then it's admissible. [¶] Whether or not – how it applies to my client is really irrelevant in this particular case, or any Kelly-Frye case, as I understand it.

31 RT 4200:4-14; see also id. at 4201:5-7 ("It has nothing to do with regards to – specifically to my client as to whether or not it meets the Kelly-Frye standard.") When the prosecutor began deposing Dr. Gold about the

specific diagnosis indicated by Nieves's PET scan results, the defense objected again:

> The District Attorney is taking a deposition with regards to potential testimony. [¶] It has nothing to do with the admissibility of the PET scan as a functional device for the Kelly-Frye hearing. [¶] That's what we're here for.

31 RT 4213:2-8. The court overruled both objections. Id. at 4201:8, 4213:13; see also 4215:7-18 (overruling defense objection to questions about why Dr. Gold did not also order another type of test); 4219:25-4220:11 (overruling objection to questions about Dr. Gold's communications with the doctor who performed the PET scan); 4660:21-4661:15 (overruling objection to questions posed to Dr. Kowell about the specific areas of the brain related to memory failure); 4279:10-17 (overruling objection to questions about whether PET scans are generally ordered with other tests).

The prosecution called two neurologists at the Kelly-Frye hearing: Dr. Helen Mayberg and Dr. Edwin Amos.

Dr. Mayberg, a Canadian researcher from Toronto with little current clinical experience (33 RT 4301:2-22), acknowledged that PET scans are generally accepted in the medical community for certain uses, including corroborating diagnoses of dementia or epilepsy (33 RT 4306:14-4307:5, 4328:9-14). Her view, however, was that the procedure is not reliable as a predictor of behavior or as a diagnostic tool in isolation. 33 RT 4304:15-4305:2. She testified that there are no established PET scan patterns that could be used "to determine behavior or mental state" (33 RT 4307:14-15), and that uses of PET scans to identify or diagnose "depression, criminal behavior, impulsivity, are highly experimental," (Id. at 4320:28-4321:8).

Dr. Mayberg acknowledged that PET scan evidence was admitted in 10 of the 13 capital trials at which she had testified. 33 RT 4360:24-4361:5.

Dr. Edwin Amos testified he uses PET scans in his clinical practice and that their primary clinical uses are in connection with evaluating dementia and tumors and in connection with surgery for epilepsy. 33 RT 4465:16-4466:17. He stated that PET scans are generally accepted in the medical community to corroborate a known diagnosis or assist with treatment as opposed to screening for a given disease or condition. Id. at 4466:18-28. He concurred with Dr. Mayberg's view that PET scans are not reliable as a predictor of behavior or as a screening test for depression, childhood brain trauma, criminal behavior or impulsivity, serotonin syndrome, dissociative states, hormone imbalances, mood disorders or anoxia as a baby. Id. at 4472:8-4473:4. He also testified that additional information about the structure of the brain, such as an MRI, would be needed to interpret a PET scan accurately. Id. at 4471:1-4472:7.

Over repeated objections by the defense, the court permitted the prosecution's experts to testify at length about matters outside the scope of Kelly-Frye issues framed by the prosecutors' motion. Dr. Mayberg was asked to comment on the specific results from Nieves's PET scan, including the way those results were depicted and the contents of Dr. Gold's and Dr. King's reports. 33 RT 4337:25-25, 4339:22-4341:6, 4341:10-4344:25; id. at 4338:1-5, 4437:23-4438:1, 4438:25 (defense objections). Dr. Amos also testified that the way Nieves's PET scan results were depicted was misleading because computer-enhanced color contrasts might have exaggerated the variations in brain activity shown in the original grayscale images. Id. at 4474:17-4476:9, 4488:27-4489:19. When Dr. Amos recounted the contents of a conversation he had with Dr. King about

Nieves's PET scan results, the court overruled a hearsay objection by the defense. Id. at 4477:4-4478:19.

In an effort to address the prosecution experts' testimony regarding Nieves's specific PET scan results, the defense recalled Drs. Gold and Mandelkern. 33 RT 4538:3-23. Dr. Mandelkern testified that he had met with Dr. King and reviewed the original "grayscale" images of Nieves's PET scan. Id. at 4547:11-4549:11. He concurred with Drs. Gold and King that the PET scan showed "significant abnormalities" in Nieves's brain function, which were "quite significant, quite severe, unambiguous." Id. at 4453:3-4454:9; 4456:4-12; see also 4456:16 ("This is far from a normal scan."). He gave his opinion that "[t]here are certainly profound abnormalities in her brain which must have some connection with her function." Id. at 4565:15-17. He testified that Nieves "could have temporal lobe epilepsy because her right temporal lobe is hypometabolism, and that's one of the diagnostic keys for detecting temporal lobe epilepsy" (id. at 4563:28-4564:3, 4568:22-28), and that the results "are wholly suggestive of trauma," (id. at 4567:26-27). He recommended further testing, including an MRI and another, higher quality PET scan. Id. at 4565:22-4566:12.

Dr. Gold reiterated the findings stated in his report that the PET scan showed "significant abnormalities" in Nieves's brain function that could have been caused by "birth defects, anoxia at birth, significant head injuries." 33 RT 4573:8-23. He confirmed the PET scan was one of a number of items he considered in reaching his conclusions. Id. at 4589:2-4590:10 (also considered physical examination, history from Nieves and Waco, neuropsych report from Dr. Humphrey, EEG, and Dr. King's report on the PET scan).

The defense also requested an opportunity to offer testimony from Dr. King the following day to address the concerns raised by the prosecution experts that the images of Nieves's PET scans had been manipulated in some way and that the procedure had not been done properly. 33 RT 4602:22-4603:24, 4604:20-23, 4605:19-24. The court denied the request. Id. at 4607:4-5.

> The court ruled that the PET scan evidence was inadmissible: There is no substantial agreement and consent in the scientific community regarding the process' reliability for the purposes for which it's being used. [¶] Going beyond that, the Court finds that there's little, if any, relevance to this material because it's highly speculative. There's no dating of the condition. It basically is speculating that because there is some perceived abnormality – and there's some dispute as to whether there is an abnormality – to the extent it is seen, it doesn't say anything about what impact that would have had on the defendant on July 1st of 1998 or several days before that. [¶] And even if it has some relevance, under 352 it clearly is outweighed by the undue consumption of time, confusing of the issues to the jury, undue prejudice because of the way the photographs will heighten attention and refocus the jury on something and cause them to speculate. [¶] For all of those reasons, the Court will not permit any evidence or any reference or any argument regarding the PET scan evidence in this case. No expert may talk about it, may not refer to it, and any opinion they state must be based on something aside from the PET scan evidence.

33 RT 4637:6-4638:3.

The court also denied the defense's request for a brief continuance to have an MRI and an additional PET scan performed that could address concerns raised by the prosecution experts about the original PET scan findings. 33 RT 4638:14-4640:13 (denial for failure to show due diligence); 18 RCT 4576.

The defense filed a motion for reconsideration of the order excluding the PET scan evidence. 19 RCT 4695. But, on July 6, 2000, the court denied the motion as to the guilt phase and reserved the issue of whether to admit the PET scan evidence during the penalty phase. 44 RT 6443:14-27.

On July 26, 2000, while the jury was deliberating the guilt verdict, the defense requested the court to issue a transportation order so Nieves could have additional neuroimaging tests performed. 57 RT 8967-8975, 9005:1-16. The defense requested the court defer its decision on the motion for reconsideration of the admission of PET scan evidence at the penalty phase until the defense had an opportunity to present results from these additional tests. Id. at 8970:9-8971:5, 8973:24-8975. The court denied the transportation order (id. at 9011:5-6), and proceeded with a hearing on the motion for reconsideration (57 RT 8978-9002).

The defense argued that the questions of relevance and admissibility were very different at the penalty phase:

> What we're trying to do is show an aspect of our client's brain which is a part of her physical or mental condition, which may invoke sympathy from at least one juror. . . . So with that low threshold of relevance and with a PET scan which shows abnormalities . . . . I think we've met the threshold under Factor K in the penalty phase. [¶] . . .
>
> We are not trying to present a diagnosis of a particular mental illness or disease. What we're trying to show is that she [Nieves] has an abnormality in her brain, and it may not have any connection with her outward behavior, or with the crime. . . . If they feel sympathy for her because she has a defect or an abnormality in her brain . . . they could still feel enough compassion, particularly in a close case, to say – or as to any individual juror, I should say, an individual juror could say: "I am not going to vote death for this woman."

57 RT 8980:12-24, 8984:10-14, 19-28. The court refused to admit the PET scan evidence at the penalty phase and denied the defense's request for a further hearing on admissibility. Id. at 8987:28, 8990:18-24, 9042:7-20.[110]

During the penalty phase, the defense renewed its motion for a transportation order to permit further testing of Nieves's brain function and structure. 60 RT 9381-91. The court again denied the request. Id. at 9389:11-9290:23.

B. The Trial Court Abused its Discretion by Prejudging and Excluding the PET Scan Evidence at the Guilt Phase

Despite being hamstrung by lack of notice and insufficient time fully to prepare for the Kelly-Frye hearing, the defense did make a sufficient showing of admissibility to permit the PET scan evidence to go to the jury.

The Kelly test does not demand "'absolute unanimity of views in the scientific community.'" People v. Venegas (1998) 18 Cal.4th 47, 85 (quoting People v. Guerra (1984) 37 Cal.3d 385, 418). The proponent of scientific evidence can establish "general acceptance" without showing a consensus of opinion, or even majority support by the scientific community. People v. Leahy (1994) 8 Cal.4th 587, 601. The fact the prosecution experts who testified at the Kelly-Frye hearing disagreed with the views of the defense experts about the usefulness of PET scans in connection with particular diseases and conditions was not, therefore, a valid basis for excluding the evidence under Kelly.

Moreover, when a scientific technique is generally accepted in the scientific community, "criticism of any particular methodology goes to the weight of the evidence, not to its admissibility" People v. Fierro (1991) 1

[110] The court later denied a defense motion for a mistrial on the basis of the exclusion of the PET scan evidence. Id. at 9002:15-25.

Cal.4th 173, 214 (rejecting a challenge to a "particular method" of using electrophoresis). All five of the experts who testified at the Kelly-Frye hearing concurred that PET scans are generally accepted in the scientific community as a reliable method of measuring metabolic activity in the brain. See 31 RT 4194:9-15, 4195:22-27, 4243:6-4245:4, 4270:14-23, 32 RT 4430-13-28, 33 RT 4465:16-4466:17. Their disagreements were over the application of this technique in certain contexts – that is, over "particular method[s]" of using PET scans, as in Fierro. Those disagreements should have been presented to the jurors so they could assess the proper weight and significance to accord the PET scan evidence showing abnormalities in Nieves's brain function. See Fierro, 1 Cal.4th at 214; see also People v. Stoll (1989) 49 Cal.3d 1136, 1149 (holding that it was reversible error for the trial court to exclude expert testimony based on analysis of personality tests performed on the defendant and used as one part of a "diagnostic process" combining "many, many pieces of data").

C. The Kelly-Frye Hearing Was Fundamentally Unfair

If this Court finds that the defense did not establish the admissibility of the PET scan evidence at the Kelly-Frye hearing, or that the court's exclusion was justified for any other reason stated by the trial court, than any insufficiency in the showing made by the defense is attributable to the fundamentally unfair manner in which the hearing was conducted and the convictions and penalty should be reversed on that ground.

1. The Trial Court Abused its Discretion and Violated Nieves's Due Process Rights By Denying the Defense Sufficient Time to Prepare for the Hearing

After granting the prosecution a two-week continuance to review expert materials timely disclosed by the defense, see 18 RCT 4512, the court denied Nieves's request for a continuance to prepare for the Kelly-

Frye hearing requested by the prosecution. This denial was an abuse of discretion and was so arbitrary as to violate due process.

Although the determination whether a continuance should be granted normally rests in the discretion of the trial court, such discretion "may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." Jennings v. Superior Court (1967) 66 Cal.2d 867, 875-76 (holding that it was prejudicial error to deny a continuance to allow the defendant to locate and subpoena a material witness); see also People v. Snow (2003) 30 Cal.4th 43, 70. The determination whether there has been an abuse of discretion requires consideration of "all circumstances." People v. Beames (2007) 40 Cal.4th 907, 921; see also People v. Jones (1998) 17 Cal.4th 279, 318.

In certain cases, "[t]he denial of a continuance may be so arbitrary as to deny due process." Beames, 40 Cal.4th at 921; see also People v. Frye (1998) 18 Cal.4th 894, 1013. "[T]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." Id. (quoting Ungar v. Sarafite (1964) 376 U.S. 575, 589-90). In determining whether a denial of a motion for continuance was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and the reasons presented for the request. Frye, 18 Cal.4th at 1013 (citing Ungar, 376 U.S. at 589).

In this case, the defense made a reasonable request for additional time to prepare for the unexpected Kelly-Frye hearing. Counsel sought a continuance in order to identify, schedule, and prepare additional experts to address the complex question whether PET scans are generally accepted in the medical community for certain uses and establish the necessary foundation for admission of this important evidence. See 18 RCT 4535-36.

"General acceptance" under Kelly means a consensus drawn from a typical cross-section of the relevant, qualified scientific community. People v. Leahy (1994) 8 Cal.4th 587, 612. In light of the prosecution's three-month silence about the PET scan evidence and its last-minute, mid-trial request for the Kelly-Frye hearing, it was unreasonable to expect the defense to have expended the time and resources necessary to martial expert opinions and other evidence reflecting a cross-section of the medical community and prepare for a Kelly-Frye hearing at an earlier time in the proceedings. Nonetheless, the court quickly scheduled the hearing based on the availability of the prosecution's expert (31 RT 4145-4146:9), and denied the reasonable request for a continuance, leaving the defense with only four and a half business days (Monday, June 5-Friday, June 9) to prepare for such an important hearing. Compare People v. Roybal (1998) 19 Cal.4th 481, 502-06 (defendant had a month prior to trial to prepare for a Kelly-Frye hearing to exclude DNA evidence offered by the prosecution).

Moreover, the motion for a continuance was made on June 7, 2000, which was early in a two-week recess of the trial the court had accorded the prosecution.[111] Unlike in the Beames case, where the defendant requested a continuance on the day the trial was scheduled to begin, granting Nieves's motion for a continuance would not necessarily have resulted in a conflict with other, already-scheduled trial proceedings or inconvenienced the jurors or witnesses. See Beames, 40 Cal.4th at 921.

Under these circumstances, the court's refusal to accord the defense additional time to prepare for the Kelly-Frye hearing constituted an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a

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[111] The recess was from Friday, June 2, 2000, to Monday, June 19, 2000. See 18 RCT 4512.

justifiable request for delay. . .'" that violated Nieves's due process rights and rendered the Kelly-Frye hearing fundamentally unfair. See Beames, 40 Cal.4th at 921 (quoting Ungar, 376 U.S. at 589); see also Morris v. Slappy (1983) 461 U.S. 1, 11-12 (motion to continue to substitute counsel); People v. Buckey (1972) 23 Cal. App. 3d 740 (it was an abuse of discretion to deny a continuance so that the defendant could present the testimony of a physician who prescribed drugs the defendant was charged with possessing unlawfully).[112]

2. The Trial Court Erred by Giving the Prosecution an Unauthorized Opportunity to Depose the Defense Experts and Offer Testimony Regarding Matters Beyond the Scope of the Motion

The defense first learned that the prosecution was challenging the admissibility of the PET scan evidence a week before the Kelly-Frye hearing. At that time, the prosecution made an oral request for a Kelly-Frye hearing for the limited purpose of determining if the PET scan evidence was "generally accepted in the medical and scientific community for the purpose it's being offered." 31 RT 4145:7-13. A week later, on the morning of the Kelly-Frye hearing, the prosecution filed and served a written motion that challenged the general acceptance of the forensic use of PET scan evidence in the scientific community and the scientific connection between PET scans and criminal behavior. 18 RCT 4562.

The prosecution did not provide notice of any intention to challenge the qualifications of the defense PET scan expert or the procedures used to perform the PET scan on the defendant. As in People v. Wash (1993) 6

[112] As we pointed out in Part III, C., 5, d. supra, the court was willing to accommodate prosecution scheduling requests.

Cal.4th 215, the challenge under Kelly was brought solely on the ground that it failed to meet the general acceptance criterion. Id. at 242.

The hearing should therefore have been confined to general questions about the PET scan's use as a forensic tool – that is, to the issues raised in the prosecution's motion. 18 RCT 4562. See People v. Hoyos (2007) 41 Cal.4th 872, 909 (Kelly-Frye objection that "neither explicitly nor implicitly raised the issues" other than the first criterion was ineffective to preserve an objection based on a different ground); accord People v. Fierro (1991) 1 Cal.4th 173, 214; see also People v. Roldan (2005) 35 Cal.4th 646, 733 ("generic, nonspecific notice" by the prosecution regarding the scope of aggravating evidence it intends to present "fails to give adequate notice" to the defense). In fact, the court misleadingly told defense counsel the issues to be addressed at the hearing were "framed . . . by what the people put in their motion to exclude the evidence." 31 RT 4177:26-28.

The court abused its discretion and deprived Nieves of due process by subsequently allowing the prosecutors to mount a much broader, multi-pronged attack on the PET scan evidence without proper notice to the defense. Over repeated objections by the defense, the court permitted the prosecution to delve extensively into the specific circumstances of Nieves's PET scan and results. Dr. Gold was cross-examined about why he ordered a PET scan for Nieves and why he did not order an MRI. 31 RT 4215:7-18, 4279:10-17. Dr. Mayberg testified at length about Nieves's PET scan results and Dr. Gold's and Dr. King's analysis of those results. 33 RT 4337:25-25, 4339:22-4341:6, 4341:10-4344:25. Dr. Amos commented on the way the results were presented and reported on a conversation he had with Dr. King. Id. at 4474:17-4476:9, 4477:4-4478:19, 4488:27-4489:19.

On the second day of the hearing, after the defense objected to a question about whether Nieves's PET scan could "help you understand the chain of events that occurred in this case" on the night of the fire (32 RT 4337:26-27), the court announced that the hearing was not limited to the issues raised in the prosecution's motion as he had stated at the outset of the hearing:

> Mr. Waco: Again, your honor, I would object, because it's getting case relevant.
>
> The Court: It's overruled. The Court is interested in the relevance of this evidence. It's not limited to the Kelly-Frye issue, Mr. Waco.

Id. at 4338:1-5.[113] Later the same day, the defense objected again to the breadth of Dr. Mayberg's testimony. Id. at 4337:23-4339:1. At the court's invitation, the prosecutors expanded the scope of their objections even farther beyond the issues in their motion:

> The Court: Well, let me hear from the People, and let them articulate what their concerns are here, and so there is just no misunderstanding about this. So Miss Silverman and Mr. Barshop, what are your objections to the PET scan evidence? It is limited to the Kelly-Frye issue, or is it something else?
>
> Miss Silverman: No. I believe that we're objecting to it, your Honor, on three different grounds. [¶] The first ground, obviously, the Kelly grounds . . . . [¶] The second issue is that there has not been established any connection between any findings on a PET scan related to the defendant in this case and her conduct on the date in question, July 1st of 1998. The PET scan, therefore, is irrelevant. [¶] The third ground, of course, is under 352 . . . . At this time, there are some serious

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[113] Although the prosecution did mention relevance in the motion served on the morning of the hearing, it raised the issue in the context of the general question of a link between PET scans and "criminal behavior," not on the specific question of whether Nieves's PET scan might have any bearing on the "chain of events" in the case. 18 RCT 4562.

> issues under 352 regarding whether there is any probative value to this particular piece of evidence and how it relates to the fact that it's so highly prejudicial, given the manner in which it's being offered.

Id. at 4339:27-4341:6. See also id. at 4442:14-18.

But the defense was not given an opportunity to address these new issues. When defense counsel requested a brief continuance to the following day so he could call Dr. King to respond to the prosecution experts' allegations that the PET scan images had been manipulated to exaggerate Nieves's brain function deficits, the court refused. 33 RT 4602:27-4606:10, 4607:4-15.

D. Exclusion of the PET scan at the Guilt Phase Violated Defendant's Right to a Fair Trial and to Present a Meaningful Defense

The PET scan evidence would have served to support and corroborate the findings from other tests and examinations, such as Dr. Humphrey's neuropsychological testing and Dr. Ney's opinions.[114] Dr. Gold was prepared to testify that test results were suggestive of some sort of head trauma in Nieves's life. 31 RT 4190:4-8. See Exh. EE (Gold Report). The PET scan was meant, in part, to look for an explanation of Nieves's history. Id. at 4201:19-28. "History suggested some brain disorder. PET scan confirmed it. Neurological testing confirmed it, and those three pieces fit together very well." Id. at 4212:17-20. The scan result was also consistent with epilepsy. Id. at 4214:3-4214:14. It showed a brain abnormality. Id. at 4217:21-28.

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[114] It likely would have corroborated Dr. Plotkin's findings as well, but Dr. Plotkin was retained and testified after the court had ruled that the PET scan result was inadmissible in evidence. 53 RT 8104:6-27. But there is no way of knowing on this record because the PET evidence could not be considered Dr. Plotkin.

All of this evidence would have given weight to the opinions of Dr. Humphrey and Dr. Ney. By excluding this evidence, the court deprived Nieves of her Sixth Amendment right to present a defense. Because this evidence would have bolstered the opinions of the other experts by offering scientific objective proof, it "offered a basis from which the jury could infer that [she] did not premeditate or deliberate the murders." See People v. Coddington (2000) 23 Cal.4th 529, 580. Tests that meet Kelly/Frye standards are routinely used in criminal trials in California by both the prosecution and defense. The weight of the evidence is for the jury to decide. People v. Cook (2007) 40 Cal. 4th 1334, 1344-47. Because the trial court failed to follow California law, Sandi Nieves's right to due process was violated. Chambers v. Mississippi, (1973) 410 U.S. 284, 302; Parle v. Runnels (9th Cir. 2007) 505 F.3d 922.

There was no basis, and no authorization for the trial court to permit the prosecution to depose the defense experts outside of the Kelly/Frye framework. The criminal discovery statute limits pretrial discovery to the terms of Penal Code §§ 1054.3 and 1054.5. See Verdin v. Superior Court (2008) 43 Cal.4th 1096.

Further, the trial court's arbitrary and one-sided preclusion of this evidence deprived Sandi Nieves of her constitutional rights to due process, to a fair trial, and to a fair opportunity to present a defense in violation of the Sixth and Fourteenth Amendments. Crane v. Kentucky (1986) 476 U.S. 683, 690 (Sixth and Fourteenth Amendments guarantee "a meaningful opportunity to present a complete defense"); Holmes v. South Carolina, (2006) 547 U.S. 319, 324-329 (same); Chambers, 410 U.S. at 302 (same); Ake v. Oklahoma (1985) 470 U.S. 68 (right to present a defense includes defense based on mental condition); Wardius v. Oregon (1973) 412 U.S.

470, 474 (noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," and holding that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense); Parle, 505 F.3d at 931-933 (cumulative effect of exclusion of mental state evidence violated due process by infecting trial with unfairness and undercutting the defense); Beck v. Alabama (1980) 447 U.S. 625, 637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense).

E. Exclusion of the PET Scan at the Penalty Phase Violated Defendant's Eighth and Fourteenth Amendment Rights

Because the trial court also refused to admit the PET scan at the penalty phase, defendant's right to a fair penalty phase trial, to present a meaningful defense, to offer mitigating evidence, and to a reliable sentence was denied in violation of the Sixth, Eighth, and Fourteenth Amendments. The relevance standard for admission of penalty phase mitigating evidence is low. Tennard v. Dretke (2004) 542 U.S. 274. The mitigating evidence does not have to be related to the underlying crime. Smith v. Texas (2004) 543 U.S. 37, 45. Thus, it was not necessary to connect the PET scan results to "criminal behavior" or the "chain of events" in this case. Under Ake v. Oklahoma (1985) 470 U.S. 68, the defendant had a right to a defense based on mental condition as a mitigating factor. Any barrier, whether it is imposed by statute, the sentencing court, or an evidentiary ruling, that precludes the jury's consideration of relevant mitigating evidence results in constitutional error. People v. Mickey (1991) 54 Cal.3d 612, 693. Defendant was therefore denied her rights to present a meaningful defense, Crane v. Kentucky, 476 U.S. at 690 (Sixth and Fourteenth Amendments guarantee "a meaningful opportunity to present a complete defense") and

denied a reliable sentence, Zant v. Stephens, (1983) 462 U.S. 862, 879. See Parle v. Runnels (9th Cir. 2007) 505 F.3d 922, 931-933 (exclusion of medical expert's testimony about effects of bi-polar disorder made defendant's defense "'far less persuasive,' infecting his trial with unfairness, and depriving him of due process").

Here, the exclusion of the PET scan evidence at the penalty phase was undoubtedly prejudicial. It would have added weight to the defense argument that, through no fault of her own, Sandi Nieves was not a capable of coping with the multiple adverse events that were imploding around her: the abortion, the abandonment by Scott Volk, the abandonment of the children by David Folden, the potential loss of child support. Coupled with evidence of traumatic brain injury earlier in her life, she would have had a chance for a sentence other than death, in part, because at least one juror could have found a basis for sympathy and mercy.

When this exclusion of the PET scan is added to the exclusion of Dr. Kyle Boone from testifying at all, and the limitations on the other witnesses who testified for the defendant at the penalty phase, the prejudice is overwhelming. See Parts XIX and XX, infra. There was a reasonable possibility that the exclusion of the PET scan evidence alone, and in combination with the other errors, affected the verdict. People v. Gay (2008) 42 Cal.4th 1195, 1223 (citing People v. Lancaster (2007) 41 Cal.4th 50, 94; People v. Guerra (2006) 37 Cal. 4th 1067, 1144-1145). Reversal is also required because respondent cannot meet its burden of "prov[ing] beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." Chapman v. California (1967) 386 U.S. 18, 24.

IX. THE TRIAL COURT PREJUDICIALLY REFUSED TO DISQUALIFY A PROSECUTION EXPERT WHO HAD BEEN POACHED FROM THE DEFENSE

Defense confidential consultant, Dr. Nancy Kaser-Boyd, conducted a psychological evaluation of Sandi Nieves in order to aid the preparation and presentation of the defense case. 18 RCT 4643. As a part of the evaluation, Dr. Kaser-Boyd enlisted Dr. Alex Caldwell to interpret Sandi Nieves's responses to the Minnesota Multiphasic Personality Inventory-2 (or MMPI-2).[115] Id. She paid for Dr. Caldwell's expert consultation through funds allocated to her under Penal Code § 987.9.[116] 36 RT 4957:8-9. Dr. Kaser-Boyd shared with Dr. Caldwell confidential information related to Nieves's defense that was protected under both the psychotherapist-patient and attorney-client privileges.

Fully aware of the defense consultation with Dr. Caldwell, the prosecution nonetheless sought and obtained the appointment of Dr. Caldwell as a prosecution expert. 18 RCT 4527-4528; 34 RT 4746:1-20. Defendant moved to vacate the appointment, 18 RCT 4571-4573, but the court denied the motion, 36 RT 5013:14-16.

The court allowed Dr. Caldwell to testify over defense objection. 44 RT 6575:12-14. Caldwell provided testimony about his interpretation of Sandi Nieves's MMPI-2 profile. It was detrimental to the defense. 44 RT 6589:1-5, 6590:20-6593:27, 6598:9-9599:11. He also gave a damaging expert opinion that letters Sandi Nieves had written were angry suicide

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[115] The test performed on Sandi Nieves is referred to interchangeably on the record as the MMPI and the MMPI-2.

[116] Penal Code § 987.9(a) states in pertinent part: "In the trial of a capital case . . . the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense."

notes. 44 RT 6613:1-6615:10. The prosecution relied heavily on Caldwell's testimony during its closing argument to portray Sandi Nieves as a liar and a manipulator. 54 RT 8459:18-26.

The trial court erred when it allowed Dr. Caldwell to switch sides to serve as an expert witness for the prosecution because he already had received confidential information from the defendant pertaining to her capital case. Caldwell's testimony violated Sandi Nieves's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and resulted in prejudice.

A. The Trial Court Allowed Dr. Alex Caldwell to Switch Sides to Serve as an Expert Witness for the Prosecution

1. Confidential Defense Consultant Dr. Kaser-Boyd Exchanged Privileged Information with Dr. Caldwell

Dr. Kaser-Boyd, a psychologist, was appointed pursuant to Evidence Code §§ 730 and 952 and Penal Code § 987.9 as a confidential expert to consult with defense counsel in the preparation and presentation of Sandi Nieves's defense. Confidential RCT 175-177. As a part of her consultation, Dr. Kaser-Boyd examined and evaluated Sandi Nieves. 18 RCT 4643. Her evaluation included administering the MMPI-2 test to Sandi Nieves. Id. In completing the MMPI-2, Nieves had to respond true or false to statements covering a wide range of deeply personal topics including, but not limited to, distress and depression, suicidal thoughts, and sexual difficulties.[117] Exh. 85A.

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[117] Sample true-false questions on the MMPI-2 related to distress and depression include: "I am certainly lacking in self-confidence," "I certainly feel useless at times," and "I am afraid of losing my mind." Sample true-false questions related to suicidal thoughts include: "Sometimes I feel as if I must injure either myself or someone else," "I

(continued...)

At the time of trial, two companies scored the MMPI-2, the National Computer Systems or NCS [118] and Caldwell Reports. 32 RT 4458:3-1, 36 RT 4969:16-17. Dr. Kaser-Boyd sent Sandi Nieves's confidential MMPI-2 answers to Dr. Caldwell for scoring and interpretation. 18 RCT 4643. She requested that he provide extended scores and a narrative report. Id. She paid for his services from Pen. Code §987.9 funds.[119] 36 RT 4957:1-11. The report that Dr. Caldwell signed and returned to Dr. Kaser-Boyd, dated February 3, 2000, included the following paragraph:

> This report was prepared for our professional clientele. In most cases this is confidential information and legally privileged. The ongoing protection of this privilege becomes the responsibility of the professional person receiving the attached material from Caldwell Report.

Exh. 85A at 6 (emphasis added). After receiving the report, Dr. Kaser-Boyd spoke with Dr. Caldwell personally, provided additional confidential information about the case, and expressed an intention to consult further with him about issues arising from the report – something she was unable to do after his appointment as a prosecution expert. 18 RCT 4642-4644.

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[117](...continued)
believe I am a condemned person," and "I have recently considered killing myself." Sample true-false questions related to sexual difficulties include: "I have never been in trouble because of my sex behavior," "I have never indulged in any unusual sex practices," and "I am worried about sex." Exh. 85A.

[118] NCS was also referred to on the record as National Computer Research Center, 32 RT 4458:7-12.

[119] Defense counsel explained on the record that although it could have had Dr. Caldwell appointed under Penal Code § 987.9, there was no need to do so because Dr. Kaser-Boyd already was paying for his services with § 987.9 funds. 36 RT 4987:6-11.

2. Defendant Moved to Vacate Dr. Caldwell's Appointment as a Witness for the Prosecution

On June 13, 2000, defense counsel objected to the prosecution's intention to call Dr. Caldwell as a witness:

> [Mr. Waco]: I have a problem with regard to Dr. Caldwell.
>
> The district attorney, I believe, violated the attorney/client privilege, as well as the doctor/patient privilege, as well as due process of law, as well as the violations of the discovery statutes in retaining the services of Dr. Caldwell when they know, because of information I turned over to them prior to Dr. Boyd's testimony, that Dr. Boyd gave her various testings, MMPI, etc., evaluated through Dr. Caldwell's service.
>
> This information was turned over to the prosecutor prior to [Dr. Boyd's] testimony, and she still hasn't testified yet.

32 RT 4457:12-25.[120] When the defendant raised this challenge to the appointment of Caldwell, Kaser-Boyd had not testified, nor did she ever testify, during Sandi Nieves's trial.

The prosecution responded that the process for scoring is computerized and that Caldwell did not know whose MMPI he was scoring. 32 RT 4458:13-20. However, defense counsel pointed out that Caldwell personally signed off on Sandi Nieves's MMPI report. 32 RT 4458:21-22. In fact, he issued a report that gave a score and interpreted the results. 44 RT 6589:1-9. Essentially, the service provided expert opinion based on

[120] The prosecution complained to the court that a representative of the defense team had attempted to dissuade Caldwell from testifying for the prosecution. 32 RT 4456:20-24. Defense counsel replied that the more appropriate issue for the court to consider was that the prosecution improperly retained Caldwell after confidential defense consultant Kaser-Boyd had already consulted with Caldwell in connection with Sandi Nieves's case. 32 RT 4457:12-28.

multi variate data. 44 RT 6620:26-6625:6. See id. At 6625:5-6 ("I'm involved in the writing of the logic that generated it.")

Defendant filed a Motion to Vacate Appointment of Defense Expert to Assist Prosecution. 18 RCT 4571-4573. Defense counsel, Gregory Fisher, argued that defense counsel obtained privileged "mental state evidence" from the defendant through its confidential defense consultant Dr. Kaser-Boyd in the form of responses to the MMPI. 34 RT 4746:4-7. Defense counsel provided the raw data through Kaser-Boyd to Caldwell to "evaluate and to furnish us with an expert opinion as to the meaning of this mental state evidence, and he did do that." 34 RT 4746:8-11. Kaser-Boyd considered Caldwell's report in her evaluation of the defendant. 18 RCT 4572.

The court wanted to know whether the data had been disclosed to the prosecution. 34 RT 4746:14-17. Defense counsel explained that it had, but only because the defense was forced by discovery rules to disclose it.[121] 34 RT 4746:21-26. At no time, defense counsel argued, was privilege waived. Id. The defendant contended that Dr. Caldwell remained a defense expert who had accessed privileged information: "So the problem here is that, first of all, we used him as an expert, and we furnished him with privileged information; he furnished us with an expert opinion, which was privileged

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[121] The trial court denied that it had compelled the defense to provide the prosecution with discovery related to Dr. Caldwell, accused defense counsel of making misrepresentations to the court, and threatened to hold him responsible. 34 RT 4747:9-4748:10.

However, defense counsel disclosed this information pre-trial after the trial court had threatened that if defense counsel waited until the time of an expert's testimony to disclose the expert's source materials, the jury would be told that any resulting delay in the trial was the fault of the defense. 9 RT 421:17-23.

at that time." 34 RT 4747:2-5. The trial court deferred judgment. 32 RT 4748:1-4.

When defense counsel resumed the argument in support of the motion to vacate the appointment (35 RT 4752:28), he clarified that the defendant had disclosed Dr. Caldwell's reports to the prosecution pursuant to its obligations under accelerated discovery which required the defendant to provide notice and information regarding its experts, even before they testified (35 RT 4753:1-21). However, defense counsel argued, this did not "make it permissible for the prosecution to then use our expert to evaluate other data which they got from us, and then have him appointed to assist the prosecution." 35 RT 4753:22-25.

Counsel explained that prosecution expert Dr. Barry Hirsh had sent Caldwell additional data to evaluate, particularly a 1997 MMPI, that the prosecution had obtained from the defendant through discovery. 35 RT 4753:26-4754:4. "So what happened was we gave discovery of all of this information to the prosecution. Dr. Hirsch then had Dr. Caldwell, who is our expert, evaluate other evidence that we had disclosed for the prosecution, and then he was appointed at the rate of $450 an hour to assist them." 35 RT 4754:8-13; 18 RCT 4527-4528.

Defense counsel further explained that the Fifth Amendment right against self-incrimination of the defendant was implicated here because Caldwell evaluated the defendant's MMPI-2 answers in such a way as to draw inferences about the defendant's personality and state of mind. 35 RT 4758:9-15. The report that Caldwell produced for Dr. Kaser-Boyd included a five-page narrative that described Sandi Nieves's personality profile based on her responses to the MMPI questions. Exh. 85A. Defense counsel argued that Dr. Caldwell could use this information to draw conclusions

about the defendant's mental state at the time of the crime. 35 RT 4758:16-20. Defense counsel stressed that Dr. Caldwell did more than just score a standardized test, he evaluated the information and formed an expert opinion as to the defendant. 35 RT 4758:10-13. "[H]e is more than a glorified calculator," defense counsel told the court, "He's giving an expert evaluation and opinion about what kind of a person [Sandi Nieves] is." 35 RT 4759:10-13.

Defense counsel submitted that it made no difference that Dr. Caldwell had not seen Sandi Nieves personally because he had evaluated mental state evidence provided to him by another defense expert, Dr. Kaser-Boyd. 35 RT 4759:20-22. Because defendant had not called Kaser-Boyd to testify, the prosecution could not call Caldwell. 35 RT 4760:16-17.

Defendant submitted an Addendum to Motion to Vacate Appointment. 18 RCT 4642-4644. Dr. Kaser-Boyd signed an attached declaration to the Addendum in which she described her relationship with Dr. Caldwell, the services he provided her, and information about their communications. 18 RCT 4642-4644; 36 RT 4962:23-4963:6. She explained that the service she requested from him was considered a confidential consultation. 18 RCT 4643. She stated, "The average psychologist who uses this scoring service would be quite surprised to be informed that Dr. Caldwell could be retained as an expert for the other side of the case after having provided this consultation service." Id. She also recounted that she spoke to Caldwell personally about the case. Id. She discussed with him her role in the case, the underlying facts of the case, and indicated to him that she would be in future contact with him about the case. Id.

The court wanted to hear from prosecution expert Dr. Barry Hirsch about the nature of the MMPI tests. 36 RT 4967:3-5. Defense counsel objected on the grounds that Dr. Hirsch could not address the issues at stake here, "that they've taken our confidential expert, our confidential material, used our expert to evaluate that material for them, and then subsequent to that have them appointed as their expert to assist them." 36 RT 4967:15-18. The court overruled the objection. 36 RT 4967:20.

Outside the presence of the jury, the prosecution called Dr. Hirsch. 36 RT 4968:14. The court instructed Hirsch to describe the MMPI-2 process. 36 RT 4970:19-25. The court conducted most of the questioning of Dr. Hirsch, including questions on how Caldwell scored MMPI-2 tests and what he did to interpret the scores. 36 RT 4977:15-20, 4978:1-3. Hirsch testified the process was computerized. 36 RT 4978:4-8. But he also testified that what Dr. Caldwell had supplied to Dr. Kaser-Boyd were "interpretive reports." 36 RT 4979:8.

The court then asked Dr. Hirsch, "[D]o you find that there's any ethical limitation on yourself to use the MMPI results that were forwarded by Kaser-Boyd to Caldwell, and you having them and then having them re-scored?" 36 RT 4982:2-5. Dr. Hirsch replied, "None whatsoever, your honor." 36 RT 4982:6. The court then asked Dr. Hirsch, the psychologist, for his legal opinion whether the MMPI and the results were privileged. 36 RT 4982:21-23. Defense counsel objected on the grounds that the court was in fact asking the witness for a legal opinion, but the court told Hirsch to answer. 36 RT 4982:23-4983:5. Hirsch testified that the holder of the privilege is always the patient. 36 RT 4983:6-10.

During cross examination, Hirsch confirmed that he had submitted to Caldwell the 1999 MMPI-2 that Kaser-Boyd had administered to Sandi

Nieves and as well as a 1997 MMPI-2 that Dr. Robert Suiter had administered to her. He had Dr. Caldwell generate a narrative evaluation that had not previously existed. 36 RT 4988:13-4989:4. He also confirmed that he submitted the information to NCS as well and was able to get a narrative evaluation that did not involve going to Dr. Caldwell. 36 RT 4989:5-17. The following exchange then took place between defense counsel and Dr. Hirsch:

> [Mr. Fisher:] So basically, what you did was you used a document you obtained from discovery, and you knew that Caldwell had already been used by Kaser-Boyd in this case; correct?
>
> A Correct.
>
> Q And your position is that within the ethics of the APA and its organizations, that that's ethical to do that in a forensic setting?[122]

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[122] The American Psychological Association's 1992 Ethical Principles of Psychologists and Code of Conduct in effect at the time of trial, available at http://www.apa.org/ethics/code1992.html#5.01, contains the following ethical standards:

> 5.02 Maintaining Confidentiality. [¶] Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scientific relationships.
>
> . . .
>
> 5.05 Disclosures. [¶] (a) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as (1) to provide needed professional services to the patient or the individual or organizational client, (2) to obtain appropriate professional consultations, (3) to protect the patient or client or others from harm, or (4) to obtain

(continued...)

A Yes. And also in accord with the licensing law for psychologists in the State of California.

36 RT 4990:5-14.

Defense counsel explained to the court that the problem was that Caldwell's services were used to obtain a narrative interpretation, and although Dr. Hirsch called it the computer's opinion, it was really Dr. Caldwell's opinion. 36 RT 4997:1-7. Defense counsel stated he would have no problem if the prosecution used NCS, because the defendant was not using anyone from NCS as an expert. 36 RT 4997:27-4998:1. When asked by defense counsel, Dr. Hirsch agreed that the NCS narrative interpretations were somewhat different from Dr. Caldwell's because Dr. Caldwell decides what data his software is going to give priority based on his research and opinions. 36 RT 5001:20-5002:5.

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[122](...continued)
payment for services, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.
(b) Psychologists also may disclose confidential information with the appropriate consent of the patient or the individual or organizational client (or of another legally authorized person on behalf of the patient or client), unless prohibited by law.
. . .

7.03 Clarification of Role. [¶] In most circumstances, psychologists avoid performing multiple and potentially conflicting roles in forensic matters. When psychologists may be called on to serve in more than one role in a legal proceeding - for example, as consultant or expert for one party or for the court and as a fact witness - they clarify role expectations and the extent of confidentiality in advance to the extent feasible, and thereafter as changes occur, in order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role.

Defense counsel then asked whether it was Dr. Hirsch who had suggested that Dr. Caldwell serve as an expert for the prosecution:

> [Mr. Fisher:] So are you saying that you wanted him appointed so that he could address the issue of how [Dr. Kaser-Boyd] used his data in her report? Is that what you mean?
>
> A There were multiple reasons why I suggested the appointment of Dr. Caldwell. I believe that I did. This has been going on for me for some period of time and it becomes a little bit fuzzy about -- I believe I had that responsibility of making that suggestion.
>
> Q Okay. But I am trying to figure out what the reason was. In other words, you suggested that he be appointed not simply because of the MMPI scoring task that you wanted him to perform, but also because you wanted him to be appointed as an expert to evaluate her report and her inclusion of his data in her report so that he could give you some evaluation of that, or opinion?
>
> . . .
>
> The Court: In other words, it was your suggestion to the prosecutor that Caldwell be called as a witness to comment upon what Kaser-Boyd did as a witness in her report?
>
> The Witness: Yes.
>
> Q By Mr. Fisher: Okay. And has he given you any feedback on that at all?
>
> A He's given me some general opinions, yes.
>
> Q About Kaser-Boyd's report?
>
> A Not -- not as a specific report, but in comparison to the other report that was done by Dr. Suiter.
>
> Q He's given you feedback about a comparison between Dr. Suiter's report and what?
>
> A And doctor -- and the report that Kaser-Boyd had Miss Nieves take.

Q Are you just talking about the MMPI test results, or are you talking about Kaser-Boyd's opinions of what they mean?

A No. The MMPI test results.

Q So you haven't asked him his opinion about what Kaser-Boyd did, or what her opinions are, or anything that she did?

A I did ask about something that Dr. Kaser- Boyd did.

Q Which was what?

A I am not sure that I can state it.

Ms. Silverman: It's irrelevant to what we're talking about.

The Court: In other words, I wanted some factual context to see what the MMPI is, and I think we're getting a little far afield now.

36 RT 5003:12-5005:6.

In light of Dr. Hirsch's testimony, defense counsel argued that the prosecution was improperly using defense expert Dr. Caldwell not only for scoring the tests, which was already problematic, but also to advise the prosecution about "any number of things," including Dr. Kaser-Boyd's report. 36 RT 5009:9-17. Defense counsel stressed that there was "even a stronger reason now to vacate his appointment for the prosecution, because I don't think it would be proper or legally permissible for them to use our expert, the expert who evaluated our test results, to basically be a member of the prosecution team." 36 RT 5009:20-25. He underscored the problem for the court, "It seems to me they've invaded the defense team and taken the expert and tried to put him on their team." 36 RT 5009:26-28, 5012:13-16.

The court denied the motion on all grounds. 36 RT 5013:14-16.

3. Defendant Did Not Waive Privilege

On June 21, 2000, defendant called expert Dr. Lorie Humphrey, a neuropsychologist, to testify about the tests she had given Sandi Nieves. 37 RT 5116:13-15. The prosecution asked her on cross-examination if she had reviewed the 1999 MMPI-2 test scored, analyzed, and interpreted by Dr. Caldwell, to which she answered, "Yes." 38 RT 5332:15-18. When the prosecution asked Humphrey about the contents of Caldwell's report, defense counsel objected on the grounds that the question assumed facts not in evidence. 38 RT 5332:19-24. The trial court overruled the objection. 38 RT 5332:25. The trial court permitted extensive questions from the prosecution about Caldwell's report on the 1997 MMPI-2 that had been prepared for Dr. Suiter, a psychologist who had evaluated Sandi Nieves in connection with her divorce from David Folden, and the 1999 MMPI-2 scores, prepared by Dr. Kaser-Boyd. 38 RT 5340:2-5346:14. The court even had Dr. Humphrey read aloud to the jury from portions of Caldwell's report, on the 1999 MMPI-2. 38 RT 5346:15-5347:7.

The prosecution next called its own expert, Dr. Robert Brook, out of order. 38 RT 5369:5-10. During direct-examination, the prosecution questioned him about Dr. Caldwell's report. 38 RT 5397:1-3.

On July 6, 2000, defense counsel objected to the prosecution's intention to call Dr. Caldwell as a witness. 44 RT 6485:6-16, 6459:4-9.

The prosecution argued that the privilege was waived because defense expert Dr. Humphrey testified that she relied on Dr. Caldwell's reports, and the defense had questioned prosecution witness Dr. Brook about the reports.[123] 44 RT 6460:6-16. Defense counsel countered that

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[123] Dr. Humphrey testified regarding Dr. Caldwell's report only after (continued...)

Humphrey had conducted her own tests, and Dr. Brook had looked at the reports based on the prosecution's assumption that Dr. Kaser-Boyd would testify. 44 RT 6460:17-6461:4. However, Dr. Kaser-Boyd did not testify and therefore the privilege had not been waived. 44 RT 6461:10-17.

The court ruled that the "extensive references" made to Dr. Caldwell's report in front of the jury and the fact that it had been earlier disclosed to the prosecution waived any privilege. 44 RT 6462:1-6. The court overruled the defense objection. 44 RT 6462:7-10. The court then denied the defense request for an Evidence Code 402 hearing on Dr. Caldwell's testimony. 44 RT 6462:13-19.

Defendant raised the issue of Dr. Caldwell's improper appointment to aid the prosecution in her motion for a new trial. 22 RCT 5535-5588.

B. The Significance of Dr. Caldwell's Testimony

The prosecution called Dr. Caldwell to testify on July 6, 2000, a day after Dr. Philip Ney, a defense expert. 44 RT 6575:12-14. First, Caldwell provided testimony about his credentials, including his forty years teaching at UCLA, 44 RT 6576:20-21, his 25 to 30 journal articles and two books, 44 RT 6577:15-18, and his mentorship under the original author of the MMPI. 44 RT 6578:3-14.

Caldwell testified that his service scored the MMPI-2 submitted to him by defense expert Dr. Kaser-Boyd. 44 RT 6589:1-5. He wrote the program that interpreted the test results. 44 RT 6590:11-18. He gave his opinion about how Sandi Nieves approached the MMPI-2. 44 RT 6590:20-

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[123](...continued)
the prosecution asked her about the report over defense objection. 38 RT 5332:15-18. Also, the defense only questioned Dr. Brook about Dr. Caldwell's reports after direct-examination questions on the subject from the prosecution. 38 RT 5397:1-3.

6593:27. He said that she exaggerated and "clearly set out to try to look bad on the test." 44 RT 6593:20-21, 26-27. His testimony also included the following:

> [Ms. Silverman:] And does the profile indicate that it's consistent with someone who is possibly outright malingering?
>
> A It certainly could be. It's not absolutely definitive, but it is easily consistent with that.
>
> Q Is the profile consistent with somebody who is prone to cover over and deny the intensity of resentments and to justify extensively any past acts that were either directly or indirectly revengeful?
>
> A The pattern, to the extent that it is valid, even though exaggerated, is definitely consistent with that.
>
> Q And people who present with the profile indicated by the defendant, are they often individuals who are apt to be seen as self-centered?
>
> A Yes.
>
> . . .
>
> Q Individuals with the defendant's profile, do they often use drastic or violent methods to dramatize the intensity of their unreleased anger during suicide attempts?
>
> A My report says that when people make -- like this, make a suicide attempt, it is often some very drastic and typically violent kind of means rather than, say, sleeping pills, which would be the contrast. You know, "maybe I'll go to sleep and wake up in a nice world." With this pattern, if the person makes a suicide attempt, it is often very drastic.
>
> Q I'll give you another hypothetical. Assume that the person whose profile we've been discussing here set fire to her home after writing what could be characterized as an angry suicide note, which resulted in the death of four of her children.
>
> Mr. Waco: Objection to the characterization of the note, your honor.

The Court: It's a hypothetical. Overruled.

By Ms. Silverman:

Q Which resulted in the death of four of her children in an attempt to kill herself and her five children, would that be consistent with what you just described, the drastic or violent methods to dramatize the intensity of anger?

A Yes, it would be.

44 RT 6598:9-6599:11.

The prosecution asked Caldwell to give his expert analysis of letters written by Sandi Nieves. 44 RT 6613:1-6615:10. Dr. Caldwell stated his conclusion, "These are all suicide goodbye notes in my mind." 44 RT 6615:10.

During the defense cross-examination of Dr. Caldwell, the court sustained at least 100 objections, largely limiting the areas of inquiry available to the defendant.[124] 44 RT 6626:17-45 RT 6783:26.

Without a motion from the prosecution, the trial court stated that it would receive Dr. Caldwell's reports into evidence as Exhibits 85A and 85B. 45 RT 6781:6-17. The court refused to admit Dr. Kaser-Boyd's report even though defense counsel argued that Dr. Caldwell had relied upon it. 45 RT 6781:18-25. Then, referring to Dr. Caldwell's report on the

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[124] The court repeatedly denied defense requests to question Dr. Caldwell outside the presence of the jury about the nature of the prosecution's original contact with him, and whether it had made Dr. Caldwell aware that he had previously provided his services to Dr. Kaser-Boyd in connection with the same case. 45 RT 6647:6-11, 6648:9-28. Defense counsel pointed to Mr. Barshop's declaration in support of the appointment of Dr. Caldwell that made no mention of the fact that Dr. Caldwell had scored the MMPI-2 that defense expert Dr. Kaser-Boyd had submitted to him. 45 RT 6650:24-6651:2; 18 RCT 4527-4528. Defense counsel again requested an Evidence Code § 402 hearing. 45 RT 6701:15-19. The court refused. 45 RT 6702:19.

1999 MMPI-2, Exhibit 85A, the court informed defense counsel in front of the jury, "I will not permit you to ask him any further questions about the specific language in the report, because the report will speak for itself." 45 RT 6781:26-28. The court overruled the defense objection to the admissibility of the reports. It then declared that the defendant would be precluded from conducting further cross-examination of Dr. Caldwell. 45 RT 6789:14-27.

After the re-direct examination of Dr. Caldwell (45 RT 6790:3-7), the court allowed re-cross examination, but then cut off questioning before defense counsel had finished (45 RT 6806:6-12).

During closing argument and rebuttal argument, the prosecution recounted at length Dr. Caldwell's testimony. 54 RT 8459:18-26; 56 RT 8728:4-15, 8774:9-8782:16. The prosecution argued that Caldwell's testimony and report were evidence that Sandi Nieves lied and manipulated. 54 RT 8459:18-26.

When referring to Dr. Caldwell, the prosecution stressed to the jury that he was "one of the top three people probably in the world in interpreting the MMPI." 56 RT 8728:5-7. It argued that Dr. Caldwell had confirmed that the letters from Sandi Nieves were angry suicide notes. 56 RT 8728:11-15. The prosecution then repeated Dr. Caldwell's testimony that Sandi Nieves's MMPI-2 profile was indicative of someone "who would use drastic or violent methods to dramatize the intensity of anger during a suicide attempt" (56 RT 8776:7-10), "who harbors great resentment and anger" (56 RT 8776:13-14), and "who routinely blames others" (56 RT 8776:17-18). The prosecution also argued at length that Caldwell's report was proof Sandi Nieves was malingering or consciously distorting her responses during both the 1997 and 1999 MMPI-2 tests.

The prosecution also stated during its closing:

> And, by the way, Dr. Kaser-Boyd, she sent the defendant's MMPI to -- from 1999 -- to Alex Caldwell for interpretation and scoring.
>
> So, in other words, the defense trusts Dr. Caldwell, because you heard the only two places to computerize score the MMPI-2 is either through NCS, National Computer Systems, or Alex Caldwell. That's it. Those are your two choices in this country.
>
> He's an expert. They trusted Alex Caldwell, but then they turn around and attack him.

56 RT 8778:1-10.

C. Switching Sides Required Disqualification

The court erred in refusing to vacate the appointment of Dr. Caldwell. See Hewlett-Packard Co. V. EMC Corp. (N.D.Cal. 2004) 330 F.Supp.2d 1087, 1092; Paul v. Rawlings Sporting Goods Co. (S.D. Ohio 1988) 123 F.R.D. 271, 277-78; Conforti & Eisele, Inc. v. Division of Building and Construction (1979) 170 N.J.Super. 64, 72. The trial court permitted Dr. Caldwell to switch sides in the middle of Sandi Nieves's capital case. The court failed to protect relevant privileges – in this case psychotherapist-patient and attorney-client privileges – and failed to preserve the fair trial that Sandi Nieves was entitled to before she could be convicted of capital murder.

An expert who switches sides in the middle of a case must be disqualified. "To be sure, no one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention. This is a clear case for disqualification." Wang Laboratories., Inc. v. Toshiba

Corp. (E.D.Va. 1991) 762 F.Supp. 1246, 1248; Koch Refining Co. v. Boudreaux M/V (5th Cir. 1996) 85 F.3d 1178, 1181; Crenshaw v. MONY Life Ins. Co. (S.D. Cal. 2004) 318 F.Supp.2d 1015. See also Erickson v. Newmar Corp. (9th Cir. 1996) 87 F.3d 298, 300 (courts "may grant the original hiring party's motion to disqualify the expert when it is determined that the expert is in possession of confidential information received from the first client").

Rhodes v. Du Pront De Nemours and Co. (S.D.W.Va. 2008) 558 F.Supp.2d 660, 666, is instructive. The court relied on Wang Laboratories two distinct tests for expert disqualification. The first is a "bright-line rule" that requires disqualification when no dispute exists about the expert's previous retention and receipt of confidential information from the adverse party. Id. at 664. The second is a two-part test in which courts consider (1) whether it was objectively reasonable for the first party to believe that a confidential relationship existed; and (2) whether the first party actually disclosed confidential information to the expert. Rhodes, 558 F.Supp.2d at 667 (citing Wang Labs., 762 F.Supp. at 1248).

In Rhodes, the plaintiffs moved for the disqualification of a defense expert because of a conflict of interest arising from her consulting relationship with plaintiffs' counsel in a prior related action. 558 F.Supp.2d at 663. The court agreed with the plaintiffs that the pending litigation was so substantially related to the previous litigation that the bright-line rule should apply. Id. at 668. "An expert retained by the adverse party in the same litigation who has received confidential information from the adverse party should be disqualified." Id. at 670-671.

There was no question Dr. Caldwell consulted with both sides in the very same matter. The evidence here showed that under both the bright-line

rule and the two part test articulated in Wang Laboratories, the trial court should have disqualified Dr. Caldwell.

1. Defendant Reasonably Believed She Had a Confidential Relationship with Dr. Caldwell

The first prong of the two-part test was satisfied in this case because the defendant "'acted reasonably in assuming that a confidential or fiduciary relationship existed.'" Rhodes, 558 F.Supp.2d at 667 (quoting United States ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Sys., Inc. (D.N.J. 1997) 994 F.Supp. 244, 249). The defendant reasonably believed she had a confidential relationship with Dr. Caldwell. She began her relationship with Dr. Caldwell when confidential defense consultant Dr. Kaser-Boyd enlisted Dr. Caldwell's services as early as February 2000. See Exh. 85A (Dr. Caldwell's Report to Dr. Kaser-Boyd).

Sandi Nieves's relationship with Dr. Caldwell was an extension of her confidential relationship with Dr. Kaser-Boyd. Defense counsel requested Dr. Kaser-Boyd's appointment as a confidential consultant under Penal Code § 987.9 to assist in the preparation of Sandi Nieves's defense. Penal Code § 987.9 allows for funding of experts necessary for the preparation of the defense of an indigent defendant in a capital case. Keenan v. Superior Court (1982) 31 Cal.3d 424, 429. The terms of Dr. Kaser-Boyd's appointment included funding for the psychological evaluation and testing of Sandi Nieves. Confidential RCT 176.

Evidence Code § 1017(a) provides that the psychotherapist-patient privilege applies when the psychotherapist "is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed . . . to present a defense based on his or her mental or emotional condition." Sandi Nieves qualified as a "patient" for privilege purposes under the Evidence

Code because she submitted to a psychological examination in order to secure a diagnosis of her mental and emotional condition. Evid. Code § 1011. Dr. Kaser-Boyd, as a licensed psychologist, fit the definition of "psychotherapist." Evid. Code § 1010(c). See also Jaffee v. Redmond (1996) 518 U.S. 1, 15 ("psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists"); United States v. Romo (9th Cir. 2005) 413 F.3d 1044, 1046-1047.

Communications with Dr. Caldwell were protected not only because he also was a licensed psychologist, but because "confidential communication between patient and psychotherapist" includes information disclosed to a third party to "whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted . . . ." Evid. Code § 1012; Roberts v. Superior Court (1973) 9 Cal.3d 330, 341 (psychotherapist did not waive privilege by exchanging patient's records with other physicians).

Dr. Kaser-Boyd acted reasonably when she disclosed Sandi Nieves's confidential MMPI-2 answers to Dr. Caldwell whose company was one of only two licensed to score and interpret the MMPI-2 and also acted reasonably when she verbally provided Dr. Caldwell with additional background information about the case. Defense counsel explained that as a part of preparing a mental health defense in Sandi Nieves's case, Dr. Caldwell was needed to take the raw data that Kaser-Boyd supplied him and to evaluate it and supply to defense counsel an expert opinion interpreting it. 34 RT 4746:8-11. Also, Dr. Kaser-Boyd relied on Dr. Caldwell's report in her overall evaluation of the defendant. 18 RCT 4572.

For similar reasons, the attorney-client privilege also protected the information exchanged with Dr. Caldwell. Confidential disclosures that a

client makes to her attorney in order to obtain legal assistance are privileged. Fisher v. United States (1976) 425 U.S. 391, 403; Evid. Code § 950 et seq. The attorney-client privilege "extends to communications between the lawyer and client which are disclosed to third persons who are present to further the interest of the client or to whom disclosure is reasonably necessary for transmission of the information to the lawyer." People v. Goldbach (1972) 27 Cal.App.3d 563, 568 (citing Evid. Code § 952). See People v. Clark (1990) 50 Cal.3d 593, 619 n.28 (psychotherapist-patient and attorney-client privileges apply to any statements made to doctor who examined defendant at request of counsel "unless defendant waived those privileges or an exception permits disclosure"). Because Dr. Kaser-Boyd was never called as a witness, her status, and therefore Dr. Caldwell's status, remained that of confidential consultant and the psychotherapist-patient and lawyer-client privileges were never waived.[125]

Dr. Kaser-Boyd reasonably expected that when she enlisted Caldwell's expert assessment of Sandi Nieves's MMPI-2 scores, the information-sharing relationship remained confidential. 18 RCT 4643. She explained in her declaration that the scoring and interpretation she sought from Dr. Caldwell was considered a confidential consultation. Id. She cited Dr. Caldwell's own acknowledgment of this confidentiality contained on the report he sent her: "This report was prepared for our professional clientele. In most cases this is confidential information and legally privileged." Id.

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[125] All events that the prosecution contested constituted waver, i.e. the testimony of Drs. Humphrey and Brook, occurred after the court denied the motion to vacate Dr. Caldwell's appointment as a prosecution expert.

Importantly, Dr. Kaser-Boyd noted it was standard practice among psychologists who used the scoring service to consider it confidential, and they would be "quite surprised to be informed that Dr. Caldwell could be retained as an expert for the other side of the case after having provided this consultation service." 18 RCT 4643. In addition, Dr. Kaser-Boyd explained in her declaration that she would not have discussed information about the case with Dr. Caldwell when she saw him in person if she had not considered their conversation to be confidential. Id.

When evaluating the reasonableness of a party's assumption of confidentiality, courts have considered whether work product was discussed, whether documents were provided to the expert, and whether the expert was paid a fee. Rhodes, 558 F.Supp.2d at 667; Hewlett-Packard Co., 330 F.Supp.2d at 1093. Each of these factors existed in this case. In addition, the confidentiality statement included in Dr. Caldwell's report must carry weight because even absent such an explicit statement, courts have found that a reasonable expectation of confidentiality is appropriate. See e.g. Shadow Traffic Network v. Superior Court (1994) 24 Cal.App.4th 1067, 1080. "The emphasis . . . is not on whether the expert was retained per se but whether there was a relationship that would permit the litigant reasonably to expect that any communications would be maintained in confidence." Hewlett-Packard Co., 330 F.Supp.2d at 1093.

In the present case, the relationship with Dr. Caldwell entailed a much more substantive exchange of confidential information and expert opinion than that which occurred in cases where an adverse party's communications with an expert have led to the disqualification of the attorneys involved. In Shadow Traffic Network v. Superior Court, 24 Cal.App.4th at 1071, for example, four members of Deloitte & Touche, an

accounting firm, met with attorneys for the plaintiff for one hour to discuss the possibility of retaining Deloitte employees as expert witnesses. Shortly afterward, plaintiff's counsel informed the representative from Deloitte that they would not be retaining Deloitte employees as expert witnesses. Id. at 1072. Three weeks later the defense retained one of the Deloitte employees as an expert for its side. Id. The plaintiff moved to disqualify defense counsel on the basis that counsel had improperly gained access to privileged information. Id. The Court of Appeal upheld the lower court's decision to grant the motion based on its finding that a reasonable expectation of confidentiality existed even after only the one hour meeting between the expert and plaintiff's counsel. Id. at 1082.

Here, the confidential relationship with Dr. Caldwell went deeper than the interactions in Shadow Traffic. Sandi Nieves's case involved protected information shared between psychotherapist and patient as well as attorney and client. In addition, the stakes were higher in Sandi Nieves's case because her life was literally on the line during the trial. Dr. Caldwell's breach of confidence proved prejudicial as discussed in section D below. Considering the multiple privileges involved, Sandi Nieves reasonably assumed that her relationship with Dr. Caldwell was just as confidential as her relationship with Dr. Kaser-Boyd and her own attorneys.

2. Defendant Disclosed Confidential and Privileged Information to Dr. Caldwell

In applying the second prong of the Wang Laboratories two-part test, it is clear that Dr. Caldwell received confidential information from the defendant. "Confidential information essentially is information 'of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the attorney-client privilege.'" Hewlett-Packard Co., 330 F.Supp.2d at 1094 (quoting Paul, 123 F.R.D. at

278). The confidential information must be related to the litigation at issue. Rhodes, 558 F.Supp.2d at 667; see also Western Digital Corp. v. Superior Court (1998) 60 Cal.App.4th 1471, 1487; In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 596.

Sandi Nieves's MMPI-2 responses were confidential information that defense counsel shared with Dr. Caldwell as part of the preparation of her defense. Dr. Kaser-Boyd explained in her declaration that she consulted with Dr. Caldwell in person and shared additional privileged information about Sandi Nieves's case with him. 18 RCT 4642-4644.

The information shared with Dr. Caldwell was protected under the psychotherapist-patient and attorney-client privileges, as well as the attorney-work product doctrine. Frequently asserted as a bar to discovery in civil cases, the attorney-work product doctrine's role "in assuring the proper functioning of the criminal justice system is even more vital." United States v. Nobles (1975) 422 U.S. 225, 238. Furthermore, protection of attorney-work product applies equally to materials an attorney's agent has prepared in anticipation of litigation as it does to an attorney's own materials. Id. As codified in Code of Civil Procedure §2018, reports prepared by an expert serving as a consultant are protected until the expert is designated as a witness. Shadow Traffic, 24 Cal.App.4th at 1079 (citing Williamson v. Superior Court (1978) 21 Cal.3d 829, 834-835). At no point did the defendant designate either Dr. Caldwell or Dr. Kaser-Boyd as witnesses. The court operated under the assumption that the defendant would call Dr. Kaser-Boyd. However, she had not done so at the time of the motion to vacate the appointment, nor did she do so at any later date in the trial.

The information disclosed to Dr. Caldwell concerned "matters traditionally considered confidential." Shadow Traffic, 24 Cal.app.4th at

1083-1084. The written notice on Dr. Caldwell's report and Dr. Kaser-Boyd's declaration underscored that standard practice dictated that the information exchanged was confidential. As a result, the second prong of the Wang Laboratories test was likewise satisfied, and Dr. Caldwell should have been disqualified.

In a case almost identical to this one, the Florida Supreme Court held in Sanders v. State (1998) 707 So.2d 664, 668-669, that an expert originally asked to serve as a defense witness should not have testified on behalf of the prosecution. In that case, the trial court granted the defendant's motion to appoint a confidential expert under Florida Rule of Criminal Procedure 3.216(a), a statute similar to California Penal Code § 987.9. Id. at 668. Defense counsel wrote to a Dr. Merin asking him to serve as a defense expert. Id. Defense counsel sent the doctor numerous documents and communicated information to him about the case. Id. However, Dr. Merin took no action in the case due to "'office snafu'" and defense counsel hired another expert. Id. Sometime later the prosecution listed Dr. Merin as a witness and the defendant objected. Id. The Florida Supreme Court held that because the defendant had not called Dr. Merin as a witness or otherwise waived the attorney-client privilege, it was error to allow Dr. Merin to testify for the prosecution. Id. at 669.

The error was even more egregious in Sandi Nieves's case because the expert, Dr. Caldwell, actually performed services for her as a part of the preparation of her defense. Furthermore, Dr. Kaser-Boyd discussed privileged information about Sandi Nieves's defense directly with Dr. Caldwell. In fact, Dr. Kaser-Boyd indicated that she intended to be in further contact with Dr. Caldwell before learning that he had been appointed to aid the prosecution. 18 RCT 4642-4644.

3. The Prosecution Had a Viable Alternative to Dr. Caldwell

There was no evidence as to why the prosecution could not have used an alternative expert from NCS as a consultant and witness instead of Dr. Caldwell. Courts, in considering the public interest in allowing or not allowing an expert to testify, look at "whether another expert is available and whether the opposing party had time to hire him or her before trial." Koch Refining Co., 85 F.3d at 1183; English Feedlot, Inc. v. Norden Lab., Inc. (D.Colo. 1993) 833 F.Supp. 1498, 1504-1505. Here, defense counsel was clear that it had no objection to the prosecution using Dr. Caldwell's competitor, NCS. 36 RT 4997:27-4998:1.

There was no evidence on the record to indicate that using NCS would have been a burden for the prosecution. Its expert, Dr. Hirsch, testified that he sent the 1997 MMPI-2 scores to Dr. Caldwell as well as NCS to be re-scored. 36 RT 4989:1-23. Furthermore, the prosecution had prior notice about the defense retention of Dr. Caldwell to score and interpret Sandi Nieves's 1999 MMPI-2 scores. 34 RT 4746:21-26. The prosecution's own argument for going to Dr. Caldwell – that he represented one of only two groups that score the MMPI-2 – begs the question as to why they did not use the other group.

D. Dr. Caldwell's Switching Sides Violated Sandi Nieves's Constitutional Rights

The court denied the defense motion to vacate the appointment of Dr. Caldwell as a prosecution expert without citing to any authority. The court's error in denying the motion had serious implications beyond those found in the civil cases discussing the disqualification of expert witnesses because the criminal law has always required higher standards (In Re Winship (1970) 397 U.S. 358), and the severity of death is different than a

civil judgment (California v. Ramos (1983) 463 U.S. 992, 998-999). The court's error violated the defendant's constitutional rights to due process, a fair trial, protections against self-incrimination, effective assistance of counsel, and a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. The Appointment of Dr. Caldwell Violated the Fifth Amendment Right Against Self-Incrimination

The Fifth Amendment protects a person against being incriminated by "his own compelled testimonial communications." Fisher v. United States (1976) 425 U.S. 391, 409. The privilege against self-incrimination protects Sandi Nieves from the unfair use of the confidential MMPI-2 answers that she voluntarily provided to Dr. Kaser-Boyd, and then Dr. Caldwell, who were members of the "defense team." See People v. Superior Court (Broderick) (1991) 231 Cal.App.3d 584, 593-595. Under the Fifth Amendment, the prosecution cannot use Sandi Nieves's statements, "unwittingly made without an awareness that [she] was assisting the State's efforts to obtain the death penalty." Estelle v. Smith (1981) 451 U.S. 454, 466.

The prosecution, with the court's blessing, used the confidential information disclosed to Dr. Caldwell to incriminate the defendant in violation of the Fifth Amendment. The defendant was compelled to disclose Dr. Kaser-Boyd's report to the prosecution – which included the identity of defense consultant Dr. Caldwell – in order to comply with the court's discovery order. 34 RT 4746:21-26; 11 RCT 2560-2561. The defendant did not waive privilege when she disclosed the report. Rodriguez v. Superior Court (1993) 14 Cal.App.4th 1260, 1270 (privilege not waived after disclosure of partial defense expert report because defendant was

"making a good-faith effort to comply with the court's order and cooperate with the prosecution").

2. The Trial Court Interfered with Sandi Nieves's Constitutionally Protected Right to the Assistance of a Mental Health Expert in the Preparation of Her Defense

Sandi Nieves's Sixth and Fourteenth Amendment right to the assistance of counsel in the preparation of a case for trial included the assistance of, and confidential communication with, mental health experts in preparing a defense. The Supreme Court held in Ake v. Oklahoma (1985) 470 U.S. 68, that due process guarantees of fundamental fairness dictate that a state must provide an indigent defendant a psychiatrist to assist in preparing and presenting his defense. This Court has also held that the constitutional right to effective counsel includes the right to ancillary services necessary to the preparation of an indigent person's defense. Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319; Keenan v. Superior Court (1982) 31 Cal.3d 424, 428. See also Tran v. Superior Court (2001) 92 Cal.App.4th 1149, 1153; County of Los Angeles v. Commission on State Mandates (1995) 32 Cal.App.4th 805, 815. "[T]he right to an effective counsel at trial includes not only the personal advice and service of counsel but also the aid and advice of experts whom counsel deems useful to the defense and, in particular, the services of a psychiatrist." In re Ketchel (1968) 68 Cal.2d 397, 399-400.

Sandi Nieves sought and received funding pursuant to Penal Code § 987.9 to seek the assistance of mental health experts in the preparation of her defense. However, the court's decision to allow one of those experts – Dr. Caldwell – to testify against her, compromised the constitutional principles behind the enactment of § 987.9. "The Legislature has . . . recognized that a defendant in a capital case may need certain protections

not granted to one charged with an offense carrying a lesser penalty. Section 987.9 demonstrates this concern by its broad language authorizing funds for 'the preparation or presentation of the defense' and its direction that in ruling on a defendant's request the court must be guided by 'the need to provide a complete and full defense.'" Keenan, 31 Cal.3d at 431.

Ake mandates that the psychiatrist (or psychologists in this case) provided to the indigent defendant will aid defense counsel to serve the defendant's interest in the adversarial system. 495 U.S. at 77. "To allow the prosecution to enlist the psychiatrist's efforts to help secure the defendant's conviction would deprive an indigent defendant of the protections that our adversarial process affords all other defendants." Granviel v. Texas (1990) 495 U.S. 963 (Marshall, J., dissenting). This is precisely what occurred in this case, and as a result, the trial court denied Sandi Nieves her constitutional rights to assistance of counsel and fundamental fairness, undermining the Sixth and Fourteenth Amendments' guarantee of "a meaningful opportunity to present a complete defense." Crane v. Kentucky (1986) 476 U.S. 683, 690.

3. The Error was Prejudicial During the Guilt Phase

The court's decision to allow Dr. Caldwell to testify for the prosecution proved severely damaging for Sandi Nieves. See Subpart B supra. Sandi Nieves's mental condition at the time of the death of her children was the central focus of her defense. Dr. Caldwell was a key mental health rebuttal witness for the prosecution for several reasons. He had some of the most impressive credentials among the experts who testified. The prosecution even had another expert, Dr. Robert Sadoff, testify as to Dr. Caldwell's stellar reputation. 47 RT 7062:2-18. The prosecution called Dr. Caldwell as a rebuttal witness after the jury had

already heard the defense case, giving him an opportunity to undermine the testimony of defense mental health experts. Further, the prosecution used his testimony in closing argument to disparage Sandi Nieves in the eyes of the jury.

Some of the most damaging testimony from Dr. Caldwell was his extremely negative profile of Sandi Nieves based on her responses to the MMPI-2. He stated that she had purposely exaggerated her answers. 44 RT 6593:20-21; 26-27. He also said that based on her responses he could conclude that she was revengeful, self-centered, and prone to using drastic and violent methods to attempt suicide. 44 RT 6598:9-6599:11. The trial court allowed him to opine on the letters that Sandi wrote – stating that they were clear suicide notes – despite defense objections that Dr. Caldwell's conclusion could only be based on speculation. 44 RT 6616:11-13. His testimony contradicted earlier testimony from Dr. Humphrey and Dr. Ney that Sandi Nieves showed no signs of malingering. 37 RT 5177:5-7; 42 RT 6028:4-10.

In its closing argument, the prosecution touted Dr. Caldwell as one of the world's top experts in interpreting MMPI-2 data. 56 RT 8758:5-7. It argued that Caldwell's testimony showed Sandi Nieves lied and manipulated her scores on the MMPI-2. 54 RT 8459:18-26. It repeated to the jury Caldwell's statements that Sandi Nieves was someone prone to attempt suicide using drastic or violent methods, then stated, "It's consistent with the facts of this case. What could be more dramatic than setting your house on fire and murdering your children?" 56 RT 8776:7-12.

The prosecution also cited Dr. Caldwell's testimony in support of its characterization of Sandi Nieves as someone who harbors great resentment and anger and who routinely blames others. 56 RT 8776:13-18. In a final

blow, the prosecution used the fact that the defense had previously solicited Dr. Caldwell's expertise to bolster his credibility in the eyes of the jury. 56 RT 8778:1-10.

4. The Error Caused Further Prejudice During the Penalty Phase of the Trial

The trial court's error in allowing the appointment of Dr. Caldwell to the prosecution team had further detrimental impact on the fairness of Sandi Nieves's capital trial because the prosecution continued to rely on his testimony during their penalty phase closing argument.

Although Caldwell did not testify during the sentencing phase, the prosecution used his guilt phase testimony about the letters from Sandi Nieves to argue that the jurors should have no sympathy for the defendant. 64 RT 10114:14-17 ("I want you to remember Alex Caldwell's testimony, and I want you to use your own common sense: is that a letter that's based on depression? No.")

The prosecution also compared defense penalty phase expert Dr. Robert Suiter to Dr. Caldwell to discredit Dr. Suiter's qualifications: "Of course he's not in the same position as Dr. Caldwell in terms of his experience or expertise, nor did he compare the two different MMPI's from 1997 and 1999, as Alex Caldwell did, in order to get a true picture of the defendant." 64 RT 10117:5-9.

The prosecution unfairly used Caldwell, after stealing him from the defense team and denying defendant access to his expertise, to undermine the penalty phase defense which focused largely on evoking sympathy from the jury in mitigation of a death sentence. The statements comparing Suiter to Caldwell were especially prejudicial because the court had already ruled to prevent Dr. Kyle Boone from testifying during the penalty phase. See Part XIX, infra, leaving Suiter as defendant's only mental health expert to

testify during the penalty phase of the trial. After successfully preventing defense access to Caldwell, the prosecution used his credentials to disparage the only remaining defense expert.

E. Conclusion

The trial court's error in allowing the prosecution to steal Dr. Caldwell away from the defense team and have him appointed to serve as a prosecution expert violated Sandi Nieves's constitutional rights. "The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed." Keenan, 31 Cal.3d at 430. See Gardner v. Florida (1977) 430 U.S. 349, 357; Gregg v. Georgia (1976) 428 U.S. 153, 187. The trial court denied Sandi Nieves these safeguards which compromised the preparation of her defense, in violation of her rights to due process and a fair trial. See Crane, 476 U.S. at 690.

During the penalty phase, the prosecution continued to capitalize on the trial court's error. The fundamental unfairness of the court's ruling to allow Dr. Caldwell to switch sides in the middle of Sandi Nieves's capital case rendered her death sentence unreliable under the Eighth and Fourteenth Amendments. See Chambers v. Mississippi (1973) 410 US. 284, 294.

There is no way to find "beyond a reasonable doubt that [allowing Dr. Caldwell to testify for the prosecution] did not contribute to the verdict obtained." Chapman v. California (1967) 386 U.S. 18, 24. Therefore, the convictions and the sentence must be reversed.

X. THE TRIAL COURT IMPROPERLY GLAMORIZED A PROSECUTION EXPERT WITNESS GIVING HIM ADDITIONAL CREDIBILITY ON THE CRITICAL ISSUE OF INTENT

On July 6, 2000, the prosecution called Dr. John Dehaan, a criminalist with a specialty in reconstructing fires and explosions, as a rebuttal witness to contradict the earlier testimony of defense arson expert Del Winter. 44 RT 6473:6-24. These experts provided opposite opinions about critical factual issues related to the charges against the defendant. At some point during Dr. Dehaan's testimony, Juror Seven relayed to the bailiff, who informed the court that the juror recognized Dehaan from watching the Discovery Channel on television.

Without consulting the lawyers, the court brought Dehaan's television appearance to the jury's attention, unilaterally bolstering the witness's credibility. The court then brought up Dehaan's television stardom to the jury a second and third time. The court's actions afforded the witness celebrity status and star-quality, tipping the scales in favor of the prosecution's version of the facts and depriving Sandi Nieves's her constitutional rights to a fair trial and due process.

A. Judge Wiatt Unilaterally Gave Dr. John Dehaan Celebrity Status in the Eyes of the Jury

Defense expert Winter had testified that in his opinion only a small amount of gasoline – a total of a pint and a half – was used to set the fire. 29 RT 3808:20-22; 3863:12-15. He testified the gas was poured on fire-resistant carpet in locations not likely to cause a great amount of damage. 29 RT 3809:18-20. Winter gave his expert opinion that the fire "did not make a lot of sense" (29 RT 3809:21-23), because whoever set the fire did not attempt to pour gasoline on the readily combustible materials that were

abundant at the scene (29 RT 3811:5-7), and left so much gasoline in the container unused (29 RT 3812:6-9).

The prosecution called Dr. Dehaan to testify that up to a gallon and a half of gasoline had been used to start the fire. 44 RT 6481:14-6482:5; 6485:3-6. He testified that his analysis showed the fire was set by someone with the intent to burn down the entire structure. 44 RT 6503:7-13. He stated, "Based on the significant quantities [of gasoline] poured in separate areas, that there was an intent to destroy the house." 44 RT 6503:19-21.

The prosecution began the direct-examination of Dr. Dehaan with questions about his background and credentials. 44 RT 6474:3-6480:16. However, the prosecution did not question him about whether he had appeared on television. After both parties had finished questioning Dr. Dehaan, the trial court asked the following questions in the presence of the jury:

> The Court: Have you ever, as part of your expertise or your training and experience, have you ever appeared on any television shows in your connection with your expertise?
>
> The Witness: Yes, sir, I have.
>
> The Court: Any on the Discovery Channel?
>
> The Witness: Two on the Discovery Channel, and one on the Fox Family Channel.
>
> The Court: Thank you.

44 RT 6569:2-10.

The jury was then excused from the courtroom with the exception of Juror Seven. 44 RT 6569:26-28. The court said: "Juror No. 7 remains, who wrote the note to the court, and I will read it. You recognize Mr. Dehaan from a T.V. Program, possibly the Discovery Channel. And you also write it will not influence on how you view his testimony." 44 RT 6570:10-15.

The juror confirmed that this was what he relayed to the bailiff, and the court clarified that the bailiff wrote the note. 44 RT 6570:16-19. The court asked the juror the following leading question: "Now that you've heard the court question him on that, apparently he has appeared on the Discovery Channel. You have heard his testimony. Is it still your view that whatever you may have seen on the television will not influence your opinion of his testimony in any way?" 44 RT 6570:20-25. The juror replied that it would not. 44 RT 6570:26-27.

Defense counsel immediately objected to the court's previous questioning of Dehaan before the jury, arguing that the questions "advanced the authority or respect the jurors might have of Dr. Dehaan by advertising to the jurors that he's been on T.V. or the Discovery Channel, et cetera." 44 RT 6571:14-17. Defense counsel further argued:

> I don't see how that promulgates the truth or non-truth of the substance of what he had to say.
>
> It seems to me the court ended up advertising the doctor's credentials and how the jurors should view him by telling the jurors that he's a known lecturer, he's been on T.V., and he is acceptable by the national media, et cetera.
>
> It seems to me that was an unfair question in front of the other jurors, and I deeply object to it, and I believe it further indicates a potential bias on the court's side with regards to assisting the prosecution to the detriment of the defense.
>
> And I respectfully object to it, and I respectfully move for a new trial based on the court's questioning of this witness, Dr. Dehaan.

44 RT 6571:18-6572:4.

The court denied the defense motion. 44 RT 6572:5-6.

Later the same day, the prosecution informed the court that Dehaan would appear on the Fox Channel the next night. 44 RT 6573:27-6574:3.

At the end of the day before excusing the jury, the court brought the upcoming television appearance to the jury's attention and told the jurors not to watch the Fox Channel at 9:00 p.m. the following night. 44 RT 6634:5-12.

Once more, at the end of the court session the following day, July 7, 2000, the trial court said this to the jury:

> And there is a witness that I told you about yesterday -- I won't name him or her -- but there is a show apparently on tonight on the Fox Channel at 9:00 p.m. I haven't verified that, but that's what I've been told.
>
> So I would ask you and order you to avoid watching that show tonight. If do you have to watch T.V., just don't watch the Fox Channel.

45 RT 6681:19-26.

B. The Trial Court's Questions of Dr. Dehaan and Subsequent Comments to the Jury Expressed Bias and Highlighted the Stature of the Prosecution's Expert

The trial court made several errors in conferring stardom on Dehaan. First, the court questioned Dehaan about his television credentials in front of the jury without first consulting the parties. Second, its questions addressed to Dehaan and its subsequent reminders to the jury that Dehaan would be appearing on television served to bolster Dehaan's prestige concerning testimony that went to the heart of this case, defendant's intent.

We do not quarrel with the trial court's questioning of Juror Seven regarding the note the juror sent to the court. But, the trial court should have asked Dehaan outside the jury's presence whether he had appeared on television previously. There was no reason to broadcast this information to the jury – except to use the juror's note as a means of bringing Dehaan's star-quality before the jury. The court's subsequent admonitions not to watch the Fox Channel only emphasized Dehaan's celebrity status.

Once the court ascertained that Juror Seven still had an open mind about the witness, it should have asked the lawyers for their input on how to proceed. The court could have reminded the jurors they had the exclusive duty to determine credibility and they were the triers of fact. See Pen. Code § 1127.[126] Instead, the court unilaterally introduced evidence to the jury that boosted Dehaan's credibility without giving the parties any opportunity to make strategic choices and work out a solution. Then, after the defense objected, the court brought up Dehaan's television stardom a second and third time. It gave Dehaan an imprimatur of veracity and celebrity.

The trial court unfairly took on the role of advocate when it introduced evidence that bolstered the credibility of Dehaan. Just as derogatory references to television characters may affect credibility, reference to a witness's prominence in the television world bolsters credibility. See People v. Geier (2007) 41 Cal.4th 555, 627-628 (references to mitigation witnesses as "Forrest Gump" and "Oprah"). A judge's comments that bolster the credibility of a prosecution witness unfairly influence the jury against the defendant:

> From the high and authoritative position of a Judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to an unfair advantage of one of the parties, with a corresponding detriment to the cause of the other.

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[126] Penal Code § 1127 states in pertinent part: "The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

People v. Frank (1925) 71 Cal.App. 575, 583-584 (quoting McMinn v. Whelan (1865) 27 Cal. 300, 319).

Any questioning of witnesses by the trial judge must be fair to both parties and limited to clarification of the evidence. People v. Cook (2006) 39 Cal.4th 566, 597. "Trial judges 'should be exceedingly discreet in what they say and do in the presence of the jury lest they seem to lean toward or lend their influence to one side or the other.'" People v. Sturm (2006) 37 Cal.4th 1218 (quoting People v. Zamora (1944) 66 Cal.App.2d 166, 210). Here, the trial court was not clarifying evidence. The prosecution had not brought up the television aspect of the witness's background and credentials. The court improperly and unilaterally introduced this credibility evidence to the jury.

C. The Court's Actions were Prejudicial

The court's exposure and emphasis of Dr. Dehaan's celebrity status was prejudicial. Winter, the defense expert, and Dehaan had contrasting opinions about the fire in this case, its origins, and the intent of the person who set it. Winter testified to a number of oddities about the fire that made it difficult to be confident about what the person who started the fire had in mind or indeed whether she was thinking clearly at all. Dehaan testified the evidence indicated an intent to burn down the house. The difference was important to the question whether Sandi Nieves, if she set the fire, did so with a deliberate premeditated intent to take the lives of her children. Essentially, which expert the jury found more credible was determinative to the jury's conclusions about the nature of the fire, particularly the mens rea of the defendant. This issue was critical to the outcome of the case and the jury's verdict as to the arson, first degree murder and attempted murder, the

arson felony murder, and the arson special circumstance charged against Sandi Nieves.

The court's actions raised the profile of Dr. Dehaan in the eyes of the jury. "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" Quercia v. United States (1933) 289 U.S. 466, 470 (quoting Starr v. United States (1894) 153 U.S. 614, 626). By enhancing the credibility of the prosecution's expert witness, the trial court's imprimatur showed bias toward the prosecution and skewed the factors the jury used to assess credibility of the two critical fire experts.

In People v. Lynch (1943) 60 Cal.App.2d 133, 144, during the cross-examination of a doctor by the defendant, the trial court commented in front of the jury that the court had appointed the doctor on many cases and his competency has never been challenged. The Court of Appeal held that the trial court's statement transcended "the bounds of legitimate comment upon the evidence or the credibility of a witness." Id. It also held that an instruction pursuant to Penal Code 1127 could not cure the prejudice because the "errors may have turned the scale in favor of the prosecution." Id. at 145.

Here, no instruction or admonishment to the jury could have cured the prejudicial effect of Judge Wiatt's comments. His treatment of the prosecution's arson expert Dehaan was consistent with his overall pattern of rulings and behavior favoring the prosecution. The judge's behavior violated Sandi Nieves's constitutional right to a fair trial with a fair judge. In re Murchison (1955) 349 U.S. 133, 136; Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 288. Judge Wiatt's improper commentary, flaunting the TV credentials of the prosecution's expert, may well have the tipped the scales

in favor of the prosecution's version of the facts, thereby depriving Nieves of due process, a fair trial, and reliable guilt and sentencing verdicts, in violation of her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Because the state cannot meet its burden of "prov[ing] beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained" (Chapman v. California, (1967) 386 U.S. 18, 24), reversal is required.