IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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 2 of 2

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XI. THE PROSECUTION COMMITTED MISCONDUCT AND THE TRIAL COURT PREJUDICIALLY PERMITTED THE PROSECUTION TO QUESTION A DEFENSE EXPERT WITNESS ABOUT THE VERACITY OF ANOTHER DEFENSE WITNESS

During cross-examination of defense expert Dr. Gordon Plotkin, the trial court allowed the prosecution – over defense objection – to ask about his views on the veracity of the testimony of another defense witness, Albert Lucia. Because credibility determinations are reserved for the jury, the court erred by permitting this line of questioning, violating Sandi Nieves's right to a fair trial and due process of law. The error was not harmless.

A. The Prosecution Elicited An Expert Witness's Views on the Veracity of A Defense Witness

During the guilt phase of the trial, defendant's step-father, Albert Lucia, traveled from Indiana to testify on her behalf. 29 RT 3771:14-15. When he testified before the jury on June 1, 2000, defense counsel limited direct-examination to matters relating to the year leading up to the death of the children. 30 RT 4089-4095. Counsel later explained he had done so in reliance on the court's promise that the information about Lucia's observations of Sandi Nieves's seizure activity when she was a little girl could come in through the experts who previously had interviewed him. 34 RT 4706:22-28.

When the court later threatened not to allow the experts to testify as to Lucia's observations, the defense made an offer of proof that it needed to recall Lucia. 35 RT 4851:23-4852:2; 4937:25-4938:1. Lucia flew in again from Indiana and testified on June 21, 2000. 37 RT 5057:3-20. This time he described for the jury a period when Sandi Nieves was 11 months old until she was eight. During that period he witnessed frequent episodes in

which she would hold her breath and pass out. 37 RT 5057:8-5058:6. He told about an incident when Nieves was two years old. He saw her collapse one day while she was standing near a tree during a cookout. 37 RT 5059:12-24. He said that when he ran up to her, he could see that her eyes had rolled back into her head and she was shaking. 37 RT 5059:22-24. Lucia testified that Nieves was hospitalized for ten days following the incident. 37 RT 5060:14. He described how at the hospital specialists treated Sandi, performing brain scans and conducting tests that included keeping her awake for 24 hours. 37 RT 5060:14-25. She took medication that seemed to help prevent the seizures or fainting spells, but she would still get them, more so during times of verbal and physical abuse from her mother. 37 RT 5095:19-5096:4.

Weeks later, defense expert Dr. Gordon Plotkin testified in surrebuttal. 48 RT 7376-7444; 52 RT 7825-8033; 53 RT 8074-8223. He testified that Lucia's testimony about what happened to Sandi Nieves as a child was consistent with a diagnosis of a seizure disorder. 48 RT 7390:15-7391:3; 7392:3-12; 7399:13-7400:6.

During cross examination of Dr. Plotkin, the prosecution confirmed that in making his diagnosis of seizure disorder, he had relied on Lucia's description of Sandi Nieves's symptoms as a child and the ensuing treatment the hospital administered to her. 52 RT 7963:27-7965:16; 7972:2-6. Plotkin testified that Lucia's description of the "hospital admission and work up" was the most important data relied upon in making his diagnosis. 52 RT 7970:26-7971:1. The prosecutor, insinuating Lucia made up his story, proceeded with the following cross-examination:

> Q What if that individual, Mr. Lucia, was coached as to what to say?

Mr. Waco: There's no -- objection. . . . assuming facts not in evidence.

The Court: Overruled.

The Witness: Assuming that he was coached, then the idea that he would have to be sophisticated enough to come up with it, obviously, would be a moot point.

By Mr. Barshop:

Q You realize he testified twice?

A I believe -- I'm not sure I knew -- I think I did hear that; that he did testify twice.

Q Were you advised that he testified, went back to Indiana, came back out here a second time, and then testified about the incident regarding the seizures once before the jury, and once outside the presence of the jury.

Were you told that?

A I don't know if I'm aware of the exact details of that. But I am aware that he did come back and testify in general to that on the second testimony.

Q Would that affect your opinion regarding Mr. Lucia's veracity and perhaps his credibility in the information that you have evaluated from him?

52 RT 7971:16-7972:13. Defense counsel objected on the grounds that the prosecution's question misstated or mischaracterized the evidence. 52 RT 7972:16-17. The court overruled the objection. 52 RT 7972:20. Dr. Plotkin, compelled to answer, replied:

> I think you could paint two scenarios on that one. I think one scenario would be that he was coached and lied on the stand. The other scenario is that he may have never been asked that, and once testimony came out that suggested it, it may have jogged his memory and he brought it out.

52 RT 7972:27-7973:5.

The prosecution continued to belabor the point. These questions and answers followed:

> Q Both [scenarios] have validity, correct? You can't tell one from the other; correct?
>
> A That's correct.
>
> Q So it would be like flipping a coin as to whether you wish to believe Mr. Lucia, or believe whether he was coached; is that correct?
>
> A Without additional data to suggest that (a), he wasn't coached; or (b), he was coached, I think it was -- it would be an equal probability of both of those. But I'm not aware there's any data on that.

52 RT 7973:8-18.

B. The Questions Were Improper

The court improperly allowed the prosecution to invade the province of the jury when it overruled the defense objection to the line of questions that asked one witness to comment on the veracity of another witness. First, the prosecution misled Dr. Plotkin as to the reasons why Lucia had returned to testify a second time, insinuating this was evidence that he was making up his testimony. Next, the prosecution tried to get Dr. Plotkin to question the veracity of Lucia in front of the jury.

Credibility determinations are reserved for the jury. People v. Boyer (2006) 38 Cal.4th 412, 480; Evid. Code § 312(b) ("the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses"). It makes no difference that the prosecution was directing its questions to an expert witness. "[An] expert is not allowed to give an opinion on whether a witness is telling the truth because the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact." People v. Long (2005)

126 Cal.App.4th 865, 871 (citing People v. Cole (1956) 47 Cal.2d 99, 103; Evid.Code, § 801(a)). "[T]he jury generally is as well equipped as the expert to discern whether a witness is being truthful." People v. Coffman (2004) 34 Cal.4th 1, 82.

This Court has held that questions that ask one witness to testify as to whether another witness is lying should not be permitted "when argumentative, or when designed to elicit testimony that is irrelevant or speculative." People v. Chatman (2006) 38 Cal.4th 344, 384. A trial court may not permit counsel to ask questions that do not elicit competent testimony about a witness's personal knowledge and would "legitimately assist the trier of fact in resolving credibility questions." Id.

The Ninth Circuit has also held that it is improper for an attorney to ask a witness to testify that another witness lied. United States v. Ramirez (9th Cir. 2008) 537 F.3d 1075, 1084; United States v. Combs (9th Cir. 2004) 379 F.3d 564, 572. "'Testimony regarding a witness' credibility is prohibited unless it is admissible as character evidence.'" Ramirez, 537 F.3d at 1084 (quoting United States v. Geston (9th Cir. 2002) 299 F.3d 1130, 1136. "'It is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience.'" Geston, 299 F.3d at 1136 (quoting United States v. Sanchez-Lima (9th Cir.1998) 161 F.3d 545, 548).

In this case, the court allowed the prosecution to compel Plotkin to testify as to the veracity of Lucia's previous testimony in front of the jury. The form of the prosecution's question, "So it would be like flipping a coin as to whether you wish to believe Mr. Lucia, or believe whether he was coached; is that correct?" (52 RT 7973:11-13), exposed the underlying problem with this line of question: asking one witness to comment on

another's credibility calls for conjecture or speculation. See Chatman, 38 Cal.4th at 382. Such testimony is irrelevant "because it has no tendency in reason to resolve questions in dispute." Id. (citing Evid. Code §§ 702; 210). Here, the prosecution improperly asked Dr. Plotkin to "opine without foundation" as to whether Lucia was a liar. Chatman, 38 Cal.4th at 382; People v. Zambrano (2004) 124 Cal.App.4th 228, 241. See People v. Melton (1988) 44 Cal.3d 713, 742. Plotkin had never met Lucia, nor was he present for Lucia's testimony. 52 RT 7971:1-27-7972:1.

Intentionally eliciting inadmissible testimony constitutes prosecutorial misconduct. People v. Cox (2003) 30 Cal.4th 916, 952; People v. Smithey, (1999) 20 Cal.4th 936, 960; People v. Bonin (1988) 46 Cal.3d 659, 689. The prosecution continued to question Plotkin about Lucia's veracity despite defense objection, exacerbating the misconduct. Smithey, 20 Cal.4th at 960; People v. Bell, (1989) 49 Cal.3d 502, 532.

C. The Error Was Prejudicial

The prosecution's use of cross-examination of Dr. Plotkin as a deceptive device to argue its case and to attack the credibility of another witness was misconduct that violated Sandi Nieves rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because it "infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643; Darden v. Wainwright (1986) 477 U.S. 168, 181; People v. Tafoya (2007) 42 Cal.4th 147, 176.

Evidence of Sandi Nieves's history of seizures was critical to the defense case. The trial court instructed the jury that if it found that the defendant was unconscious at the time of the events that caused the death of the children, she could not be convicted of murder. 54 RT 8391:21-24 ("A

person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime."); CALJIC 4.30 (6th Ed. 1996). The instructions included the following statement about evidence of unconsciousness:

> This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium, a fever, or because of an attack of epilepsy, a blow on the head, the involuntary taking of drugs, or the involuntary consumption of intoxicating liquor, or any similar cause.

54 RT 8391:25-8392:5. Dr. Plotkin had testified that following a complex partial seizure is the postictal period, the equivalent of delirium, that can last as long as a full day. 48 RT 7419:28-7420:22. Plotkin also testified that after the fire, Sandi Nieves had dramatically raised CPK levels, an enzyme that muscle tissue releases into the bloodstream after trauma or a seizure. 48 RT 7425:14-7426:11. This testimony, in conjunction with his diagnosis that the defendant had a history of seizures, constituted important evidence of unconsciousness.

Because Plotkin and other experts relied on Lucia's description of Sandi Nieves's history, accusing Lucia of lying was a part of the prosecution's attack on the unconsciousness defense raised by the defendant. As the prosecution pointed out in its closing argument, Lucia was the only witness to Sandi Nieves's childhood seizures. 56 RT 8797:9-13. It accused Lucia of having a motive to lie. Id. But to try to show he lied, the prosecution improperly asked Plotkin for his assessment of Lucia's veracity.

The improper attack on the credibility of Lucia's testimony was an attack on the heart of the defense case. The trial court permitted the prosecution to do so in violation of Sandi Nieves's constitutional rights to a

fair trial and due process. The error was therefore not harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S. 18, 24, and the judgment must be reversed.

The prosecution's actions clearly constituted misconduct under California law because it used "deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." People v. Morales (2001) 25 Cal.4th 34, 44. The conviction should be reversed because it was "reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." People v. Wallace (2008) 44 Cal.4th 1032, 1071 (quoting People v. Crew (2003) 31 Cal.4th 822, 839); People v. Watson (1956) 46 Cal.2d 818, 836.

XII. THE PROSECUTION CROSS-EXAMINATION OF DEFENSE EXPERT GORDON PLOTKIN CONSTITUTED PREJUDICIAL MISCONDUCT

The prosecution committed misconduct during the cross-examination of defense expert Dr. Gordon Plotkin by repeatedly asking questions that assumed inflammatory facts not in evidence. The prosecution's questions improperly suggested that Sandi Nieves had been found guilty of perjury and fraud when no such determination had been made by a trier of fact. The prosecution's questions were flagrantly inappropriate and prejudicial to the defendant.

A. The Prosecution Asked Inflammatory Cross-Examination Questions that Misstated the Facts in Evidence

During the cross-examination of defense expert Dr. Gordon Plotkin, the prosecution questioned him regarding his opinion that Zoloft, when taken together with certain other drugs, can cause serotonin syndrome. 52 RT 7952:6-20. Plotkin confirmed that the only evidence that Sandi Nieves took Zoloft on the night of June 30, 1998, came from the defendant's testimony and her statements to other medical professionals. 52 RT 7954:12-18. The prosecution then asked a series of questions that included inflammatory assertions of facts related to the defendant's credibility that were not in evidence:

> And does the fact that [Sandi Nieves] has a history of malingering and faking good and faking bad affect that opinion?
>
> . . .
>
> What if I were to tell you that the defendant took the witness stand and out and out lied, and was proven to be a liar by physical evidence when she said that she did not use certain words, and there were writings of her words on pieces of paper removed from her house?
>
> . . .

> Would that affect your opinion if I told you that the defendant out and out committed perjury when she took the witness stand?
>
> . . .
>
> So would it affect your opinion as to the likelihood that she, in fact, took Zoloft on June 30th if we put all these factors together -- that being the opinions of Dr. Caldwell regarding malingering on separate occasions, the fact that the defendant took the witness stand and lied?
>
> . . .
>
> That she further fabricated a rental agreement and committed fraud upon the landlords --would these factors affect your opinion regarding the fact that she may well not have taken Zoloft on the night of June 30th?

52 RT 7954:19-7958:11. Defendant objected to each of these questions on the grounds that the prosecutor misstated or mischaracterized the evidence. Id. The court overruled defendant's objections. Id. Although Dr. Plotkin testified that some evidence of faking good or faking bad was not conclusive evidence of absolute malingering, the prosecution did get Plotkin to admit that perjury and fraud had "predictive value" that a person is prone to lying. 52 RT 7954:26-7955:6; 7958:15-16.

During the prosecution's closing argument, it stated that Dr. Plotkin had admitted "malingering or lying is a predictable possibility, given the defendant's past malingering, as well as her perjury on the stand." 56 RT 8761:21-23.

B. The Prosecution Committed Misconduct

The prosecution engaged in misconduct when it misstated facts and referred to inflammatory facts not in evidence. See People v. Coffman (2004) 34 Cal.4th 1, 95. "Assuming prejudicial facts not in evidence" is among the "improper tactics that overzealous or misguided prosecutors have adopted in judicial proceedings." United States v. Williams (1992)

504 U.S. 36, 60-61 (citing Berger v. United States (1935) 295 U.S. 78, 84-85. It is a "well-established rule that a prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed." People v. Visciotti (1992) 2 Cal.4th 1, 52; accord People v. Price (1991) 1 Cal.4th 324, 481.

A prosecutor's statement of supposed facts not in evidence is a highly prejudicial form of misconduct. People v. Hill (1998) 17 Cal.4th 800, 827-828; People v. Zurinaga (2007) 148 Cal.App.4th 1248, 1259. "[S]uch statements 'tend[] to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."'" Hill, 17 Cal.4th at 828 (quoting People v. Bolton (1979) 23 Cal.3d 208, 213).

The credibility of Sandi Nieves's testimony was an issue reserved the jury. Evid. Code § 312(b). Juries are tasked to assess credibility based on the criteria set forth in Evidence Code § 780. The prosecutor's statement that the defendant lied reflect only his personal assessment of the evidence. However, he characterized his assertions as settled fact. See e.g. 52 RT 7954:19-21 ("the fact that [Sandi Nieves] has a history of malingering and faking good and faking bad"); 52 RT 7956:16-17 ("[she] was proven to be a liar"). More egregiously, he stated – as if it were a conclusive fact – that Sandi Nieves had committed the crimes of perjury and fraud. 52 RT 7956:27-7957:1 ("the defendant out and out committed perjury when she took the witness stand"); 52 RT 7958:2-3 ("she . . . committed fraud upon the landlords"). There was no evidence that a trier of fact had determined

that the defendant committed perjury when she testified or that she was guilty of fraud against her landlord.

The prosecution's questions did not constitute proper hypothetical questions. The use of hypothetical facts during the examination of an expert witness is allowed within limits. People v. Boyette (2002) 29 Cal.4th 381, 449. But the hypothetical question must be "'rooted in facts shown by the evidence.'" Id. (quoting People v. Gardeley (1996) 14 Cal.4th 605, 618). The Court of Appeal in Fortner v. Bruhn (1963) 217 Cal.App.2d 184, 188-189, explained the problem with questions that misstate the facts such as those put to Plotkin by the prosecution in this case: "While a wide latitude should be given in cross-examinations, counsel, in putting questions to the witness, should not be allowed to assume facts not in evidence and state as positive assertion facts which if true, would be detrimental to the opposing party's case and of such a nature as to inflame and prejudice the minds of the jurors. . . . The inherent vice of the matter lies in the attempt to bring before the jury, in a roundabout way, facts which could not be proved . . . ."

The prosecution's misstatement of facts here went beyond a mere stretch of the evidence, allowing the prosecution to use the vehicle of hypothetical questions to send a message to the jury denigrating the credibility of Sandi Nieves's testimony.

C. The Prosecution's Misconduct Violated Defendant's Constitutional Rights and Resulted in Prejudice

The improper cross-examination of Plotkin and the prosecution's characterization of Sandi Nieves as a perjurer violated her rights to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments. The convictions must be reversed because the prosecution's misconduct "'infected the trial with unfairness as to make the resulting conviction a

denial of due process.'" Darden v. Wainwright (1986) 477 U.S. 168, 181 (quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643).

Jurors likely gave great weight to the prosecutor's comments because of their "special regard" for the prosecution. Hill, 17 Cal.4th at828. In addition, the trial court's preferential treatment of the prosecution over the defendant, pervasive throughout this trial, amplified the jury's credence given to statements made by the prosecution. Also, the trial court overruled every defense objection to this line of questioning, further endorsing the prosecutor's conduct in the eyes of the jury.

The prosecution's cross-examination of Dr. Plotkin was especially prejudicial because it suggested to the jury that Sandi Nieves was guilty of the additional crimes of perjury and fraud. This Court has warned that prosecutors who label defendants as perjurers "tread on dangerous ground." People v. Ellis (1966) 65 Cal.2d 529, 539. "Perjury is a felony, and the connotation conveyed to the jury is therefore apt to be far more derogatory than that conveyed by the term liar. Particularly when applied to the defendant, it is apt adversely and unnecessarily to affect the ability of the jury dispassionately to weigh the credibility of the accused and the issue of guilt or innocence." Id. at 540. The prosecution exacerbated the error and its prejudicial effect when it repeated during closing argument that Sandi Nieves had committed perjury.[127] 56 RT 8761-21-23.

Here, the trial court took none of the measures that other courts have used to remedy this type of error, or render it harmless. See e.g. People v. Mayfield (1997) 14 Cal.4th 668, 752-753 (no prejudice because the trial

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[127] The prosecution committed the same form of misconduct – misstating the facts and asserting the defendant committed perjury during the cross examination of a penalty phase witness. See Part XX, infra.

court sustained defense objections and the prosecutor voluntarily rephrased questions). The trial court did not sustain defendant's objections, which might have at least alerted the jury that the prosecution had stepped out of line. Nor did the trial court order the prosecution to rephrase its questions. Defense counsel objected to every question in which the prosecution misstated the facts, each time to be overruled by the trial court.

The prosecution's misconduct could have led the jury to condemn Sandi Nieves to death for lying, a crime for which she was not charged. The jury likely had not forgotten the prosecution's inflammatory comments about Sandi Nieves by the time it came to sentencing. The error carried over to the penalty phase, rendering her death sentence unreliable under the Eighth and Fourteenth Amendments. See Caldwell v. Mississippi (1985) 472 U.S. 320, 341. Therefore the convictions must be reversed. The error was not harmless beyond a reasonable doubt. See Chapman v. California (1967) 386 U.S. 18, 24; United States v. Cabrera (9th Cir.2000). 201 F.3d 1243, 1246.

XIII. THE TRIAL COURT PREJUDICIALLY INSTRUCTED THE JURY TO CONSIDER AS A BASIS FOR GUILT DISCOVERY VIOLATIONS ATTRIBUTED TO THE DEFENDANT

A. Introduction

The trial court instructed the jury twice during the guilt phase that Sandi Nieves herself had unlawfully withheld a series of discovery materials from the prosecution. The jury was given unbridled discretion to rely on this information in determining whether Nieves was guilty and whether the alleged special circumstances were true.

There is no evidence in the record to suggest that defendant was personally responsible for any discovery violations. Before delivering this instruction the trial court had already imposed several other sanctions designed to punish counsel and counteract any possible prejudice to the prosecution, including ordering immediate disclosures, granting continuances to the prosecution, imposing monetary sanctions on defense counsel and admonishing counsel in front of the jury. Nonetheless, the trial court erroneously delivered the discovery violation instruction over objections by the defense. This unwarranted and misleading instruction failed to guide the juror's discretion at all, leaving them to determine how to factor the discovery violations into their determination of Nieves's guilt or innocence. This instruction injected structural error into Nieves's trial, unfairly prejudiced her defense, and requires reversal of the judgment.

B. Significant Facts

1. Exchange of Discovery

Prior to trial, the parties exchanged discovery pursuant to Penal Code §§ 1054 et seq. The exchange of discovery continued on both sides up to and during the trial.

At various times, the parties each claimed that the other party had improperly delayed or withheld discovery.[128] The court refused to take any action when the prosecution delayed disclosure of discovery materials. See, e.g., 19 RT 1991:22-1996:4 (denying defense motion for mistrial or to strike coroner's testimony based on the prosecution's failure to disclose materials in discovery);[129] 24 RT 3120-3125, 3171-3172; 28 RT 3656:14-3658:22 (asking "So what?" in response to an objection to the prosecution's failure to provide scientific test results in discovery);[130] 35 RT 4763-4767, 4769:22-4770:26; 39 RT 5568-69, 5574-5586 (denying defense motion for an order directing disclosure of discovery materials relating to the prosecution's experts);[131] 44 RT 6444:24-6445:17, 6452:20-6453:20

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[128] In some instances, the prosecutors later acknowledged that they had in fact received discovery materials they claimed the defense had withheld. For example, after accusing defense counsel of withholding a statement by witness Debbie Wood until after she testified, the prosecutors admitted they had received all materials relating to defense counsel's interviews with Wood prior to her testimony. 33 RT 4538:25-4540:19. The prosecutors also conceded that they had received notes of defense expert Michael Gold that they had earlier claimed were not disclosed. 33 RT 4542:19-4543:5. When defense counsel objected to the prosecutors' misrepresentations, the court said, "So what?" 33 RT 4543:5.

[129] 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. The court denied both motions. 19 RT 1995:26-1996:4.

[130] Prosecution witness Phil Teramoto reviewed several gas chromatograph readouts during his testimony that had not been provided to the defense in discovery.

[131] See also 18 RCT 4611 (defense discovery motion).

(denying defense motion for a continuance to examine a prosecution expert's recently-disclosed notes).

In contrast, the court routinely imposed sanctions on the defense when the prosecutors complained. As described in more detail below, the court delayed or interrupted the testimony of several defense witnesses to give the prosecution additional time to prepare to cross-examine them, imposed sanctions on defense counsel, and granted the prosecution a two-week continuance to prepare to cross-examine the defense's experts. Even though the continuance did not result from any discovery violations, the court blamed the defense when it told the jury about the continuance. 30 RT 4112:23-4113:10. The court instructed the jury that defendant herself was responsible for concealing and delaying disclosure of discovery materials and information even though there was no evidence of defendant's involvement.

a. Expert Witnesses

The prosecution was provided with the names, addresses and reports of the experts the defense intended to call at trial. After reviewing this material with its consulting expert, Dr. Barry Hirsch, the prosecution moved for additional discovery from the defense based on a list prepared by Dr. Hirsch. 11 RCT 2432-2485;[132] see also 8 RT 399:21-407:3. Defense counsel opposed the motion to the extent that it sought information and materials outside the scope of the defendant's statutory discovery obligations. 8 RT 401:4-22, 403:3-7, 421:14-16. Defense counsel did not

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[132] In his letter, Dr. Hirsch requested numerous specific documents and reports referenced in the expert reports of Dr. Philip Ney, Dr. Nancy Kaser-Boyd and Dr. Lorie Humphrey, including privileged correspondence and internal memoranda prepared by the defense. 11 RCT 2476-2485.

object to the order to the extent it required compliance with the defense's statutory discovery obligations. 8 RT 400:16-401:11.

The trial court promptly signed the prosecution's proposed discovery order as written. 11 RCT 2486-87; see also 8 RT 402:21-23. The order required the defense to disclose certain general categories of information listed in Penal Code § 1054.3(a), including reports or statements of defense experts and original documentation of examinations or tests performed by the experts.

Defense counsel sought to clarify the scope of the court's discovery order in order to avoid problems later in the case. 9 RT 420:7-12, 421:14-16. The court refused to hold a hearing on the matter. 9 RT 421:27-422:6. But it did advise the parties the discovery order was limited to reports and statements of experts the defense intended to call to testify at trial and that the defense was not required to disclose any other materials its experts relied on unless and until the experts testified. 9 RT 416:19-25, 417:20-418:4, 418:23-25.

Despite this advisement and explicit acknowledgment that the defense had no statutory obligation to disclose additional expert materials, the court 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. Id. at 421:17-23.[133] Defense counsel objected that it would not be appropriate to penalize the defense if it had complied with the law. Id. at 421:24-26.

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[133] In contrast, the court deferred a defense request to order disclosure of records relating to Nieves's son, David Nieves, on the ground that the issue could be addressed at trial if necessary. See 9 RT 447:20-448:14 ("There might be some delay, but other witnesses could be called in the interim, or [David's] cross-examination could be delayed.").

The parties met and conferred about outstanding discovery requests. 10 RT 459:13-16. The prosecution then filed a second discovery motion requesting the trial court to issue an order directing the defense to disclose over 25 specific items. 11 RCT 2548-56. The defense filed a motion seeking to limit pretrial discovery to materials covered by Penal Code § 1054.3. 11 RCT 2537-2547.

Following a hearing on April 11, 2000, the court issued a new discovery order. 11 RCT 2560-61; see also 10 RT 530:11-547:6. The new order listed general categories of documents the defense was required to disclose.

The court specifically stated that "subsidiary reports" relied on by testifying experts are not covered by Penal Code § 1054.3. Id. at 533:4-7, 535:21-25. It also rejected the prosecutor's argument that the court had inherent authority to order pretrial disclosure of materials not listed in Penal Code § 1054.3. 10 RT 534:24-535:2.

The trial court acknowledged that if the prosecution only obtained some of the materials relied on by a defense expert at the time the expert testified, there could be a need for a continuance. 10 RT 535:19-21. But it stated, "if somebody is truly an expert, they will be able to testify in rather a quick fashion after they hear or have read what the defense expert has to say." Id. at 535:22-25. The court also observed that any problems or delay that might arise from the lawful disclosure at trial of materials relied on by an expert are "due to the way the law is written." Id. at 536:5-20.

After ruling that the prosecution was not entitled to some of the expert discovery it sought, the court continued to browbeat the defense about delaying disclosure. See 10 RT 539:6-12 (telling defense counsel to turn over expert materials early to "avoid the possibility that you are

committing some kind of violation of the discovery statute"); 10 RT 545:2-4 (threatening defense counsel that delaying disclosure "may come back to haunt you later on").

Following opening statements, the prosecution requested all information and materials relied on by the defendant's mental health experts, including statements by the defendant, on the ground that the defense had put the defendant's mental state in issue. 15 RT 1460:12-1461:21, 16 RT 1463:11-1464:5. The defense objected that such discovery would be premature until the defense actually called an expert to testify. 16 RT 1465:8-15.

The court initially seemed to agree. It ruled that it did not have authority to order the defense to disclose any further materials in discovery based on the defense opening statement. 19 RT 1990:12-21. The court stated that items subject to a privilege, "such as attorney-client matters, defendant's statements that might tend to incriminate her, [or] work-product" were not discoverable. 19 RT 1987:28-1988:3; see also 19 RT 1987:6-9 ("matters relied upon [by an expert], such as text or reference works, I think it's a matter of work product" that is not subject to disclosure until the expert testifies).

Despite this ruling, the court persisted in threatening the defense about delaying disclosure of its experts' materials. See 27 RT 3586:13-16 ("I have told you this, Mr. Waco, ahead of time. You know, you might be guessing wrong on the impact of your late disclosure of this information.").[134]

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[134] At a later hearing, the court ruled defense counsel had waived the attorney-client and work-product privileges by disclosing certain privileged expert materials before the expert was called to testify. 45 RT 6853:9-23.

(continued...)

On May 25, 2000, the defense provided the prosecution with notes and background research materials recently received from defense expert Dr. Philip Ney, along with a few pages of additional notes of witness interviews received from defense expert Dr. Lorie Humphrey, both of whom the defense intended to call during the next week. 27 RT 3578:14-20, 3579:14-15, 3587:11-17, 3588:20-27. On May 26, 2000, the prosecution moved for a continuance on the ground that its experts needed additional time to assist the prosecution in preparing to cross-examine the defense's experts. 27 RT 3578:11-3581:8.

The prosecutors also claimed that the notes they received from some of the defense experts were not legible. 29 RT 3911:28-3912:2, 3937:17-3939:23, 3939:28-3941:15. 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.

Even though doctors' handwriting is notoriously bad,[135] the court treated the handwriting as an outrage. Without even reviewing some of the defense experts' notes itself, the court ordered them to prepare new,

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[134](...continued)
When defense counsel accurately explained that he had only disclosed the materials early under compulsion by the court (45 RT 6817:6-6818:8:4), the court disavowed its role and ruled that the disclosures had been entirely voluntary. Id., 6818:11-17, 23-25, 6853:20-23.

[135] See, e.g., The New Yorker Book of Doctor Cartoons (Knopf 1996), and the many references to doctors' poor handwriting in cartoons accessible on the Internet at www.cartoonstock.com/ (Search terms: "handwriting," "medical") (accessed September 23, 2008).

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; 49 RT 7442:7-7444:11.[136]

The court also granted the prosecution's request for a continuance. 30 RT 3955:19-25, 3962:22-25. It instructed the jury the trial was being delaying for two weeks because the defense had only recently disclosed some information about its experts and because some of the defense experts' notes were "indecipherable to a great degree...." 30 RT 4112:23-4113:10. The court acknowledged that the defense was not required to provide the information any earlier, but he made it quite clear that it was the defense's "delay in the disclosure" that created "a need to continue this case so that the People can prepare to examine the witnesses." Id., 4112:28-4113:5.

Following the two-week break, the prosecution used information obtained from the defense experts' transcribed notes and other materials to cross-examine defendant Nieves about her actions on the night of the fire, medications she was taking, and other key issues in the case. See, e.g., 35 RT 4818:6-20, 4819:21-25, 4861:3-6; 4865:2-4868:18, 4874:26-4875:10, 4880:19-26, 4900:9-18, 4901:19-4902:3, 4908:8-10, 4913:13-4914:1, 4917:27-4918:23, 4920:3-4921:19. The prosecutors also used these materials to cross-examine Nieves's step-father, Al Lucia, 37 RT 5039:10-28, 5078:7-15, 5091:27-5092:6, 5098:27-5099:17, and defense expert Lorie

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[136] In stark contrast, when the defense later requested transcriptions of a prosecution expert's notes, the court denied the request because "[t]here is not a need to have a transcription of notes." 36 RT 4953:8-10; see also 39 RT 5587:21-25 (reviewing prosecution expert's notes before denying the defense's request for a transcription).

Humphrey. 38 RT 5348:19-5351:16, 5353:4-26.[137] The prosecution also used the experts' notes in rebuttal. 47 RT 7078:3-7079:18 (using Dr. Kaser-Boyd's notes in questions posed to prosecution expert Robert Sadoff); 48 RT 7301:8-7303:5 (using Dr. Kaser-Boyd's notes in questions posed to prosecution expert Edwin Amos).

During Dr. Lorie Humphrey's testimony on June 21, 2000, the parties learned Dr. Humphrey had not provided defense counsel with a set of norms she had used to score one of the neuropsychological tests she administered to Nieves. 38 RT 5292:17-5295:3, 39 RT 5570:17-5571:5. As a result, the norms and her related notes had not been provided to the prosecution in discovery. Over defense objections (38 RT 5295:12-14, 5355:21-23), the court permitted the prosecution to attack Dr. Humphrey's credibility by cross-examining her about why she delayed providing the norms and her notes. 38 RT 5295:7-11, 5355:8-5357:2. The court also joined in the prosecution's attack on Dr. Humphrey, adding the weight of the court to the prosecutor's point:

> The Court: You just said that you used it [the norms] to form your opinion; correct?
>
> The Witness: Yes, I did. It does make sense.
>
> The Court: You agree you should have turned it over?
>
> The Witness: Sure. Next time I'll give you all of my normative data.

38 RT 5294:24-5295:3.

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[137] Many of the notes the prosecutors relied on in their cross-examination of these defense witnesses were provided by defense expert Nancy Kaser-Boyd. The defense never called Dr. Kaser-Boyd to testify. 41 RT 5925:23-24.

The court abruptly cut off Dr. Humphrey's testimony and told the jurors the court was "delaying any further examination of Dr. Humphrey until such time as I have a hearing on legal issues." 38 RT 5364:9-11. It ordered Humphrey to get the materials from her office immediately. 38 RT 5362:5-18. In the meantime, the court allowed prosecution rebuttal expert Dr. Brook to testify out of order. 38 RT 5365:22-5366:6. In contrast, when Dr. Brook revealed that he had prepared notes that had not been disclosed to the defense, the court brushed the matter aside and accused defense counsel of waiting too long to request notes he had just learned about:

> 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.
>
> 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.

Prior to the testimony of defense expert Dr. Philip Ney, the court ordered the defense to instruct Dr. Ney to bring "anything that he used in this case to form his opinion, any booklets, any normative data, anything, any scrap of paper that he's looked at or read in the past" to court. 39 RT 5580:24-5581:7. On June 23, 2000, the defense provided the prosecution with an interview transcript[138] and research materials sent that day by Dr. Ney. 39 RT 5583:27-5586:15.

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[138] The court subsequently ordered Dr. Ney to provide the prosecution with the original tape of the interview with Al Lucia, 41 RT 5849:20-5851:2, so the prosecutors could "make sure it's an accurate transcription." 40 RT 5601:5-7. The prosecution later used the tape to impeach Dr. Ney. 46 RT 6948:3-6949:4.

On June 26, 2000, the court delayed further testimony by Dr. Ney so it could determine if there had been any discovery violations. 41 RT 5857:23-5858:21. The court excused the jurors after telling them that it needed to determine whether the defense had violated the discovery rules in connection with recently disclosed expert materials. 41 RT 5866:16-5867:27. Following a lengthy 402 hearing during which the prosecution was allowed to depose Dr. Ney about his contacts with Sandi Nieves and other matters relating to his opinion, the court proposed to strike Dr. Ney's testimony and exclude any further testimony from him. 41 RT 5914:11-26.

But the prosecutors protested, wanting an opportunity to cross-examine him instead. Id. They did not seek to strike or exclude his testimony, and they did not request a continuance to prepare for cross-examination. Instead, they requested sanctions against defense counsel and Dr. Ney as well as a jury instruction. 42 RT 6069:5-6070:8; 43 RT 6236:26-6238:9, 6431:24-6434:14. Defense counsel objected to any sanctions on the ground the prosecution had not shown any prejudice from the purported discovery violations. 43 RT 6433:22-26.

With the jury back, the prosecution conducted a lengthy and detailed cross-examination of Dr. Ney that included questions based on the content of the materials disclosed to the prosecution just prior to Dr. Ney's testimony. 42 RT 6086:17-6110:15, 6112:27-6142:3, 6147:10-6164:24, 6169:8-6181:27, 6189:1-6205:11, 43 RT 6379:14-6419:18, 6422:3-6423:4. The court again assisted the prosecution by cross-examining Dr. Ney about when he disclosed information. See, e.g., 42 RT 6107:24-6110:19. In a subsequent hearing, the court and the prosecution both noted that the jury had been made "well aware" of the discovery issues during Dr. Ney's cross-examination. 43 RT 6432:22-27.

b. Lay Witnesses

On May 30, 2000, just before the defense started its case, defense counsel discovered that his paralegal had notes of interviews with several defense witnesses on her computer that had not been disclosed to the prosecution. Counsel immediately disclosed the interview notes, which totaled fewer than 12 pages.[139] 28 RT 3665:18-3668:14, 3668:19-3669:3, 3731:13-3732:15.

Counsel explained that he had not had copies of the notes in his paper trial file. Id. Names and addresses of the witnesses in question, including Sandi Nieves's friends Rhonda Hill and Debbie Wood and Sandi's stepparents Al and Penny Lucia, had been provided to the prosecution well in advance of the trial. Id. The longest set of notes, from the paralegal's interview with witness Debbie Wood, was under four pages long. See RCT Supp. Vol. III, 91-94. The others were all under two pages. Id. at 84-90, 95. Some of the statements were not relevant at the guilt phase. Id. at 84-85 (Penny Lucia's account of events that occurred after the fire); id. at 86 (Al Lucia describing how Sandi Nieves's mother abandoned Nieves's brothers in exchange for $350.00 in the 1970's).

Defense counsel planned to call Nieves's friends Rhonda Hill and Debbie Wood as his first witnesses. 29 RT 3661:18-3662:14. But the court prohibited the defense from calling any of these witnesses until after a hearing to determine whether the prosecution had been prejudiced by the delayed disclosure of the Hill and Wood statements. 28 RT 3669:26-3670:8. As a result, the defense was compelled to open its case with the

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[139] Copies of witness statements provided to the prosecution on May 30, 2000, are in the record at RCT Supp. Vol. III, 84-95.

only other defense witness present, a police sergeant who had already testified for the prosecution. Id. 29 RT 3678:1-3685:27 (Michael Wilson).

The court offered the prosecution additional time to interview the witnesses whose statements were disclosed that day. 28 RT 3703:12-15, 3704:1-7, 3707:15-20. It also invited the prosecution to move to exclude those witnesses' testimony. 28 RT 3707:20. The prosecution did not make such a request.

In addition, the trial court instructed the jury the defense had violated the discovery laws by delaying disclosure of certain witness statements. 28 RT 3709:23-3710:26. The court instructed the jury:

> 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 with 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.
>
> So at this time, because there is some chance that one witness can be put on today – if that does occur – and apparently this person has come some distance to be here – I am going to excuse you now ntil[sic] 3:00 p.m.
>
> [General admonitions]

> I'll give you further instructions on this discovery noncompliance later on when the issues are more clarified. But that's just to give you some explanation of why we're taking a break at this time.

The court then adjourned.

The next day, the prosecutors told the court they had reviewed the newly disclosed witness statements of Debbie Wood and Rhonda Hill and were prepared to cross-examine them. 29 RT 3775:28-3776:5. But they requested more time to prepare to cross-examine Al and Penny Lucia. This request was not based on the late disclosure of the Lucias' defense paralegal's notes. Instead, the prosecutors now claimed they could not read defense expert Dr. Nancy Kaser-Boyd's notes of her interviews with the Lucias and asked for more time to get her help deciphering them. 29 RT 3775:12-27, 3776:22-25.[140]

The Kaser-Boyd notes had been provided to the prosecution in pretrial discovery. All of a sudden they needed to be transcribed. 29 RT 3776:17-3781:12. Although the prosecutors had had several weeks to contact Kaser-Boyd about her notes, the court refused to permit the defense to call the Lucias until the prosecutors felt they were prepared for cross-examination. 29 RT 3780:21-23. When defense counsel reminded the court that the prosecution had already had the Kaser-Boyd notes "for over a

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[140] The prosecutors were in fact able to decipher Dr. Kaser-Boyd's notes when it suited them. Later the same day, one of the prosecutors cross-examined Dr. Kaser-Boyd during a 402 hearing about information he had found in her notes. See, e.g., 29 RT 3888:17-22 ("You did mention Dr. Markman in your notes?"), 3890:3-8 ("Her name is in your notes for some purpose?"), 3891:6-7 ("But Dr. DeCarlo's name is, again, one of the names of the doctors that is in your notes?"), 3892:12-14 ("Showing you the notes, I guess, again from the first visit, 12/28, second to the ast page, there is [sic] name of a Petra Ricardo?").

month," the court responded, "So what?" and cut off any further discussion. 29 RT 3781:2-12.

On June 1, 2000, Debbie Wood, Rhonda Hill, Al Lucia, and Penny Lucia all testified.[141] Their testimony was brief and involved uncomplicated matters, such as Sandi Nieves's relationships with her children and the events immediately preceding the fire. The prosecutors used the interview notes disclosed by the defense on May 30, 2000 to cross-examine Debbie Wood and Rhonda Hill. See, e.g., 30 RT 4005:16-18, 4009:3-4010:25, 4013:6-4014:12, 4018:15-26, 4066:8-4067:10, 4070:20-28. They relied on information from Dr. Kaser-Boyd's interview notes while cross-examining Al and Penny Lucia. 30 RT 4098:15-26, 4100:6-22, 4108:2-3, 15-18.

After Wood, Hill, and the Lucias testified, and just before the two week break, which the court blamed on the defense, the court instructed the jury the defendant had violated the discovery statute by delaying and concealing witness statements of Rhonda Hill, Debbie Wood, Al Lucia, Penny Lucia, Delores Morris and Lenora Frey. 30 RT 4113:28-4114:16.

Outside the presence of the jury, the court also sanctioned defense counsel $500.00 for disobeying the court's discovery order. 18 RCT 4596; see also 30 RT 4116:28; 31 RT 4163:8-10; 34 RT 4644:13-4645:10 (imposing monetary sanctions pursuant to Code of Civ. Proc. § 177.5).

2. Instructions to the Jury

During the guilt phase, the court instructed the jury twice that the defendant, rather than defense counsel, had violated the discovery laws.

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[141] See 30 RT 3964:3-3996:10, 4004:11-4031:16 (Debbie Wood); 30 RT 4033:8-4077:12, 4086:16-4088:8 (Rhonda Hill), 30 RT 4089:3-4101:25 (Al Lucia), and 30 RT 4102:19-4112:9 (Penny Lucia). Al Lucia was also recalled to testify three weeks later about his observations of Sandi Nieves's health when she was a child. 37 RT 5057:3-5043:13.

After the court told the jury there would be a brief break in the proceedings because the defense had violated the discovery laws, 30 RT 3709:23-3710:26, the court delivered the then-current version of CALJIC No. 2.28 (Failure to Timely Produce Evidence).[142] This lengthy instruction advised the jury that "[t]he defendant has concealed and failed to timely disclose evidence regarding witness statements – witness statements of Debbie Woods, Rhonda Hill, Al Lucia, Penny Lucia, Delores Morris, and Aunt Lenore." 30 RT 4113:28-4114:16 (emphasis added).[143]

Defense counsel objected to this instruction on the ground that the defense had not hidden anything. See 30 RT 4115:8-4116:25. Counsel also

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[142] The version of CALJIC No. 2.28 given at the trial was revised in 2005 to address serious flaws identified in decisions of the Court of Appeal. See Use Note to CALJIC No. 2.28 (Fall 2007 ed.) pp. 67-68. The corresponding standard jury instruction on this issue approved by the California Judicial Council as the State's official instructions pursuant to the California Rules of Court also differs significantly from the version of CALJIC No. 2.28 delivered by the trial court in this case. See CALCRIM No. 306 (Untimely Disclosure of Evidence) (Spring 2008 ed.) and Use Note; see also People v. Riggs (2008) 44 Cal. 4th 248, 306-309.

[143] The remainder of this instruction stated,

> Although the defendant's concealment and failure to timely disclose evidence was without lawful justification, the court has, under the law, permitted the production of this evidence during the trial.
>
> The weight and significance of any concealment and delayed disclosure are matters for your consideration.
>
> However, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

30 RT 4114:5-16.

objected to the court's reference to statements of Delores Morris and "Aunt Lenore" because they were not being called as witnesses.

Over further objections by the defense, 46 RT 6996:15-7001:18, 7006:12-24, the court delivered CALJIC No. 2.28 a second time when it instructed the jury at the close of the guilt phase. The court stated as established fact that "the defendant" violated the discovery rules by "conceal[ing] and fail[ing] to timely disclose" three statements by witnesses, Debbie Wood, Rhonda Hill and Al Lucia, and "[r]eadable notes and reports and other materials relied upon" by defense experts Lorie Humphrey and Philip Ney.[144] 54 RT 8381:18-8383:3 (emphasis added); 19 RCT 4931. The instruction continued:

> Although the defendant's concealment and failure to timely disclose evidence was without lawful justification, the court has, under the law, permitted the production of this evidence during the trial.
>
> The weight and significance of any concealment and delayed disclosure are matters for your consideration.
>
> However, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

Id. (emphasis added).

3. Closing Arguments

The prosecution used the alleged discovery violations by counsel to its advantage in closing argument. The prosecutor claimed that the

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[144] As noted above, the court also informed the jury during the testimony of defense expert Philip Ney that it was sending them home for the day because the defense had delayed disclosing some of Dr. Ney's working materials to the prosecution. 41 RT 5867:26-5868:10. The court explained that it would be deciding "whether this is a violation of the discovery rules." Id. at 5868:4-5.

defendant had hidden crucial discovery materials to gain a strategic advantage and prejudice the prosecution:

> You also received an instruction with respect to discovery violations and the failure to produce evidence 30 days prior to trial. People, along with the Sheriff's Department, gave all the evidence to the defense in accordance with the law. We can't say the same for the defense.
>
> The point of it is you can't find defendant guilty because they hid stuff. The point is why. Why hide? Why hide your defense?
>
> I tell you why. Desperation. The evidence in this case is so overwhelming, so enormous, and so vast, what are you going to do?
>
> It's in order to prevent the prosecution from being able to prepare; in order to gain a strategic advantage.

57 RT 8864:6-20.

C. The Discovery Violation Jury Instruction Was Not Supported by Penal Code § 1054.3

1. Materials Identified in the Instruction Were Not Subject to Pretrial Discovery

Three categories of information the trial court included in its instructions to the jury regarding discovery violations by the defendant were not covered by the discovery statutes: statements of witnesses the defense did not intend to call, "readable notes" of the defense's experts, and source materials relied on by defense experts. In the absence of any discovery violation regarding these materials, the court had no authority to advise the jury otherwise.

a. Discovery Obligations of Criminal Defendants

Penal Code § 1054.3 requires the defense to disclose to the prosecution:

> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer in evidence at the trial.

Pursuant to Penal Code § 1054.7, these disclosures must be made at least 30 days prior to the trial, or, if the information "becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately," unless good cause is shown.

Penal Code § 1054(e) provides that "[t]he prosecution is entitled to discovery from the defense only in accordance with Penal Code sections 1054.3 and 1054.7." Alford v. Superior Court (2003) 29 Cal.4th 1033, 1046 (citing People v. Tillis (1998) 18 Cal.4th 284, 294). See Verdin v. Superior Court (2008) 43 Cal.4th 1096. "[C]ourt-ordered discovery is governed exclusively by – and is barred except as provided by [Penal Code § 1054 et seq.]." In re Littlefield (1993) 5 Cal.4th 122, 129; see also Penal Code § 1054.5(a) ("No order requiring discovery shall be made in criminal cases except as provided in this chapter.").

Pursuant to Penal Code § 1054.6, the defendant is not required to disclose in discovery any materials or information that "are work product" or that are "privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." Id. "This section thus expressly provides that attorney work product is nondiscoverable." Izazaga v. Superior Court (1991) 54 Cal.3d 356, 382.

b. Authority to Impose Sanctions for Discovery Violations

> Pursuant to Penal Code § 1054.5(b), the trial judge is authorized to make any order necessary to enforce the [parties' statutory discovery obligations], including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

The disclosure of materials that are not subject to discovery pursuant to § 1054.1 et seq., however, cannot be "untimely" or constitute a discovery violation warranting a sanction. Cf. People v. DePriest (2007) 42 Cal.4th 1, 38-39 (holding that the prosecution's disclosure of discovery materials after 30 days before trial but within the time periods mandated by the discovery statutes did not warrant a discovery sanction).

c. The Defense Was Not Required to Disclose Witness Statements of Non-Testifying Witnesses

The trial court instructed the jurors that "[t]he defendant" violated her discovery obligations by "conceal[ing] and fail[ing] to timely disclose" witness statements of Sandi Nieves's mother, Delores Morris, and her "Aunt Lenore,"[145] among others. 30 RT 4113:28-4114:16.

Penal Code section 1054.3(a) limits the defendant's disclosure obligation to witness statements of persons the defendant "intends to call as witnesses at trial." This Court has held that the prosecution's right to statements of a witness for the defense is triggered by the intent of the defense to call the witness to testify. Tillis, 18 Cal.4th at 294.

The defense did not intend to call Morris or "Aunt Lenora [Frey]" to testify during the guilt phase. See 30 RT 4115:14-4116:16. Their names

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[145] "Aunt Lenore" is also referenced in the transcript as Lenora Frey.

were not included on the defense guilt phase witness lists, 11 RCT 2434-2435, 2466-2467a, and Morris and Frey did not testify during the guilt phase. See RT Vol. A, Master Index of Witnesses.[146] Defense counsel's disclosure of their statements during trial did not constitute a discovery violation. In fact, Morris never testified at all. "Aunt Lenore" did not testify at the guilt phase. When the court gave the instruction at the guilt phase of the trial there was absolutely no prejudice to the prosecution as to these witnesses.

The court abused his discretion when it instructed the jury that Nieves had concealed and delayed disclosing Morris's and Frey's statements in violation of the discovery rules. 30 RT 4113:28-4114:16. The court compounded the error by failing to correct it. The jurors were never told to disregard the instruction to the extent that it referred to Morris and Frey.

d. The Defense Was Not Required to Create Legible Versions of Experts' Raw Notes or Disclose All of Its Experts' Raw Notes and Source Materials Prior to Their Testimony

The court instructed the jury it could consider as part of its deliberations that Nieves "concealed and failed to timely disclose ... [r]eadable notes and reports and other materials relied upon [by defense expert] witnesses Dr. Philip Ney and Dr. Lorie Humphrey." 30 RT 4113:28-4114:16. This part of the instruction was also unwarranted under the discovery statute.

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[146] Lenora Frey was called to testify during the penalty phase. 62 RT 9680:17-9721:22. She testified in August 3, 2000, over two months after the May 30, 2000, disclosures.

i. The Defense Had No Statutory Obligation to Prepare "Readable Notes" for the Prosecution

A defendant's statutory pretrial discovery obligations with regard to testifying experts are limited to "reports or statements of experts made in connection with the case" and "the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." Pen. Code § 1054.3(a). There is no requirement that counsel obtain a report, statement or other written documentation from an expert solely for the purpose of providing it to the other side in discovery. See In re Littlefield (1993) 5 Cal.4th 122, 136.

This Court has not addressed whether or to what extent § 1054.3(a) applies to a defense expert's raw notes. But two appellate courts have held that such materials do not constitute "reports or statements" of an expert subject to discovery unless they document the expert's factual findings. See Hines v. Superior Court (1993) 20 Cal. App. 4th 1818, 1822, 1823 (an expert's interview notes reflecting the defendant's statements, preliminary drafts of an expert report, an expert's notes to himself about interim conclusions and other random notes in the expert's file are not discoverable); Sandeffer v. Superior Court (1993) 18 Cal.App.4th 672, 679 (holding that an order requiring disclosure of an expert's notes exceeded the court's authority to enforce the defendant's statutory discovery obligations).

There was some evidence at trial that production of raw notes is not common. When Dr. Robert Plotkin, a defense rebuttal expert, testified he was also forced to produce transcriptions of his notes. Dr. Plotkin, who had considerable experience giving court testimony, objected.

The Court: Dr. Plotkin, when did you write these notes?

Dr. Plotkin: Saturday -- Sunday, when I read through the documents.

The Court: Why didn't you forward them to Mr. Waco immediately?

Dr. Plotkin: Your honor, in all of the times I testified, I never forwarded my handwritten notes. In all of the times.

The Court: Did you write a report?

Dr. Plotkin: I did not. I was hired on this case on Friday.

48 RT 7073:9-20.

Here the defense had no obligation to disclose Dr. Ney's and Dr. Humphrey's notes to the prosecution until they were called to testify. Defense counsel provided these experts' notes before they testified. 27 RT 3578:14-20, 3579:14-15, 3587:11-17, 3588:20-27 (Ney and Humphrey notes disclosed on May 25, 2000); 39 RT 5583:27-5858:21 (Ney notes disclosed on June 23, 2000).

Regardless whether any particular expert's notes were discoverable, there is nothing in § 1054.3 that requires a defendant or a defense expert to create a new version of an expert's handwritten notes in typewritten form for the benefit of the prosecution. Given that the defense is not required to obtain and disclose materials that its experts have not already generated, see In re Littlefield, 5 Cal.4th at 136, there is no basis for the court's orders requiring the defense to have its experts prepare new documents, such as transcribed notes, different from or in addition to the already existing, original notes. See 29 RT 3937:17-3939:23, 3959:12-3961:16; 31 RT 4142:1-4, 4144:28-4145:4.

The trial court exceeded its authority when it ordered the defense experts to create materials that did not already exist. See Penal Code § 1054.5(a) ("No order requiring discovery shall be made in criminal cases

except as provided in this chapter."); Verdin v. Superior Court, 43 Cal.4th at 1103; In re Littlefield, 5 Cal.4th at 129. And the court further abused its discretion by instructing the jury that the defendant had violated her discovery obligations by failing to provide "readable notes" from Drs. Ney and Humphrey in discovery. Because there was no discovery violation – let alone a violation by defendant herself – there was no justification for penalizing the defendant in this manner.

This error was all the more egregious because the court imposed the transcription obligation only on the defense. When defense counsel requested transcriptions of a prosecution expert's raw notes, the court denied the request. 39 RT 5586:24-5587:4; 5587:21-25 (Dr. Brook).

ii. Source Materials

The court did not have authority to order pretrial disclosure of all materials relied on by the defense experts. Any delay in disclosing such materials was not a discovery violation. See In re Littlefield, 5 Cal. 4th at 129. Because there was no discovery violation, it was error for the court to instruct the jury that defendant had delayed disclosure and concealed "materials relied upon" by defense experts Dr. Ney and Dr. Humphrey.

As the court itself recognized, §1054.3 also does not require that the defense disclose in pretrial discovery all outside materials consulted, considered or relied on by an expert, such as scholarly articles he or she may have reviewed. See 19 RT 1987:28-1988:3; see also 19 RT 1987:6-9 ("matters relied upon [by an expert], such as text or reference works, I think it's a matter of work product" that is not subject to disclosure until the expert testifies). Although the court initially followed this rule when it denied the prosecution's request for expert materials beyond the experts' reports, it undermined the work product protection when it instructed the

jurors that defendant violated the law by disclosing expert source materials less than 30 days before trial.

2. The Instructions Were Not Justified, Appropriate, or Necessary

Penal Code § 1054.5(b) authorizes a trial judge to

> make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

The statute does not authorize any form of discovery sanction that is not "necessary" to enforce the provisions of Chapter 10 ("Discovery") of Title 6 of Part 2 of the Penal Code, which comprises §§ 1054 et seq. Sanctions that are "out of proportion" to a discovery violation are therefore prohibited. In re Michael L. (1985) 39 Cal.3d 81, 87 (holding that exclusion of identification testimony was "unwarranted" when the police failed to preserve related evidence); People v. Zamora (1980) 28 Cal.3d 88, 103 (when a party does not comply with its criminal discovery obligations, the court must "tailor the sanction to compensate for the exact wrong done"); see also Wilcox v. Birtwhistle (1999) 21 Cal.4th 973, 980 (discovery sanctions should be tailored "to the severity of the discovery abuse").

The primary objective of Penal Code §§ 1054 et seq. is to facilitate "'the true purpose of a criminal trial, the ascertainment of the facts.'" In re Littlefield (1993) 5 Cal.4th 122, 130 (internal citation omitted); see Pen. Code § 1054(a) (setting forth the purposes of the criminal discovery statutes). Penal Code § 1054.3, which requires disclosures by the defense, is designed to achieve this objective by providing

> the prosecution a reasonable opportunity to investigate prospective defense witnesses before trial so as to determine the nature of their anticipated testimony, to discover any matter that might reveal a bias or otherwise impeach the witnesses's testimony....

In re Littlefield, 5 Cal.4th at 131.

Sanctions are not necessary to achieve these objectives – and therefore not authorized – when there is no discovery violation, see People v. Kraft (2000) 23 Cal.4th 978, 1063, or when the prosecution is not prejudiced by the delayed disclosure of discovery materials. See DePriest, 42 Cal.4th at 39. In DePriest, the defendant argued that the trial court should have imposed sanctions on the prosecution for failing to disclose shoeprint evidence in pretrial discovery. This Court found that sanctions were not warranted under § 1054.5(b) because the defendant had had a sufficient opportunity during trial to investigate the shoeprint evidence and defend against it. Id.; see also People v. Cook (2007) 40 Cal.4th 1334, 1358 (no need to penalize the prosecution for failing to disclose information about a witness's statement because "the defense suffered no prejudice from the nondisclosure" in light of other information disclosed in pretrial discovery and other impeaching evidence presented to the jury); People v. Pinholster (1992) 1 Cal.4th 865, 941 (holding that CALJIC No. 2.28 was not warranted when a continuance would have been sufficient to cure the harm caused by the prosecution's failure to timely comply with a discovery order). But see People v. Riggs, 44 Cal.4th at 407 (discovery violation instruction appropriate if nondisclosure permits an inference that defendant tried to hid something required by law).

As shown in Section B above, the only materials and information referenced in the jury instructions that were not timely disclosed by the defense pursuant to Penal Code § 1054.3 were witness statements of Debbie

Woods, Rhonda Hill, Al Lucia and Penny Lucia, and a set of norms Dr. Humphrey used to score one of the tests she administered to Nieves. The prosecution was not inhibited by the delayed disclosure of any of these materials or by the delayed disclosure of the other information referenced in the jury instruction.

First, the defense witnesses whose statements were disclosed during trial were known to the prosecution well in advance. See 11 RCT 2434-2435, 2466-2467a (defense witness lists); 28 RT 3665:18-3668:14, 3668:19-3669:3, 3712:10-19, 3731:13-3732:15. The prosecution therefore had "a reasonable opportunity to investigate prospective defense witnesses before trial...." In re Littlefield, 5 Cal.4th at 131.

Second, the Wood, Hill and Lucia witness statements were all brief and uncomplicated. See RCT Supp. Vol. III, 84-95. Some of the statements did not even relate to any issue of relevance at the guilt phase. Id. at 84-85 (Penny Lucia's account of events that occurred after the fire); id. at 86 (Al Lucia describing how Sandi Nieves's mother abandoned Nieves's brothers in exchange for $350.00 in the 1970's). Lenora Frey did not testify until the penalty phase, two months after disclosure of her pretrial statement. The delay in disclosure therefore did not deprive the prosecution of "a reasonable opportunity" to determine "the nature of their [the witnesses'] anticipated testimony" or to discover any basis for impeachment in the statements. In re Littlefield, 5 Cal.4th at 131.

Third, the court went to great lengths to offset any conceivable hindrance of the prosecution. It employed nearly every one of the other sanctions listed in Penal Code § 1054.5(b). The court ordered immediate disclosures by the defense, including an order requiring Dr. Humphrey to leave court in the middle of her testimony to retrieve documents from her

office across the county. 38 RT 5364:9-11; 11 RCT 2486-87, 2560-61. The court repeatedly offered to exclude evidence and testimony based on discovery violations by the defense. 28 RT 3707:20 (lay witnesses); 39 RT 5571:11-19 (Dr. Humphrey's test results); 41 RT 5914:11-26 (Dr. Ney's testimony).

The court delayed the testimony of Wood, Hill and the Lucias, barring the defense from calling any of them until the prosecutors had reviewed their respective witness statements and were ready for cross-examination. 28 RT 3661:18-3662:14; 29 RT 3703:12-15, 3704:1-7, 3707:15-20, 3775:28-3776:5. And the court granted the prosecutors a two-week continuance to prepare to cross-examine the defense experts, including Drs. Ney and Humphrey, even though expert discovery had been provided in a timely manner. 30 RT 3955:19-25, 3962:22-25.

In addition, the court chastised Dr. Humphrey in front of the jury for failing to disclose a subset of testing norms, 38 RT 5294:24-5295:3, abruptly cut off her testimony so she could retrieve the materials immediately for the prosecution, id. at 5364:9-11, and permitted the prosecution to call a rebuttal witness to attack her opinions before she had even finished testifying. Id. at 5362:5-12, 5365:22-5366:6, 5379:28-5380:10. The court also allowed the prosecutors to make the jurors "well aware" of the alleged discovery violations involving defense experts. 43 RT 6432:22-27 (Dr. Ney); see also 38 RT 5355:8-5357:2 (Dr. Humphrey).

The trial court gave the prosecution free reign to conduct wide-ranging depositions of the defense witnesses, under the guise of 402 hearings, including Al Lucia, Dr. Humphrey and Dr. Ney, which gave the prosecutors the advantage of deposing these witnesses before they testified in front of the jury. 37 RT 5028:25-5043:13 (Lucia); 39 RT 5506:19-

5557:26 (Dr. Humphrey); 40 RT 5676:20-5698:13, 5803:21-5819:26, 41 RT 5829:6-5852:26, 5889:6-5914:6, 5941:1-5992:23 (Dr. Ney). The court also imposed monetary sanctions on defense counsel for violating the court's discovery order. See 18 RCT 4596.

Fourth, the record demonstrates that the prosecutors made extensive use of the witness statements and other materials referenced in the court's instruction. They cross-examined Woods and Hill specifically about their statements to the defense paralegal, Tina Katz. See, e.g., 30 RT 4010:3-25, 4013:6-14, 4018:22-25 (Wood); 30 RT 4066:8-4067:7 (Hill). They interrogated Dr. Humphrey about the norms she had used, but failed to disclose. 38 RT 5295:7-11, 5299:11-5303:28. They cross-examined Dr. Ney in detail about the contents of scholarly articles and other materials they received just prior to his testimony. 42 RT 6086:17-6110:15, 6112:27-6142:3 , 6147:10-6164:24, 6169:8-6181:27, 6189:1-6205:11; 43 RT 6379:14-6419:18, 6422:3-6423:4.

Under the circumstances, a jury instruction about the defense counsel's relatively minor discovery violations was not "necessary" to accomplish the objectives of the provision requiring disclosures by the defense. The prosecution had "a reasonable opportunity to investigate prospective defense witnesses before trial" and was able to "determine the nature of their anticipated testimony, [and] to discover any matter that might reveal a bias or otherwise impeach the witnesses's testimony" before they testified. In re Littlefield, 5 Cal.4th 122 at 131. There was, therefore, no prejudice to redress. See People v. Pinholster (1992) 1 Cal.4th 865, 941 (the prosecution's disclosure of a witness in the middle of trial caused no prejudice because the defendant was given "ample time to investigate once the witness and his proposed testimony were disclosed."). The discovery

statute did not authorize the trial court to hold discovery violations against the defense in its instructions to the jury regarding its consideration of guilt or innocence.

3. There Was No Basis for Instructing the Jurors that Nieves Herself Violated the Discovery Rules

It is error for a trial court to instruct the jury that a defendant has attempted to suppress evidence in the absence of evidence that the defendant participated in or authorized an attempt at suppression. People v. Valdez (2004) 32 Cal.4th 73, 137; People v. Coffman (2004) 34 Cal.4th 1, 102 (there needs to "some evidence in the record" that, if believed by the jury, would support the instruction); see also People v. Weiss (1958) 50 Cal.2d 535, 553-554 (holding that it was error to admit evidence of an intimidating telephone call to a witness purportedly made by the defendant's attorney when there was no evidence that the defendant had any involvement), overruled on other grounds in People v. Johnson (1980) 26 Cal.3d 557, 570-71. Compare People v. Riggs, 44 Cal.4th at 307 ("defendant represented himself,..., and my discovery violation was his responsibility, not any error of counsel.").

Sandi Nieves was in jail or in court. The is nothing in this record to show she had anything to do with producing information to the prosecution.

Delivering CALJIC No. 2.28 in the absence of evidence of a defendant's involvement is reversible error. See People v. Bell (2004) 118 Cal. App. 4th 249, 254-56 (reversing murder conviction because CALJIC No. 2.28 instruction was given); see also People v. Lawson (2005) 131 Cal. App. 4th 1242 (reversing drug conviction because of improper discovery sanctions, including use of CALJIC No. 2.28); People v. Cabral (2004) 121 Cal. App. 4th 748, 752-53 (reversing conviction for forgery because CALJIC No. 2.28 instruction was given).

In the Bell case, the defense failed to disclose the names and statements of the defendant's alibi witnesses until 10 days before trial even though the defense investigator obtained the information several weeks earlier. As a sanction, the trial judge gave CALJIC No. 2.28 in which he attributed the discovery violation to the defendant. Id. at 255. The Court of Appeal held that "[p]unish[ing] a defendant for the malfeasance of someone else" is not a legitimate method of enforcing the discovery rules. Id. at 256. To the extent the jurors rely on the discovery violation as evidence of consciousness of guilt or to doubt a defendant's credibility, this reliance would be misplaced in the absence of evidence of his responsibility for the violation. Id.

As in the Bell case, the trial court here instructed the jurors conclusively that "the defendant" had violated the discovery rules despite the absence of any evidence indicating that Nieves was responsible for delayed disclosures of discovery. The court instructed the jury twice, "In this case, the defendant concealed and failed to timely disclose the following evidence ...." 30 RT 4113:28-4114:16, 54 RT 8382:9-11; see also 54 RT 8382:17-19 (referring to "the defendant's concealment and failure to timely disclose evidence"). Given that the instruction attributed not only delay but "concealment" to Nieves, the error here is even more egregious than in Bell, where the trial court only attributed delayed disclosure to the defendant.

4. The Trial Court's Reliance on Penal Code § 1054.5(b) Was an Unconstitutional Application of the Statute

It is an "established rule" of statutory construction that courts are required "to construe statutes to avoid 'constitutional infirmit[ies].'" McClung v. Employment Development Dept. (2004) 34 Cal.4th 467, 477. The imposition of discovery sanctions that are "arbitrary or disproportionate

to the purposes they are designed to serve'" does not pass "constitutional muster". Michigan v. Lucas (1991) 500 U.S. 145, 151 (discussing a preclusion sanction imposed on the defense for violation of a state law requiring early notice of certain types of evidence in rape cases, and the relationship between such a sanction and the defendant's Sixth Amendment right to present a defense and confront adverse witnesses). See Fendler v. Goldsmith (9th Cir. 1983) 728 F.2d 1181, 1190 (the sanction imposed by the trial court was "too high a price to exact for failure to comply with discovery orders issued pursuant to general discovery rules" and therefore unconstitutional).

As shown above, the trial court's gratuitous jury instructions erroneously attributing discovery violations to the defendant herself were "disproportionate" to the actual discovery violations committed by defense counsel, which resulted in no hindrance of the prosecution. The use of this sanction was also arbitrary because many of the purported discovery violations were not in fact violations of the discovery statute – for example, the "late" disclosure of the statements of a non-testifying family member, Delores Morris. Penal Code § 1054.5 cannot, therefore, be applied to permit a court to instruct the jury with CALJIC No. 2.28 under the circumstances presented in this case. The trial court's repeated instruction in the 2000 version of CALJIC No. 2.28 was arbitrary, disproportionate, unwarranted, and deprived Sandi Nieves of a fair trial and due process in violation of the Sixth and Fourteenth Amendments.

D. It Was Error to Instruct the Jury with the Former Version of CALJIC No. 2.28

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." Carter v. Kentucky (1981) 450 U.S. 288, 302. "Discharge of the jury's responsibility

for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Bollenbach v. United States (1946) 326 U.S. 607, 612 (emphasis added).

As recognized repeatedly by the Court of Appeal, the old version of CALJIC No. 2.28, which the trial court used here, does not provide jurors with the requisite "lucid statement of the relevant legal criteria." Id. See People v. Bell (2004) 118 Cal. App. 4th 249, 254-56 (reversing murder conviction because CALJIC 2.28 instruction was given); People v. Cabral (2004) 121 Cal. App. 4th 748, 752-53 (reversing conviction for forgery because CALJIC 2.28 instruction was given); People v. Lawson (2005) 131 Cal. App. 4th 1242 (reversing drug conviction because of improper discovery sanctions, including use of CALJIC 2.28); see also People v. Saucedo (2004) 121 Cal. App. 4th 937, 942-43 (finding error but no prejudice). Instead CALJIC 2.28 introduces speculation regarding irrelevant and often untrue matters into the jury's deliberations.

First, CALJIC 2.28 attributes discovery violations to the defendant without requiring any finding that she – as opposed to defense counsel or a defense investigator – bore the responsibility. Compare People v. Riggs, 44 Cal.4th at 307 (defendant represented himself). It therefore introduces false evidence into the trial and permits the jury arbitrarily to penalize a defendant for another person's conduct.

Second, the instruction invites the jury to speculate that the prosecution was prejudiced by the discovery violations and to compensate for the supposed prejudice in some unspecified way. Third, it gives the jurors unbridled discretion over how to factor the discovery violation into their deliberations. See, e.g., Bell, 118 Cal. App. 4th at 254-56. Following

these decisions, CALJIC 2.28 was substantially revised in 2005 and then replaced in 2006 with a new and very different CALCRIM instruction on delayed disclosures.

CALJIC 2.28 was consistently criticized and then abandoned as a model instruction for good reason. By delivering this instruction, the trial court injected extraneous and prejudicial information into Nieves's trial that distorted the jury's deliberations, reduced the prosecution's burden of proof, unfairly favored the prosecution, and deprived Nieves of a reliable verdict.

1. The Version of CALJIC No. 2.28 Delivered by The Trial Court Is Fundamentally Flawed, As Shown By Subsequent Revisions

Following strong and consistent criticism of CALJIC 2.28 by the Court of Appeal, this instruction was substantially revised in 2005. New instructions developed by the Judicial Council Task Force on Jury Instructions went into effect in January 2006. CALJIC 2.28 has now been superseded by CALCRIM 306. CALCRIM 306 reads, in pertinent part:

> Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose: _____ <describe evidence that was not disclosed> [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] [However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime....]

The differences between the version of CALJIC 2.28 given at Nieves's trial, the 2005 version, and CALCRIM No. 306 highlight the flaws inherent in the former instruction. First, the revised instruction does not

attribute the discovery violation to the defendant. Instead, it refers to conduct by "an attorney for" a given party.

Second, CALCRIM 306 limits and directs the jury's discretion regarding how the discovery violation may be considered. Former CALJIC 2.28 left the matter wide open by stating that "[t]he weight and significance of any concealment and delayed disclosure are matters for your consideration." Compare People v. Riggs, 44 Cal.4th at 307 ("the instruction given by the trial court limited inferences the jury could draw.")

In contrast, CALCRIM 306 instructs the jury that "in evaluating the weight and significance of that evidence [i.e., the evidence relating to the discovery violation], you may consider the effect, if any, of that late disclosure." (Emphasis added). In addition, the revised instruction includes an explicit admonition that a discovery violation by defense counsel "is not evidence that the defendant committed a crime."[147]

The Judicial Council's abandonment of the former CALJIC 2.28 and adoption of a very different instruction in its place is a strong indication that CALJIC 2.28 as given during Nieves's trial does not comport with California law or due process.

2. As Delivered, the Instruction Improperly Injected Extraneous Factors into the Jury's Deliberations and Was Unfairly Partisan

"The decisions of both this court and the United States Supreme Court reflect the importance of restricting the foundation for the jury's decision to the evidence and arguments presented at trial." People v. Gainer

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[147] Despite the inclusion of this admonition, CALCRIM 306 is still accompanied by a use note cautioning that use of the instruction "could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant." See CALCRIM 306 (Spring 2008 ed.) and Use Note at pp. 69-70.

(1977) 19 Cal.3d 835, 848 (reversing a murder conviction based on an instruction that introduced extraneous considerations regarding other jurors' views into the jury's deliberations). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana (1965) 379 U.S. 466, 472-473; Smith v. Phillips (1982) 455 U.S. 209, 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it...."). "The right of every criminal defendant to trial by a jury that considers only the evidence admitted in court is, of course, fundamental." People v. Stanley (1995) 10 Cal.4th 764, 836 (citing U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16); accord People v. Steele (2002) 27 Cal.4th 1230, 1280 (George, C.J., concurring) (citing Turner, 379 U.S. at 472-473). Instructing the jury to consider extraneous and inaccurate information about delayed discovery, as the court did in this case, conflicts with this basic principle. People v. Nesler (1997) 16 Cal.4th 561, 579-80; People v. Kaurish (1990) 52 Cal.3d 648, 683. See Gainer, 19 Cal.3d at 1848.

In Nesler, a juror received unflattering information about the defendant from a woman in a bar during the sanity phase of the defendant's manslaughter trial. During deliberations, the juror reported this information to the rest of the jury. This Court found that the juror's injection of extraneous information into the deliberations violated the defendant's rights because "it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront,

cross-examine, or rebut." Nesler, 16 Cal.4th at 579-80 (finding juror misconduct).

In Kaurish, the prosecutor stated in closing argument, without foundation, that the defense had attempted to prevent the prosecution from playing an audio tape in its entirety and suggested that the rest of the tape was "inconsistent with defendant's own defense." Id. at 683. This Court held that these remarks were "clear misconduct" because they contained "innuendo, based on facts not in evidence, that may have given rise to jury speculation regarding the unheard portions of the tapes." Id.

The jurors in this case were improperly permitted to consider extraneous information about facts not in evidence. As shown above, the court's instructions on discovery violations wrongly attributed the misconduct to Nieves herself. Nothing in the record indicates that she was involved in defense counsel's belated disclosure of his paralegal's computerized notes of witness interviews or the delays in providing various materials relied on by defense experts.

Moreover, that false attribution of defense counsel's conduct to Nieves herself was not relevant to the question of her guilt for the crimes charged. Nonetheless, the jurors were told by the trial judge to consider this negative information about Nieves as they saw fit, permitting them to rely on it to draw adverse inferences. The introduction of such "evidence" is both unfair and prejudicial. See People v. Hannon (1977) 19 Cal.3d 588, 600 (the suggestion that the defendant tried to suppress evidence implies a consciousness of guilt and is inadmissible unless adequately substantiated).

CALJIC 2.28 also encouraged the jurors to speculate that the delays in disclosure of defense discovery placed the prosecution at a disadvantage. The jury was told that

> Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or to produce evidence which may exist to rebut the non-complying party's evidence.

30 RT 4113:19-23; see also 54 RT 8381:25-8382:3. The implication of this language in the context of the instruction as a whole is that the prosecution was unable to call "necessary witnesses" and/or produce rebuttal evidence because of the discovery violations listed in the instruction. But, as demonstrated above, the prosecution suffered no prejudice at all.

By inviting the jurors to speculate about unfounded prejudice to the prosecution, the instruction created a risk that they would compensate for the assumed prejudice by, for example, arbitrarily discounting or disbelieving the evidence of the defense witnesses. As a result, this sanction that was supposed to enforce discovery rules intended to facilitate "'the true purpose of a criminal trial, the ascertainment of the facts,'" In re Littlefield (1993) 5 Cal.4th 122, 130, instead served to distort the truthseeking process. See also Taylor v. Illinois (1988) 484 U.S. 400, 411-12 (pretrial discovery rules in criminal cases are "one component of the broader public interest in a full and truthful disclosure of critical facts").

In Wardius v. Oregon (1973) 412 U.S. 470, the United States Supreme Court found a violation of due process in a state procedure that unfairly skewed discovery obligations in favor of the prosecution: "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser." Id. at 474. This Court has applied this same principle of even-handedness to jury instructions. See, e.g., People v. Moore (1954) 43 Cal.2d 517, 526-529 (reversing a manslaughter conviction because of one-sided self-defense

instructions); People v. Rice (1976) 59 Cal.App.3d 998, 1004 ("instructions must "avoid misleading the jury or in any way overemphasizing either party's theory"); see also People v. Mata (1955) 133 Cal. App. 2d 18, 21 (instructions must not "strongly present the theory of the prosecution and minimize that of the defense").

Instructions that are argumentative are particularly suspect. See People v. Sanders (1995) 11 Cal.4th 475, 560. Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" People v. Mincey (1992) 2 Cal.4th 408, 437 (internal citations omitted). The problem with argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. See People v. Wright (1988) 45 Cal.3d 1126, 1135-1137.

Judged by these standards, CALJIC 2.28, was impermissibly partisan, argumentative, and inconsistent with Nieves's right to due process. It not only placed untrue facts that were both irrelevant and highly prejudicial before the jury – that Nieves herself had "delayed and concealed" discovery from the prosecution. It also tilted the balance in favor of the prosecution with respect to the jury's evaluation of guilt because the instruction given allowed the jury to give whatever "weight and significance" it believed was appropriate in its consideration of guilt or innocence. 54 RT 8381-8383; 19 RCT 4931. And, as shown above, the instruction encouraged the jurors to approach their deliberations under the assumption that the prosecution had been disadvantaged by the delayed disclosures.

By introducing an array of extraneous, unfair, and speculative factors into the jury deliberations, the court undermined the defendant's rights to

due process and a fair trial, to present a defense and confront the evidence against her, to trial by jury based only on evidence introduced at trial in open court, and to a reliable determination of capital charges against her, in violation of the Sixth, Eighth and Fourteenth Amendments.

The use of this instruction also improperly injected an invalid factor into the jury's decisions regarding Nieves's eligibility for the death penalty at the guilt phase. The Eighth Amendment requires that a state's death penalty law must guide the jury to make a principled distinction between the subset of murders for which the sentence of death may be imposed and the majority of murders which are not subject to the death penalty. See Zant v. Stephens, (1983) 462 U.S. 862, 876-77. California has sought to satisfy this requirement by listing a finite number of special circumstances that make a defendant eligible for the death penalty. See Penal Code § 190.2(a). By telling the jurors at the end of the guilt phase that they should "do something" about the discovery violations, Bell, 118 Cal. App. 4th at 255, the trial court allowed them to find special circumstances true based in part on purported discovery violations, that were not the fault of the defendant or relevant to the special circumstances allegations. The instruction therefore violated the constitutional mandate to narrow and channel the jury's discretion to impose the death penalty.

3. CALJIC No. 2.28 Impermissibly Reduced the Prosecution's Burden of Proof

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship (1970) 397 U.S. 358, 364; accord Cage v. Louisiana (1990) 498 U.S. 39, 39-40; People v. Roder (1983) 33 Cal.3d 491, 497. The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the

foundation of the administration of our criminal law,'" In re Winship, 397 U.S. at 363 (internal citation omitted), and at the heart of the right to trial by jury. Sullivan v. Louisiana (1993) 508 U.S. 275, 278 ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard" of proof beyond a reasonable doubt. Victor v. Nebraska (1994) 511 U.S. 1, 6.

The repeated use of CALJIC 2.28 during Nieves's trial improperly lightened the prosecution's burden of proof. First, it completely removed the issue of Nieves's own responsibility for the discovery violations from the jury by conclusively – and falsely – attributing the misconduct to her instead of to her counsel or the defense experts. As a result, the prosecution did not have to prove Nieves's involvement at all – let alone beyond a reasonable doubt. See Sandstrom v. Montana (1979) 442 U.S. 510, 516-17 (jury instructions containing mandatory presumptions can relieve the prosecution of it burden to prove facts to the jury beyond a reasonable doubt). Compare People v. Riggs, 44 Cal.4th at 407-408 (unlike Bell, the jury was told a discovery violation "may" have occurred).

Second, the instruction encouraged the jurors to make a number of inferences that are not supported by the record. See Ulster County Court v. Allen (1979) 442 U.S. 140, 158 (an inference that is not substantiated by evidence in the record is irrational, arbitrary and unconstitutional). These included an adverse inference of consciousness of guilt and an inference that the prosecution suffered prejudice. One obvious way for the jurors to

respond to such inferences would be to lower the burden of proof on the prosecution to make up for any possible disadvantage.

The result undermined Nieves's Eighth and Fourteenth Amendment rights to due process and to a reliable determination of the capital charges against her by undermining the prosecution's burden of proof both directly and by authorizing the jury to draw unwarranted incriminating inferences. (Ulster County Court v. Allen, 442 U.S. at 157 (an authorized inference undermines the application of the "beyond a reasonable doubt" standard and violates due process when, under the facts of the case, there is no rational way to make the connection permitted by the authorized inference); In re Winship, supra (due process requires proof beyond a reasonable doubt as a prerequisite to conviction of a criminal offense); 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. The Repeated Use of CALJIC No. 2.28 Constituted Structural Error Requiring Reversal

Structural error is a "'defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards.'" People v. Robinson (2005) 37 Cal.4th 592, 636 (quoting Arizona v. Fulminante (1991) 499 U.S. 279, 306-309). In contrast, trial error "can be 'qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" Id. Structural errors are per se reversible. Fulminante, 499 U.S. at 310.

A constitutional violation whose consequences are "necessarily unquantifiable and indeterminate" may constitute a structural error. Sullivan v. Louisiana (1993) 508 U.S. 275, 281-282; see also Arizona v. Fulminante (1991) 499 U.S. 279, 306-311 (defining structural errors

requiring reversal by focusing on whether it was possible to determine accurately the impact of the error on the outcome of the proceeding).

An erroneous instruction that affects the prosecution's burden of proof may also constitute a structural error. Sullivan, 508 U.S. 281-82 (reversing capital murder conviction because delivery of instruction reducing reasonable doubt standard of proof constituted structural error). Likewise, an erroneous instruction that directs the jury to consider impermissible factors in reaching a verdict constitutes structural error. People v. Gainer (1977) 19 Cal.3d 835, 842-43, 854-55 (delivery of a jury instruction that directed the jury to consider "extraneous and improper factors" was a per se reversible error because "it is difficult if not impossible to ascertain if in fact prejudice occurred"). In both situations, the trial court delivers an erroneous statement of the law that directly affects how the jury should reach its verdict, making any subsequent analysis of that verdict impossible.

In this case, the CALJIC 2.28 instruction functioned as a wildcard, undermining Nieves's constitutional right to a verdict based on a finding of guilt beyond a reasonable doubt. Because they were repeatedly instructed to "do something" about discovery violations purportedly committed by defendant herself, the jurors may have relied on those violations to lessen the prosecution's burden – or to switch the burdens entirely so as to begin with a presumption of guilt. The court's erroneous instruction – which was delivered repeatedly both during the trial and prior to the jury's deliberations – infected the entire trial process and amounted to a structural defect. Because it is impossible to know or assess how the jurors factored defendant's purported discovery violations into their deliberations, this error defies harmless error analysis and warrants automatic reversal.

Sullivan, 508 U.S. at 279-80 (conviction reversed because faulty reasonable doubt instruction made assessment of whether the verdict rendered was unattributable to the error was an exercise in speculation).

F. The Repeated Use of CALJIC No. 2.28 Was Not a Harmless Error

Even if the error here was not structural, it is subject to harmless error analysis pursuant to Chapman v. California (1967) 386 U.S. 18. People v. Visciotti (1992) 2 Cal.4th 1, 59 (applying Chapman test to instructional error of constitutional magnitude); People v. Lee (1987) 43 Cal. 3d 666, 676 (same). The prosecution must therefore establish that the error was harmless beyond a reasonable doubt to avoid reversal. Chapman, 386 U.S. at 24.

In cases of non-constitutional instructional error, reversal is required if it is "reasonably probable that a result more favorable to [defendant] would have been reached in absence of the error." People v. Watson (1956) 46 Cal.2d 818, 836-37; See, e.g, People v. Lawson (2005) 131 Cal. App.4th 1242, 1249, n. 7 (finding the erroneous use of CALJIC No. 2.28 to be prejudicial under Watson). The error here was prejudicial under either of these standards.

The jury was instructed about the defense's purported discovery violations three different times during the guilt phase. The repetition magnified its effect. See LeMons v. Regents of University of California (1978) 21 Cal.3d 869, 876 (reversal warranted based on rereading of an erroneous instruction).

The trial court systematically undermined defense credibility: The court gave the instruction for the second time right after telling the jury that the reason for an upcoming two-week recess in the trial was the defense delay in providing information about its experts. The court acknowledged

that the delay was "permitted by law," but it made its disapproval of the defense conduct quite clear. 30 RT 4112:21-4113:10. This information could only have served to confuse the jury and give the impression that the defense was engaged more broadly in improper tactics. By attributing the lengthy and inconvenient delay in the proceedings to the defense's supposed misconduct, the court also biased the jury against the defense.

Further, the effects of CALJIC 2.28 were exacerbated by the prosecutor's statement during her guilt phase closing argument that the discovery violations were intended to create a "strategic advantage." The prosecutor improperly implied that the defense alleged assessment of the strength of its case was somehow relevant to the jury's decision whether guilt beyond a reasonable doubt was established.

In combination with other errors, including extreme judicial bias toward defendant and defense, the CALJIC 2.28 error was not harmless.

G. Conclusion

Because the trial court instructed that Nieves was responsible for discovery violations and that the jury could give her violations whatever "weight and significance" it believed appropriate, the convictions and special circumstances findings must be reversed.

XIV. THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES

The trial court instructed the jury on the crimes of first and second degree murder. The court refused Sandi Nieves's request to instruct the jury on the lesser-included offense of involuntary manslaughter. The court also improperly refused to instruct on the lesser included offenses to felony arson. The court's failure to instruct the jury regarding lesser included offenses unfairly prejudiced the defendant and was not harmless. The convictions must therefore be reversed.

A. The Superior Court Refused Sandi Nieves's Request to Instruct the Jury Regarding Lesser Included Offenses

The court rejected the defense request for instructions on the definition of manslaughter. 46 RT 7038:15-18. This instruction would have informed the jury manslaughter is the unlawful killing of a human being without malice aforethought. CALJIC 8.37 (6th ed. 1996).

Next, the court rejected instructions related to involuntary manslaughter.[148] 46 RT 7038:22-7045:20; 50 RT 7604:7-8. The defendant had argued that based on the evidence presented, the jury should be instructed that if Sandi Nieves was unconscious as a result of voluntary intoxication, and if she killed a human being without an intent to kill and without malice, then the crime would be involuntary manslaughter. 46 RT 7038:22-7039:1; CALJIC 8.47.

Defendant also requested instructions on lesser included offenses to arson, specifically misdemeanor offenses under Penal Code § 452, unlawful causing of a fire that causes great bodily injury or burns an inhabited structure, and Penal Code § 453, unlawful possession of flammable, combustible, or explosive material.[149] 46 RT 7039:2-2. Defendant argued

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[148] Specifically, defendant requested the court give CALJIC jury instructions 8.45 ("Involuntary Manslaughter–Defined"), 8.46 ("Due Caution and Circumspection"), 8.47 ("Involuntary Manslaughter–Killing While Unconscious Due to Voluntary Intoxication"), 8.50 ("Murder and Manslaughter Distinguished"), and 8.51 ("Murder and Manslaughter Distinguished–Nature of Act Involved"). 19 RCT 4741-4752.

[149] Specifically, defendant requested the court give CALJIC jury instructions 14.82 ("Unlawfully Causing a Fire–Causing Great Bodily Injury or Burning of Inhabited Structure, Inhabited Property, or Structure or Forest Land"), 14.85 ("Unlawfully Causing a Fire or Burning of Property–A Misdemeanor"), 14.86 ("Unlawfully Causing a Fire or Burning One's Own Property–Causing Bodily Injury–A Misdemeanor"), and 14.88 (continued...)

that if given the involuntary manslaughter instruction, the jury could find Sandi Nieves acted without an intent to kill and without malice, during the commission of one of these lesser offenses that do not amount to a felony, but "which is dangerous to human life under the circumstances of its commission." Id.; CALJIC 8.45. Defendant argued the law and the facts required the court to instruct the jury that if it found Sandi Nieves was acting without "due caution and circumspection in an aggravated and reckless manner," she would be guilty of involuntary manslaughter. 50 RT 7603:26-7604:5; CALJIC 8.46.

Although the court indicated it would not give the involuntary manslaughter instructions, 50 RT 7604:7-8, the prosecution urged the court to do so, specifically requesting instructions that addressed killing while unconscious due to voluntary intoxication. 50 RT 7604:20-7605:23; 19 RCT 4749. The prosecution acknowledged that there was evidence on the record to support CALJIC instructions 8.45 and 8.47. 50 RT 7605:18-7606:12.

The court nonetheless tried to talk the prosecution into revoking its concession. See e.g. 50 RT 7606:26-27 (The Court: "Let's look at 8.45 and go through there so we eliminate any unnecessary language."); 7607:26-27 (Mr. Barshop: "I am rethinking my position now, after looking at these instructions."); 7614:27-7616:19.

But the prosecution did concede that People v. Ochoa (1998) 19 Cal.4th 353, required the court to give an involuntary manslaughter instruction. 51 RT 7754:27-7755:1. The prosecution eventually submitted

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[149](...continued)
("Unlawful Possession of Flammable, Explosive, or Combustible Material, or Device"). 19 RCT 4741-4752.

its own draft instruction based on the theory of unconsciousness due to voluntary intoxication. 52 RT 8034:16-23; 19 RCT 4956.

Instead of considering the issue of voluntary intoxication, the court focused on whether defense counsel could articulate a predicate unlawful act within the meaning of CALJIC 8.45. 52 RT 8034:27-8035:8. However, it did not accept defense counsel's position that the misdemeanor offenses under Penal Code § 452(d) such as recklessly setting a fire, or under Penal Code § 453(a), such as carrying around the gas can in a negligent or dangerous way or pouring the gasoline on the carpet, would apply. 52 RT 8035:17-8036:22.

The prosecution continued to concede that an instruction on involuntary manslaughter was appropriate based on a theory of criminal negligence due to drinking alcohol and/or taking drugs. 52 RT 8038:3-15. But the court rejected the prosecution's analysis. It ruled that it would not instruct on involuntary manslaughter at all, blaming defense counsel: "He says he wants 8.45 in the CALJIC, not [the prosecution's] instruction, which to me means that he doesn't want this to go to the jury." 52 RT 8039:5-7.

Despite the prosecution's concession, the court did not instruct on involuntary manslaughter. 54 RT 8341-8393; 20 RCT 5095-5118. It did, however, instruct about the effects of voluntary intoxication. 54 RT 8388:24-8391:19. The court provided an instruction that voluntary intoxication is not a defense to the general intent crime of arson (54 RT 8388:24-8389:5), and that, "It is a general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition" (54 RT 8389:11-14). But with respect to the effect of

intoxication on specific intent crimes, the court instructed the jury as follows:

> However there is an exception to this general rule, namely, where a specific intent or mental state is an essential element of a crime, allegation, or special circumstance. In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the applicable crime, allegation, or special circumstance.
>
> As has been mentioned elsewhere in these instructions, in the crimes of murder and attempted murder and in the special circumstances of murder while lying in wait and murder committed during the commission of arson, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state.
>
> If the evidence shows that the defendant was intoxicated at the time of the applicable alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent or mental state.
>
> If from all the evidence you have a reasonable doubt whether the defendant had a required specific intent or mental state, you must find that the defendant did not have that specific intent or mental state.

54 RT 8389:22-8390:27.

In addition, the court instructed the jury that "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime." 54 RT 8391:21-24. The instructions included the following statement about evidence of unconsciousness:

> This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium, a fever, or because of an attack of epilepsy, a blow on the head, the involuntary taking of drugs, or the involuntary consumption of intoxicating liquor, or any similar cause.

> Unconsciousness does not require that a person be incapable of movement.
>
> Evidence has been introduced for the purpose of showing that defendant may have been unconscious at the time and place of the commission of the alleged crimes for which she is here on trial.
>
> If after a consideration of all the evidence you have a reasonable doubt that the defendant was conscious at the time the alleged crimes were committed, she must be found not guilty.

54 RT 8391:25-8392:19.

The court did not inform the jury that Nieves would be guilty of involuntary manslaughter rather than first or second degree murder if, as a result of unconsciousness due to intoxication, she did not have the specific intent or malice aforethought required for murder. Id. The jury was not given the option of convicting Nieves of involuntary manslaughter.

B. Involuntary Manslaughter Is a Lesser Included Offense of Murder

Under California law, involuntary manslaughter is a lesser included offense of murder. People v. Heard (2003) 31 Cal.4th 946, 981; People v. Ochoa (1998) 19 Cal.4th 353, 422.

Involuntary manslaughter is an unlawful killing without malice "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Pen. Code § 192(b). When based on an unlawful act, involuntary manslaughter involves an act that "was dangerous to human life or safety under the circumstances of its commission." People v. Cox (2000) 23 Cal.4th 665, 675; People v. Garcia (2008) 162 Cal.App.4th 18, 27. Involuntary manslaughter based on a lawful act that might produce death "without due caution and

circumspection" is equivalent to criminal negligence. People v. Penny (1955) 44 Cal.2d 861, 879. "Criminal negligence is 'aggravated, culpable, gross, or reckless . . . conduct . . . [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . .'" People v. Valdez (2002) 27 Cal.4th 778, 783 (quoting Penny, 44 Cal.2d at 879).

To prove Nieves guilty of first degree murder in this case, the prosecution had to show beyond a reasonable doubt she had the specific intent unlawfully to kill or the specific intent to commit arson in violation of Penal Code § 451(b). CALJIC 8.10; People v. Berryman (1993) 6 Cal.4th 1048, 1085, overruled on another ground in People v. Hill (1998) 17 Cal.4th 800, 823, fn. 1; People v. Hernandez (1988) 47 Cal.3d 315, 346; People v. Stewart (2000) 77 Cal.App.4th 785, 794 n.4. However, as we will demonstrate, there was substantial evidence in this case that Sandi Nieves did not act with the required specific intent, and could therefore be guilty of only the lesser included offense of involuntary manslaughter.

Second degree murder, under the instructions provided to the jury, also required proof of a specific intent, i.e., an intent to kill: "Murder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." 54 RT 8352:15-21 (setting forth CALJIC 8.30).[150] "[I]f, in a murder case, evidence of mental illness or intoxication raises a reasonable doubt the defendant premeditated or deliberated, but establishes he did

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[150] The jury was not instructed on implied malice as a basis for a second degree murder verdict.

harbor malice aforethought, then he is guilty of second degree murder; if such evidence negates malice aforethought, the only supportable verdict is involuntary manslaughter or acquittal." People v. Halvorsen (2007) 42 Cal.4th 379, 414; People v. Saille (1991) 54 Cal.3d 1103, 1117.

"When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter." Ochoa, 19 Cal.4th at 423. "Unconsciousness" for this purpose does not mean the actor lies still and unresponsive, but rather that the actions were done without the actor "being conscious thereof." See Cal. Penal Code § 26. "Unconsciousness 'can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.'" Ochoa, 19 Cal.4th at 424 (quoting People v. Kelly (1973) 10 Cal.3d 565, 572).

First, the record contains substantial evidence Sandi Nieves could not have acted with specific intent because she was unconscious the night of the fire due to a mental disorder and her consumption of alcohol and/or pills. Substantial evidence means "that which a reasonable jury could find persuasive." People v. Halvorsen (2007) 42 Cal.4th 379, 414; People v. Barton (1995) 12 Cal.4th 186, 201, n.8; Garcia, 162 Cal.App.4th at 24-25. "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." People v. Breverman (1998) 19 Cal.4th 142, 177.

Although evidence of voluntary intoxication or a mental disorder does not reduce murder to voluntary manslaughter under California law, "[a] defendant . . . is still free to show that because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill." Saille, 54 Cal.3d at 1116-1117. In this case, there was evidence of both

mental disorder and voluntary intoxication. "In a murder case, if this evidence is believed, the only supportable verdict would be involuntary manslaughter or an acquittal." Id. at 1117.

Second, if instructed on the lesser included offenses to felony arson, the jury could have found Nieves did not have the specific intent to commit felony arson, as required for a first-degree felony murder conviction. If the jury had found Nieves had acted only with the criminal intent or with criminal negligence to commit a misdemeanor offense dangerous to human life or safety under the circumstances of its commission, she would be guilty only of the lesser-included offense of involuntary manslaughter. Cox, 23 Cal.4th at 672; People v. Wells (1996) 12 Cal.4th 979, 988; People v. Stuart (1956) 47 Cal.2d 167, 173.

C. A Court Is Required to Give a Lesser Included Offense Instruction to the Jury in a Capital Case When There Is Substantial Evidence Supporting the Instruction

When there is substantial evidence in a capital case supporting a lesser included offense instruction, it is a violation of the due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution for the court not to give such an instruction. Beck v. Alabama (1980) 447 U.S. 625, 637- 638. The failure to instruct the jury on a lesser included offense in a capital case diminishes the reliability of the guilt phase verdict – and hence the penalty phase verdict – to an intolerable extent. Hopper v. Evans (1982) 456 U.S. 605, 610-611.

Under California law, whether or not the case is a capital one, and whether or not the defendant requests the instruction, the failure to instruct on a lesser included offense violates the defendant's constitutional right to have a jury determine every material issue presented by the evidence. People v. Abilez (2007) 41 Cal.4th 472, 515; People v. Cook (2006) 39

Cal.4th 566, 596; People v. Lewis (2001) 25 Cal.4th 610, 645, 106. See also Cal. Penal Code § 1159 (providing that the jury may find the defendant guilty of a lesser included offense).

A court is obligated to instruct on a lesser included offense when there is "substantial evidence" to support the lesser included offense. Hopper, 456 U.S. at 611; People v. Barton (1995) 12 Cal.4th 186, 195 n. 4. In this case, the trial court stated that it would not instruct on involuntary manslaughter because defense counsel failed to articulate a satisfactory answer to the court's questions about the desired instruction. 52 RT 8034:27-8035:8; 8038:25-8039:13. The court must instruct on the lesser included offence even if it is inconsistent with the defense put forth by the defendant. Barton 12 Cal.4th at 195; People v. Sedeno (1974) 10 Cal.3d 703, 717, n.7. Cf. United States v. Anderson (9th Cir. 2000) 201 F.3d 1145 ("Even when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given.") "A trial court's sua sponte duty to instruct on lesser included offenses arises, however, not from the arguments of counsel but from the evidence at trial." Barton, 12 Cal.4th at 203. The trial court's decision not to provide instructions about lesser included offenses is reviewed de novo. People v. Manriquez (2005) 37 Cal.4th 547, 584; People v. Cole (2004) 33 Cal.4th 1158, 1218.

D. There Was Substantial Evidence that Sandi Nieves Was Unconscious, Requiring the Trial Court to Instruct the Jury on Involuntary Manslaughter

There was ample evidence from which a juror reasonably could have concluded that Sandi Nieves was unconscious when the fire was set. Defendant testified she consumed alcohol and pills the night of June 30,

1998. She testified that she had no memory of starting a fire in her home that night. Other witness testimony corroborated the drinking that night and the taking of prescription diet pills and anti-depressant medication. Defendant presented expert testimony that the combination of drugs, her history of epilepsy, hormonal imbalances attributed to her recent abortion, and severe depression could trigger a seizure and/or delirium that would have left Sandi Nieves in a state of unconsciousness.

Sandi Nieves testified that in the time between when she had the abortion, Thursday, June 24, 1998, and the fire on the night of June 30, 1998, she had resumed taking diet pills. 35 RT 4795:24-4796:2. She also testified that on either Sunday (June 28, 1998) or Monday (June 29, 1998) she had resumed taking the anti-depressant drug, Zoloft, on a daily basis because she was having a hard time dealing with the abortion. 35 RT 4796:4-10. She said that she took both a mixture of diet medications and Zoloft on Tuesday, June 30, 1998. 35 RT 4797:14-18, 4870:1-28, 4874:22-4876:13. She also testified she was drinking on the night of June 30. 35 RT 4807:7. She drank both beer and wine coolers, but she could not recall how many. 35 RT 4881:10-18.

Defendant's testimony about her recall of June 30 was consistent with someone in a state of unconsciousness. She explained that she remembered being in the kitchen with her children and described turning on the oven to use it for heat. 35 RT 4809:8-10. She said that she laid on the ground near the oven, with the oven door ajar, and put her feet on it to warm them. 35 RT 4809:12-15. She said that her children were asleep, but that her son David stirred. 35 RT 4809:18-19. Her testimony about what happened next included the following questions from defense counsel and her answers:

Q And do you remember whether or not you went to sleep at that time?

A No. I was laying there looking at my kids realizing how big they were going to get, and Jaqlene was going into 1st grade and just, you know, when you look at your children when they're sleeping they look so peaceful, and you just really enjoy them at that time.

Q And what's the next thing you remember?

A Waking up in black smoke.

Q Do you remember waking up your children at that time?

A I don't remember how we got awake, but I remember waking up in black smoke.

35 RT 4809:20-4810:5.

She testified she next recalled telling her children to lie on their stomachs and breathe through the blankets so that they would not breathe smoke. 35 RT 4810:9-21. She testified she was not able to see anything and that she had no idea where the fire was coming from. 35 RT 4810:22-25. She then stated, "I went to get up and that's the last I remember. I don't remember anything else." 35 RT 4811:1-2. The next time she recalled waking up was likely six in the morning. 35 RT 4811:3-8. Defense counsel asked her about statements her son, David Nieves, testified she made – telling him not to go outside and telling one of the girls to throw up on the ground and not go to the bathroom – but she did not recall making these statements. 35 RT 4911:10-20. She testified that she did not remember starting the fire.[151] 35 RT 4815:10-12.

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[151] Sandi Nieves also testified that she did not remember sending a letter to Scott Volk, Exhibit 20A, on June 30, 1998. 35 RT 4803:23-4804:3. Nor did she remember sending a letter, Exhibit 36A, and a copy of annulment papers to David Folden. 35 RT 4804:20-4805:15. Sandi Nieves (continued...)

Nieves's testimony about her consumption of pills and alcohol was corroborated through other witness testimony. Dr. Gary Ordog, the medical toxicologist who examined Sandi Nieves on July 1, 1998, testified tests indicated she had the diet pill Phentermine in her system. 29 RT 3793:21-28. He did not test for Zoloft. 29 RT 3794:4-10.

Debbie Wood, a friend of the defendant who spoke to her at length the night of June 30, 1998, testified Sandi Nieves had been drinking that night. 30 RT 3990:23-25. Rhonda Hill, another friend, testified to having seen Sandi Nieves take medication in the past. 30 RT 4044:13-15.

Expert testimony supported the defense contention Sandi Nieves was in a state of unconsciousness at the time that the fire started in her home. The defense had called Sandi Nieves's step-father, Al Lucia, who described witnessing Sandi suffer seizures as a child, one in particular for which she was hospitalized. 37 RT 5057:8-5058:6; 5059:12-5060:25. Defense experts Dr. Lorie Humphrey, a neuropsychologist, Dr. Philip Ney, with expertise in psychology and psychiatry, and Dr. Gordon Plotkin, a psychiatrist and Ph.D. in biochemistry, all agreed that this history could be consistent with epilepsy, also known as seizure disorder. 37 RT 5147:14-23, 40 RT 5757:10-19,48 RT 7390:15-7391:3.

Defense expert Dr. Ney, testified at length about the potential risks of mixing the drug Zoloft with the diet drug Phentermine, especially for someone who suffers 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 an epileptic seizure (40 RT 5763:15-

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[151](...continued)
also stated that she did not recall parking her van in a manner that would block entrance to the garage. 35 RT 4820:5-15.

5764:2). He also testified Sandi Nieves had symptoms consistent with neurological dissociation. 40 RT 5770:5-5771:5. He explained that during dissociation, the mind does not record what is going on, similar to sleep talking and sleep walking. 40 RT 5775:12-18. He explained that Sandi Nieves was particularly vulnerable to dissociation because she had experienced large changes in the neuro-chemistry of her brain, namely the serotonin syndrome and the loss of hormones from the abortion, that could cause a seizure, which commonly leads to dissociation.[152] 40 RT 5778:10-5779:14.

Defense expert Dr. Plotkin testified, too, that 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 also testified that Phentermine and Zoloft together can cause serotonin syndrome. 48 RT 7414:1-12. He explained that these drugs also increase the risk of seizures. 48 RT 7419:4-8.

Dr. Plotkin testified that a complex partial seizure is followed by the postictal period, the equivalent of delirium, that can last as long as a full day. 48 RT 7419:28-7420:22. He remarked that Sandi Nieves's blood tests taken after the fire indicated a "dramatically elevated CPK," an enzyme that muscle tissue releases into the bloodstream after trauma or a seizure. 48 RT 7425:14-7426:11. Dr. Plotkin testified that Sandi Nieves had a CPK reading of 2237 when the normal range is 24 to 178. 48 RT 7427:1-3.

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[152] Dr. Ney testified that an individual is capable of performing complicated acts during dissociation. 40 RT 5779:10-14. He also testified that a dissociative state can last a couple of hours or more, 40 RT 5786:26-5787:5, and that it is possible to drift in and out of such a state. 40 RT 5787:13-18.

In addition, prosecution expert Dr. Robert Sadoff testified he agreed with Dr. Ney that factors such as stress, hormonal imbalance, a combination of drugs, or severe major depression could lead to a dissociative state. 47 RT 7109:1-19; 7114:17-18. He also agreed that a dissociative state can last for minutes or hours or days during which a person can perform meaningful tasks. 47 RT 7110:23-7111:1.

Prosecution toxicology expert, Dr. Scott Philips, confirmed that Sandi Nieves's medical records indicated she had a prescription for Zoloft. 49 RT 7469:23-28; 7498:1-8; Exh. 92. He disagreed that Zoloft and Phentermine could cause serotonin syndrome. 49 RT 7470:18-7471:5. However, he admitted Nieves had also been prescribed other diet pills such as Fastin and Fenfluramine. 49 RT 7497:27-7499:20. He agreed that Fenfluramine, taken off the market in 1997 or 1998, can cause serotonin syndrome when mixed with Zoloft. 49 RT 7499:21-7500:3; 7501:2-19. He testified that Nieves also had a prescription for phenylpropanolamine and phendimetrazine. 49 RT 7516:10-13; Exh. 80A. He stated that Nieves's treating doctor had prescribed Phentermine and Fenfluramine, a combination commonly known as Phen-Fen, on more than one occasion. 49 RT 7519:27-7520:6.

After hearing the testimony from Sandi Nieves and other witnesses, including the numerous experts, the jury could reasonably have concluded the defendant was unconscious during the events that took place the night of June 30, 1998, because of a seizure, her voluntary intoxication, or the combination of all factors. The prosecution believed there was enough evidence (50 RT 7604:20-7606:12), and the court did give an intoxication instruction without linking it to involuntary manslaughter (54 RT 8388:24-8391:19).

Given Judge Wiatt's bias in this case, the court likely did not believe testimony favorable to the defense in this case. But it was not for him to decide which side made the better case. That was for the jury to decide under proper instructions.

The trial court should have instructed on involuntary manslaughter because "there is evidence deserving of consideration that the defendant was unconscious due to voluntary intoxication." People v. Halvorsen (2007) 42 Cal.4th 379, 418; Abilez, 41 Cal.4th at 515; Ochoa, 19 Cal.4th at 79.

E. There Was Substantial Evidence of an Unlawful Act Less Than a Felony, Requiring the Trial Court to Instruct the Jury on Involuntary Manslaughter and the Lesser Included Offenses to Arson

Alternatively, defendant presented evidence sufficient to raise reasonable doubt about the prosecution's theory that the fire in this case was arson.

The prosecution charged Sandi Nieves with felony arson, a violation of Penal Code § 451(b). Section 451 states, "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property."[153] However, there was enough evidence related to the nature of the fire to raise reasonable doubt as to whether it was willfully and maliciously set in the first place.

The prosecution presented only circumstantial evidence that the fire was set by someone with the intention to burn the house down. 18 RT

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[153] Section 451(b) provides, "Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years."

1918:19-1919:3. Defense expert Del Winter's testimony raised significant questions as to how the fire was started and what the circumstances of the fire indicated about the intentions of the person who started it. Winter testified that only a small amount of gasoline, not more than 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. He stated that whoever set the fire did not attempt to pour gasoline on the many items such as clothes and other readily combustible materials that were found lying around the house. He stated, "The house was loaded with combustible materials, and they would have made fine kindling." 29 RT 3811:5-7. Also, he testified that he had never heard of someone leaving half the gasoline unused when trying to start a fire. 29 RT 3812:6-9.

Even though the prosecution's fire expert, Dr. John Dehaan, disagreed with Winter about the amount of gasoline used to start the fire and the intention of whoever set the fire (44 RT 6503:7-13), the ultimate question about the nature of the fire was one for the jury to decide.

Unlawfully causing a fire in violation of Penal Code § 452 is a lesser included offense of arson. People v. Lopez (1993) 13 Cal.App.4th 1840, 1846; People v. Schwartz (1992) 2 Cal.App.4th 1319, 1324-1325; People v. Hooper (1986) 181 Cal.App.3d 1174, 1182. Defendant appropriately requested instructions on Penal Code § 452(d), a misdemeanor. Under this offense, "A person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property." (emphasis added.)

The jury could reasonably have concluded Nieves acted recklessly rather than willfully and maliciously, especially in light of the evidence concerning her consumption of pills and alcohol.[154] If the jury had been informed that it had an option other than felony arson in combination with an instruction on involuntary manslaughter, it could reasonably have found Nieves guilty of a misdemeanor offense such as Penal Code § 452, leading to a conviction of involuntary manslaughter.

It is important to recognize that the issue here is not whether there was evidence to support the first degree felony murder verdict; rather, the issue is whether there was substantial evidence that supported an involuntary manslaughter instruction. The distinction is illustrated by Vickers v. Ricketts (9th Cir. 1986) 798 F.2d 369, cert. denied (1987) 479 U.S. 1054. In that case, the defendant killed his cellmate by strangling him and stabbing him repeatedly. The issue was whether there was sufficient evidence to justify a second degree murder instruction. The Ninth Circuit

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[154] The jury instruction on Penal Code § 452(d), CALJIC 14.85 (Unlawfully Causing a Fire or Burning of Property – A Misdemeanor) proposed by the defendant (46 RT 7039:2-2), would have informed the jury that a person who creates a substantial and unjustifiable risk of setting fire to property "but due to involuntary intoxication is unaware of the risk . . . acts recklessly with respect to the risk" is guilty of the misdemeanor offense of unlawfully causing a fire or burning of property. Proposed jury instruction CALJIC 14.86 (Unlawfully Causing a Fire or Burning One's Own Property – Causing Bodily Injury – A Misdemeanor) contains similar language.

The court refused to provide the jury with proposed language for a jury instruction submitted by the defendant on lesser offenses to arson that stated: ""If a person is intoxicated (alcohol and/or drugs) at the time they do an act(s) which causes a structure to be burned, then such a person may not have the requisite mental state to have committed arson within Penal Code 451." 19 RCT 4765.

recognized that "[t]here was abundant, clear, persuasive evidence of premeditation" – evidence that the defendant had made a garrotte prior to the killing, and had admitted after the killing that it was premeditated. Vickers, 798 F.2d at 371-72. The court also recognized that "evidence on the lack of premeditation was not compelling." Id. at 373. Nonetheless, the court of appeals held that the district court committed reversible error by not giving a second degree murder instruction. Id. at 372-74. The court explained, "A jury given the choice between first and second degree murder might well return a verdict of either first degree murder or second degree murder." Under the Supreme Court's decisions in Beck and Hopper, due process required that the jury be given that choice. Id. at 373, citing Beck v. Alabama (1980) 447 U.S. 625, and Hopper v. Evans (1982) 456 U.S. 605.

The issue to be decided here is whether there was evidence from which the jury could have rationally concluded that there was reasonable doubt that Sandi Nieves acted with the specific intent required to commit murder or felony murder, and found her guilty of involuntary manslaughter. The answer, as we have shown, is clearly "yes."

F. The Error Was Prejudicial

1. The Murder Convictions Must be Reversed

Sandi Nieves was prejudiced by the trial court's error in refusing to instruct on involuntary manslaughter. Given the record regarding the defendant's actions on the night of June 30, 1998, the jury likely believed that no one other than the defendant started the fire that led to the deaths of her daughters. The jury may well have believed that Sandi Nieves should be convicted of some offense. But under the jury instructions given by the trial court, the jury was informed that if it believed the evidence on the record about voluntary intoxication and unconsciousness, that would negate

the specific intent required for first or second degree murder, leaving the jury with only the option of acquittal. The jury was never informed that there was a middle ground, another option less than acquittal – involuntary manslaughter.

The court provided an instruction on unconsciousness as a complete defense (54 RT 8391:21-8392:19), but this did not remedy the problem. The instruction referred to unconsciousness based, among other things, on "the involuntary taking of drugs, or the involuntary consumption of intoxicating liquor, or any similar cause." 54 RT 8392:2-5 (emphasis added). By presenting unconsciousness solely as a complete defense, the instruction left the jury with the same unconstitutional choice: convict of murder or acquit.

The court's error was not harmless. The federal harmless error test is applicable here because there is federal constitutional error. Under the federal harmless error analysis, error is only harmless if it is harmless beyond a reasonable doubt. Chapman v. California (1967) 386 U.S. 18, 23. In order to establish harmless error the state must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Yates v. Evatt (1991) 500 U.S. 391, 402-03, quoting Chapman, 386 U.S. at 24; see also Sullivan v. Louisiana (1993) 508 U.S. 275, 279.

The trial court's error in denying an involuntary manslaughter instruction cannot be considered harmless under the Chapman standard, because, as was explained in Beck, failure to inform the jury of the options that exist between degrees of murder and acquittal increased the chances that the jury would return an unwarranted conviction. "Such a risk cannot

be tolerated in a case in which the defendant's life is at stake." Beck, 447 U.S. at 637.

The state cannot point to the jury's guilty verdict, and claim that the error must have been harmless because the jury was properly instructed and nonetheless apparently found the requisite specific intent. As the Court in Beck explained:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other --precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Beck, 447 U.S. at 634, quoting, Keeble v. United States (1973) 412 U.S. 205, 212-13 (emphasis in original).

In Beck v. Alabama, the Court noted that because "the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented." 447 U.S. at 635.

Here, the jury should have had the option of a conviction of involuntary manslaughter, and – in light of the evidence that Sandi Nieves was unconscious and did not form the specific intent required for first or second degree murder – this Court cannot find beyond a reasonable doubt that taking that option from the jury did not affect the jury's verdict. The error was not harmless. Sandi Nieves's conviction of first degree murder must be reversed.

2. The Arson Convictions Must be Reversed

Likewise, the conviction of arson must be reversed because the court's refusal to instruct the jury on the lesser included offenses to felony arson. The court's instructions left the jury with the same problem described above – it had only two options: convict the defendant of arson or acquit.

The evidence that the fire was intentionally set was circumstantial (18 RT 1918:19-1919:3); and the evidence that Sandi Nieves set the fire was circumstantial (25 RT 3292:4-3297:13). However, depending on which arson expert the jury believed, as well as the substantial evidence of involuntary intoxication, the jury could have found, if given the option, that Sandi Nieves's actions amounted only to recklessness and that she did not act willfully and maliciously. See People v. Cole (2004) 33 Cal.4th 1158, 1218 ("A person is guilty of arson when he 'willfully and maliciously sets fire to or burns . . . any structure . . . or property' (§ 451), whereas a person is guilty of unlawfully causing a fire when he 'recklessly' sets fire to such a structure or piece of property (§ 452).")

The sufficiency of evidence raising reasonable doubt about the nature of the fire triggered the court's duty sua sponte to instruct the jury on the lesser included offenses to arson, including violations of Penal Code § 452, requested by the defendant. People v. Schwartz (1992) 2 Cal.App.4th 1319, 1324-1325. By failing to instruct on the lesser offenses to arson, the court prevented the jury from determining "every material issue presented by the evidence." People v. Abilez (2007) 41 Cal.4th 472, 515; People v. Cook (2006) 39 Cal.4th 566, 596; Schwartz, 2 Cal.App.4th at 1325.

When this Court reverses the first degree murder conviction as we have urged based on the court's failure to instruct on the lesser included

offense of involuntary manslaughter, it must also reverse the arson conviction on similar grounds.

3. The Attempted Murder Conviction Must be Reversed

The defendant's conviction of attempted murder of her son, David Nieves, must also be reversed in conjunction to a reversal of the first degree murder convictions.

We recognize that attempted involuntary manslaughter is not ordinarily available as a lesser included offense to attempted murder because attempt, by definition, requires specific intent. People v. Johnson (1996) 51 Cal.App.4th 1329, 1332; People v. Brito (1991) 232 Cal.App.3d 316, 320-321. The court's instructions informed the jurors that to convict the defendant of attempted murder, they had to find that Nieves had the "specific intent to kill unlawfully another human being." 54 RT 8353:5-14.

Therefore, if this Court reverses based on the trial court's failure to instruct on involuntary manslaughter as a lesser included offense to murder because of the sufficiency of evidence that the defendant lacked specific intent, it must likewise reverse the conviction of attempted murder. Because the state cannot show beyond a reasonable doubt that, if properly instructed on involuntary manslaughter, the jury would have found that Sandi Nieves acted with the intent to kill her daughters, it likewise cannot show that the jury would have found she acted with the specific intent to attempt to kill her son, David Nieves. The only difference between the charges against Sandi Nieves for murder and attempted murder which is that the son survived.

We have established that there was substantial evidence to support instructing the jury on the lesser included offenses of arson. With respect to David Nieves, if properly instructed, the jury would have had the option of

finding Sandi Nieves guilty of unlawfully causing a fire that resulted in great bodily injury, Penal Code § 452(a), or injury to another person, Penal Code § 452(d), instead of attempted murder.

XV. THE FINDINGS ON THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ALLEGATIONS MUST BE REVERSED

A. Introduction

As to each homicide count, after finding Nieves guilty of murder, the jury also found true the special circumstance that she committed murder while lying in wait. Pursuant to Penal Code §190.2(a)(15), the special circumstance findings made Nieves eligible for the death penalty. The true findings on the lying-in-wait special circumstance allegations must be reversed.

First, as interpreted by this Court, the lying-in-wait special circumstance is unconstitutionally vague and overbroad. Second, the evidence at trial was insufficient to support the jury's findings on this special circumstance.

B. Evidence Presented at Trial

The prosecution relied on the following evidence to support the lying-in-wait special circumstance: testimony that Nieves gathered her children in the kitchen of their house for a slumber party on the night of the fire (21 RT 2392:3-2392:18, 2396:21-2399:28); testimony that the children sometimes slept in the family room but that it was unusual for the family to plan a slumber party (21 RT 2392:15-28; 23 RT 2765:21-2766:9); circumstantial evidence that Nieves set a fire in the house (25 RT 3292:4-3297:13); and testimony that neighbors smelled smoke they thought was from a brush fire at various times during the night and early morning (17 RT 1665:14-22 (3:30 a.m.), 1718:3-21 (some time between midnight and 3 a.m.).

The evidence did not show when the fire was set or what Nieves was doing immediately before it was set.

C. The Lying-in-Wait Special Circumstance Provision Pursuant to Which Nieves Was Found Death-Eligible Is Unconstitutional

The Eighth Amendment prohibition against cruel and unusual punishment imposes a "fundamental requirement" on states seeking to impose the death penalty: they must "adequately protect[] against the wanton and freakish imposition of the death penalty." Zant v. Stephens (1983) 462 U.S. 862, 876. To comply with this requirement, a state must ensure that its capital sentencing scheme "genuinely narrow[s] the class of persons eligible for the death penalty and . . . reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant, 462 U.S. at 877; see also Romano v. Oklahoma (1994) 512 U.S. 1, 7; Arave v. Creech (1993) 507 U.S. 463, 474; Lowenfield v. Phelps (1988) 484 U.S. 231, 244; Godfrey v. Georgia (1980) 446 U.S. 420, 427.

California's lying-in-wait special circumstance, which triggers eligibility for the death penalty, has been expanded so far over the past twenty years that it does not meet either prong of this constitutional standard. See Maynard v. Cartwright (1988) 486 U.S. 356. First, the test for this special circumstance has been applied so loosely that it no longer performs a narrowing function at all. A murder eligible for the death penalty on the basis of "lying-in-wait" has become virtually indistinguishable from any premeditated murder. See People v. Stevens, (2007) 41 Cal.4th 182, 213 (Werdegar, J., concurring). Second, the expansive construction given to this special circumstance fails to distinguish "in a meaningful way the category of defendants upon whom capital punishment may be imposed." Arave, 507 U.S. at 476 (statutory factors making a defendant eligible for the death penalty "must provide a

principled basis for doing so"). Nieves therefore respectfully requests that the Court reconsider its previous decisions regarding the constitutionality of the lying-in-wait special circumstance and set aside the jury's true findings on the grounds that this special circumstance is invalid because it fails to perform the narrowing function required by the Eighth Amendment. But see People v. Carasi (2008) 44 Cal.4th 1263, 1310 (holding statute is constitutional); People v. Lewis (2008) 43 Cal.4th 415, 515-517.

1. Failure Genuinely to Narrow the Class of Persons Subject to the Death Penalty

The lying-in-wait special circumstance is established if the defendant commits an intentional murder that involves (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. People v. Morales (1989) 48 Cal.3d 527, 557. This Court stated in Morales, "We believe" that this combination of elements "presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." Id. But as construed and applied by this Court, each of these elements can be found in most cases of premeditated murder.

Traditionally,"lying in wait" has referred to a physical concealment of the perpetrator in an ambush situation. See Dictionary.com. Merriam-Webster's Dictionary of Law. Merriam-Webster, Inc. http://dictionary.reference.com (accessed Oct. 15, 2007) (defining "lying in wait" as "holding oneself in a concealed position to watch and wait for a victim for the purpose of making an unexpected attack and murdering or inflicting bodily injury on the victim"); see also People v. Merkouris (1956) 46 Cal.2d 540, 559-60 (lying in wait was not established because there was no evidence the defendant hid his presence). But in Morales this Court

eliminated the physical concealment requirement. It held that "the concealment element 'may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer.'" Morales, 48 Cal.3d at 555.

As explained by Justice Mosk in his dissent in Morales, a perpetrator almost always "conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." 48 Cal.3d at 575 (Mosk, J., dissenting); accord People v. Stevens, supra, 41 Cal.4th at 223 (Moreno, J., dissenting and concurring). Moreover, the concealment element has become so malleable since Morales, that it has been found even in cases in which the perpetrator has frankly announced "his bloody aim." See People v. Hillhouse (2002) 27 Cal.4th 469, 501 (the defendant stated "I ought to kill you" before striking the victim); see also People v. Arellano (2004) 125 Cal. App. 4th 1088, 1091-92, 1094-95 (the defendant threatened to kill his ex-wife several times and told the ex-wife and her mother he was going to kill her on the day of the killing; concealment of purpose still found). It is not even clear, then, that the concealment of purpose requirement functions to narrow the class of persons eligible for the death penalty at all.

The Court has also given expansive meaning to the "watching and waiting" element of this special circumstance, thereby compounding the constitutional infirmity caused by its broad interpretation of the concealment element. In Morales, the Court held there must be a "substantial" period of watching and waiting to qualify for the special circumstance. 48 Cal.3d at 457. As Justice Kennard explained in her concurrence in Stevens, the Court in Morales required "a substantial period of watching and waiting for an opportune time to act" in order to

distinguish between the lying-in-wait special circumstance and first degree premeditated murder. 41 Cal.4th at 215 (Kennard, J., concurring) (emphasis in original). See People v. Lewis, 43 Cal.4th at 512-515.

The word "substantial" remains a part of the test for this special circumstance. Stevens, 41 Cal.4th at 201-02 (citing Morales). But subsequent decisions have approved jury instructions stating that the period of watching and waiting "'need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.'" Id. (quoting People v. Sims (1993) 5 Cal.4th 405, 433-34). Given that "[p]remeditation and deliberation do not require much time," People v. Lenart (2004) 32 Cal.4th 1107, 1127, this new construction effectively nullifies the "substantial period" requirement. See People v. Stevens, supra, 41 Cal.4th at 215 (Kennard, J., concurring) (the new standard "undercuts" the test set forth in Morales), and 220 (Moreno, J., dissenting) ("'substantial period of watching and waiting'" as interpreted in Morales has become no more than the watching and waiting needed to establish the premeditation and deliberation required in 'ordinary' premeditated murder."). As a result, this element no longer serves to distinguish the special circumstance from non-capital premeditated murder. See Stevens, 41 Cal.4th at 216 (Kennard, J., concurring) (concluding that the Court was "wrong in departing from this [its] earlier holding in [Morales] that the lying-in-wait special circumstance requires a "substantial" period of watchful waiting").

The final requirement, "a surprise attack on an unsuspecting victim from a position of advantage" immediately following the period of watching and waiting, is routinely treated as if it were a separate, additional factor. The purpose of concealing the intent to kill is to gain a position of

advantage and catch the victim unawares. A surprise attack will always require some concealment, whether of the person or the purpose, to be successful. Surprise is "a common feature of murder – since murderers usually want their killings to succeed, and victims usually don't want to be murdered . . . ." 41 Cal.4th at 223 (Moreno, J., dissenting).

In her concurrence in Stevens, Justice Werdegar expressed serious concern that "the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." 41 Cal.4th at 213 (Werdegar, J., concurring). As shown above, that threat has been realized. The lying-in-wait special circumstance as currently applied is more likely to include than exclude a defendant found guilty of premeditated murder. It therefore fails to "genuinely narrow" the class of death-eligible defendants, in contravention of the Eighth Amendment. Zant, 462 U.S. at 877.

2. Failure to Provide a Meaningful Basis for Distinguishing Among Defendants Found Guilty of Murder

Even if the lying-in-wait special circumstance were not applicable to most premeditated murders, there is a second reason this special circumstance provision is unconstitutional. To protect the defendant's Eighth Amendment rights, a special circumstance must not only narrow the class of murderers, but must do so in a principled and meaningful way that " ' "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder," ' " Romano, 512 U.S. at 7 (internal citations omitted). But as construed by this Court, the lying-in-wait special circumstance does not provide a meaningful basis for

identifying a subclass of defendants who are "more deserving of death." Arave, 507 U.S. at 476.

As Justice Moreno observed in Stevens, "[t]he lying-in-wait special circumstance as interpreted by this court declares in effect: 'The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did.' " 41 Cal.4th at 223. It is not clear, though, why a murderer who confronts his victim and tells him, "I'm going to kill you" is less culpable than one who hides his intentions and surprises his victim.[155] The former is most likely either sadistic or confident of his ability to overpower a defenseless victim, or both. A special circumstance that qualifies a defendant for the death penalty based on the use of surprise while allowing a defendant who declares his intent to kill to a defenseless victim or sadistically toys with his victim to escape the most severe penalty does not provide a "meaningful basis" for identifying those few defendants who are "more deserving of death." Arave, 507 U.S. at 476.

D. The True Findings of the Lying-in-Wait Special Circumstance Must Be Reversed Due to Insufficiency of the Evidence

1. Standard of Review

Evidence is sufficient to support a verdict only if, when viewed in the light most favorable to the judgment, the record is found to contain "substantial evidence, i.e., evidence that is credible and of solid value from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." People v. Green (1980) 27 Cal.3d 1, 55; People v.

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[155] Moreover, under Hillhouse, it is not even clear such a murderer would not be subject to the lying-in-wait special circumstance.

Johnson (1980) 26 Cal.3d 557, 578; see also Jackson v. Virginia (1979) 443 U.S. 307, 317-18 (as a matter of due process under the Fourteenth Amendment, the evidence in the record must "reasonably support" the jury's finding).

A jury's findings may rest on "reasonable inferences" but may not be based on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." People v. Morris (1988) 46 Cal.3d 1, 21 (internal quotation marks and citations omitted). The same standard of review applies to special circumstance findings. People v. Stevens (2007) 41 Cal.4th 182, 201; see also People v. Carter (2005) 36 Cal.4th 1215, 1258 (setting aside lying-in-wait special circumstance due to insufficiency of the evidence).

2. The Jury's Findings on the Lying-in-Wait Special Circumstance Were Based on Speculation and Conjecture

The evidence here was insufficient to support the jury's lying-in-wait special circumstance findings. Viewing the record in the light most favorable to the verdict, as required, there is no "substantial" evidence satisfying the applicable standard.

The elements of the lying-in-wait special circumstance at the time of the fire in 1998 were: (1) intent to kill; (2) a concealment of purpose, (3) a substantial period of watching and waiting for an opportune time to act, and (4) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. Penal Code §190.2, former subd. (a)(15); Morales, 48 Cal.3d at 554-55, 557.[156]

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[156] The lying-in-wait special circumstance was amended in 2000. The amendment did not apply to Nieves pursuant to the prohibition on ex post facto laws in the California and United States Constitutions. U.S.

(continued...)

The lying-in-wait special circumstance requires the killing take place "during the period of concealment and watchful waiting." People v. Gutierrez (2002) 28 Cal.4th 1083, 1149. The evidence must therefore show an uninterrupted attack commencing no later than the moment concealment ends. See id.; see also People v. Lewis, 43 Cal.4th at 514; People v. Michaels (2002) 28 Cal.4th 486, 516; Morales, 48 Cal.3d 527 at 558; Domino v. Superior Court (1982) 129 Cal. App.3d 1000, 1011; Houston v. Roe (9th Cir.1999) 177 F.3d 901, 907.

In Carter, this Court set aside the jury's verdict on a lying-in-wait special circumstance because it was not supported by substantial evidence. 36 Cal.4th at 1261-62. The prosecution had presented two theories, both of which relied on speculation about the timing of the relevant events instead of reasonable inferences drawn from the evidence.

Under the first theory, the defendant entered the victim's apartment while she was out and was waiting for her when she returned home. The evidence for this theory was some wood chips found strewn on the floor just inside the front door, suggesting a forcible entry. The Court held that even if the inference of a forcible entry were reasonable, it was purely speculative to assume that the entry occurred before the victim came home. Id. at 1261.

Under the prosecution's second theory, the defendant was waiting for the victim in a car outside her apartment building so he could attack her by surprise when she returned home. The evidence for this theory was

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[156](...continued)
Const., art. I, § 10; Cal. Const., art. I, § 9; People v. Alvarez (2002) 100 Cal. App. 4th 1170, 1178 (a statute that inflicts greater punishment than the applicable law when the crime was committed is an ex post facto law) (citing Collins v. Youngblood (1990) 497 U.S. 37, 42-43).

testimony from a neighbor who stated she saw the car defendant was later found driving idling at the curb outside the victim's apartment for about 10 minutes around the time the other evidence showed the victim may have arrived home. This Court noted that the neighbor could not pinpoint the time of this event. Id. at 1262. In addition, "the car idling, besides occurring at an uncertain time, does not strongly imply that defendant was waiting in the car to attack [the victim]; if defendant had planned a home invasion when [the victim] arrived home, he likely would have turned off the engine so as not to attract attention." Id. Because the jury's finding relied on multiple levels of speculation, the Court held that it was not supported by substantial evidence and set aside the lying-in-wait special circumstance.

In this case, the jury also had to rely heavily on speculation about the timing of the relevant events to reach its verdict. As in Carter, the neighbors who testified about smelling smoke could not pinpoint the time – in fact, one of them testified it could have been any time between midnight and 3 a.m. 17 RT 1718:3-21. Moreover, even if there was smoke by midnight or by 3 a.m., the only reasonable inference from that evidence would be that the fire started at some unspecified time before then.

In People v. Lewis, the court set aside the special circumstance findings because the defendants had been lying in wait to kidnap the victims, but then drove them around for hours before killing them.

David Nieves's testimony about the night of the fire was extremely vague as to time. He testified that he and his sisters fell asleep at an unspecified time and that when his mother later woke him up, it was dark, there was smoke in the house and everyone was coughing. 21 RT 2396:21-2397:7. When asked to pinpoint the time of these events, though, he stated,

"I'm not sure." Id. at 2396:25-2397:1. Asked again, he guessed that he'd been asleep "a short time," which could have meant five minutes or two hours.

The evidence also showed that Nieves left the house at least once during the night. 35 RT 4918:25-4919:16. But there was no evidence about the timing of that event in relation to when the children fell asleep and when the fire was set. Id.

In light of the uncertain evidence regarding when the fire actually started and what Nieves was doing immediately beforehand, the jury could only have concluded that the killing took place "during the period of concealment and watchful waiting," Gutierrez, 28 Cal.4th at 1149 (emphasis added), by relying on guesswork and speculation. The true findings on the lying-in-wait special circumstance allegations are therefore unsupported by "substantial evidence," and must be set aside. See Carter, 36 Cal.4th at 1261-62.

XVI. THE FINDINGS ON THE ARSON-MURDER SPECIAL CIRCUMSTANCE ALLEGATIONS MUST BE REVERSED

A. Introduction

As to each homicide count, after finding Nieves guilty of murder, the jury also found true the special circumstance that she committed murder while engaged in the commission of the crime of arson. These special circumstances findings made Nieves eligible for the death penalty. Pen. Code § 190.2(a)(17)(H).

A felony-murder special circumstance, such as arson-murder, is only proved "when the murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder." People v. Mendoza (2000) 24 Cal.4th 130, 182. True findings of felony-murder special circumstances may be upheld only if appellant had an independent

felonious purpose for committing the felony separate from committing murder. People v. Green (1980) 27 Cal.3d 1, 61-62.[157] In this case, there was no evidence of an independent felonious purpose.

In addition, the trial court committed prejudicial error by delivering a confusing and misleading arson-murder instruction and denying the defense request for a clarifying instruction. These errors, coupled with the prosecution's misstatements of the law in closing argument, impermissibly reduced the prosecution's burden of proof on this issue. As a result, the jury was permitted to find the arson-murder special circumstances true without determining beyond a reasonable doubt that Nieves had an independent felonious purpose for committing arson, in violation of state law and the state and federal constitutions.

B. Relevant Procedural and Factual Background

1. Penal Code § 995 Motion

After the information was filed, Nieves filed a motion pursuant to Penal Code § 995. 10 RCT 2043. In the motion, Nieves moved to set aside the allegations of a special circumstance of arson-murder because there was insufficient evidence presented at the preliminary hearing. Specifically, Nieves argued that there was no evidence presented at the preliminary hearing to support a finding that Nieves had an independent felonious intent to commit arson, as required under Green. 10 RCT 2049-52; see also 3 RT 75:2-77:16, 113:26-114:16. The trial court denied the motion. 10 RCT 2107; see also 3 RT 114:17.

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[157] Green was overruled on other grounds in People v. Hall (1986) 41 Cal.3d 826, 834 & n.3, and abrogated on other grounds in People v. Martinez (1999) 20 Cal.4th 225, 239, 241.

2. Evidence Presented at Trial

The prosecution argued that Nieves deliberately set a fire in her house in order to kill herself and her children. To support this theory, the prosecution relied on the following: letters written by Nieves expressing depressed feelings, anger, and vengeful feelings toward the fathers of her children (Exhs. 20-A, 20-B, 27, and 36; see also 47 RT 7199:10-18); evidence suggesting that Nieves did not want her children to be raised by their fathers if she died (30 RT 4019:18-4020:2); testimony that Nieves gathered her children in the kitchen of their house for a slumber party on the night of the fire and instructed them to stay there when there was smoke in the house (21 RT 2392:3-2392:18, 2396:21-2399:28); circumstantial evidence that the fire was intentionally set (18 RT 1918:19-1919:3); circumstantial evidence that Nieves set the fire (25 RT 3292:4-3297:13); and evidence that the victims died of carbon monoxide poisoning as a result of the fire (17 RT 1723:11-19, 1734:13, 1735:2-4, 1830:16-21).

There was no evidence presented to indicate that if Nieves did set the fire, she did so for a reason other than to cause the deaths of the inhabitants of the house.

3. The Jury Instruction

The standard instruction on the special circumstance of murder committed during the commission of a felony incorporates the Green rule requiring the prosecution to show the defendant had an independent purpose for committing the underlying felony. Green, 27 Cal.3d at 61-62. The instruction states that in order to establish that the arson-murder special circumstance is true, the prosecution must prove:

> (1) The murder was committed while the defendant was engaged in the commission of arson, and;
>
> (2) The murder was committed in order to carry out or advance the commission of the crime of arson, or to facilitate the escape therefrom, or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the arson was merely incidental to the commission of the murder.

CALJIC 8.81.17.

The prosecution in Nieves's case requested that the second paragraph of the standard instruction be amended to read as follows:

> (2) The murder was committed in order to carry out or advance the commission of the crime of arson, or to facilitate the escape therefrom, or to avoid detection. Moreover, this special circumstance is still proven if the defendant had the separate specific intent to commit the crime of arson, even if she also had the specific intent to kill. In other words, the special circumstance referred to in these instructions is not established if the arson was merely incidental to the commission of the murder.

50 RT 7652:14-7654:18 (emphasis added).

The defense objected to the proposed instruction on the ground that it was confusing and misstated the law. Defense counsel pointed out that the added language diluted the portion of the instruction stating that the special circumstance does not apply if the arson is "merely incidental to the commission of murder." 50 RT 7652:27-28, 7654:21-23; 51 RT 7721:18-7722:28.

The defense requested that the court clarify the meaning of the arson-murder instruction by explaining to the jury that this special circumstance requires a finding beyond a reasonable doubt that the arson was committed for a purpose independent of the murders – that is, "if the sole purpose of the arson was to kill, then the special circumstance would

not apply." 51 RT 7721:22-23; see also 19 RCT 4768, 4909, 4912, 4922 (alternative versions of the special instruction requested by the defense).

The trial court refused to give any of the special instructions requested by the defense on the ground that the proposed instructions "are not the law." 51 RT 7721:24. The trial court also overruled Nieves's objection to the prosecution's special instruction, stating the modification would "inoculat[e] the jury" against the defense's arguments. 51 RT 7723:1-8. The judge delivered the special instruction in the exact form requested by the prosecution. 54 RT 8366:15-8367:8.

The trial court also instructed the jury the required mental state for the special circumstance of murder in the commission of arson is "the specific intent to commit arson. This is so even though the crime of arson, as charged in Count 6, is a general intent crime." 54 RT 8358:16-22.[158]

4. Closing Arguments

In closing arguments, the prosecution argued that Nieves intentionally set the fire in order to kill her children and herself. 54 RT 8406:5-6 ("By lighting that fire, the defendant showed the state of mind necessary for murder."); 54 RT 8446:4-6 (arguing that Nieves's goal was for everyone inside the house to die in the fire); 57 RT 8938:6-24 (arguing that Nieves intended "to burn her kids to death"). The prosecution did not argue that Nieves had any other purpose for setting the fire.

With respect to the legal standard, the prosecutor told the jurors that if they found Nieves committed arson and the victims died because of the arson, those findings were sufficient to find the arson-murder special circumstance true. 54 RT 8419:6-8420:16.

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[158] The jury was never instructed on the difference between "specific intent" and "general intent" to commit arson. See 54 RT 8371:21-8372:18.

The defense argued that if the jury believed that "the sole purpose of the arson is to kill," the special circumstance would not apply. 56 RT 8671:1-8672:16.

On rebuttal, the prosecution elaborated further on the applicable law. The prosecutor said that the court's instruction that the special circumstance "is not established if the arson was merely incidental to the commission of murder" meant that the special circumstance was true unless the arson was only "an afterthought," such as a decision to take a victim's wallet after murdering him. 57 RT 8894:6-16. The prosecutor also told the jury, "if you find there were dual or concurrent intents; in other words, the intent to commit arson, along with the intent to kill, the special circumstance is true." 57 RT 8895:6-9.

The court did not provide the jury with any further instruction regarding the arson-murder special circumstance or the meaning of "merely incidental" in the instruction given before closing arguments.

C. Legal Standards Governing Felony-Murder Special Circumstances

1. Requirement of Guilt Beyond a Reasonable Doubt on the Underlying Felony

In order to find an allegation of felony-murder special circumstances to be true, the jury must first find the defendant guilty of the underlying felony. Pen. Code § 190.4(a) ("Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime"); People v. Hillhouse (2002) 27 Cal.4th 469, 499 (holding that "the kidnapping-murder special circumstance cannot stand" because there was insufficient evidence to support the kidnaping

conviction); Green, 27 Cal.3d at 74 (setting aside kidnaping-murder special circumstance because the kidnaping conviction was invalid).

2. Requirement of an Independent Felonious Purpose

Penal Code § 190.2(a)(17)(H) provides that a defendant is eligible for the death penalty if she is found guilty of first degree murder and the jury finds the murder was committed while the defendant was engaged in the commission of arson in violation of Penal Code § 451(b).[159]

In Green, 27 Cal.3d 1, this Court held that California's felony-murder special circumstance provision does not apply unless a murder is committed to facilitate or conceal one of the statutorily enumerated felonies. The defendant in Green took his wife's belongings after he killed her. Because the robbery was only committed to conceal the killing by making it difficult to identify the body, the Court held that the evidence was

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[159] Pursuant to Penal Code § 451,

> A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.

Section 451(b) provides:

> Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.

Nieves was originally charged with a violation of Penal Code § 451(a) (arson causing great bodily injury). Midway through the trial, the prosecution amended the information to allege a violation of Penal Code § 451(b) (arson of an inhabited structure). The court allowed the amendment over an objection by the defense. 28 RT 3608:8-3609:22.

insufficient to support a felony-murder special circumstance finding. Id. at 60-61.[160]

The Court explained that by including the felony-based special circumstances in Penal Code § 190.2, the Legislature intended to carve out a narrow category of murders subject to the death penalty because they were committed "to advance an independent felonious purpose." Green, 27 Cal.3d at 61. This legislative goal

> is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery [or other felony] is merely incidental to the murder–"a second thing to it," as the jury foreman here said–because its sole object is to facilitate or conceal the primary crime.

Id. Therefore, "[t]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder." People v. Mendoza (2000) 24 Cal.4th 130, 182 (emphasis added).

The "independent purpose" rule is not only compelled by the statutory language and legislative intent of Penal Code § 190.2(a)(17). The state and federal constitutions also dictate that the felony-murder special circumstance be limited to those cases in which the defendant has killed in order to advance or conceal a separate felony. The Eighth and Fourteenth

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[160] In Green the Court was construing former § 190.2, subd. (c)(3), the felony-murder special circumstance provision enacted by the Legislature as part of the 1997 death penalty statute. But the rationale for the Court's holding in Green is fully applicable to current section 190.2, subd. (a)(17), the successor felony-murder special circumstance provision enacted by the Briggs Initiative as part of the 1978 death penalty statute, and the Court has made clear that Green's holding applies to the Briggs Initiative special circumstance provision. See, e.g., People v. Weidert (1985) 39 Cal.3d 836, 842; People v. Mendoza, supra, 24 Cal.4th at 182 .

Amendments of the United States Constitution and Article I, Sections 7, 15, and 17 of the California Constitution prohibit the states from imposing the death penalty in a "capricious and arbitrary manner." Furman v. Georgia (1972) 408 U.S. 238, 274, 277; U.S. Const. amend. VIII, § 1; U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 15, cl. 2; Cal. Const. art. I, § 17. In order to avoid the risk of capricious and arbitrary capital sentencing decisions, states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of the same crime." Zant v. Stephens (1983) 462 U.S. 862, 877.

As the Court explained in Green, a scheme that subjected defendants to the death penalty solely because they incidentally committed a felony to facilitate or conceal a murder would violate these principles:

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court . . . .

Green, 27 Cal.3d at 62 (quoting Gregg v. Georgia (1976) 428 U.S. 153, 189). Such a scheme "would not rationally distinguish between murderers," as required. Id.; see also Furman, 408 U.S. at 313 (White, J., concurring) (a procedure for imposing the death penalty is unconstitutional if there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

In keeping with the statutory and constitutional constraints on the application of the felony-murder special circumstance, this Court has consistently adhered to the "independent felonious purpose" rule. The rule applies to all of the enumerated felonies in § 190.2(a)(17), including

arson.[161] Mendoza, 24 Cal.4th at 182 (arson-murder special circumstance finding sustained because the evidence supported a finding that arson was committed to cover up a rape); People v. Clark (1990) 50 Cal.3d 593, 598 (arson-murder special circumstance finding sustained because there was evidence the defendant set fire to the victim's house in order to drive the victim out of the house); see also, e.g., People v. Weidert (1985) 39 Cal.3d 836, 842 (reversing kidnap-murder special circumstance finding because there was no evidence the victim was kidnaped for a reason independent of the murder); People v. Thompson (1980) 27 Cal.3d 303, 324 (robbery-murder special circumstance reversed because the evidence was insufficient to show that the robbery was not committed merely to escape from the murder scene).

The rule applies regardless of when the intent to commit a felony for an independent purpose is formed in relation to any intent to kill. "[D]etermining whether a killing had occurred in the commission of a felony is not 'a matter of semantics or simple chronology.'" People v. Hernandez (1988) 47 Cal.3d 315, 348 (quoting Green, 27 Cal.3d at 60). "Instead the focus is on the relationship between the underlying felony and

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[161] The Legislature amended Penal Code § 190.2 in 1998 to create a statutory exception to the "independent felonious purpose" requirement when specific intent to kill is proved in cases of kidnaping or arson. See Stats.1998, c. 629, § 2 (S.B.1878). This amendment required approval of the voters and did not become effective until March 8, 2000, nearly two years after the fire in July 1998. Penal Code § 190.2(a)(17)(M). It therefore did not apply to Nieves pursuant to the prohibition on ex post facto laws in the California and United States Constitutions. U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; People v. Alvarez (2002) 100 Cal.App.4th 1170, 1178 (a statute that inflicts greater punishment than the applicable law when the crime was committed is an ex post facto law) (citing Collins v. Youngblood (1990) 497 U.S. 37, 42-43).

the killing . . . ." Id. Evidence that a defendant had a "concurrent intent . . . consisting of both an intent to kill and an intent to commit an independent felony" does not, therefore, necessarily disprove a special circumstances allegation. People v. Barnett (1998) 17 Cal.4th 1044, 1158. But there must still be proof sufficient to allow "a rational trier of fact [to] find beyond a reasonable doubt that defendant had a purpose for the kidnapping apart from murder." Id. (emphasis added).

The decision in Mendoza illustrates the proper application of this test. In this case, the Court upheld special circumstances findings on the basis of evidence the defendant committed arson for a purpose other than facilitating a killing. The victim died in a fire defendant set in her bedroom after he raped her. 24 Cal.4th at 182-83. There was evidence indicating the defendant intended the fire to kill the victim. But the physical evidence also "supported the conclusion that defendant committed the arson not just to kill the victim, but also as a means of concealing the rape or avoiding detection." Id. at 183. The fire was set in a manner intended to destroy the victim's torn clothing, the bruises on her body, and the defendant's fingerprints in the victim's bedroom. Id. at 183-84.

The Court upheld the arson-murder special circumstance finding on the ground that the evidence was sufficient to establish the defendant started the fire with "'independent, albeit, concurrent goals.'" Id. at 183 (quoting Clark, 50 Cal. 3d at 609) (emphasis added).

3. Unanimous Jury Finding of Proof Beyond a Reasonable Doubt

Under California law, the prosecution must prove the truth of any alleged special circumstance beyond a reasonable doubt. Penal Code § 190.4; People v. Robertson (1989) 48 Cal.3d 18, 58. In addition, the federal constitution requires that any fact that increases the maximum punishment a

defendant is subjected to must be submitted to a jury and unanimously found true beyond a reasonable doubt. Ring v. Arizona (2002) 536 U.S. 584, 609 (Sixth Amendment jury trial guarantee applies to the finding of facts or circumstances "necessary for imposition of the death penalty").

The special circumstances set forth in Penal Code § 190.2 operate as "'the functional equivalent of an element of a greater offense'" because they that make a criminal defendant eligible for the death penalty. Ring, 536 U.S. at 609 (quoting Apprendi v. New Jersey (2000) 530 U.S. 466, 494, n.19); see also Sattazahn v. Pennsylvania (2003) 537 U.S. 101, 111 ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact– no matter how the State labels it–constitutes an element, and must be found by a jury beyond a reasonable doubt."). Findings on special circumstances must therefore be decided by the jury unanimously and beyond a reasonable doubt to satisfy the constitutional standard. Ring, 536 U.S. at 609; see also People v. Prieto (2003) 30 Cal.4th 226, 256 (holding that under Ring, defendants have rights under the Sixth and Eighth Amendments "to have a jury determine the existence of all of the elements of a special circumstance.").

D. The True Findings of the Arson-Murder Special Circumstance Must Be Reversed Due to Insufficiency of the Evidence

1. Standard of Review

Evidence is sufficient to support a verdict only if, when viewed in the light most favorable to the judgment, the record is found to contain "substantial evidence, i.e., evidence that is credible and of solid value from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Green, 27 Cal.3d at 55; People v. Johnson (1980) 26

Cal.3d 557, 578; see also Jackson v. Virginia (1979) 443 U.S. 307, 317-18 (the evidence in the record must "reasonably support" the jury's finding).

A jury's findings may rest on "reasonable inferences" but may not be based on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." People v. Morris (1988) 46 Cal.3d 1, 21 (internal quotation marks and citations omitted); see also United States v. Lewis (9th Cir. 1986) 787 F2d 1318, 1323 ("mere suspicion or speculation cannot be the basis for creation of logical inferences"). This standard of review applies to findings on special circumstances. People v. Michaels (2002) 28 Cal.4th 486, 515.

2. There Was No Evidence of an Independent Purpose for Committing Arson and No Evidence That the Murders Were Committed to Advance or Conceal the Crime of Arson

The evidence here was insufficient to support the jury's arson-murder special circumstances findings. Viewing the record in the light most favorable to the verdict, as required, the record discloses no "substantial" evidence that Nieves had an independent felonious purpose to commit arson, or that the murders were committed in order to advance or conceal the crime of arson. In fact, as in Green, there is no evidence to support such conclusions.

In Green, the evidence showed that the defendant killed his wife out of spite and jealousy. At the murder scene, he took her clothes, ring, and purse in an effort to conceal her identity. Because there was no evidence that the murder was committed to advance or cover up the robbery, this Court held there was insufficient evidence to sustain the robbery-murder special circumstance finding. 27 Cal.3d at 62.

In this case, there was also no evidence that Nieves had any "independent" reason for setting a fire in her house or that the murders were

in any way motivated by a desire to advance or conceal the crime of arson. Nieves had nothing to gain from damaging or burning down the house she and her children lived in. She did not own the house, so she could not have expected to collect insurance. There was no evidence that she believed her landlords would pay her to burn down their house. Compare People v. Cole (2004) 33 Cal.4th 1158, 1173 (the record contained evidence that the defendant set fire to his apartment in part because his landlord offered him money to burn the building down). And unlike the defendant in People v. Oliver (1985) 168 Cal. App. 3d 920, Nieves had no vendetta against the owners of the house. Id. at 923 (defendant threw a Molotov cocktail into the house of a woman who refused to marry him to "get even" with her). See 29 RT 3864:7-22 (defense arson expert Winter testifies to categories of arson fires).

There was also no evidence tending to show the fire was set to conceal additional crimes, compare Mendoza, 24 Cal.4th at 182 (fire was set to cover up prior rape and assault), or that the fire was set to drive the inhabitants out of the house. Compare Clark, 50 Cal.3d at 606 (the defendant testified that his plan was to drive the victim's family out of their house); see also Oliver, 168 Cal. App. 3d at 923. To the contrary, Nieves's son testified that she told the children to stay inside because she was concerned the smoke in the house might be coming from outside. 21 RT 2397:9-16.

The record here contains even less evidence of an independent felonious purpose than cases where this Court has found insufficient evidence to support a jury's findings. In People v. Thompson (1980) 27 Cal.3d 303, the defendant took his victims' car keys in the course of a murder. But because he had previously refused to take money and

valuables the victims offered him, the Court concluded, "It is at most a close question whether the perpetrator had any intent to steal at all" and reversed the robbery-murder special circumstance finding. Id. at 323 (concluding that in light of all the evidence, the only reasonable conclusion was that the defendant stole the car keys to facilitate his escape from the murder scene).

In People v. Marshall (1997) 15 Cal.4th 1, the jury heard evidence the defendant took a letter from the victim during the course of a rape and murder. There was no evidence to show that the letter "was so valuable to defendant that he would be willing to commit murder to obtain it." Id. at 35. The Court held the evidence was therefore insufficient to support an inference that the defendant killed the victim to advance or conceal a robbery and reversed the jury's finding on the special circumstance. Id. at 41; see also Garcia v. Carey (9th Cir. 2005) 395 F.3d 1099, 1103-04 (gang sentencing enhancement would have to be reversed because there was "no testimony or other evidence to support a rational inference that the robbery of [the victim] was committed with the intent to further other criminal activity of [a gang]") (emphasis in original).

Viewing the record in the light most favorable to the verdict, there was no evidentiary basis for an inference – and certainly no direct proof – that an arson was committed to serve some independent purpose "apart from the murder[s]." Barnett, 17 Cal.4th at 1158. Not surprisingly, the prosecution did not even attempt to identify any fact in evidence tending to satisfy this requirement. Instead, as discussed in further detail below, the prosecution sidestepped the problem by misstating the law and capitalizing on an erroneous and confusing special instruction.

Under these circumstances, the jury could only have arrived at true findings on the arson-murder special circumstances by relying impermissibly on "suspicion, . . . imagination, speculation, supposition, surmise, conjecture, or guess work," Morris, 46 Cal.3d at 21, or by misapplying or entirely ignoring the "independent felonious purpose" requirement. Either way, the findings must be reversed.

A capital conviction that is not supported by substantial evidence violates the defendant's rights to due process and a reliable penalty determination guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. Jackson, 443 U.S. at 317-18; see also Thompson v. City of Louisville (1960) 362 U.S. 199, 206 ("it is a violation of due process to convict and punish a man without evidence of his guilt").

The failure of the prosecution to sustain its burden of proof on a special circumstance allegation also fails to narrow the case to those most deserving of death, in violation of his Federal Constitutional right under the Eighth Amendment. Zant v. Stephens (1983) 462 U.S. 862, 876-877.

Reversal is required under both state and federal law.

E. The Trial Court Committed Prejudicial Error by Instructing the Jury on the Felony-Murder Special Circumstance, Giving the Prosecutor's Misleading Special Instruction, Refusing Nieves's Corrective Special Instruction, and Failing to Correct the Prosecutor's Misstatements of the Law

1. Legal Standard

The issue whether the trial court correctly instructed the jury is reviewed de novo. People v. Cole (2004) 33 Cal.4th 1158, 1206; People v. Waidla (2000) 22 Cal.4th 690, 733 ("Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.").

In reviewing an instruction for error, the Court must determine whether a reasonable jury would be misled by the instruction. People v. Frye (1998) 18 Cal.4th 894, 957; see also Estelle v. McGuire (1991) 502 U.S. 62, 72; Boyde v. California (1990) 494 U.S. 370, 380.

2. The Trial Court Erred By Instructing the Jury It Could Find the Arson-Murder Special Circumstance True

"[U]nsupported theories should not be presented to the jury." People v. Guiton (1993) 4 Cal.4th 1116, 1131 (holding that it was error to instruct the jury it could convict the defendant of a felony for selling cocaine when the evidence was insufficient to support a finding that he sold cocaine). "It has long been the law that it is error to charge the jury on abstract principles of law not pertinent to the issues in the case." People v. Jackson (1954) 42 Cal.2d 540, 546; People v. Roe (1922) 189 Cal. 548, 558 (error to give an instruction "covering an assumed issue which finds no support in the evidence, or which the undisputed evidence in the case shows does not exist"); see also Penal Code § 1127 (a trial judge's authority to charge the jury is limited to points of law "applicable to the facts of the case"). Giving an instruction with no application to the facts in evidence "tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." Jackson, 42 Cal.2d at 546-47.

As shown above, the evidence in this case was insufficient as a matter of law to warrant giving an arson-murder special circumstance instruction. In the absence of any evidence tending to show an independent felonious purpose for committing arson, the instruction was not "applicable to the facts of the case," as required. See Penal Code § 1127; see also People v. Rubio (1977) 71 Cal.App.3d 757, 768-69 (holding that it was error to instruct the jury about how to treat a defendant's statements explaining his possession of stolen goods when the record contained no

evidence of any such statements), overruled on other grounds in People v. Freeman (1978) 22 Cal.3d 434, 438-39. The trial court therefore erred under state law when it submitted to the jury the question whether the arson-murder special circumstances were true.

This error also violated Nieves's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. By instructing the jurors to decide whether or not the arson was "incidental" to the murder, the trial court led them to assume there was sufficient evidence in the record to support a finding that it was not incidental to the murder. The instruction therefore permitted the jurors to make an inference when, "under the facts of the case, there [was] no rational way the trier of fact could make the connection permitted by the inference." Ulster County Court v. Allen (1979) 442 U.S. 140, 157. The effect was to "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Id. (citing In re Winship (1970) 397 U.S. 358, 364).

Jury instructions that relieve the prosecution of its burden of proving beyond a reasonable doubt each element of a special circumstance also violate a capital defendant's Due Process rights under the Eighth and Fourteenth Amendments, see Sullivan v. Louisiana (1993) 508 U.S. 275, 277-78, as well as her Sixth Amendment right to a jury trial. See Ring, 536 U.S. at 609.

In addition, this unfounded instruction "substantially increase[d] the risk of error in the fact finding process," in violation of Nieves's Eighth and Fourteenth Amendment rights to a fair trial and a reliable penalty determination. Beck v. Alabama (1980) 447 U.S. 625, 632. "Such a risk

cannot be tolerated in a case in which the defendant's life is at stake." Id. at 637.

By giving the instruction, the trial court also abdicated its own responsibility to ensure that the jury's sentencing discretion in this capital case was suitably channeled. See Maynard v. Cartwright (1988) 486 U.S. 356, 362 ("Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action"); Godfrey v. Georgia (1980) 446 U.S. 420, 428 (death penalty laws must be applied in a manner that "channel[s] the sentencer's discretion").

3. The Trial Court Erred by Giving the Prosecutor's Confusing and Misleading Special Instruction

The arson-murder special circumstance instruction was not only unwarranted by the evidence. It was also confusing and misleading. This Court has consistently enforced the rule that when there is evidence in the record that the felony underlying a felony-murder special circumstance allegation was committed to facilitate or conceal the murder, the jury must be instructed on the "independent felonious purpose" requirement. See People v. Stanley (2006) 39 Cal.4th 913, 957-58 (finding that it was error to substitute "or" for "and" before the paragraph of the felony-murder special circumstance instruction describing the independent felonious purpose rule); People v. Raley (1992) 2 Cal.4th 870, 903 (same). The trial court purported to instruct the jury on this requirement. But the instruction it delivered actually undermined the "independent felonious purpose" requirement and thus failed to adequately advise the jury of the applicable law.

As requested by the prosecution, the trial court told the jurors they could find the arson-murder special circumstance true if they determined that

> (1) the murder was committed while the defendant was engaged in the commission of arson and
>
> (2) The murder was committed in order to carry out or advance the commission of the crime of arson, or to facilitate the escape therefrom, or to avoid detection. Moreover, this special circumstance is still proven if the defendant had the separate specific intent to commit the crime of arson, even if she also had the specific intent to kill. In other words, the special circumstance referred to in these instructions is not established if the arson was merely incidental to the commission of the murder.

54 RT 8366:15-8367:8 (emphasis added to indicate modification to the standard instruction).

If read in isolation, the prosecution's amendment to the standard instruction appears to be a correct – though incomplete – statement of the law. Evidence a defendant had the intent to kill as well as the intent to commit a felony does not necessarily defeat a felony-murder special circumstance allegation. Barnett, 17 Cal.4th at 1158. But even in cases of concurrent intent, there must still be adequate proof the defendant had an independent purpose for committing the felony "apart from murder." Id.; see also Raley, 2 Cal.4th at 902-04.

For example, there could be a true finding of the arson-murder special circumstance if someone burned his own warehouse down to collect insurance money with the concurrent intent to kill a person in the warehouse who knew about the arsonist's fraudulent scheme. In such a case, the special circumstance would apply, but only because the arson was committed for a purpose other than killing the person in the warehouse.

Without this independent purpose, the perpetrator's intent to commit arson would not be sufficient to support the special allegation. See People v. Cash (2002) 28 Cal.4th 703, 738 ("the 'reason a person chooses to commit a crime' . . . is not equivalent to the 'mental state such as intent' required to commit the crime") (quoting People v. Hillhouse (2002) 27 Cal.4th 469, 504).

Taken as a whole, the prosecution's special instruction obscured the independent purpose requirement. In the standard Green instruction, the first sentence describes a murder committed to advance or conceal a felony, and the second sentence cautions that the special circumstance is not established if the felony is "merely incidental" to the murder. Significantly, the second sentence is linked to the first sentence by the phrase "In other words . . . ." As this Court has explained, these "transitional words" refer back to the first sentence. See People v. Horning (2004) 34 Cal.4th 871, 907. Logically, then, a jury given the standard instruction would understand that a felony is "merely incidental" to a murder unless the murder is committed to advance or conceal a predicate felony.

By inserting a sentence about dual intent between these two sentences, the trial court changed the meaning of the instruction. As given, the instruction no longer related the concept of a felony that is "merely incidental" to a murder to the requirement of an independent purpose for the felony. Instead, the transitional phrase "[i]n other words" refers back to the language requested by the prosecutor: "Moreover, this special circumstance is still proven if the defendant had the separate specific intent to commit the crime of arson, even if she also had the specific intent to kill."

This awkward construction is confusing and misleading. It implies that the rule that the special circumstance is not established if a felony is

"merely incidental" to a murder and the rule that dual intent does not disprove the special circumstance are two versions of the same rule stated in different ways. But these are unrelated concepts. The dual intent rule broadens the applicability of the special circumstance. The "merely incidental" rule limits it. As a whole, the special instruction misled the jury into thinking that a finding of concurrent intents to commit arson and to kill somehow meant the arson was not "merely incidental" to the murder and was therefore sufficient to prove the special circumstance. That the jury would have embraced this mistaken view of the law is made all the more certain by the fact that the prosecutor expressly advanced this construction of the special instruction in closing argument, erroneously telling the jurors that concurrent intents meant that the special circumstance allegation was true. 57 RT 8895:6-9.

4. There Is More than a Reasonable Likelihood the Jury Misapplied the Arson-Murder Special Circumstance Instruction

In light of the jury's true finding on the special circumstance in the absence of any evidence of an independent felonious purpose, there can be no doubt that the jury misapplied this unwarranted and misleading special instruction. See Frye, 18 Cal.4th at 957. The jury was doubly misled. First, the giving of an arson-murder instruction told the jury there was sufficient evidence to find the special circumstance true. Second, the prosecution's misleading version of the instruction led the jurors to believe they could find the special circumstance true without finding Nieves had a separate and independent purpose for committing arson.

These instructional errors violated Nieves's constitutional as well as her state law rights. Under Ring, this erroneous special circumstance instruction violated Nieves's Sixth and Eighth Amendment rights to have

jury determine beyond a reasonable doubt whether the arson was committed for an independent purpose. 536 U.S. at 609; see also Prieto, 30 Cal.4th at 256 (Ring applies to determination of facts necessary to prove a special circumstance). The erroneous instruction also impermissibly lightened the prosecution's burden of proof in violation of Nieves's due process rights. See People v. Dyer (1988) 45 Cal.3d 26, 60, 62. In Dyer, as in this case, the trial court delivered an instruction that did not clearly instruct the jury on the requirement of a showing regarding the defendant's intent. Id. at 60. Consequently, the instruction was held to be constitutionally defective, but harmless on the facts of that case. Id. at 62, citing Rose v. Clark (1986) 476 U.S. 570, and Sandstrom v. Montana (1979) 442 U.S. 510, 520..

By delivering a misleading and confusing special circumstance instruction here, the trial court also violated Nieves's Eighth Amendment and due process rights in that the instruction was likely to cause an arbitrary and unreliable finding on the special circumstance. See Beck v. Alabama (1980) 447 U.S. 625, 632, 637 (risks of error in the fact finding process "cannot be tolerated in a case in which the defendant's life is at stake"); see also People v. Lee (1987) 43 Cal.3d 666, 674 (misleading or confusing instructions may violate federal due process).

5. The Instructional Error Was Not Harmless

An erroneous instruction that omits or mischaracterizes an element of a special circumstance is subject to harmless error analysis pursuant to Chapman v. California (1967) 386 U.S. 18. Prieto, 30 Cal.4th at 256 (applying the Chapman test to a faulty felony-murder special circumstance instruction). The prosecution must therefore establish that the error was harmless beyond a reasonable doubt to avoid reversal. Chapman, 386 U.S. at 24; see also People v. Visciotti (1992) 2 Cal.4th 1, 59 (applying Chapman

test to instructional error of constitutional magnitude); People v. Lee (1987) 43 Cal. 3d 666, 676 (same).

In cases of non-constitutional instructional errors, reversal is required if it is "reasonably probable that a result more favorable to [defendant] would have been reached in absence of the error." People v. Watson (1956) 46 Cal.2d 818, 836-37. The error here was prejudicial under both of these standards.

The circumstances surrounding the instructional errors in this case ensured that the jury would misunderstand and misapply the arson-murder special circumstance instruction. Compare Stanley, 39 Cal.4th 913. In Stanley, this Court held that it was error under Green for the trial court to substitute "or" for "and" before the portion of the felony-murder special circumstance instruction that articulates the Green rule. Id. at 956. The disjunctive construction using "or" could have prevented the jury from "drawing the distinction between felony-murder robberies that qualify for special circumstance treatment, and intentional murders during which a robbery is 'only incidentally committed,' which do not." Id. at 957 (internal citation omitted). This error was found to be harmless only because it was cured by "the delivery of another specially requested defense instruction as well as the closing arguments of both the prosecutor and defense counsel" that "properly conveyed the Green requirement." Id. at 956-57. The trial court also delivered its own additional "clarifying remarks." Id. at 957.

Here, however, additional errors by the court and misstatements of the law by the prosecution compounded the instructional error. First, in addition to giving the prosecutor's confusing and misleading specially modified instruction, the trial court also erroneously refused another special instruction requested by the defense. Nieves requested an instruction

stating that if the only purpose of the arson was to kill, the jury could not find the special circumstance to be true. 51 RT 7721:22-23; see also 19 RCT 4768, 4909, 4912, 4922. The trial court rejected the proposed instruction on the ground that it misstated the law. 51 RT 7721:24. Contrary to the trial court's ruling, the defense instruction stated the applicable law correctly. See Green, 27 Cal.3d at 61; see also Mendoza, 24 Cal.4th at 182; Clark, 50 Cal.3d at 598.

Moreover, a clarifying instruction was needed to counteract the confusion created by the prosecution's special instruction. That instruction created the misleading impression that no showing of an independent felonious purpose was required as long as there was an intent to commit arson. In the absence of a corrective instruction, the jury was prevented "from properly drawing the distinction" between an arson that is merely incidental to a murder and one committed for a separate purpose. Stanley, 39 Cal.4th at 957.

Second, unlike Stanley, the prosecutors in this case used their closing arguments to capitalize on the misleading special instruction. "[I]n cases suffering from insufficient evidence, deficient instructions, or other errors made in presenting evidence or giving instructions, ill-advised remarks by the prosecutor may compound the trial's defects." People v. Morales (2001) 25 Cal.4th 34, 48. That is exactly what happened here.

Faced with no evidence Sandi Nieves might have committed arson for any reason other than to kill the inhabitants of her house, the prosecutors sidestepped the problem by misstating the law. The prosecution told the jury, "If you find there were dual or concurrent intents; in other words, the intent to commit arson, along with the intent to kill, the special circumstance is true." 57 RT 8895:6-9; see also 54 RT 8419:6-8420:16.

This restatement of the applicable law was "unsound." Green, 27 Cal.3d at 59. Under the prosecutors' version, concurrent intent is sufficient by itself to prove the felony-murder special circumstance. Green rejected precisely this same flawed formulation:

> [I]n his closing argument, the district attorney correctly told the jurors that in order to find the charged special circumstances to be true they must first find defendant guilty of the underlying crimes of robbery and kidnaping. After discussing the evidence bearing on those crimes, however, the district attorney in effect told the jurors that was all they needed to do: i.e., that if they found defendant guilty of the underlying crimes, the corresponding special circumstances were ipso facto proved as well. The latter reasoning was unsound, as it ignored key language of the statute: it was not enough for the jury to find the defendant guilty of a murder and one of the listed crimes . . . ."

Id. at 59.

Green and its progeny require more than just intent to commit arson coupled with intent to kill. They require a finding that the defendant "had a purpose for the arson apart from the murder." Mendoza, 24 Cal.4th at 182-83 (defendant also set the fire to destroy evidence of other crimes); see also Cash, 28 Cal.4th at 738 (motive and intent are not the same thing).

On rebuttal, the prosecutor further undermined the Green rule. Referring back to the trial court's instruction, she told the jury that a felony is "merely incidental to the commission of murder," if it is committed as "an afterthought," to the murder. She then offered the example of a murderer who decides to take the victim's wallet after murdering him. 57 RT 8894:6-16.

The prosecutor's example might have been relevant in the context of a robbery-murder special circumstance allegation. But in the context of the arson-murder special circumstance alleged in Nieves's case, it was

inapposite and misleading. There was no evidence that the fire in this case was "an afterthought" of the kind described by the prosecutor. In light of evidence suggesting the fire was set for the purpose of causing the victims' deaths, the jury could have found the arson was "merely incidental" to the killings in the sense intended by Green, i.e., merely a part of the homicidal scheme, and rejected the special circumstance allegation on that basis. By defining the phrase "merely incidental" so narrowly, to cover only "afterthoughts," the prosecutor effectively foreclosed such a finding.

Third, the trial court did nothing to correct the prosecution's misstatement of the law. Compare Stanley, 39 Cal.4th at 457. Having delivered a confusing instruction and refused to give the defense's clarifying instruction, the trial court allowed the prosecutors' misleading gloss on the applicable law to stand. This additional error compounded the previous instructional errors. See Green, 27 Cal.3d at 67 (reversing a kidnaping conviction because, among other things, the court failed to correct the prosecutor's misstatement of the law in closing argument).

The combined effect of the lack of evidence of an independent felonious purpose, the misleading special instruction given by the court and the prosecutor's erroneous "clarification" of the instruction was to confuse and mislead the jurors in a manner that nullified the Green rule. In light of the trial court's failure to cure these errors, the state cannot establish harmlessness "beyond a reasonable doubt." Chapman, 386 U.S. at 24. It is also more than "reasonably probable" that the jury would not have found the arson-murder special circumstance true in the absence of these errors. Watson, 46 Cal.2d at 836-37. In fact, given the absence of any evidence of an independent felonious purpose, the only plausible explanation for the jury's verdict on this special circumstance is that it did not apply the

independent felonious purpose rule to the evidence presented. The instructional error was therefore prejudicial.

The true findings on the arson-murder special circumstance allegations must be reversed.

XVII. THE TRIAL COURT PREJUDICIALLY PERMITTED VICTIM IMPACT EVIDENCE THAT WAS UNNECESSARY, EXCESSIVE, IRRELEVANT, CUMULATIVE, AND INFLAMMATORY

Over repeated objections by the defense, the trial court admitted unnecessary, irrelevant and inflammatory victim impact evidence during the penalty phase. This evidence included improper and excessively emotional testimony from several of the victims' family members, including malicious and disparaging statements about Sandi Nieves, speculative characterizations about the victims' deaths, and gratuitously emotional accounts of the victims' funeral.

Throughout the victim impact presentation, the court permitted the prosecution to display several poster-sized photo-collages containing over 50 photographs of the victims and of a shrine maintained by a family member. In addition, the trial court allowed the prosecution to present a lengthy compilation of home movies edited in a way that misleadingly diminished Sandi Nieves's participation in her children's lives.

The trial court failed to perform its crucial role as gatekeeper with respect to the prosecution's emotionally stirring victim impact presentation. As a result, the defense was placed in a Catch-22. Defendant was compelled to respond in some way to this potent evidence because it was certain to divert the jury's attention from its proper role of rationally assessing her moral culpability. But by cross-examining the victims' grieving relatives, the defendant risked alienating the jurors, as happened in this case. See 65 RT 10222:1-10223:8 (statement of juror who found it "appalling" that the defense cross-examined the victim impact witnesses). This fundamentally unchallengeable evidence invited an irrational, purely subjective response that virtually guaranteed a verdict of death, in violation

of state law and Nieves's rights under the Eighth Amendment and the Fourteenth Amendment Due Process clause.

A. Significant Facts

1. Victim Impact Testimony

Shortly before the penalty phase began, the prosecution gave the defense a final list of penalty phase witnesses. 59 RT 9163:21-9164:6. The defense objected to the late disclosure because it interfered with counsel's ability to investigate and prepare to cross-examine all of the prosecution's witnesses. 59 RT 9163:21-9164:6, 9170:7-17.

Defendant moved to limit the victim impact testimony the prosecution intended to present on the grounds that much of it was irrelevant, cumulative, excessive, and/or unduly prejudicial and violated her Eighth and Fourteenth Amendment rights. 59 RT 9163:26-28, 9171:18-9177:23, 9181:15-9190:26. In addition, Nieves objected to any testimony by individuals who had had little or no ongoing contact with the victims and/or who were not related to them. Id.

The court denied Nieves's motion as to all of the prosecution's intended victim impact witnesses except a teacher and two friends. 59 RT 9190:25-26, 9239:3-9241:4. The court did not require a proffer of evidence regarding the need for witnesses other than the victims' fathers to provide victim impact evidence. It also denied the defense request to examine the proposed witnesses to determine the extent to which they had actually known the victims: "I certainly don't want to get into a 402 hearing. I don't think that's appropriate." 59 RT 9189:6-8. The court did not set any limits on the scope of the victim impact witnesses' testimony.

The jurors heard testimony from four different victim impact witnesses: the children's fathers, Fernando Nieves and David Folden;

Fernando's mother, Minerva Serna; and Fernando's second wife, Charlotte Nieves. The victim impact testimony comprised the prosecution's entire case-in-chief. It lasted for more than a day spanning nearly one hundred pages of the Reporter's Transcript. It was reinforced by the display of over 50 photographs, a shrine to the children's memory, and the showing of a videotape of scenes from their lives.

a. Minerva Serna

Minerva Serna, grandmother to Nikolet and Rashel, testified first. 60 RT 9296:23-9316:14. She acknowledged she had only known her granddaughters briefly, but blamed Sandi Nieves for keeping them away from her. 60 RT 9298:9-10 9302:24-9303:1. Serna gave an emotional description of how she felt when she learned her granddaughters had died and of the impact their deaths had on her life. 60 RT 9299:20-24, 9300:23-9301:3. She also testified about her son Fernando's intense grief. 60 RT 9301:4-12.

The prosecutor prompted Serna to talk about the victims' open-casket funeral. 60 RT 9305:3-22. She proceeded to give a graphic and disturbing description of seeing her granddaughters' dead bodies:

> [T]hey looked so bruised. They looked terrible. They really did. Nikolet, she had bruises on her. Rashel had black and blue marks around her neck here, you know. And I didn't know what they were from at the time. I really think more had happened to them. I wasn't sure. I learned later on that it was from the – that the smoke, that it came through their body.

Id.

Throughout her testimony, Serna repeatedly disparaged Sandi Nieves. She lashed out, calling Nieves "vicious and malicious." 60 RT

9308:16. She described Nieves manipulating those around her. 60 RT 9311:14 ("For 18 years she pulled our strings.").

Serna also insinuated that Sandi had withheld love and affection from her children and made them "suffer[]" when they were alive:

> Nikolet was the saddest one of all. I don't know what she went through, but I can see it in her eyes all the time. She kept to herself. We'd try to hug her and kiss her the most, because she – she suffered the most for some reason.

60 RT 9303:5-12. When describing the state of the victims' bodies at the funeral, Serna also insinuated that Sandi might have abused the girls physically. 60 RT 9305:19-20 ("I really think more had happened to them.").

Serna gave her opinion that what Sandi did is "just beyond a human . . . ." 60 RT 9305:10-11. She also described Sandi as a person who was "evil all the time." 60 RT 9311:13.

Over a defense objection (60 RT 9301:18-19), Serna also talked at length about what a "loving father" Fernando was to the girls and how much other children adored him. 60 RT 9302:3-10. "All our friends have kids. They love my son. . . . So that's the kind of person he is." Id.

Serna was permitted to give her own dramatic and disturbing account of the victims' deaths even though she was not a percipient witness. Over a defense objection (60 RT 9307:13), 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," then evoked an upsetting scene: "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. The defense moved to strike Serna's speculative reenactment of the crime. The court overruled the objection and only interceded when Serna reached the

point of condemning Nieves as "a person with no heart. No feelings." 60 RT 9307:18-28.

b. Fernando Nieves

Fernando Nieves followed his mother as a witness for the prosecution. 60 RT 9317:3-9367:22. The prosecutor led Fernando step by step through his experiences on the day following the fire, from seeing a television news report to racing to the hospital. 60 RT 9317:5-9319:8. 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 told the jury, "It's so hard to maintain a happiness. There's always – always a cloud around the family, always." 60 RT 9324:8-10. Fernando also testified at length about his views of the impact of the crime on his son David. 60 RT 9320:26-9324:5.

As with Serna, the prosecutor asked Fernando to describe the victims' funeral to the jury. 60 RT 9320:11-25. Fernando recalled looking down at the "four shiny coffins" and not being able to recognize the girls because "[t]hey were swollen and bruised." Id. He also invoked the broader impact of their deaths on the community, describing "the family and friends all coming to try and help us." Id.

Fernando contrasted the victims' innocence ("They never hurt nobody") with Nieves's crime. Id. He painted for a second time the gut-wrenching image of "[f]our little girls laying [sic] in a coffin," and emphasized the senselessness of their deaths, saying they had "no reason to be there." He told the jurors that the victims "deserved to be on this earth," implying that Nieves lacked any human worth and did not deserve to be alive. Id. ("[S]he could have killed herself and left them alone.").

Fernando presented a portrait of his family as loving and caring and of himself as completely devoted to his children. 60 RT 9319:20-23, 9323:2-24, 9335:27-28. The prosecutor prompted Fernando to elaborate for the jury on the "happy times" depicted in the photographs in several of the memorial posters on display in the courtroom, including the ones devoted specifically to Fernando's daughters Nikolet and Rashel. 60 RT 9324:27-9327:3, 9331:21-9335:1.

Fernando portrayed Sandi as manipulative and vindictive. He told the jury that she used the children to get her way: "They [the children] would come spend time with me, unless she was mad at me. If I made her angry in some way, then she would not let me see them." 60 RT 9338:5-8; see also 9344:3-7 ("If I say no, she gets angry. Then what does she say to me? 'You can't see the kids.'"). He speculated that Sandi had petitioned for her father to have custody of David while she was in jail because she wanted to "control his [David's] testimony" during the trial. 60 RT 9365:12-22. The defense objected and moved to strike, but the Court allowed Fernando's views about Sandi's duplicitous motives to stand. 60 RT 9365:15-17.

When the defense attempted to cross-examine Fernando about his suggestion that Sandi used her children to manipulate others, the trial court sustained an objection on the ground that the question was beyond the scope of the direct examination. 60 RT 9348:14-27.

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 on the night of the fire. Fernando testified that Sandi "would have stopped him forcibly, I think, from leaving that house." 60 RT 9359:1-2.

c. David Folden

David Folden, father to Jaqlene and Kristl, testified next. 60 RT 9368:13-9380:3. He 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 that Sandi Nieves had taken "everything" from him, leaving his life empty. 60 RT 9370:13-9371:3.

Like Serna and Fernando, Folden was asked to describe the funeral. 60 RT 9372:8-21. He described the outpouring of grief from the community. "We had 400 people at that funeral for those girls. 400. That's saying a lot." Id. The jurors were also told that the plant where Folden worked was shut down on the day of the funeral, and that many friends and relatives traveled from out of state to attend the funeral. Id.

The prosecutor prompted Folden to say the names of the victims over and over again as he 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 was also asked to describe what was going on in each of the photographs, including those in the two posters devoted to Kristl and Jaqlene individually. Id.

The prosecutor closed by asking Folden about 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 told the jury the shrine was in his daughters' room. It included photographs of the victims, stuffed animals, and other toys left behind by Kristl and Jaqlene when they died. Folden described for the jury how Kristl and Jaqlene had picked out the quilts on their twin beds just a month before their deaths. 60 RT 9379:2-10.

Throughout his testimony, Folden repeatedly disparaged Sandi Nieves. He testified that Nieves 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 that Nieves "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, Nieves had always "won everything," and it was time for her to pay: "This time it stops." 60 RT 9371:13-25.

Testifying about the impact of the crime on his mother, Folden lashed out, saying "That person over there [Nieves] tried to even take things away from a 67-year-old lady just for being mean, bitter, I guess." 60 RT 9373:7-9. He portrayed Sandi Nieves as undeserving of and ungrateful for the Foldens' efforts to make her feel part of the family despite knowing her "for what she was." 60 RT 9373:10-22.

Folden also portrayed Sandi as a bad mother. He described the children as "starved for attention." 60 RT 9378:3-6. He characterized her as controlling and overly protective to the point of stunting her children's development. Talking about David Nieves, Folden observed, "One thing he did gain from the deaths of his sisters, he gained freedom. He would have never known freedom. He would have never known it." 60 RT 9374:1-3.

The court overruled a defense objection to this type of "character assassination" by a victim impact witness. 60 RT 9392:11-9393:1.

d. Charlotte Nieves

The prosecution's final victim impact witness was Fernando's second wife, Charlotte Nieves, who he married after abandoning Sandi and the children. 60 RT 9401:3-9415:7, 61 RT 9444:8-9466:10. Charlotte testified about her attachment to the victims and the friendship between her

two daughters and the victims. She described the impact of the victims' deaths on her husband and children and on David Nieves. Charlotte testified that her 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.

Over a defense objection, Charlotte spoke at length about her beliefs that a parent's first priority should be her children. 60 RT 9404:1-2. She proclaimed her intention to raise her children as "independent, caring, respectful people," adding to the chorus of witnesses asserting that Nieves had not shared or promoted those positive values. 60 RT 9403:9-28. Over a further objection, Charlotte was permitted to criticize Nieves's mothering of David: "He was never taught to have an opinion. He was never taught to have a choice. . . . He was never taught to speak for himself, think for himself." 60 RT 9413:6-11.

Charlotte also testified about the death of her own daughter Jessica soon after birth. 61 RT 9445:16-9446:24. Over repeated objections by the defense (61 RT 9445:22-23, 9446:7), Charlotte was permitted to describe the details of baby Jessica's illness and death, how she was unable to breathe on her own and ultimately suffered heart failure at three months of age. After leading Charlotte through these heart-wrenching and gratuitous details of her infant's death, the prosecutor asked her to compare the loss of a child from natural causes to the loss of a child who is murdered. 61 RT 9446:15-24.

Before the end of Charlotte's testimony, the defense objected again to the trial court's admission of inflammatory victim impact evidence:

> I will object again for the record to the nature of the victim impact-type evidence that the court allowed. I believe it is in violation of the 5th, 8th and 14th Amendments . . . .

61 RT 9437:21-25. Showing the highly prejudicial impact of the prosecution's evidence, counsel pointed out that "many of the members of the jury [were] crying." But the court summarily overruled the objection and denied a defense request for a cautionary instruction. Id. at 9437:25-9438:21.

2. Photographic Display

Before the penalty phase began, the court ruled that any photographs of the victims while they were alive would be admissible. 59 RT 9242:2-3. The court did not examine the prosecution's photographic display to assess its admissibility. 60 RT 9262:20- 9265:8. It also did not inquire into how many photographs the prosecution intended to present to the jury or how they would be presented and used. Id.

The defense was not given an opportunity to examine the photographic display in any detail before the penalty phase began. The day before, the court ordered the prosecutor to notify defense counsel "as soon as you get the photographs . . . so he can see them ahead of time." 60 RT 9252:7-8. The prosecutor stated, "As soon as they are available, Mr. Waco will be contacted, and he can come take a look at them." 60 RT 9252:14-15.

Instead of contacting defense counsel ahead of time, the prosecutors set up their extensive photographic display in the courtroom shortly before the jurors were scheduled to arrive on the first morning of the penalty phase. 60 RT 9258:4-5. Defense counsel was using the time before the jury arrived to prepare for the proceedings and did not have an opportunity to examine the photographs in any detail or to discuss them with Sandi Nieves. 60 RT 9258:4-9. The court did not reprimand the prosecutors for failing to notify defense counsel "as soon as" the photographs were

available. It also did not give the defense any additional time to examine the photographs before hearing objections. 60 RT 9257:27-9260:5; 9264:9-10.

The prosecution's photographic display included eight large posters memorializing the victims. Each poster was approximately two by three feet and included multiple, enlarged photographs of the victims. Exhs. 98-101 & 103-06. They were on display in the courtroom. 60 RT 9257:27-9258:3.

Three of the memorial posters showed the victims with other family members in a variety of settings. Exhs. 98, 99 & 103. Each of them bore an emotionally charged title in large print. One was called "Memories," another "Family Memories," and the third was titled "Fun Times Together." Id.

Four of the posters resembled gravestones. Each commemorated one of the four victims with her name, date of birth and date of death, and an array of six or more photographs. Exhs. 100, 101, 104 & 105.

The final poster was prominently titled "In Remembrance." It included five large photographs of a shrine to the victims. Exh. 106. The photographs show a children's bedroom with two empty beds, two bicycles, toys, and stuffed animals, but no children. Visible on each of the two beds was a smaller photograph of the four victims.

Defense counsel had to formulate and make his objections to the photographic display as he was viewing it for the first time and without an opportunity to consult with his client. 60 RT 9258:10-9260:5. Counsel objected to the sentimental titles like "Family Memories" and "In Remembrance" because they only served to "exhibit emotionalism." 60 RT 9258:14. He also objected to the gratuitous inclusion of the victims' dates

of birth and death on the posters. 60 RT 9259:6-11. Finally, counsel objected "to the pictures themselves unless there's some foundation laid ahead of time so we know exactly what the purpose of these pictures are [sic] other than to create bias and prejudice against our client . . . ." 60 RT 9259:21-25.

The prosecutor simply asserted "the photographs are appropriate for this stage of the trial for victim impact testimony . . . ." 60 RT 9263:7-9. She did not explain how or why they were appropriate or identify a permissible use for them. She presented no legal authority to support the use of large print, emotionally charged titles for victim photographs or the inclusion of birth and death dates. 60 RT 9263:7-9. The court did not press the prosecutor on these matters. It overruled all of the defense's objections to the photographic display. 60 RT 9264:9-10.

Defense counsel also objected to the use of the photographs on the ground that he had not had an opportunity to review them with the defendant so he could cross-examine the witnesses about them effectively. 60 RT 9329:2-17. The court overruled the objection. 60 RT 9329:23.

The prosecutors heightened the emotional effect of the memorial display by asking family members to narrate the events depicted and identify the victims by name in nearly every one of the 54 separate 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.

3. Video Compilation

The trial court also admitted, over an objection by the defense, a video compilation of the victims created by Fernando Nieves's wife, Charlotte, from a series of home movies. 60 RT 9260:6-9261:19, 9295:10-14. Defense counsel had viewed the raw footage used to create the video,

but he was not given the opportunity to view the edited compilation that would be shown to the jury or to compare the edited version to the original. Id. Counsel requested a copy of the original footage so he could determine if the edited version had been manipulated to diminish Nieves's involvement with the children and so he could demonstrate any such manipulation to the jury. 60 RT 9261:11-18; 9264:16-9265:2.

The court did not review any of the video footage before it was shown to the jurors. It denied defense counsel's request to compare the original and edited versions and overruled the defense's objections to admission of the video into evidence. 60 RT 9264:11-12, 9265:5-6, 9295:21. Defense counsel was later given an opportunity to view the edited version of the video before it was played for the jurors. 60 RT 9424:12-22. But he was not permitted to compare the edited version to the original footage or to show the jury any of the original footage.

The jurors were shown the video compilation during the testimony of Charlotte Nieves, who had edited the original footage to create a 13-minute version. The video depicted the four victims enjoying themselves at various family events. 61 RT 9443; Exh. 107A. In several scenes, the victims were shown interacting playfully with one another and with Fernando, Charlotte, or their brother David. Id. The video ended poignantly with Fernando Nieves saying "I want to see your face" to his eldest daughter, Nikolet. 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 jurors. See Exh. 107A.[162] Charlotte confirmed that

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[162] Significantly, one of the only things the jurors heard Nieves saying in the video was "Fire extinguisher." Exh. 107B at 6:16. Given the context, these words must have worked – even if subliminally – to divert

(continued...)

she "cut her [Nieves's] face" out of several scenes in which Sandi had participated. 61 RT 9455:10-9457:26. She claimed that she had only done so in order to maximize scenes showing the victims. Id. When defense counsel tried to establish which scenes and events Nieves had been edited out of in the version shown to the jury, the court abruptly cut off cross-examination. 61 RT 9458:19-26.

At the close of the prosecution's case-in-chief, the defense repeated its objections to admission of the photographs, the photo-collage titles, and the video. 61 RT 9466:22-9467:9. The court overruled these objections and admitted all of the materials into evidence. 61 RT 9467:15-17.

4. Closing Arguments

During closing argument, the prosecution relied heavily on the victim impact evidence. Ms. Silverman thanked the jurors for their dedication "on behalf of" the Nieves and Folden families. 64 RT 10096:3-9. She then reviewed in detail the testimony of each of the victim impact witnesses and invoked the names of the survivors repeatedly. 64 RT 10100:1-10103:21, 10113:21-23, 10115:5-8, 10126:9-10, 10127:23-10128:3.

The prosecutor told the jurors their decision should be based on "the individual value that you each attach to the lives of those children," instead of on their assessment of the Nieves's moral culpability:

> Again, it depends on the individual value that you each attach to the lives of those children. That's what it comes down to. It's all this case is. That's what this case is.

64 RT 10114:7-10; see also 64 RT 10104:14-18.

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[162](...continued)
the jurors' attention away from Nieves's affectionate interaction with her children and back to the fire on July 1, 1998.

Alluding to David Folden's testimony that he felt Nieves always "won everything" while the children were alive, the prosecutor exhorted the jury to even the score: "She won when she inflicted the ultimate punishment on Dave Folden, on Fernando Nieves, and she wins again if you give her life." 64 RT 10126:9-11.

B. Limits on the Admissibility of Victim Impact Evidence

1. Federal Law

In Booth v. Maryland (1987) 482 U.S. 496, 507, the United States Supreme Court held that the admission of victim impact evidence during the penalty phase of a capital trial constituted a per se violation of the Eighth Amendment. Four years later, the Supreme Court revisited its decision in Booth and held that "the Eighth Amendment erects no per se bar" to the admission of victim impact evidence that provides "a quick glimpse" of the victim's life or the impact of his death on his immediate family. Payne v. Tennessee (1991) 501 U.S. 808, 822, 827 (brief testimony about the impact on the victim's young son, who witnessed the killing, was admissible).

However, the Payne decision recognized that there are constitutional limits to the character and amount of victim impact evidence the jury may consider at the penalty phase. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825.

The Supreme Court also stated explicitly in Payne that admitting surviving family members' opinions about the crime, the defendant or the appropriate sentence is still impermissible under Booth . Payne, 501 U.S. at 830 n.2; see also id. at 833 (O'Connor, J., concurring) and 835 n.1 (Souter, J., concurring). The Court had held in Booth that the Eighth Amendment

bars admission of such evidence. 482 U.S. at 508-09 (allowing a jury to consider a survivor's views about the conclusions the jury should draw from the evidence "clearly is inconsistent with the reasoned decisionmaking we require in capital cases").

Such evidence is particularly suspect because it has no bearing on the central questions of a defendant's "personal responsibility and moral guilt," which are to guide the jury's sentencing discretion. Enmund v. Florida (1982) 458 U.S. 782, 801; see also Zant v. Stephens (1983) 462 U.S. 862, 879, 885 (capital sentencing must not be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process.").

2. California Law

Penal Code § 190.3 ("factor (a)") provides that in determining whether to impose a death sentence to impose, the jury may take into account "[t]he circumstances of the crime of which the defendant was convicted . . . ." After Payne was decided, this Court held that victim impact evidence may be admitted as a "circumstance of the crime" under Factor (a), as long as it is not unduly prejudicial so as to render the trial fundamentally unfair or invite a purely irrational response from the jury. People v. Zamudio (2008) 43 Cal.4th 327, 324-325; People v. Pollock (2004) Cal.4th 1153, 1180. "But victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family or friends, and such testimony is not permitted." Pollock, 32 Cal.4th at 1080, quoted with approval in Zamudio, 43 Cal.4th at 370. See also People v. Prince (2007) 40 Cal.4th 1179, 1286 (emphasizing that the rule permitting some victim impact evidence "does not mean that there are no limits on emotional

evidence and argument") (internal citation omitted); People v. Lewis (2006) 39 Cal.4th 970, 1056 (the admission of excessive or excessively inflammatory victim impact evidence during the penalty phase of a capital trial violates the defendant's constitutional rights because it invites a "purely irrational response from the jury").

Discussing the limitations on the type and amount of victim impact evidence that is admissible at a penalty trial, this Court cited with approval the decision in a Texas case holding that it was error to allow jurors to view a 17-minute video montage of images of the murder victim when he was alive. People v. Robinson, (2005) 37 Cal.4th 592, 652 (discussing Salazar v. State (Tex. Crim. App. 2002) 90 S.W. 3d 330, 336). This Court described Salazar as an "extreme example of such a due process infirmity" and endorsed the Texas high court's view that "'[v]ictim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice . . . .'" Id. at 652. See People v. Kelly (2007) 42 Cal.4th 743, 797-798 (distinguishing Salazar in part because the trial judge in Kelly "watched the videotape and exercised discretion" and the Kelly video supplemented the testimony of the single victim impact witness).

Victim impact evidence is also subject to state-law evidentiary rules barring evidence that is irrelevant, unduly prejudicial, time-consuming, confusing or misleading. Evidence Code §§ 350 & 352; see People v. Kelly, 42 Cal.4th at 798 (rules are similar "whether the evidence is offered in mitigation or in aggravation.")

C. Payne Was Wrongly Decided And Should be Overruled

Payne is binding on this Court. In order to exhaust her state remedies so she can, if necessary, present her claim in federal habeas corpus proceedings and obtain the benefit of any new rule of law on this question by the United States Supreme Court (see 28 U.S.C. §§2254(b)(1), 2254(d)(1)), defendant submits that Payne was wrongly decided and should be overruled or limited.

Payne was wrongly decided because it is contrary to the dictates of the Eighth Amendment, as Justice Stevens and Justice Marshall explained in their dissenting opinions. 501 U.S. at 856-866 (Stevens, J., dissenting); id. at 844-856 (Marshall, J., dissenting). First, victim impact evidence is inconsistent with the Eighth Amendment principle that the decision to impose the death sentence should be based solely on an assessment of the defendant's blameworthiness, as informed by the character of the offense and the character of the defendant, and not on evidence that "serves no purpose other than to appeal to the sympathies or emotions of the jurors. . .." Id. at 856-857 (Stevens, J., dissenting).

Second, victim impact evidence is not necessary to avoid a sentencing proceeding that is unfairly imbalanced against the state. The Constitution does not require parity between the defendant and the state, but rather grants rights to the criminal defendant and imposes special limitations on the state designed to protect the individual from overreaching by the disproportionately powerful state. Id. at pp. 859-860 (Stevens, dissenting); see Bandes, Empathy, Narrative, and Victim Impact Statements (1996) 63 U. Chi. L. Rev. 361, 401 (disputing the assumption in Payne that without victim impact evidence, the defendant has the advantage at the penalty phase).

Third, the admission of victim impact evidence introduces a substantial risk of arbitrary results by permitting the jury to impose a death sentence on the basis of the character or reputation of the victim or the grief of his or her survivors. Payne, 501 U.S. at 864-866. Although Payne envisioned that the due process clause would protect against evidence that renders the trial fundamentally unfair, id. at 825, that limitation has proved an ineffective remedy. See Wayne A. Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials (1999) 41 Ariz. L. Rev. 143, 175-186.

The admission of victim impact evidence at the penalty phase violated Sandi Nieves's Eighth Amendment and Fourteenth Amendment rights.

D. The Trial Court Abdicated Its Role as Gatekeeper in Violation of State Law and Defendant's Due Process and Eighth Amendment Rights

1. Failure to Accord Nieves a Sufficient Opportunity to Meet the Prosecution's Evidence

The "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Presnell v. Georgia (1978) 439 U.S. 14, 16. Defendant certainly had a constitutional right to prepare and present a meaningful defense. Crane v. Kentucky (1986) 476 U.S. 683, 690. Therefore, due process requires that a defendant be given a meaningful opportunity to deny or explain all of the evidence used to procure a death sentence. See Gardner v. Florida (1977) 430 U.S. 349, 353, 362 (failure to disclose to the defense a portion of a report reviewed by the trial judge at sentencing violated due process); see also People v. Williams (2006) 40 Cal.4th 287, 304-05 (due process and other constitutional

violations "would arise from unfair surprise to defendant or his counsel" regarding evidence in aggravation).

Pursuant to Penal Code § 190.3, "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." A defendant is entitled to notice of the prosecution's intended aggravating evidence "before the cause [i]s called for trial or as soon thereafter as the prosecutor learn[s] of the existence of the evidence." People v. Roldan (2005) 35 Cal.4th 646, 733 (applying § 190.3). "The purpose of the notice provision is to afford defendant an opportunity to meet the prosecutor's aggravating evidence." People v. Taylor (2001) 26 Cal.4th 1155, 1182. The notice must be sufficiently specific to allow the defense to investigate and respond to the evidence. See Roldan, 35 Cal.4th at 734 (holding that it was error to admit victim impact evidence after the prosecution had only provided "generic notice" of the evidence it would offer in aggravation).

In this case, defendant was not given sufficient notice of the prosecution's evidence in aggravation to have an opportunity to meet that evidence.

First, the prosecution did not disclose its intention to mount an extensive visual display with over 50 carefully arranged photographs and large-print titles intended to dramatize the presentation. In its § 190.3 notice, the prosecution provided "generic notice" that it intended to introduce unspecified photographs the prosecution claimed were previously provided to the defense in discovery. 10 RCT 2109. Before the penalty

phase began, the prosecutors acknowledged that the defense had not been shown the photographs they intended to present to the jury. 58 RT 9105:9-11, 14-19-9107:11.

Until counsel arrived in court on the first day of the penalty phase, the defense only knew that the prosecutors would be introducing some photographs of the victims while they were alive. 59 RT 9168:2-4, 9177:24-25, 9242:2-3. There was no advance notice that the jury would be bombarded with over 50 photographs of the child-victims' faces – none of them showing the children with Nieves – or that the pictures would be displayed on large posterboards with dramatic titles like "Family Memories" and "In Remembrance." See Exhs. 98-101 & 103-06. There was also no notice that the jurors would be shown a series of pictures of David Folden's memorial shrine to his two daughters. See Exh. 106.

Despite the last-minute disclosure of the photographic display, the court refused to give defense counsel any additional time to examine the display or consult with his client, the defendant. 60 RT 9257:27-9260:5, 9264:9-10. Defense counsel was forced to formulate and interpose his objections while viewing the display for the first time and without adequate time to consult with his client. 60 RT 9258:10-9260:5.

Second, the defense was denied any opportunity to compare the edited version of the home videos that was shown to the jury with the original footage counsel had viewed several months before. See 60 RT 9260:6-9261:19, 9295:10-14. Editing video footage can significantly alter its meaning and impact, and the defense was especially concerned that the edited version had been manipulated to give the false impression that Sandi Nieves was largely absent from the happy occasions in her children's lives. The court refused the defense requests for an opportunity to compare the

original and edited versions and overruled objections to admission of the edited version into evidence. 60 RT 9264:11-12, 9265:5-6, 9295:21.

Unable to compare the two versions and show the jury original footage that included Sandi Nieves, counsel was forced to correct the record by cross-examining Charlotte Nieves about the editing process. As a result, he risked antagonizing the jury. See RT 10222:1-10223:8. Moreover, he was not even permitted to complete his cross-examination of Charlotte Nieves on this issue. Just as the witness was beginning to acknowledge having "cut [Nieves's] face" out of many scenes (61 RT 9455:10-9457:26), the court ordered counsel to move on to another topic. 61 RT 9458:19-28.

Third, the prosecutors did not reveal the names of their penalty phase witnesses until right before the penalty phase began. 59 RT 9163:21-9167:28. As defense counsel explained in his objections, this last-minute disclosure interfered with counsel's ability to investigate and prepare to cross-examine the victim impact witnesses. 59 RT 9163:21-9164:6, 9170:7-17.

The prosecution's delays and failures to disclose evidence it intended to offer in aggravation violated Penal Code § 190.3, and deprived Sandi Nieves of an opportunity to meet all of the aggravating evidence, in violation of her rights under the Sixth, Eighth, and Fourteenth Amendments. Because the trial court required the defense to disclose everything in advance, the failure to require the prosecution to do the same was not a two-way street required by Wardius v. Oregon (1973) 412 U.S. 470, 476. The delays and failure to disclose also deprived her of the liberty interest without due process created by Penal Code § 190.3. Hicks v. Oklahoma (1980) 447 U.S. 343; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300.

2. Failure to Review and Assess Victim Impact Evidence Adequately Prior to Admission

This Court has held that in every capital case, "the trial court must strike a careful balance between the probative and the prejudicial" when determining whether to admit victim impact evidence during the penalty phase. People v. Edwards (1991) 54 Cal.3d 787, 836 (emphasis added); See People v. Prince (2007) 40 Cal.4th 1179, 1289. At the penalty phase trial here, the court effectively abdicated its responsibility to act as gatekeeper and deprived defendant of this most basic procedural safeguard. Without undertaking anything approaching the "careful" balancing required under Edwards, or the actual exercise of discretion as required by People v. Kelly (2007) 42 Cal.4th at 796-797 (see also People v. Zamudio, 43 Cal.4th at 363, 366) (court reviewed the evidence and permitted some and excluding some), the trial court permitted the prosecution to transform the first days of the penalty phase into a memorial service for the victims, complete with multiple portraits of the deceased, a video tribute, and lengthy testimony from several family members, who were permitted to demean the defendant and speculate about the crime.

a. The Photographic Display

In Edwards, this Court demonstrated the type of analysis that a trial court must undertake when presented with victim impact evidence by carefully scrutinizing the relevance of three victim photographs presented briefly during the penalty phase. 54 Cal.3d at 832. In People v. Stitely (2005) 35 Cal.4th 514, this Court also carefully considered the relevance of a single photograph of the victim with her husband presented during the husband's testimony to determine its admissibility under Payne. Stitely, 35 Cal.4th at 564. Notably, the trial court had only admitted the photograph after multiple hearings, and it had also excluded another photograph

showing the victim with other family members. Id. Similarly, in Kelly, the trial court "watched the videotape" and then ruled. 42 Cal.4th at 794. In contrast, the trial court here ruled on the admissibility of the victim photographs before even seeing them. 59 RT 9241:20-9242:3 ("Well if these are photographs of the children while alive, they're admissible."). The court failed to consider either the individual relevance or the cumulativeness of the 50-plus separate photographs in the display mounted by the prosecution. The court did not require the prosecutor to explain why it was relevant or necessary to show the jury so many photographs of each victim or the series of pictures of David Folden's memorial shrine. See 60 RT 9263:7-9. The court also failed to exercise any control over the manner or timing of the visual presentation. After only a cursory review, the court summarily overruled the defense objections that the photographs would arouse strong and unduly prejudicial emotions in the jury by virtue of their sheer volume and the inflammatory manner of their presentation. See 60 RT 9264:9-10.

b. The Video Tribute

In another egregious lapse, the trial court allowed the jurors to view a compilation of home videos of the victims without viewing it first. This Court has "caution[ed] courts against the routine admission of videotapes featuring the victim." Prince, 40 Cal.4th at 1289. There is a "strong possibility" that moving images of victims will create "an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents." Id. For this reason, "courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally

impermissible level of emotion." Id.; see also People v. Robinson, 37 Cal.4th at 652 (citing Salazar v. State (Tex. Crim. App. 2002) 90 S.W.3d 330, 336-337 (prejudicial error to admit an evocative video of the victim without viewing it first to weigh its probative value against its prejudicial impact)). Compare, People v. Zamudio, 43 Cal.4th at 363, 366; People v. Kelly, 42 Cal.4th at 796-797.

In Prince, the prosecution intended to show the jury a television interview with the victim that this Court described as a "straightforward, dry interview" about the victim's accomplishments and interests. Id. at 1291. Even though the video was relatively innocuous, the trial judge had held several hearings on its admissibility and excluded portions of the tape showing the victim performing. Id. at 1290. He had also kept detailed records of his observations of the jurors and spectators while the video was played. Id. This Court relied on the judge's compliance with these mandatory procedures as well as on the blandness of the video when it held that the video was properly admitted. Id.

In this case, the trial court failed to "strictly analyze" the videotape either in its own right or in the context of the rest of the victim impact presentation. In fact, the trial court completely abdicated its role as gatekeeper by not even viewing this evidence before it was played for the jury. There is also no record that the judge took any measures, such as monitoring the jurors' reactions "to ensure that the proceedings d[id] not become injected with a legally impermissible level of emotion," as required. Prince, 40 Cal.4th at 1289.

These procedural errors alone distinguish this case from the several cases upholding the admission of photographs and videotapes where the court scrutinized the evidence to protect against inflammatory and

unnecessarily emotional evidence that is irrelevant to defendant's moral culpability or the circumstances of the crime. Payne v. Tennessee, supra; Booth v. Maryland, supra.

E. Victim Impact Evidence Should Not Have Been Admitted in this Filicide Case

Even under Payne, victim impact evidence should not have been admitted in this filicide case because it served no constititutionally permissible purpose. The family of the victims was also the family of the defendant. The slain children were not "valueless fungibles," Payne, 501 U.S. 808, 838 (conc. opn, of Souter, J.), who needed to be humanized so the jury could understand the tragedy of their deaths. The jury heard about all four girls at the guilt phase of the trial. The horror experienced by Fernando Nieves and David Folden was made clear during their guilt phase testimony. Nor was victim impact evidence justified to counterbalance the cursory mitigating evidence about Sandi Nieves's background and character. The only point of the victim impact evidence was impermissible – to play on the emotions of the jury in making its "'moral assessment of . . . whether the defendant should be put to death.'" People v. Edwards (1991) 54 Cal.3d787, 834, quoting People v. Haskett (1982) 30 Cal.3d 841, 863-864.

In Payne, the Supreme Court held that the Eighth Amendment did not erect a per se bar to admission of victim impact evidence. The Court, however, did "not hold that victim impact evidence must be admitted, or even that it should be admitted." Id. at 831, (O'Connor, J, concurring.) Rather, the Court ruled that "[i]n the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes" – clearly acknowledging that victim impact evidence will not be proper in all penalty trials. Id. at 825. Similarly, in People v. Edwards (1991) 54 Cal.3d 787, this

Court did not hold that victim impact evidence is admissible in every capital case. The Court framed the issue as whether "'evidence of the specific harm caused by the defendant (Payne, supra, 501 U.S. at p. 825) is a circumstance of the crime admissible under factor (a). We think it generally is." Edwards at 833.

This case is an exception to the general rule because the reason for permitting victim impact evidence does not apply here. The girls were not faceless, unknown strangers. The concern underlying Payne was a perceived imbalance between the defendant's right to present humanizing, mitigating evidence and the state's inability to present comparable evidence about the victim. Writing for the majority, Chief Justice Rehnquist referred to the Court's previous decisions in Booth and South Carolina v. Gathers (1989) 490 U.S. 805, which had barred the admission of victim impact evidence, as having "unfairly weighted the scales in a capital trial," against the state. Payne, 501 U.S. at 809. The majority opinion recognized the state's interest in counteracting the mitigating evidence the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too should the victim Id. at 825; see also id. at 839 (Souter, J., concurring) The Court was concerned that the victim not be turned into a "'faceless stranger at the penalty phase of a capital trial.'" Id. at 825

This Court also has also said that victim impact evidence is admissible to counterbalance the defendant's mitigating evidence. See, e.g., People v. Pollock, 32 Cal.4th at 1182; People v. Brown (2004) 33 Cal.4th 382, 398 ("just as the defendant is entitled to be humanized, so too is the victim").

The perceived imbalance was not present in this case. First, the jurors were given more than a "brief glimpse" of the victims at the guilt phase, so they understood that the children whose lives were taken were "unique human being[s]." Payne, 501 U.S. at 831 (O'Connor, J., concurring).) Second, at the guilt phase the jury was given a sense of the magnitude of the pain suffered by the fathers. Third, unlike other cases, the mitigating evidence here was not extensive and the circumstances of the crimes themselves were emotionally charged and especially sad. There was no unfair imbalance against the state that called for a remedy through victim impact evidence. The introduction of additional evidence at the penalty phase specifically addressing the impact of the children's deaths on their family gave prejudicially unfair emphasis to the emotional tragedy of the case. The prejudicial effect of the evidence outweighed its probative value under Evidence Code § 352, and its admission resulted in an unfair penalty trial and an arbitrary and unreliable death sentence in violation of defendant's rights under the Sixth, Eighth, and Fourteenth Amendments.

F. The Trial Court Erred By Admitting Irrelevant and Highly Prejudicial Evidence Barred by the Eighth Amendment

In Payne, the Supreme Court drew a bright line between victim impact evidence that provides "a quick glimpse" of the victim or of the impact on immediate relatives, which may be admissible, and relatives' testimony about their opinions of the defendant, the crime or the proper punishment. Payne, 501 U.S. at 830 n.2 (stating that the decision did not disturb the holding in Booth that the Eighth Amendment bars opinion evidence from the victim's relatives); see also id. at 833 (O'Connor, J., concurring) and 835 n.1 (Souter, J., concurring); People v. Robinson, 37 Cal.4th at 656-58 (Kennard, J., conc.); People v. Smith (2003) 30 Cal.4th 581, 622; People v. Johnson (1992) 3 Cal.4th 1183, 1246.

The only permissible purpose of victim impact evidence is to "inform[] the sentencing authority about the specific harm caused by the crime in question . . . ." Payne, 501 U.S. 825; see also Edwards, 54 Cal.3d 832-36 (victim impact evidence is admissible solely as a "circumstance of the crime"). Relatives' opinions about the defendant's character or conduct, about the facts of the crime or about the proper punishment do not serve this purpose. See People v. Hinton (2006) 37 Cal.4th 839, 898 (opinion of victim's mother "was not admissible on the question of penalty"); Smith, 30 Cal.4th at 622 (victims' views on the proper punishment do not constitute "circumstances of the crime").

In this case, the trial court erred by allowing the jury to consider family members' inadmissible opinions about all three of these topics.

1. The Trial Court Erroneously Admitted Irrelevant and Inflammatory Testimony About Surviving Relatives' Disparaging Opinions of Nieves's Character and Conduct

Minerva Serna, Fernando Nieves, David Folden, and Charlotte Nieves were all permitted to attack Sandi Nieves's character during the prosecution's case in chief. They portrayed Nieves as "vicious and malicious" (60 RT 9308:16), "evil all the time" (60 RT 9311:13), manipulative, controlling, and vindictive (60 RT 9311:14, 9338:5-8, 9344:3-7, 9371:21-23), and described what she had done as "just beyond a human . . ." (60 RT 9305:10-11).

They also asserted that Sandi was attempting to manipulate the trial. Over a defense objection, Fernando speculated that Sandi tried to have David Nieves live with his maternal grandfather so Sandi and her family could "control" David's testimony at trial. 60 RT 9365:12-22. Folden told the jury that Nieves "wanted to control and manipulate everyone around

her," including the jury. 60 RT 9371:21-23; see also 60 RT 9311:14 ("For eighteen years she pulled our strings.").

Nieves was repeatedly accused of being a bad parent while the children were alive. Serna and Folden both testified that Nieves withheld attention and affection from her children, who were described as "sad[]," "suffer[ing]," and "starved for attention." See 60 RT 9303:5-12, 60 RT 9378:3-6. Nieves was also portrayed as so controlling that she suffocated the children and stunted their development. 60 RT 9374:1-3, 60 RT 9413:6-11. Serna, the grandmother who had hardly seen the children, was even permitted to insinuate that Nieves might have abused the children. 60 RT 9305:19-20.

These witnesses also testified that Sandi Nieves used the children as tools in her relationships with the men in her life. Fernando stated, "If I made her angry in some way, then she would not let me see them [the kids]." 60 RT 9338:5-8. Folden testified that after their divorce, Nieves tried to turn the kids against him by making up stories about him and keeping him from seeing them. 60 RT 9371:15-16. This is not victim impact evidence; it is character evidence.

These witnesses's portrayal of Nieves as a selfish mother who used her children instead of nurturing them was thrown into greater relief by the equally irrelevant –and somewhat hypocritical– testimony the witnesses were permitted to give about Fernando Nieves and Dave Folden's own loving and selfless treatment of the Nieves and Folden children. Serna described herself as a "good mother" and a "good grandmother" (60 RT 9298:10-11), and, over a defense objection (60 RT 9301:18-19), testified at length about what a "loving father" Fernando was (60 RT 9302:3-10). Fernando testified about his devotion to his children. 60 RT 9319:20-23,

9323:2-24, 9335:27-28. Charlotte lectured from the stand about putting your children first, emphasizing her own commitment to raising "independent, caring" children. 60 RT 9403:9-28. She chided Sandi Nieves that a parent "should overcome your own problems when there are children involved . . . . It doesn't matter if it's a single mother or a single father. It doesn't matter. Your concern should be your children." 60 RT 9403 15-21.

This irrelevant evidence shifted the jury's attention from the harm caused by the crime to Nieves's qualifications as a parent. By admitting this evidence in the prosecution's case-in-brief, the court improperly signaled to the jurors that they could consider Nieves's alleged deficits as a parent prior to the fire as a basis for imposing the death penalty.

2. Speculative Accounts of the Crime

The family members were permitted to offer their own speculative and biased accounts of the crime, including the details of the victims' deaths. Despite conflicting and uncertain evidence whether the victims suffered before they died and how long it took them to lose consciousness (see 17 RT 1784:4-1786:4, 1805:21-1806:19, 1820:5-28; 18 RT 1847:10-17, 1854:4-10, 1855:15), Minerva Serna was allowed to characterize their deaths in the worst possible light: "Nobody should have to see four innocent girls die such a miserable death that lasted for hours and hours." 60 RT 9307:9-17.

Fernando also hypothesized about the crime during his testimony. He speculated that if David had tried to leave the house on the night of the fire, Nieves "would have stopped him forcibly, I think, from leaving that house." 60 RT 9359:1-2. This fictionalized version of the crime further tarnished Sandi Nieves's character by attributing to her a level of malice

and deliberateness that was based on Fernando's own anger and not on the facts of the crime.

3. Opinion About the Proper Punishment

David Folden made it clear to the jury that he wanted it to impose a death sentence. He testified that Sandi Nieves had always "won everything." Then he told the jury, "This time it stops," indicating that he did not want her to "win" again by receiving a life sentence instead of the death penalty. 60 RT 9371:13-25. Like the comment of a victim's mother in Hinton, who said, "Thank you, Jesus. Kill him," about the defendant's conviction, Folden's "This time it stops" statement "was not admissible on the question of penalty." Hinton, 37 Cal.4th at 898. The prosecutor's use of the statement in closing argument made it even worse and more prejudicial. 64 RT 10126:9-11 (defendant "won when she inflicted the ultimate punishment on Dave Folden, on Fernando Nieves, and she wins again if you give her life").

4. The Admission of Irrelevant and Incendiary Opinions Violated Nieves's Constitutional Rights

The opinions and unfounded characterizations presented by the prosecution witnesses had no bearing on the "specific harm" caused by the crime. Payne, 501 U.S. 825. "Such testimony is too far removed from victim impact evidence's central purpose of explaining the loss to the family and society that resulted from the victim's death, and can too easily lend itself to improper characterization and opinion of the crime and defendant, to pass muster under the Eighth Amendment." Robinson, 37 Cal.4th at 657-58 (advocating for a "general rule" that "the testimony of victims' friends and family regarding their imagined reenactments of the crime be excluded") (Moreno and Kennard, JJ, concurring); see also See State v. Payne (Idaho June 18, 2008) 2008 WL 2447447, *21 ___ P.3d ___ (trial

court erred in permitting witnesses to refer to defendant as "as evil, a waste of aspirin, a sociopath, a cold-blooded killer, unremorseful, a predator, cold and calculating, not a man, not even human, selfish, a coward, a pathetic monster, a wimp and a man without a conscience."); DeRosa v. Oklahoma (Okla. 2004) 89 P.3d 1124, 1152 & n.138 (holding that a relative's "speculative and inflammatory claims about the victims' experience of their attack" went "too far"); Conover v. State (Okla. Cr. 1997) 933 P.2d 904, 920-21 (a witness's "inflammatory descriptions designed to invoke an emotional response by the jury" should be excluded because they "weigh the scales too far in favor of the prosecution").

Admission of this irrelevant and inflammatory evidence was also an abuse of discretion under Evidence Code §§ 350 and 352. The surviving family members' visceral attacks did not assist the jury in assessing Sandi Nieves's moral culpability for the crime she was convicted of. But because three witnesses knew Sandi personally, their opinions of her must have carried added weight.

The relatives' speculative accounts of events they did not witness had no probative value either. But the prejudicial effect of these opinions was intense, especially since they were delivered by witnesses whose palpable grief enhanced their authority and credibility in the eyes of the jury.

The inflammatory opinions also went beyond the scope of the statutory "circumstances of the crime" sentencing factor, and therefore violated state law and the defendant's due process liberty interest in not being condemned to death on the basis of nonstatutory aggravating factors. Because the opinion evidence went beyond sentencing factor(a), allowing its consideration also violated the state sentencing statute (Penal Code §

190.3), and deprived Sandi Nieves of an important state-law procedural safeguard and resulting liberty interest -- the right not to be sentenced to death except upon the basis of statutory aggravating factors. People v. Boyd (1985) 38 Cal. 3d 762, 792. This opinion evidence thereby violated the defendant's Fourteenth Amendment right to due process. Hicks v. Oklahoma (1980) 447 U.S. 343, 346; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300.

Allowing the jury to consider the survivors' "emotionally charged opinions" about these matters also violates the Eighth and Fourteenth Amendments because it "is also inconsistent with the reasoned decisionmaking we require in capital cases." Booth, 482 U.S. at 508-509. Because Payne did not overrule Booth's injunction against the admissibility of "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence," Payne, 501 U.S. at 829 n.2, admission of such evidence in this case violated Sandi Nieves's Eighth and Fourteenth Amendment rights to a reliable penalty determination and a fair trial. Id.

G. The Trial Court Erred By Admitting Excessive, Inflammatory and Cumulative Victim Impact Evidence Calculated to Appeal to the Jurors' Emotions and Divert Them from a Rational Consideration of Whether Sandi Nieves Deserved to Die

Victim impact evidence is admissible during the penalty phase of a capital trial only for the purpose of providing "a quick glimpse" of the victim's life and a general description of the impact of the victim's death. Payne, 501 U.S. at 822, 830. The scope and character of such evidence must be carefully scrutinized to ensure that it does not invite a "purely irrational response from the jury." Lewis, 39 Cal.4th at 1056; accord Edwards, 54 Cal.3d at 836. This Court has "several times noted that victim

impact evidence may be deemed inadmissible if it is so inflammatory that it would tend to divert the jury's attention from the task at hand." People v. Roldan (2005) 35 Cal.4th 646, 731. It is for this reason that the judge must monitor juror reaction. Zamudio, 43 Cal.4th at 367; Kelly, 42 Cal.4th at 798. "[A]t some point the line is crossed from pure information, and raw emotion takes hold." Hicks v. State (Ark. 1997) 940 S.W.2d 855, 860 (Brown, J., concurring). The victim impact evidence admitted by the trial court here was neither monitored, nor objective and non-inflammatory.

The court permitted the jury to consider victim impact evidence that was both more extensive and more inflammatory than the limited evidence deemed admissible by the United States Supreme Court in Payne or by this Court in Zamudio and Kelly. In Payne, the victim impact evidence consisted of a single statement by the victim's mother that the victim's surviving child missed his mother and younger sister. Payne, 501 U.S. at 826. In Zamudio, this Court held it was permissible to admit a life history, photographs, and a videotape.

Here the court admitted lengthy testimony from four different witnesses that included attacks on Nieves's character and disturbing accounts of the victims' deaths, a lengthy and misleading video compilation depicting the victims at various family occasions, an extended display of several large posters with over 50 photographs of the victims while they were alive, and several more photographs of a shrine created by the father of two of the victims. Together, they exceeded the type and amount of victim impact evidence this Court has previously approved, rendered Nieves's penalty trial fundamentally unfair, and deprived her of a reliable penalty determination in violation of the Eighth Amendment.

1. The Presentation of the Photographs of the Victims on Display Was Calculated to Appeal to the Jury's Emotions

The multiple photographs of David Folden's shrine for the victims, which showed two empty twin beds, stuffed animals, and the victims' unused bicycles is unprecedented. In contrast to the temporal video montage approved in Zamudio, and the videotape approved in Kelly, the shrine photographs and other poster boards were on display for the duration of the prosecution's case. They added nothing to the jurors' rational appreciation of the harm caused by the Nieves's conduct. Instead, they infected the courtroom with a continual and incessant display of grief.

The eight large photo-montages could not have failed to arouse strong emotions in any viewer. Unlike an unadorned photograph, this extensive and carefully designed visual display was "particularly calculated to elicit sympathy." People v. Thompson (1988) 45 Cal.3d 86, 115. The emotional impact was only heightened by the addition of dramatic titles such as "In Remembrance," the victim's birth and death dates, the careful arrangement of the photographs on each poster, and the relatives' descriptions of the people and activities in nearly every photograph on display. See Prince, 40 Cal.4th at 1289 (embellishing visual images of the victim is likely to intensify "the emotional impact upon the jury"). The entire presentation was an improper "emotional memorial tribute to the victim." Id. at 1290. It injected gratuitous drama and emotion into the proceedings, thereby "divert[ing] the jury's attention from its proper role." Edwards, 54 Cal.3d at 836. It therefore crossed the line set by Booth, Payne, and Edwards.

2. The Lengthy Victim Impact Testimony from Four Different Witnesses Was Inflammatory and Cumulative

Much of the testimonial evidence the jurors heard was gratuitously inflammatory. Serna and Fernando both gave graphic descriptions of their distress at seeing the victims' swollen and bruised bodies at the funeral. But there was no indication that Sandi Nieves, who was in prison at the time, had any part in the decision to have open caskets. The evidence about seeing the victims' bodies at the funeral was therefore too remote from Nieves's actions to "logically show[] the harm caused by the defendant." Edwards, 54 Cal.3d at 835; see also People v. Harris (2005) 37 Cal.4th 310, 351 (testimony regarding mourners' distress at seeing the victim's body at the funeral should have been excluded because it was "too remote" from the defendant's own actions); Cargle v. Mullin (10th Cir. 2003) 317 F.3d 1196, 1223 (admission of "lengthy and very emotional" testimony from the victim's sister and mother of the victims "exceeded the bounds delimited in Payne").

The admission of Charlotte Nieves's testimony about her dead baby was especially egregious. The fact that Charlotte had previously lost a child and the details of the baby Jessica's death were entirely irrelevant to the jury's assessment of the proper punishment to impose on the defendant in this case. This evidence was used solely – and improperly – to elicit special sympathy for Charlotte and stir the jurors' emotions.

Family members' testimony about the last time they saw the victims and about all of the birthdays, holidays, graduations, and other occasions they would not be able to spend with the victims was also improper. See Hollaway v. State (2000) 116 Nev. 732, 6 P.3d 987, 994.("'holiday arguments' are meant only to appeal to jurors' emotions and arouse their passions") (internal citation omitted); United States v. McVeigh, (10th Cir.

1998) 153 F.3d 1166, 1221 n.47 (noting with approval that the district court excluded wedding photographs of victims of the Oklahoma City bombing); Conover v. State (Okla. Cr. 1997) 933 P.2d 904, 921 (surviving parents' comments about their hopes for a child victim's future increase the risk of violating the defendant's due process rights).

This testimony was also excessively lengthy and unnecessarily repetitive. The number of witnesses presented and the cumulative length of their testimony was excessive. It was more than enough to humanize the victims and show the family's loss. As a chorus cheering for death, the sheer emotion and volume of witness testimony was overwhelmingly harsh and irrational. Unlike the evidence in Zamudio and Kelly this chorus expressed "outrage," not just "sadness." 43 Cal.4th at 367; 42 Cal.4th at 979. And unlike Zamudio and Kelly, the evidence was cumulative and completely uncontrolled by the judge.

Much of the victim impact testimony should also have been excluded as cumulative. Serna, Fernando, and Charlotte all described the impact of the victims' deaths on Fernando and David. Fernando and Charlotte both described the impact on their two daughters. Serna, Fernando, and Folden all described the funeral. And the prosecution asked multiple witnesses to describe the events and name the victims in the same photographs.

3. Cumulative Effect of the Improper Victim Impact Evidence

"'[T]he punishment phase of a criminal trial is not a memorial service for the victim.'" Robinson, 37 Cal.4th at 652 (quoting Salazar, 90 S.W.3d at 336). But the prosecution's penalty phase case-in-chief resembled an extended memorial service, with dozens of photographs on display in the small courtroom, a memorial video, and the repeated

invocation of the girls' names and family members' grief and memories, including descriptions of the funeral.

As shown above, the admission of each separate type of evidence was error. But the different types of evidence – testimony, photographs, home movies – were also mutually reinforcing. They worked together to heighten the emotional impact on the jurors and to create the impression that Sandi Nieves was a bad person and a bad parent who was undeserving of mercy. The admission of this evidence was an abuse of discretion under the rules of evidence and violated Nieves's state and federal constitutional rights to a reliable penalty determination free of arbitrary and capricious sentencing decisions and rendered her penalty trial fundamentally unfair.

H. Nieves's Death Sentence Must Be Reversed Because the Admission of Improper Victim Impact Evidence, in Itself and in Combination with the Trial Court's Refusal to Provide Instructional Guidance, was Prejudicial

The admission of improper victim impact evidence is an error of magnitude that directly implicates Nieves's federal constitutional rights. Nieves is therefore entitled to reversal of her death sentence unless Respondent can show beyond a reasonable doubt that the error was harmless. Harris, 37 Cal.4th at 352 (applying Chapman v. California (1967) 386 U.S. 18) (harmless error standard to the appellant's claim that inflammatory victim impact evidence had been improperly admitted during the penalty phase); see also People v. Gonzalez (2006) 38 Cal.4th 932, 961 (when violation of federal constitutional rights occurs at the penalty phase "the applicable test is whether the error is harmless beyond a reasonable doubt") .

The harmless error test applicable to the state law errors at Nieves's penalty phase "is whether there is a reasonable possibility the error affected

the verdict." Gonzales, 38 Cal.4th at 961 (citing People v. Brown (1988) 46 Cal.3d 432, 446-448). The Brown "reasonable possibility" standard and Chapman "reasonable doubt" test "are the same in substance and effect." Prince, 40 Cal.4th at 1299 (internal citations omitted). Both require "the most exacting standard of review" of errors committed at the penalty phase. Id.

In this case, there is more than a reasonable possibility that the extensive and highly charged victim impact evidence aroused the jurors' passions and persuaded them to vote for death, instead of life without the possibility of parole.

Victim impact evidence can be the most compelling and powerful evidence available to the prosecution in a death penalty case. It is highly emotional in character. It appeals to the jurors' passions and sympathies. It pits the defendant's crime against the grief of the victim's surviving friends and relatives and the value of the victims' lives. It also forces the defense to choose between letting highly prejudicial testimony stand unchallenged and appearing to attack the grieving family members on cross-examination. Indeed, at least one juror in this case appears to have been "appalled" and distressed by the fact the defense was allowed to cross-examine grieving victims. 65 RT 10222:1-10223:8.

In addition, this evidence is presented at the precise time when the balance is at its most delicate and the stakes are highest – that is, when the jurors are poised to make a highly subjective and visceral decision about whether the defendant should live or die. See Howarth, Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors, (1994) 1994 Wis. L. Rev. 1345, 1396-98 (contrasting the jury's fact-finding role in guilt trials with its moral and ethical role in penalty trials).

The effects of admitting such volatile evidence are unpredictable at best. It creates a serious risk that the jury will "impos[e] the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Booth, 482 U.S. at 505. In fact, the more a jury is exposed to the emotional aspects of a victim's death, the less likely it is that the verdict will reflect a reasoned moral response to the question of whether a defendant deserves to die. See Robinson, 37 Cal.4th at 652 (endorsing the view that "'[v]ictim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice . . . .'"); see also Cargle v. State (Okla. Crim. App. 1995) 909 P.2d 806, 830; State v. Nesbitt (Tenn. 1998) 978 S.W.2d 872, 891.

In this case, the inherent risks of allowing the jury to hear and see the inflammatory victim impact evidence were increased several fold. First, absent the improper evidence, the balance of aggravating and mitigating factors was not so overwhelming as to point irresistibly to a verdict of death. While a mother's murder of her four children is certainly a shocking and tragic event, there was evidence here that Sandi Nieves was also trying to kill herself – that she was despondent over her prospective inability to support her children, an abortion obtained in violation of her religious faith, her abandonment by another man in her life; that she was, as a result of mental impairments and a miserable upbringing, a person of limited situational coping skills; that she may have been acting under the influence of a post-abortion hormonal imbalance, and diet and anti-depression medications; and that she herself was distraught over the deaths of her four daughters and estrangement from her son. As a unique individual Sandi Nieves was a defendant for whom a reasonable juror could feel enough pity

to spare her life. Absent the improper victim impact evidence, even on a record distorted by the actions of a biased trial judge, the jury could certainly have returned a verdict of life imprisonment.

Second, the jurors were bombarded with a series of visceral accounts of the survivors' grief punctuated by irrelevant and improper attacks on Nieves's character as the victims stared out at them from multiple enlarged photographs and a poignant video compilation. In no other case has this Court addressed the combined effects of such lengthy victim impact testimony coupled with such an extensive and prolonged display of the victims' images and voices. There can be little doubt this evidence had a powerful emotional impact on the jury. By the end of the final witness's testimony, during which the jurors viewed the video, "many of the members of the jury [were] crying." 61 RT 9437:25-27. But, unlike the judge in Zamudio, this judge gave no directions to the witnesses to "refrain from making 'inappropriate' comments that might arouse emotions," 43 Cal.4th at 366-367.

Third, the prejudicial effects of this evidence were further magnified when the defense attempted to cross-examine the victims' grieving relatives. Compelled to defend herself against the witnesses' ad hominem attacks, Nieves may only have alienated the jurors further. See 65 RT 10222:1-10223:8.

Fourth, the prosecution relied almost exclusively on the victim impact presentation for its case in aggravation. It constituted the prosecution's entire case-in-chief. The prosecutor also relied heavily on victim impact in closing arguments. She told the jurors she was speaking "on behalf of" the Nieves and Folden families. 64 RT 10096:3-9. She reviewed the victim impact testimony in detail. 64 RT 10100:1-10103:21,

10113:21-23, 10115:5-8, 10126:9-10, 10127:23-10128:3. She told the jurors their decision should be based on "the individual value that you each attach to the lives of those children," instead of on their assessment of the Nieves's moral culpability:

> Again, it depends on the individual value that you each attach to the lives of those children. That's what it comes down to. It's all this case is. That's what this case is.

64 RT 10114:7-10; see also 64 RT 10104:14-18. No juror would want to think he or she does not value the lives of such young victims.

Finally, prosecutor exhorted the jurors to even the score: "She won when she inflicted the ultimate punishment on Dave Folden, on Fernando Nieves, and she wins again if you give her life." 64 RT 10126:9-11.

By emphasizing the inflammatory victim impact evidence in this manner, the prosecution signaled its importance and ensured that it would play a central role in the jury's decision to impose the death sentence. See People v. Minifie (1996) 13 Cal.4th 1055, 1071-72 (holding that an improper evidentiary ruling was not a harmless error because the prosecutor emphasized the matter in closing argument).

Finally, the trial court failed to take any remedial action to limit the impact of this evidence or guide the jury's discretion in considering it. Compare, Zamudio 43 Cal.4th at 366, and Kelly, 42 Cal.4th at 797-798. The defense repeatedly objected to all aspects of the victim impact presentation and several times moved to strike particularly inflammatory statements by the witnesses. See 59 RT 9163:26-28, 9171:18-9177:23, 9181:15-9190:26; 60 RT 9258:10-9261:19, 9264:16-9265:2, 9329:2-17, 9301:18-19, 9307:13, 9365:15-17, 9392:11-9393:1, 9404:1-2; 61 RT 9445:22-23, 9446:7, 9437:21-9438:29, 9466:22-9467:9. With the exception of one brief disparaging comment by Minerva Serna, 60 RT 9307:18-28, the

Court overruled and denied every single one of these objections and motions to strike.

The court also refused to give a limiting or cautionary instruction regarding the victim impact evidence, as requested by the defense before the penalty phase began. See 21 RCT 5391, 5399; 59 RT 9147:1-9148:16, 9150:19-24; 60 RT 9392:21-27. Later in the proceedings, a juror asked the trial court for guidance about the purpose and use of the emotional victim impact testimony: "I was really, very respectfully, not really prepared to get the feeling that I've received today that maybe our judgment is to be based on how much people have been injured, how much people have been hurt." 60 RT 9421:18-22.[163] But when the defense renewed its request for an

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[163] This occurred during an in camera meeting with Juror No. 2 regarding scheduling. It occurred after Charlotte Nieves's testimony at the end of the prosecution's victim impact presentation.

After voicing concerns about personal scheduling conflicts, the juror said to the court and counsel:

> "I have one other concern that I guess I would just really like to raise at this point. I don't know if it's appropriate. When we came this morning, I wondered where on earth we were possibly going to go, but I have -- I thought maybe we would just hear kind of a closing argument from each side based on the leniency or not leniency, and move it on. Now, I have no problem whatsoever -- I have no problem, let's take off the whatsoever, making a judgment on the basis of the law, and I see advantages both ways and disadvantages both ways. I was really, very respectfully, not really prepared to get the feeling that I've received today that maybe our judgment is to be based on how much people have been injured, how much people have been hurt.
>
> The Court: well, let me stop you right there. What's going to happen, at some point I will give you instructions on how to deal with the evidence in this phase of the trial and you will

(continued...)

instruction that would address this kind of confusion about the permissible use of the victim impact evidence, the trial court refused again.[164] 61 RT 9438:1-21. As a result, the only guidance provided to the jury on this issue was delivered by the prosecutor, who stated in closing argument that the jurors should render a decision based on "the individual value that you each attach to the lives of those children." 64 RT 10114:7-10. But this is precisely the type of comparative calculation capital juries are not supposed to engage in. See Payne, 501 U.S. at 823 ("victim impact evidence is not offered to encourage comparative judgments" regarding the relative value of different victims' lives).

Even assuming, without conceding, that some victim impact evidence was properly admissible in this case, the failure of trial court to instruct the jury that such evidence should not divert it from its proper role in deciding the appropriate sentence based on a rational assessment of the character of the defendant and the circumstances of the crime, resulted in an unfettered and unguided sentencing decision. See Maynard v. Cartwright (1988) 486 U.S. 356, 362 ("channeling and limiting the sentencer's

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[163](...continued)
hear the attorneys argue at that point, and I will give you some more instructions. You will have a framework on how to make a decision in this case. It's not going to -- so don't be concerned about that at this point.

Juror No. 2: Don't be concerned about that? But you can see why I might feel that way?"

60 RT 9421:6-9422:5.

[164] Defense counsel asked the court to instruct the jury that consideration of "the victim impact evidence must be limited to a rational inquiry in the culpability of a defendant, not an emotional response to the evidence." 61 RT 9438:8-13.

discretion in imposing the death penalty is a fundamental constitutional requirement"); Furman v. Georgia (1972) 408 U.S. 238, 310 (Stewart, J., concurring) (in the absence of procedural controls and limits on juror discretion, the death penalty will be "wantonly and . . . freakishly imposed.").

The failure to give an instruction clarifying and limiting the jury's consideration of the victim impact evidence also deprived Nieves of a reliable, non-arbitrary, and individualized sentencing determination and failed to protect her against the consideration of constitutionally irrelevant or arbitrary matters, in violation of her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Dawson v. Delaware, (1992) 503 U.S. 159; Sochor v. Florida, (1992) 504 U.S. 527; Penry v. Lynaugh, (1989) 492 U.S. 302; Clemons v. Mississippi, (1990) 494 U.S. 738.

I. Penal Code § 190.3(a) Is Unconstitutionally Vague If it Encompasses the Scope of the Victim Impact Evidence Admitted in this Case and Would Undermine the Statute's Capacity to Provide Constitutionally Required Protection Against Arbitrary and Capricious Infliction of Capital Punishment

A decision holding that the wide-ranging and largely irrelevant victim impact evidence presented in this case is permissible under Penal Code § 190.3(a) would render the State's death penalty statute unconstitutionally vague and incapable of providing the necessary guided discretion required by the Eighth and Fourteenth Amendments. We recognize that this Court has rejected similar claims in other cases, see, e.g., People v. Boyette (2002) 29 Cal.4th 381, 445-46, n.12, but defendant respectfully requests that this Court reconsider this issue in light of the circumstances of this case.

A state seeking to put an individual to death must "tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia (1980) 446 U.S. 420, 428. "It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. (footnotes omitted).

California's statutory law does not specifically authorize the use of "victim impact" as a sentencing factor during a penalty trial. This Court has held that some evidence of the "harm caused by the defendant, including the impact on the family of the victim," is admissible as a "circumstance of the crime" under Penal Code § 190.3(a). Edwards, 54 Cal.3d at 835. But, as shown above, this Court has never permitted the kind of victim impact presentation allowed in this case.

If Edwards is applied to allow jurors to consider as a "circumstance of the crime" a combination of ad hominem attacks on the defendant, speculative recreations of the victims' deaths, lengthy and highly emotional testimony, and extended evocations of the victims' faces and voices, all without adequate oversight or guidance by the trial court, California's sentencing statute would be unconstitutionally vague and overbroad, and incapable of functioning within federal constitutional limits in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments.

XVIII. THE TRIAL COURT PREJUDICIALLY EXCLUDED RELEVANT LAY OPINION ON DEFENDANT'S STATE OF MIND

Sandi Nieves had an abortion only five days before the fire that killed her children. The trial court made erroneous evidentiary rulings that excluded important relevant evidence related to the abortion's effect on her

state of mind during the time leading up to the death of her children. The trial court's erroneous exclusion of this critical state of mind evidence at the guilt phase had a prejudicial effect on the sentencing process, denying the defendant her due process rights to put on a meaningful defense and resulting in an unreliable penalty under the Eighth and Fourteenth Amendments.

A. The Trial Court Excluded Relevant Evidence of the Defendant's State of Mind

At the guilt phase, during the cross-examination of prosecution witness Scott Volk, defendant's former boyfriend, defense counsel attempted to ask the following questions:

> With regards to -- did she indicate to you that because of her personal and religious beliefs she would have difficulty with an -- aborting a child?
>
> . . .
>
> Did she tell you that she was having difficulty in making that decision because of her personal beliefs and religious beliefs?
>
> . . .
>
> Did Sandi tell you she was -- it was easy for her to make a decision on that, or she didn't know what to do?

23 RT 2735:20-2736:12. The prosecution objected on the grounds of hearsay. Id. Defense counsel argued that the state of mind exception to the hearsay rule applied. Id. The court sustained the objections. Id.

Next, during the cross-examination of prosecution witness Fernando Nieves, defendant's former husband, defense counsel asked, "Did you feel that after this -- after this fire, did you feel that Sandi lost it because of the abortion?" 24 RT 3007:19-21.

The prosecution objected on the grounds the question called for speculation. 24 RT 3008:3-4. The court ordered the jury out of the courtroom. 24 RT 3008:7-9. Defense counsel explained that the question

referred to a statement Fernando Nieves had made to the same effect at the hospital shortly after the fire. 24 RT 3009:9-11.

The court ruled that defense counsel could not ask the question or try to rephrase the question because the witness's "opinion about whether -- why your client killed these children, or how she did it, or what state of mind she's in is not relevant." 24 RT 3009:17-19.

B. Evidence of Defendant's State of Mind was Admissible as an Exception to the Hearsay Rule

The trial court erroneously sustained hearsay objections to defense counsel's questions to Scott Volk about whether Sandi Nieves had expressed that she was having a difficult time making the decision to have an abortion. The questions fell, as defense counsel argued, under the exception to the hearsay rule for statements of existing mental state. Evid. Code § 1250. Evidence of statements of the declarant's then existing state of mind or emotion are not made inadmissible by the hearsay rule when: ". . . (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶](2) The evidence is offered to prove or explain acts or conduct of the declarant. . . ." Evid. Code §1250(a).

Out of court statements about the declarant's state of mind at the time of the statement are admissible when the then existing state of mind is a relevant issue in the case. People v. Hernandez (2003) 30 Cal.4th 835, 872; Adkins v. Brett (1920) 184 Cal. 252, 255. The statements need not be dispositive on an issue to be admissible. See People v. Geier (2007) 41 Cal.4th 555, 586 (rape victim's statements admissible because relevant, although not dispositive, on consent issue) (citing Evid. Code, § 210 (relevant evidence is evidence "having any tendency in reason to prove or

disprove any disputed fact that is of consequence to the determination of the action")).

Here, the prosecution had put the defendant's state of mind leading up to the time of the death of her children at issue when, in opening statement, it alleged that the defendant was motivated by anger and the desire to punish the men in her life. 15 RT 1330:21; 1334:11-14. The defendant sought to show that at the relevant time, she was depressed and distraught over her abortion. See e.g. 15 RT 1416:24-27 (defense opening statement argument that defendant was depressed over abortion); 22 RT 2584:25-2585:3 (defense offer of proof as to relevance of evidence related to defendant's difficult decision to have abortion). Whether Sandi Nieves had indicated to those individuals closest to her – particularly Scott Volk, the man who impregnated her – that the decision whether to have the abortion caused her distress would be probative of her mental and emotional state at the time of the abortion, which was only five days before the death of her children.

C. Lay Opinion About the Defendant's State of Mind was Admissible Relevant Testimony

The trial court erred when it ruled that Fernando Nieves's opinion about Sandi Nieves's state of mind was inadmissible. Lay opinion based on a witness's perceptions is admissible when it is helpful to better understand his testimony. Evid. Code § 800. A lay witness may give an opinion if no particular scientific knowledge is required, but testifying in opinion form is the most practical manner to express something complex or subtle. People v. Williams (1988) 44 Cal.3d 883, 915. This Court has held that lay opinion evidence is relevant in a murder trial if it concerns the state of mind of a defendant at the time of the alleged murder. See People v. Kennedy (2005) 36 Cal.4th 595, 621 (lay witness allowed to opine about defendant's

state of mind on night of murder). Here, as explained above, the prosecution put Sandi Nieves's state of mind at issue, and evidence to rebut its characterization of her mental state was relevant. Fernando Nieves's opinion about her state of mind was particularly relevant because he had seen her and spoken to her during the interim between the abortion and the fire. 23 RT 2822:20-2824:25. During direct-examination of Fernando Nieves, the court had allowed the prosecution to ask him to describe her demeanor when he spoke to her. 23 RT 2824:19-23. Defendant's question on cross-examination was similarly relevant.

D. The Trial Court's Exclusion of State of Mind Evidence Prejudiced the Defendant at the Penalty Phase

At the close of the penalty phase of Sandi Nieves's trial, the court instructed the jury as follows: "You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." 64 RT 10067:8-11 (emphasis added). At this phase, the jurors may consider evidence of the defendant's state of mind contemporaneous with the capital murder under Penal Code § 190.3(a) "as bearing on the circumstances of the crime." People v. Guerra (2006) 37 Cal.4th 1067, 1154; People v. Ramos (1997) 15 Cal.4th 1133, 1163-1164. Furthermore, subsection (k) of § 190.3 also allows the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Although the error occurred during the guilt phase, the error had its principal prejudicial effect at the penalty phase. The trial court excluded testimony that was highly relevant to Sandi Nieves's state of mind, and the circumstances surrounding the crime – a critical issue that would shed light on her moral culpability. Lockett v. Ohio (1978) 438 U.S. 586, 604. The issue of the abortion, and the effect it had on Sandi in the days leading up

the death of her daughters was critical to show the jury that there were extenuating reasons that she was unable to cope due to her impaired functioning. Evidence that Sandi Nieves was distraught over the abortion and evidence of the emotional state that it triggered in her was critical for the jury's consideration when weighing the evidence for and against the death penalty, because it was mitigating and it provided a basis for sympathy, an appropriate and necessary when death is at stake. See Caro v.Calderon (9th Cir. 1999) 165 F.3d 1223, 1227 (death cannot be imposed "without adequate consideration of factors which might evoke mercy") (internal citations omitted). Furthermore, evidence related to Sandi Nieves's state of mind after the abortion would have bolstered the credibility of her own guilt-phase testimony, therefore rebutting the prosecution's attack on her credibility that continued into the penalty phase of the trial. A defendant must not be sentenced to death "'on the basis of information which [s]he had no opportunity to deny or explain.'" Skipper v. South Carolina (1986) 476 U.S. 1, 4 n.1 (quoting Gardner v. Florida (1977) 430 U.S. 349, 362).

The court's error was exacerbated when it made similar rulings to exclude penalty phase testimony from other witnesses regarding Sandi Nieves's state of mind after the abortion. By preventing the jury from considering this evidence, the court violated Sandi Nieves's constitutional rights to a due process, particularly the right to put on a meaningful defense. Crane v. Kentucky (1986) 476 U.S. 683, 690 ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"); Chambers v. Mississippi (1973) 410 U.S. 284, 302. The prejudicial effect of excluding this critical evidence rendered the death

sentence in this case unreliable under the Eighth and Fourteenth Amendments. Id. at 301.

The exclusion of critical state of mind mitigating evidence was prejudicial because it could have reasonably led the jury to vote for a sentence less than death. People v. Gay (2008) 42 Cal.4th 1195, 1223; People v. Brown (1998) 46 Cal.3d 432, 448. It was not harmless beyond a reasonable doubt as required by Chapman v. California (1967) 386 U.S. 18, 24.

XIX. THE TRIAL COURT'S EXCLUSION OF DEFENSE EXPERT DR. KYLE BOONE DURING THE PENALTY PHASE VIOLATED DEFENDANT'S RIGHT TO PRESENT MITIGATING EVIDENCE

The trial court erred when it excluded the testimony of Dr. Kyle Boone, a neuropsychologist, during the penalty phase of Sandi Nieves's trial on the ground her testimony would be cumulative of the guilt-phase testimony of Dr. Lorie Humphrey. During the penalty phase, the trial court cannot preclude the defense from presenting relevant mitigating evidence that it chooses to put forward. Skipper v. South Carolina (1986) 476 U.S. 1, 4; Eddings v. Oklahoma (1982) 455 U.S. 104, 114. Defense counsel properly proffered the testimony of Dr. Boone as mitigating evidence. Her testimony would have been relevant to the circumstances of the crime, to the defendant's lack of future dangerousness, to likely bases for sympathy toward the defendant and for purposes of rehabilitating the findings of Dr. Lorie Humphrey who the trial court had humiliated, threatened, and effectively chased away before her testimony was complete.

The trial court's exclusion of Dr. Boone during the penalty phase violated Sandi Nieves's constitutional rights on several grounds. Preventing the defense from introducing mitigating evidence violated her

rights under the Eighth and Fourteenth Amendments. Lockett v. Ohio (1978) 438 U.S. 586, 604 (plurality opinion of Burger, C.J.). By preventing an effective presentation of Dr. Humphrey's testimony, dissuading her from returning to the witness stand, and then excluding Dr. Boone's testimony during the penalty phase, the trial court denied Sandi Nieves her rights to rebut evidence against her to present a defense, to due process and a fair trial, and to a reliable sentencing determination in violation of the Eighth and Fourteenth Amendments. Gardner v. Florida (1977) 430 U.S. 349 (due process standards fully applicable to penalty phase trial; due process denied when sentence imposed, in part, on basis of information defense had no opportunity to explain or contest); 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 v. Mississippi (1973) 410 U.S. 284, 302 (same); Ake v. Oklahoma (1985) 470 U.S. 68 (right to defense includes defense based on mental condition); Zant v. Stephens (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require a reliable penalty determination); Johnson v. Mississippi (1988) 486 U.S. 578, 584-85 (same). Precluding the jury from hearing Dr. Boone's testimony was prejudicial because the evidence could reasonably lead a juror to vote for a sentence less than death. People v. Gay (2008) 42 Cal.4th 1195, 1223; People v. Brown (1988) 46 Cal.3d 432. Therefore, the penalty of death must be reversed. The error was not harmless beyond a reasonable doubt as required by Chapman v. California (1967) 386 U.S. 18, 24.

A. Significant Facts

To explain the scope and nature of the trial court's error in preventing Dr. Boone from testifying during the penalty phase of the trial, we will describe the trial court's treatment of Dr. Humphrey, who testified during the guilt phase. The court thwarted the defense presentation of Dr. Humphrey's testimony and drastically limited its scope. Nonetheless, as the record shows, the court excluded Dr. Boone during the penalty phase on grounds that her testimony would be cumulative to Dr. Humphrey's testimony. The trial court made its ruling to exclude Dr. Boone despite the defense proffer that Dr. Boone's testimony also had mitigating value independent of Dr. Humphrey's guilt-phase testimony.

1. The Trial Court Cut Off the Guilt Phase Testimony of Dr. Lorie Humphrey Then Humiliated and Threatened Her

During the guilt phase of the trial, on June 21, 2000, the defense called Lorie Humphrey, Ph.D., a licensed clinical psychologist. 37 RT 5122:12-25. The defense called Dr. Humphrey to testify about the neuropsychological testing she performed on Sandi Nieves, whether the results were associated with abnormalities of the brain, and the causes of those abnormalities. 37 RT 5127:12-26, 5138:4-5140:10, 5140:14-5141:8, 5234:3-5235:24.

Although Humphrey was allowed to give some of her opinions, including testimony that the defendant had a history consistent with a seizure disorder, such as epilepsy, and a brain malfunction that would impede her coping skills, 37 RT 5147:14-23, 5148:1-11, 5149:2-16, the court improperly cut off direct examination before defense counsel had finished questioning her. The following exchange took place in front of the jury:

. . .The Court: Mr. Waco, sit down. I am going to let the prosecutors cross-examine at this point.

Mr. Waco: I have more questions.

The Court: Well, not now you don't. I will let you reopen after we have a 402 hearing.

Mr. Waco: Can I go to other areas?

The Court: No, you may not. Have a seat. But I will let you reopen based on a 402 hearing that we'll have at some point in this proceeding, maybe early tomorrow morning.

Mr. Waco: But I haven't finished with my direct.

37 RT 5210:17-28.

The prosecution was then allowed to cross examine Dr. Humphrey extensively until the jury was excused shortly before four o'clock in the afternoon. 37 RT 5211:3-5231:22. The court then held an Evidence Code section 402 hearing because, the court stated, "it became clear to the court that almost without exception every question [Mr. Waco] asked was objectionable, and there was a sustained objection." 37 RT 5233:22-25.

The defense opened its offer of proof with an explanation that Dr. Humphrey was qualified to testify to the results of neuropsychological testing performed on Sandi Nieves and to testify that these tests indicated abnormalities of the brain and the causes of those abnormalities. 37 RT 5234:21-23. The defense also explained that Humphrey could testify as to the effects of carbon monoxide exposure and whether the brain damage existed prior to exposure. 37 RT 5236:2-5. Defense counsel began to question the witness to provide a foundation for her expertise. However, the court frequently interrupted and eventually took over the questioning. It ultimately cut the defense off from further inquiry. 37 RT 5237:6-5250:17.

The court ruled Dr. Humphrey could not testify as to carbon monoxide exposure, 37 RT 5251:23-5252:1, limiting her to her findings,

but stated that it would give defense counsel an opportunity to resume direct examination "if you think you can ask comprehensible questions." 37 RT 5252:2-19.

However, when court resumed the next day, June 22, 2000, the court reversed its ruling without allowing defense counsel to be heard:

> . . .The Court: When all of the jurors are here, Dr. Humphrey will be back on the stand for further cross-examination by Miss Silverman.
>
> Mr. Waco: I would like to do my direct.
>
> The Court: I gave you a half hour yesterday to make, in effect, an offer of proof, and based on what you did at that point, I don't see any further need for you to do any more direct examination. There may be examination you're going to do based on the cross-examination; but at this point, Dr. Humphrey will continue to be cross-examined by Miss Silverman.
>
> Mr. Waco: Your honor told me yesterday I can have further direct examination today. I believe that's on the record unless you changed your mind.
>
> The Court: I have changed my mind, because having thought about it, I don't think you made an offer of proof as to anything, and I gave you an ample opportunity to do that.
>
> Mr. Waco: You didn't give me --
>
> The Court: Wait. Wait. Wait. Are you all here?
>
> A juror: Yes.
>
> The Court: Come on in, please.

38 RT 5277:14-5278:9.[165]

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[165] See Part III, C., 2, a. supra for a complete discussion of the court's treatment of D. Humphrey. The argument there is incorporated here by reference.

Cross-examination of Dr. Humphrey continued. The prosecution attacked her for alleged methodological mistakes in her written report. 37 RT 5221:26-5229:27, 38 RT 5303:24-5305:10. The prosecution also accused Humphrey of withholding from the court materials that she had consulted and making misrepresentations to the jury. 38 RT 5293:11-5295:3, 5321:145322:16, 5358:18-5360:6. During cross-examination, the court belittled and humiliated Dr. Humphrey, alluding in front of the jury to the information used in her reports as "garbage in, garbage out" (37 RT 5222:28-5223:1), threatening sanctions against her for talking over the prosecutor (38 RT 5319:26-28), and accusing her of withholding information (38 RT 5362:5-12).

The trial court denied defense counsel re-direct and instead allowed the prosecution to call rebuttal witness, Dr. Robert Brook. 38 RT 5362:5-18. Dr. Brook's testimony disputed Dr. Humphrey's findings.[166]

The trial court ordered Dr. Humphrey back in court for a hearing regarding an alleged discovery violation. 39 RT 5503:20-22. Again, the court threatened that she could be subject to sanctions, this time for discovery violations, despite defense counsel's objection that discovery was his duty. 39 RT 5518:3-28. After her testimony, the court chastised Dr. Humphrey for walking through the well of the courtroom. 39 RT 5558:8-10. The court then ordered her excluded from the courtroom. 39 RT 5558:14-5560:1.

The court threatened Humphrey with prosecution for perjury due to her mistaken testimony regarding a color trails test, despite her explanation

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[166] Dr. Brook called into question Dr. Humphrey's conclusions that results of testing indicated brain damage caused by cognitive impairment. 38 RT 5420:1-5420:9.

that this test did not play a significant part in her determination that Sandi Nieves had abnormalities and testimony that she believed that the norms she used were the newer norms. 39 RT 5514:25-26, 5535:6-5536:7, 5572:3-5, 5573:12-17, 5574:1-6.

At the conclusion of the guilt phase of the trial, the court refused to admit Dr. Humphrey's report into evidence. 53 RT 8248:20-8249:6. During its closing argument, the prosecution stressed that Dr. Humphrey's statements about why she used the color trails norms were untrue. Ms. Silverman then capitalized on the failure of the defense to complete its examination of her: "We never heard from her, or course, after she said that. There was no redirect. She just left." 56 RT 8143:5-6.

2. The Trial Court Excluded the Penalty Phase Mitigation Testimony of Dr. Kyle Boone, Ph.D.

During the penalty phase, Dr. Humphrey did not return to testify. On August 2, 2000, defense counsel called Dr. Kyle Boone, Ph.D., also a neuropsychologist. 61 RT 9595:2-20. The court insisted the defense make an offer of proof as to why she should be allowed to testify. 61 RT 9608:17-18. Gregory Fisher, counsel for the defense, explained that he had located Dr. Boone as a part of his effort to obtain an independent evaluation of the tests performed by Dr. Humphrey, "in light of what happened during the guilt phase." 61 RT 9609:3-7.

In support of the offer of proof, defense counsel submitted Dr. Boone's two-page report, marked for identification as Exhibit YY-1, as well as her curriculum vitae, Exhibit YY-2. 61 RT 9609:26-28. Dr. Boone, board certified in clinical neuropsychology, was an associate professor-in-residence at UCLA School of Medicine, Department of Psychiatry, and the Director of Neuropsychological Services, Harbor-UCLA Medical Center. 21 RCT 5272-5273. Her report addressed four issues. First, she evaluated

Dr. Humphrey's neuropsychological evaluation and concluded it was thorough and comprehensive, verifiable, and had concluded accurately that Sandi Nieves had "cognitive deficits in memory (especially verbal) and select executive/problem-solving skills." Id. Second, Dr. Humphrey had not used the correct norms when scoring the Color Trails Test; however, the mistake was not her fault, nor did it invalidate her conclusion of "executive/frontal lobe dysfunction." Id. Third, the neuropsychological test revealed impairment in memory, especially verbal memory, frontal lobe/executive skills, and math ability. Id. Fourth, after several tests designed to detect malingering, there was no evidence that Sandi Nieves was faking. Id.

The defense argued Dr. Boone's testimony was necessary to rehabilitate the validity of the results of Humphrey's tests after the attack on Humphrey during the guilt phase. 61 RT 9611:7-9613:12. Boone's report showed that the mistakes made in the Color Trails Test were not Humphrey's fault, and they did not invalidate her findings of abnormality. 21 RCT 5272. Defense counsel stated Dr. Boone could also testify that other alleged mistakes in Humphrey's report were simply typos. 61 RT 9611:20-28. Defense counsel explained that Dr. Boone was an expert on malingering. 61 RT 9612:3-5. She had reviewed all tests performed on Sandi Nieves, including Dr. Caldwell's reports on the MMPIs. Contrary to Dr. Caldwell's testimony, she had concluded that there was no evidence of malingering. 61 RT 9612:6-25.

Defense counsel explained that Dr. Boone was needed because the "nature and extent of the attack" on Humphrey's competence and integrity made it impossible for the defense to call Humphrey back as a witness. 61 RT 9613:1-6. Not only was Dr. Humphrey upset by the court's treatment of

her and its accusations that she was a liar, but the defense needed an independent witness to evaluate Humphrey's work because the prosecution had called her a liar in front of the jury. 61 RT 9613:7-24. See 56 RT 8770:10-16 (prosecution guilt phase closing: "she quite clearly lied."). Defense counsel argued that Humphrey could not effectively rehabilitate herself. 61 RT 9614:8-10. In addition, Dr. Boone had special expertise in the area of normative data and malingering. 61 RT 9614:16-19.

During the offer of proof, defense counsel informed the court Dr. Boone's testimony would not be cumulative of previous testimony from Dr. Humphrey, nor would the defense use the testimony to try to re-litigate the guilt phase. 61 RT 9614:20-22. The defense sought to introduce evidence of mental conditions or disorders and of brain damage, to which Dr. Humphrey was not allowed to testify. 61 RT 9614:23-28. This evidence would serve a separate purpose during the penalty phase since the mental state issues were different from those considered at the guilt phase. 61 RT 9615:1-4.

The defense proffered Dr. Boone's testimony to show that Sandi Nieves would function normally in a situation in which she did not face multiple problems and high levels of stress. 61 RT 9615:10-13. However, if faced with multiple problems and high levels of stress, "[h]er dysfunction would not allow her to be aware of or to choose from the same wide range of solutions or choices that a normal brain would be able to do." 61 RT 9615:16-19.

Defense counsel explained that this testimony would not have made sense to introduce in the guilt phase because it was being offered to explain the circumstances of the crime and not to excuse it. 61 RT 9615:27-9616:2.

This evidence was admissible as Penal Code § 190.3(k) or "factor (k)" evidence because, as defense counsel stated:

> If the jury finds that she was, in fact, under a lot of stress, if she was confronted with multiple problems, and if they believe based on this neuropsychological evidence that her range of choices was to some extent limited; that she wasn't able to think of all of the solutions that a normal person might, that could well be enough for a juror to decide not to vote for the death penalty.

61 RT 9616:3-10. Defense counsel cited Skipper v. South Carolina (1986) 476 U.S. 1, for the proposition that the defense was entitled to present evidence of the defendant's mental condition during the penalty phase and Gardner v. Florida, (1977) 430 U.S. 349, in support of the defense's argument that it should be able to rebut the prosecution's evidence and arguments. 61 RT 9616:12-18.

Defense counsel also argued that Dr. Boone's testimony addressing Sandi Nieves's cognitive dysfunction could lead a juror to conclude that she would not be dangerous in prison. 61 RT 9616:19-9617:20. Counsel explained that the testimony could aid a juror to understand that the conditions under which the crime and special circumstances occurred were unlikely to exist in prison. 61 RT 9617:14-20. In addition, Boone's testimony about the impact of these mental dysfunctions on the day to day life of someone like Sandi Nieves could invoke sympathy from the jurors. 61 RT 9617:21-25.

The trial court accused defense counsel of waiting until the "last minute to spring" Dr. Boone on the prosecution. 61 RT 9617:26-27. Counsel explained that they had been scrambling to find an independent expert after Dr. Humphrey did not come back after being called a liar and a perjurer. 61 RT 9618:5-9619:9. Considering how distressed she was, the

defense did not think they could call her back, or that she would be an effective witness. 61 RT 9618:22-26. The defense could not have anticipated the attack waged against Dr. Humphrey. 61 RT 9619:10-11. After Humphrey's and Brook's testimony, the defense realized that they would need to address the issue in the penalty phase and started looking for someone who could analyze the normative data and provide testimony appropriate for the penalty phase. 61 RT 9619:11-24.

The defense had asked Dr. Boone to concentrate in her report on the neuropsych reports and not to delve into other areas. 61 RT 9621:23-9622:1. Defense counsel provided her with copies of the MMPIs because he anticipated that they could be the subject of cross-examination. 61 RT 9622:11-9623:13. In addition, defense counsel argued Dr. Boone would be able to testify as to the invalidity of Dr. Brook's conclusions regarding the tests performed on Sandi Nieves. 61 RT 9623:17-9624:13.

The court ruled that Dr. Boone would not be allowed to testify because: "It would be cumulative. It would involve the undue consumption of time. It would take days." 62 RT 9648:7-8. The defense assurance that it did not expect to need more than an hour for Dr. Boone's direct examination did not dissuade the court. 61 RT 9648:10-11. Counsel assured the court that the testimony would not be cumulative, explaining that the testimony would focus on the impact of the test results on Sandi Nieves's everyday life, evidence that is allowable during the penalty phase regardless of what happened during the guilt phase of the trial:

> . . . Mr. Fisher: In other words, Dr. Boone would be testifying as to factor k evidence.
>
> The Court: Well, what about Dr. Humphrey? Didn't she already testify to that?
>
> Mr. Fisher: No.

Ms. Silverman: Yes.

The Court: Well, then, why not?

Mr. Fisher: Because factor k was not relevant in guilt phase. She attempted to link up her findings to guilt phase mental states.

Ms. Silverman: That's just completely inaccurate.

The Court: No. She talked about stress and all this other stuff. She talked about it, and she could have talked about it.

Ms. Silverman: She showed pictures of the brain and how certain areas are tied to functioning. She testified to that for four hours. That was her testimony.

62 RT 9648:20-9649:9.

The jurors never heard from Dr. Boone, nor did they see her report, Exhibit YY-1.

B. The Trial Court Erred When it Excluded Relevant Mitigating and Non-Cumulative Testimony of Dr. Boone During the Penalty Phase

After limiting Dr. Humphrey's testimony, then dissuading her from returning as a witness, the trial court's exclusion of Dr. Boone prevented the defense from bolstering Dr. Humphrey's credibility as permitted by Evidence Code §780. It also precluded the defense from filling the hole created by Dr. Humphrey's absence or presenting factor "k" evidence untethered from considerations of guilt and innocence. Dr. Boone's testimony had mitigating value independent of Dr. Humphrey's guilt-phase testimony.

The trial court also violated Sandi Nieves's constitutional rights when it ruled to exclude the relevant mitigating testimony of Dr. Boone during the penalty phase of the trial. People v. Lucero (1988) 44 Cal. 3d 1006, 1027. "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from

considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio (1978) 438 U.S. 586, 604 (plurality opinion of Burger, C.J.) (emphasis in original). See also Eddings v. Oklahoma (1982) 455 U.S. 104, 114.

The Eighth and the Fourteenth Amendments are implicated because error committed in the penalty phase creates the heightened risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment. See Caldwell v. Mississippi (1985) 472 U.S. 320, 323; Woodson v. North Carolina (1976) 428 U.S. 280, 305 (plurality opinion). "'There is no more important hearing in law or equity than the penalty phase of a capital trial.' At that phase, a capital defendant has a 'constitutionally protected right [] to provide the jury with . . . mitigating evidence.'" Correll v. Ryan (9th Cir. 2008) 539 F.3d 938, 946 (internal citations omitted).

Dr. Boone's testimony constituted relevant mitigating evidence admissible during the penalty phase. It is established law that the jury may not be precluded from considering any relevant mitigating evidence that the defense proffers during the penalty phase. Mills v. Maryland (1988) 486 U.S. 367, 374. See Skipper v. South Carolina (1986) 476 U.S. 1, 4 ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'") (quoting Eddings, 455 U.S. at 114). Any barrier, whether it be 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 (citing Mills, 486 U.S. at 374).

Here, the trial court's exclusion of Dr. Boone imposed a constitutionally invalid barrier that precluded the jury from considering relevant mitigating evidence addressing the defendant's mental condition and showing that the defendant did not pose a threat of future dangerousness if allowed to live the duration of her life in prison. Nor was Dr. Boone's penalty-phase testimony cumulative to related, but incomplete, testimony given by Dr. Humphrey during the guilt phrase of the trial.

1. During the Penalty Phase, the Jury May Consider Evidence of the Defendant's Mental Condition as a Factor in Mitigation Whether or Not the Mental Condition Caused Her to Commit the Crimes

Dr. Boone's testimony was admissible under Penal Code section 190.3 because the defense offered it to explain the circumstances surrounding the crime for purposes of mitigation (61 RT 9615:27-9616:2), and further, by explaining the impact of Sandi's impairments on her everyday life, to provide a basis for sympathy. 61 RT 9617:21-25, 62 RT 9648:15-21. Such testimony also constituted the type of mitigating evidence that the United States Supreme Court has consistently held to be admissible and critical for the jury to consider when death is at stake. See Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674 ("before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for the individual in light of his personal history and characteristics and the circumstances of the offense"); Brewer v. Quarterman (2007) 550 U.S. 286, 127 S.Ct. 1706, 1714 (the jury must be allowed to respond to mitigating evidence in a "reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death").

Sentencing factor (a) of California Penal Code section 190.3 allows the trier of fact to take into account the circumstances of the crime when determining whether to sentence the defendant to death. See People v. Guerra (2006) 37 Cal.4th 1067, 1154 ("Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime").

Two other statutory sentencing factors under section 190.3 separately make a defendant's mental disturbance or defect at the time of the offense relevant as potential mitigation, factor (d) ("whether or not the offense was committed while the defendant was under the influence of extreme mental or emotion disturbance") and factor (h) ("whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect . . ."). Factor (k) also allows the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Penal Code § 190.3(k). Cf. People v. Rogers (2006) 39 Cal.4th 826, 895 ("Section 190.3, factor (k) and its corresponding instruction allow a jury to consider any aspect of the defendant's character or record that calls for a sentence less than death, including, in this instance, mental illness of the defendant that did not cause the crime in question."); People v. Arias (1996) 13 Cal.4th 92, 189 ("the catch-all language of section 190.3, factor (k), calls the sentencer's attention to '[a]ny other circumstance which extenuates the gravity of the crime,' and therefore allows consideration of any mental or emotional condition, even if it is not 'extreme'") (quoting People v. Clark (1992) 3 Cal.4th 41, 163).

The defendant here was entitled to have the jury consider her particular brain dysfunction as a factor in mitigation whether or not the mental condition caused her to commit the crimes. People v. Lucero (1988) 44 Cal.3d 1006, 1030. Dr. Boone's testimony was admissible under Penal Code section 190.3 because the defense proffered it not to excuse the crime, but to show that Sandi Nieves, based on her particular brain dysfunction, was not able to think of the same solutions or appreciate her range of choices in the same manner as other people when under severe stress and confronted with multiple personal challenges. This information could lead the juror to be more sympathetic and find Sandi Nieves less morally culpable than she might otherwise have been. 61 RT 9616:3-10. The testimony was offered and admissible to show how her impairment affected her daily life and so provide a possible basis for sympathy and mercy. 61 RT 9617:21-25, 62 RT 9648:15-21.

Furthermore, under Lockett and its progeny, Sandi Nieves had a constitutional right to the admissibility and consideration by the jury of evidence concerning her mental impairment during the penalty phase. In Abdul-Kabir, the United States Supreme Court conducted a careful review of the Lockett line of cases and reinforced the Court's holding that when a jury is not permitted to consider a defendant's mitigating evidence then the sentencing process is fatally flawed. Abdul-Kabir, 550 U.S. 233, 127 S.Ct. 1654, 1675. Evidence concerning emotional or mental problems is highly relevant to sentencing because of society's long held belief that someone with such problems may be less culpable. California v. Brown (1987) 479 U.S. 538, 545 (O'Conner, J., concurring). Furthermore, the Supreme Court has said that "impaired intellectual functioning is inherently mitigating," Tennard v. Dretke (2004) 542 U.S. 274, 287 (citing Atkins v.

Virginia (2002) 536 U.S. 304, 316), and therefore admissible during the penalty phase. The exclusion of Dr. Boone's testimony was constitutional error requiring reversal.

2. Dr. Boone's Testimony Was Relevant to Show the Defendant Posed No Future Danger

Defense counsel also argued that Dr. Boone's testimony regarding Sandi Nieves's cognitive dysfunction could lead a juror to conclude she would not pose a threat of future dangerousness if she lived the rest of her life in prison. 61 RT 9616:19-9617:20. Counsel explained that the testimony could aid a juror to understand that the conditions under which the crime and special circumstances occurred were unlikely to exist in prison. 61 RT 9617:14-20.

Evidence that the defendant does not pose a danger if spared the death penalty, but is instead incarcerated, is admissible as a relevant mitigating factor. Skipper v. South Carolina (1986) 476 U.S. 1, 5; People v. Fudge (1994) 7 Cal.4th 1075, 1117-1118. In Skipper, the United States Supreme Court held that just as evidence that a defendant would, in the future, pose a danger to society if he or she is not executed is admissible in some jurisdictions as an aggravating factor during the penalty phase of a death case, evidence that a defendant would not pose such a danger must be considered potentially mitigating. 476 U.S. at 5. "[A] defendant's disposition to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." Id. at 7.

After hearing Dr. Boone's testimony, a juror could conclude that, based on Sandi Nieves's particular mental dysfunction, her problems would arise only when faced with multiple challenges at once, a situation she would unlikely face in prison where her day-to-day life would be highly regimented. 61 RT 9616:19-9617:8. Dr. Boone's testimony would have

supported the proposition that Sandi Nieves could make a "satisfactory" adjustment to life in prison, and that she would not pose a danger to anyone if allowed to live out her life there. 61 RT 9616:23-24, 9617:6-7.

The trial court refused to accept the defense proffer of Dr. Boone's testimony for the purpose of showing Sandi Nieves's lack of future dangerousness because the prosecution had not claimed she would be dangerous. 61 RT 9617:9-10. However, the prosecution did not need to open the door for the defense to be able to present evidence in mitigation. The reverse is true. The defense can present any evidence in mitigation of the sentence, Skipper, 476 U.S. at 4; Eddings, 455 U.S. at 114, and the prosecution's rebuttal cannot exceed the scope of the defense evidence. People v. Loker (2008) 44 Cal.4th 691, 709.

Notably, when the court, outside the presence of the jurors, dismissed the issue of future dangerousness as irrelevant, it made the observation on the record that Sandi Nieves would pose no threat in prison. 61 RT 9617:10-11. The court restated this observation when it denied the Penal Code section 190.4 motion: "The court can and will infer from the evidence that defendant will more than likely be a model prisoner." 63 RT 10373:17-19. Despite the court's own finding that Sandi Nieves would pose no threat of danger in prison, it precluded the jury from considering the evidence and coming to its own conclusion.

A defendant's propensity for safely adjusting to prison life is particularly relevant and important evidence to present during the penalty phase, because it would be inadmissible during the guilt phase of the trial. Simmons v. South Carolina (1994) 512 U.S. 154, 162. "Many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase. The defendant's

character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment." Id. (citing Lockett, 438 U.S. 586, Eddings, 455 U.S. 104, 110, Barclay v. Florida (1983) 463 U.S. 939, at 948-951). Here, the defense did not present evidence related to future adjustment to prison life during the guilt phase. Such evidence would not have made sense. It would not have been relevant to the determination of guilt or innocence.

As defense counsel pointed out, Dr. Boone's testimony as it related to lack of future danger was appropriate mitigating evidence presentable during the penalty phase under factor (k) of Penal Code § 190.3. 61 RT 9617:19. In addition, this Court has noted that an expert's authority and experience on the issue of future behavior "may persuade the jurors to a conclusion they would not reach on their own." People v. Lucero (1988) 44 Cal.3d 1006, 1029. Dr. Boone's expert testimony could have helped the jury to better understand the nature of Sandi Nieves's particular mental condition and dysfunction.

With the benefit of Dr. Boone's testimony, the jury could have reached a conclusion that life in prison without the possibility of parole was an appropriate sentence for this defendant. The evidence was admissible because it may have served as a basis for a sentence less than death. Tennard, 542 U.S. at 287; Skipper, 476 U.S. at 5 (citing Lockett, 438 U.S. at 604).

3. The Testimony of Dr. Boone Was Not Cumulative

The trial court erroneously concluded that Dr. Boone's penalty phase testimony would be cumulative to Dr. Humphrey's guilt phase testimony. First, the defendant cannot be prevented from proffering Dr. Boone's

testimony and submitting it for the jury's consideration for the purpose of mitigating the penalty, if the evidence could lead a juror to vote for a sentence less than death. Skipper, 476 U.S. at 5 (citing Lockett, 438 U.S. at 604). Second, mental impairment issues are independently relevant in the penalty phase. See People v. Zambrano (2007) 41 Cal.4th 1082, 1135. Third, because the prosecution showed that debate existed concerning the interpretation of the results of the neuropsychological evaluations, evidence from an independent expert on neuropsychological testing, normative data, and malingering would not be cumulative. See Lucero, 44 Cal.3d at 1030-1031 (evidence from two experts, both during the penalty phase, was not cumulative because of the considerable debate about the existence of post traumatic stress syndrome and because it was important to show that "not only one, but two mental health experts" had diagnosed the defendant with the syndrome). Further, the testimony of such an additional expert with credentials like those of Dr. Boone was particularly important and non-cumulative in light of the prosecution's theme in guilt phase closing argument that Sandi Nieves was a manipulator and that her guilt phase mental state evidence was at least in part the product of her having manipulated her own expert witnesses and/or the dishonesty of the experts themselves. 54 RT 8438:28-8439:2, 8441:28-8442:5, 8442:26-8443:5, 8459:18-8560:2; 56 RT 5687:11-16, 8713:9-11, 8775:3-8777:20; 57 RT 8845:14-8846:10, 8848:9-14, 8854:9-10, 8856:7, 8869:18-20, 8870:25-27

The defense explained that Dr. Boone's testimony about the impact of these mental dysfunctions on the day to day life of someone like Sandi Nieves was intended to invoke sympathy from the jurors. 61 RT 9617:21-25. Sympathy for the defendant is an appropriate and necessary objective for defense evidence during the penalty phase. It is "imperative that all

relevant mitigating information be unearthed for consideration at the capital sentencing phase." Death cannot be constitutionally imposed "without adequate consideration of factors which might evoke mercy." Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223, 1227 (internal citations omitted). Invoking sympathy made the testimony of Dr. Boone inherently non-cumulative. Invoking sympathy for Sandi Nieves would not have been relevant during the guilt phase of the trial and was never the objective of the examination of Dr. Humphrey.

Furthermore, Dr. Boone's testimony could not have been cumulative because Dr. Humphrey's testimony was incomplete and restricted. The trial court did not allow defense counsel to complete direct examination of Dr. Humphrey. The court abruptly and in front of the jury cut off defense questioning of Dr. Humphrey. 37 RT 5210:17-28. The court limited Dr. Humphrey's testimony to prevent her from testifying as to the causes of Sandi Nieves's impairments, limiting her to her findings as if she were a technician, rather than an expert. 38 RT 5277:14-5278:4. The court prevented further examination of Dr. Humphrey, reversing its own ruling made after an evidentiary hearing as to the parameters of her testimony. 38 RT 5277:14-5278:9. The court expressly denied redirect examination. 38 RT 5362:13-18. Ultimately, the court never admitted Dr. Humphrey's report into evidence. 53 RT 8248:20-8249:6.

Since Dr. Humphrey never finished her testimony, it would not have been cumulative to have her testify during the penalty phase. However, by then, the court had effectively dissuaded Humphrey from returning to court by belittling her in front of the jury (37 RT 5222:28-5223:1, 38 RT 5383:25), and then threatening her with prosecution for perjury after she openly admitted the mistakes, albeit insignificant, in her report (39 RT

5572:3-5574:6). See 22 RCT 5591-5591. Not only was she too upset to come back, but the defense could not reasonably call her as a penalty phase witness after the attack she sustained from the court and the prosecution. The defense had to find another expert neuropsychologist.

The expert they found, Dr. Boone, brought her own unique expertise on normative data and malingering. 61 RT 9614:16-19; see Exhibit YY-2. The defense sought to introduce through Dr. Boone results from Sandi Nieves's neuropsychological evaluation that served a mitigating function in the penalty phase wholly separate from the testimony presented during the guilt phase. There was no other testimony during the penalty phase that addressed the defendant's mental impairments as they related to the circumstances of the crime, and her lack of future dangerousness, or their potential for inspiring sympathy due to her difficulty in facing the challenges ahead of her.

Finally, the fact that during the penalty phase, the jury had Sandi Nieves's life in its hands meant that additional precautions were required on the part of the trial court. "'A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Eddings v. Oklahoma (1982) 455 U.S. 104, 112 n.7 (quoting Woodson v. North Carolina (1976) 428 U.S. 280, 304). Here, the defense was asking for only an hour for direct examination of Dr. Boone to present to the jury critical information about the mental infirmities particular to this defendant. The court's dismissal of Dr. Boone's testimony as cumulative and wasteful

of the court's time did not afford the defendant the respect due a unique individual that is required in capital cases. Lockett, 438 U.S. at 605.

C. The Trial Court's Exclusion of Dr. Boone's Testimony Denied Sandi Nieves Her Constitutional Rights to Due Process, to Present a Defense, and to a Fair and Reliable Sentencing Determination

The sentencing process, like the guilt phase, must satisfy due process requirements. Gardner v. Florida (1977) 430 U.S. 349, 360; Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d 926, 969. "[D]eath is a different kind of punishment from any other which may be imposed in this country, and as such, this sentence requires greater scrutiny than others." Id. Due process requires that a defendant cannot be sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner, 430 U.S. at 362. See also Simmons, 512 U.S. at 164; Skipper, 476 U.S. at 5 n.1.

Here, the trial court, by preventing the defense from presenting Dr. Boone's testimony and report, violated Sandi Nieves's due process rights, as well as her Sixth and Fourteenth Amendment right to present a defense and her Eighth and Fourteenth Amendment right to a fair and reliable sentencing determination in a capital case. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi (1973) 410 U.S. 284, 301. See Holmes v. South Carolina (2006) 547 U.S. 319, 324-325; Crane v. Kentucky, 476 U.S. at 690 (Sixth and Fourteenth Amendments guarantee "a meaningful opportunity to present a complete defense"); Zant v. Stephens, 462 U.S. at 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination); 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.").

The trial court had prematurely cut off the examination of Dr. Humphrey during the guilt phase, then excluded Dr. Boone's testimony during the penalty phase as cumulative of Dr. Humphrey. However, the trial court allowed the prosecution to present rebuttal witness Dr. Brook who testified extensively as to problems within Dr. Humphrey's report. 38 RT 5420:1-5420:9. Furthermore, the prosecution called Dr. Humphrey a liar in its guilt phase closing argument (56 RT 8743:3-4), then insinuated that Dr. Humphrey just took off without explanation and that the defense chose not to redirect (56 RT 8743:5-6), when it was the court that shut off every opportunity for the defense to rehabilitate the findings of Dr. Humphrey in the guilt phase. When it came to the penalty phase, the jury was left with its guilt phase impressions of the neuropsychological state of the defendant.

At the close of the penalty phase, the trial court expressly instructed the jurors to consider guilt phase testimony: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case . . . ." 21 RCT 5407 (emphasis added); 64 RT 10068:8-17; 65 RT 10196:5-13. By excluding Dr. Boone's testimony, the defense was prevented from rebutting those guilt phase impressions for the purposes of mitigating the sentence.

Defense counsel objected to the prosecution's closing argument in the penalty phase on the grounds that it argued that there was no mental defense. Counsel stated, "It's inappropriate, if not downright unlawful, to keep out evidence of a person's diminished mental state and then argue it

does not exist." 64 RT 10132:15-17. The court overruled the objection. 64 RT 10133:17.

The trial court's exclusion of Dr. Boone violated the Due Process Clause and the Sixth and Eighth Amendments. Allowing the prosecution to use the absence of the very mitigating evidence that the defense intended to present through Dr. Boone against the defendant in closing argument aggravated the violation. The jurors were likely to remember the prosecution's statements because the closing arguments are the last thing the jurors hear from the lawyers before deliberations. The error tainted the jury's decision that Sandi Nieves should be condemned to death.

D. The Improper Exclusion of Dr. Boone's Testimony Requires Reversal of the Penalty

The trial court's exclusion of Dr. Boone is reversible error because there was a reasonable possibility that it 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.

This Court found reversible error in People v. Lucero, (1988) 44 C.3d 1006, 103, when the trial judge improperly excluded expert testimony about a defendant's psychological disorder regardless whether it caused him to commit the crimes. The situation is no different here. While the deaths of the children were tragic, Sandi Nieves did have deficits and faced multiple life challenges that easily could have tipped the balance between life and death for at least one juror, if they had been adequately explained by an expert at the penalty phase. She also had sympathetic qualities and a

likelihood of adjusting to prison life which could have been addressed by an expert and mitigated the choice between life and death.

The court's exclusion of Dr. Boone resulted in prejudicial error and requires reversal of the sentence.

XX. THE TRIAL COURT EXCLUDED ADDITIONAL RELEVANT MITIGATING EVIDENCE DURING THE PENALTY PHASE WHILE PERMITTING THE PROSECUTION TO COMMIT MISCONDUCT IN ITS CROSS-EXAMINATION

The trial court allowed the prosecution to open the penalty phase with testimony from members of the victims' family who, among other things, made disparaging statements about Sandi Nieves's character. However, when Sandi Nieves tried to put on her defense, the trial court excluded significant testimony from defense witnesses, including close friends, members of her church, family, and the chaplain from the jail where she had been housed for two years. Defendant proffered these witnesses to provide evidence of positive and sympathetic aspects of her character, to rebut the prosecution's improper character evidence, disguised as victim impact, and to shed light on the her state of mind leading up to the death of her children. But she was not permitted by the court to present most of this mitigating evidence.

The trial court systematically shut down the testimony of one witness after another. The court's error violated Sandi Nieves's constitutional rights to a fair trial on the issue of penalty, to present a defense, to due process of law, and to a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Skipper v. South Carolina (1986) 476 U.S. 1, 4; Eddings v. Oklahoma (1982) 455 U.S. 104, 114; Lockett v. Ohio (1978) 438 U.S. 586, 604 (plurality opinion).

The court also allowed the prosecution to commit misconduct during the cross-examination of defense penalty phase witness Shirley Driskell. The prosecution asked questions that assumed inflammatory facts not in evidence, suggesting to the jury that the defendant had been found guilty of the crime of perjury. This was a repetition of the same

prosecutorial misconduct committed during the guilt-phase cross-examination of defense expert Dr. Gordon Plotkin. See Part XII, supra. The prosecution's questions were highly prejudicial because they inappropriately interfered with the jury's determination of the defendant's moral culpability, rendering her death sentence unreliable under the Eighth and Fourteenth Amendments.

A. The Trial Court Excluded Relevant Mitigating Testimony

During the prosecution's penalty phase case-in-chief, the trial court allowed members of the victims' family to attack Sandi Nieves's character. However, during the defense penalty phase case, the trial court sustained objection after objection when defense counsel attempted to humanize and to rehabilitate Sandi Nieves in the eyes of the jury.

1. The Trial Court Permitted Prosecution Witnesses to Attack Sandi Nieves's Character

The prosecution's first penalty phase witness, Minerva Serna, Sandi Nieves's former mother-in-law, stated that Sandi was "vicious and malicious" (60 RT 9308:16), "evil all the time" (60 RT 9311:13), manipulative (60 RT 9311:14), and described Sandi's actions as "just beyond a human . . ." (60 RT 9305:10-11). Serna also insinuated that Sandi Nieves had withheld love and affection from her children and made them "suffer[]" when they were alive. 60 RT 9303:5-12. The court permitted her to suggest Nieves might been abusive toward the children. 60 RT 9305:19-20 ("I really think more had happened to them.").

The next witness, Sandi's former husband Fernando Nieves, told the jury that Sandi used the children to get her way. 60 RT 9338:5-8 ("They [the children] would come spend time with me, unless she was mad at me. If I made her angry in some way, then she would not let me see them."). He said that Sandi was manipulating the trial, testifying that Sandi wanted to

"control" the testimony of her son, David. 60 RT 9365:12-22. The court overruled the defense objection to this testimony. 60 RT 9365:15-17. The court also prevented defense counsel from cross-examining Fernando about his suggestion Sandi used her children to manipulate others, sustaining an objection on the grounds the question was beyond the scope of the direct-examination. 60 RT 9348:14-27.

The court permitted David Folden, also Sandi Nieves's ex-husband, to disparage Sandi throughout his testimony. He told the jury that she "wanted to control and manipulate everyone around her." 60 RT 9371:21-23. Folden portrayed Sandi as a bad mother and said the children were "starved for attention." 60 RT 9378:3-6. He characterized her as controlling and overly protective. 60 RT 9374:1-3. The court overruled the defense objection to this type of "character assassination" by a victim impact witness. 60 RT 9392:11-9393:1.

Over defense objection, the court permitted the prosecution's final witness, Fernando's second-wife Charlotte, to criticize Sandi Nieves's mothering of David: "He was never taught to have an opinion. He was never taught to have a choice. . . . He was never taught to speak for himself, think for himself." 60 RT 9413:6-11.

2. The Trial Court Excluded Mitigating Testimony from Defense Witnesses

a. Shirley Driskell

Defendant called her long-time friend Shirley Driskell as her first penalty phase witness. 61 RT 9473:5-6. Driskell flew from Nampa, Idaho, to testify on Sandi Nieves's behalf. 61 RT 9473:11-14. She testified she had known Sandi since the age of 13. 61 RT 9473:23-24. The two had lived in the same apartment complex and attended the same school. 61 RT 9473:25-27. Driskell even lived with Sandi's family at 15. 61 RT 9477:14-

22. Driskell testified she remained close to Sandi and considered her a sister. 61 RT 9478:26-9479:4.

Driskell explained that she had many opportunities to observe Sandi Nieves's relationship with her children, including a period of several weeks that she spent at their home in 1997. 61 RT 9479:13-24; 61 RT 9485:20-9487:28. The court permitted Driskell to describe Nieves's parenting practices and share some observations about Sandi's interactions with her children. 61 RT 9481:19-9482:26. However, the court – in sustaining an objection based on speculation – did not allow the witness to answer when defense counsel asked, "Did you think, knowing Sandi, that she could do harm to her children, such as . . . what happened in this case?" 61 RT 9482:27-9483:4. Nor did the court allow her to answer a series of questions relevant to her observations of whether Sandi Nieves was overly controlling, or simply a concerned mother. See e.g. 61 RT 9486:1-2 ("And was Sandi concerned about the safety of her neighborhood?"); 61 RT 9487:24-28 ("From your observation, did Sandi want [the children] to stay in the immediate neighborhood of the house?"). Although none of defense counsel's questions asked for an out of court statement, the court repeatedly sustained objections to these questions on grounds of "hearsay and/or speculation." 61 RT 9486:10-13, 9487:26-28.

Defense counsel asked Driskell if she knew about Sandi's pregnancy with Scott Volk's baby, to which she replied, "Yes, I do." 61 RT 9488:1-3. The court granted the prosecution's motion to strike the answer on hearsay and lack of foundation grounds. 61 RT 9488:4-8. The court prevented the defense from asking any questions about conversations Driskell had with Sandi Nieves about the pregnancy or abortion on hearsay grounds, despite

the defense contention that the information was offered to show the defendant's state of mind. 61 RT 9488:9-9489:2.

The trial court also prevented Driskell from testifying about her perceptions of Sandi Nieves's state of mind during the period of time leading up to the death of her children, even though she had spoken with Sandi within the preceding weeks. 61 RT 9490:15-9491:5. The court sustained an objection to every question the defense attempted to ask on grounds that it called for speculation. See e.g. 61 RT 9490:15-16 ("How did Sandi act at that time when you last spoke to her?"); 61 RT 9490:20-23 ("Did you get any impression with regards to whether or not she was depressed or feeling great, or what her mood was when you last talked to her?"); 61 RT 9490:27-28 ("Do you know her well enough to know her moods when talking to her on the phone?").

The court did not allow defense counsel to ask Driskell what she would miss about Sandi Nieves if she were not able to communicate with her, ruling that the question was irrelevant and improper. 61 RT 9491:25-9492:3. The court also prevented the witness from answering the defense question, "If you can give the jury one impression that you have with regards to Sandi, the person that you've known most of your life, what words would you leave them?" 61 RT 9492:12-15. The court sustained the prosecution's objection that the question was vague and irrelevant. 61 RT 9492:16-17. The court finally permitted the defense to ask the witness her "overall view of Sandi as a human being." 61 RT 9493:12-13. However, when the witness answered, "She's a wonderful human being. She would never do anything like this if she was in her right mind," the court granted the prosecution's motion to strike the entire answer. 61 RT 9493:18-25.

The only question that the court permitted was, "[D]o you think she's a good human being?" Driskell answered, "Yes." 61 RT 9493:26-28.

Despite defense counsel's assertion that he had more questions, the trial court put an abrupt end to the direct examination.[167] 61 RT 9494:1-9495:10; 9523:6-7. The trial court then allowed cross-examination, during which the prosecution chided Driskell for considering Sandi Nieves a good mother, "Does a good mother do this to her children?" 61 RT 9500:26-9501:2. Driskell managed to answer, "No, not in her right mind." Id.

During a hearing outside the presence of the jury, defense counsel made an offer of proof as to segments of Driskell's testimony that the court had excluded. 61 RT 9522:27-9525:13. He argued the court had sustained "all manner of objections by the people," and that Driskell had not been allowed to testify to her feelings about Sandi Nieves as a person and a human being. 61 RT 9524:14-19. He implored the court, "Why can't I come in and have people testify with regards to what they will miss in my client, how they feel about her as a person, what losses that they'll feel with regards to missing her and seeing her because of her conviction, et cetera, or even possible death for that matter." 61 RT 9525:5-10.

The trial court granted defense counsel redirect-examination of Driskell. 61 RT 9537:12. However, as soon as defense counsel asked what value Sandi Nieves's presence had in Driskell's life or what aspects about the defendant's character would Driskell miss, the court sustained relevancy objections and shut down further testimony. 61 RT 9542:27-9544:5.

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[167] Driskell's direct examination is 21 pages of reporter's transcript, much of which includes objections and unanswered questions.

b. Tammy Olivares Pearce

Penalty phase defense witness Tammy Olivares Pearce testified that she had met Sandi Nieves in 1990 through the Mormon Church. 61 RT 9505:15-21. She saw Sandi Nieves and her children regularly at church services and functions. 61 RT 9506:2-6; 9508:14-20. In addition, she knew Sandi Nieves as the chairperson of the Cub Scout Troop Committee. 61 RT 9506:6-17. She explained she also knew the children very well. 61 RT 9506:18-20.

Pearce testified Sandi Nieves was an "excellent" cub scout chairperson (61 RT 9506:17), and she described Sandi as a loving mother who did not physically abuse her children (61 RT 9507:1-14). However, when defense counsel asked Pearce about several examples of how Sandi Nieves was not overbearing or controlling, but simply concerned for the safety and well-being of her children, the court sustained hearsay objections in each instance before the witness could answer. See e.g. 61 RT 9509:18-9510:3 ("Did Sandi show concern with regards to the safety for her children . . ."); 61 RT 9510:11-12 ("Was Sandi concerned with regards to her stepson and drugs?"); 61 RT 9510:15-16 ("Was Sandi concerned with her kids not getting involved with drugs?"). Although the court allowed Pearce to answer a question about observing love and affection between Sandi Nieves and the children (61 RT 9510:20-25), the court did not allow her to testify as to her observations of the role the children had played in Sandi Nieves's life (61 RT 9511:27-9512:14).

The court next sustained relevancy objections to defense counsel's question, "Can you envision in your knowledge of Sandi and her relationship with the children her doing anything to harm them, let alone kill them?" 61 RT 9512:15-21. The court also prevented defense counsel

from asking, "From what you know of Sandy [sic], is she the type of person that would grieve for the loss of her children?" 61 RT 9512:22-27. The court sustained an objection on the grounds of relevancy and speculation. Id.

The court sustained 14 objections in a row, not allowing any questions as to Pearce's perception of Sandi Nieves's character, no matter how many forms of the question defense counsel attempted to ask. 61 RT 9511:20-9514:17; see e.g. 61 RT 9513:6-7 ("How you [sic] would you describe Sandi as a person, as a human being?" (sustained as to speculative)); 61 RT 9513:17-18 ("From your observation of Sandi, what was the most important thing in her life?") (sustained as "calling for speculation, conclusion, and/or hearsay"); 61 RT 9514:12-14 ("If you can tell the jury your description of Sandi as a person, as a mother, what would you say?") (sustained as speculative, irrelevant, and argumentative). Finally, defense counsel gave up, stating he had nothing further. 61 RT 9514:18.

During a hearing outside the presence of the jury that followed Pearce's testimony, defense counsel proffered that Pearce had not been allowed to testify as to her feelings with regard to Sandi Nieves. 61 RT 9527:1-3. The court did not respond.

c. Henry Thompson

Defendant next called Henry Thompson. 61 RT 9546-9579. He testified that he had known Sandi Nieves for 22 years, since the time that she was 14 years old. 61 RT 9547:25-9548:3. Thompson explained that he is Shirley Driskell's father, and that while growing up, his daughter and Sandi Nieves were as close as sisters. 61 RT 9548:5-8. He explained that he lived in the same apartment complex as Sandi and her family. 61 RT

9548:9-13. He testified that he has kept in touch with Sandi Nieves over the years, and that she always sent him cards and letters for holidays and birthdays, even while she was in jail. 61 RT 9550:24-9551:4. Sandi Nieves and the children lived with Thompson for a period of time and later visited him often. 61 RT 9551:19-25.

The court permitted Thompson to give some testimony that he had observed Sandi Nieves as a loving mother, and that he did not witness her abuse her children. 61 RT 9551:26-9552:10; 9553:1-2; 21-23. Nonetheless, the court sustained relevancy objections to a series of consecutive questions that defense counsel put to Thompson: "Was this fire and the death of the kids of a shock to you?" (61 RT 9557:2-3); "Does Sandi's presence in your life have value to you?" (61 RT 9557:7-8); "Is there anything about her character that benefits your life?" (61 RT 9557:13-14); and "Is there anything in your life that you will miss by not having Sandi?" (61 RT 9557:19-20). The court prevented Thompson from answering any questions that asked directly about Sandi Nieves's character.

Defense counsel also attempted to ask Thompson about his knowledge of Sandi Nieves's pregnancy and subsequent abortion. 61 RT 9556:4-17. However, the court sustained objections on hearsay grounds despite counsel's efforts to argue that an exception to the hearsay rule applied. Id.

Thompson testified he remained in communication with Sandi Nieves while she was in jail. 61 RT 9557:24-9558:1. But when defense counsel asked, "Are you aware of her continual worry about her son's welfare?", the court would not allow Thompson to answer, admonishing counsel to ask questions that do not call for hearsay and speculation. 61 RT 9558:19-27.

Defense counsel requested a hearing outside the presence of the jury during which he argued the trial court's limitations on Thompson's testimony denied the defendant an opportunity to put on character evidence in her defense, citing Skipper v. South Carolina (1986) 476 U.S. 1. 61 RT 9572:3-10. The court said that the problem was with defense counsel's questions, stating that counsel was not asking for positive character traits, but was asking about impact on the witness. 61 RT 9572:15-9573:7. Defense counsel countered that he was asking what about Sandi Nieves did this witness value. 61 RT 9572:18-9573:14. However, the court ruled that counsel's offer of proof was insufficient. 61 RT 9575:25-26.

During redirect-examination, the trial court sustained relevancy objections to every question defense counsel asked: "Do you view Sandi as a person that has value?" (61 RT 9579:3-4); "Would the Sandi that you know kill or do harm to her children?" (61 RT 9579:9-10); "Does Miss Nieves, Sandi, have a positive effect on your life?" (61 RT 9579:17-18).

d. Lynn Taylor Jones

Lynn Taylor Jones testified that he had served as a bishop with the Church of Jesus Christ of Latter Day Saints. 61 RT 9580:18-26. He had known Sandi Nieves since 1991 through the Perris Ward of the Mormon Church. 61 RT 9580:27-9581:6. He testified he was familiar with Sandi Nieves's work with the cub scouts, that he saw her and the children on a regular basis at church, and that he visited their home several times. 61 RT 9581:7-9582:28.

The trial court gave him a bit more leeway when it allowed him to answer some limited questions about Sandi Nieves character. Jones testified that she had a "positive attitude" toward working with others in the church. 61 RT 9585:16-28. However, when defense counsel asked Jones

whether Sandi had "a type of character that benefitted those around her at the church," the trial sustained an objection on the grounds the question called for speculation. 61 RT 9585:4-10.

e. Cindy Hall

Cindy Hall flew in from Utah to testify. 62 RT 9723:22-24. She had known Sandi Nieves since 1991 through her husband, Carl Hall, a childhood friend of Sandi's. 62 RT 9723:27-9724:4. She testified that she had spent significant time with the defendant and the children. 62 RT 9724:9-9725:3.

Inexplicably, the trial court permitted this witness to answer the defense question about Sandi Nieves's value as a person and what benefit Sandi could offer others. 62 RT 9729:8-10; 17-25. But true to form, the court immediately started sustaining objections to subsequent defense questions about whether, from Hall's perspective, it was in the defendant's character to harm her children. 62 RT 9729:27-9730:27. In addition, when defense counsel asked Hall whether "Sandi [was] the type of person who you [would] feel comfortable in being around," the trial court sustained an objection on relevancy grounds. 62 RT 9730:17-20.

f. Albert Lucia

Defendant's step-father, Albert Lucia, had testified during the guilt phase of the trial, and flew in again from Indiana to testify during the penalty phase. 62 RT 9749:25-9750:2. He knew Sandi Nieves when she was a small child, and continued to remain in close contact with her and to see her and the children on a regular basis. 62 RT 9750:3-4; 9750:23-9751:14.

The court sustained relevancy objections to questions posed to Lucia about Sandi Nieves's character. See e.g. 62 RT 9753:9-10 ("Do you believe

Sandi is of value to her community?"); 62 RT 9753:13-16 ("What is your opinion in regards to her character for being a decent person?"); 62 RT 9753:8-11. The court then prevented Lucia from testifying as to whether Sandi Nieves had the character for being a peaceful person. 62 RT 9753:17-19. Although the court allowed him to say that Sandi was a loving mother, the court did not permit him to testify as to any "redeeming qualities" that she had to share with others. 62 RT 9753:22-9754:11.

The court also did not allow Lucia to testify regarding his opinion about how Sandi would adapt to prison. 62 RT 9753:12-16 ("Did you have an opinion with regards to her ability to nurture and give compassion to others, even in a jail cell?"). Defense counsel then asked Lucia whether, in his opinion, Sandi Nieves was the type of person to do harm to her children. 62 RT 9754:17-19. The trial court did not permit Lucia to answer and told defense counsel to stop asking improper questions. 62 RT 9754:22-24.

The court sustained an objection to the final defense question to Lucia, "Do you believe that Sandi's character is such to be a decent, warm, considerate human being?" The court said it was irrelevant and vague. 62 RT 9755:9-14. Defense counsel asked to be heard outside the presence of the jury, but the court did not respond and moved on to allow cross-examination of the witness. 62 RT 9755:15-20.

g. Shannon North

Shannon North testified she had been good friends with Sandi Nieves since they were both children. 63 RT 9855:3-18. North testified she considered the defendant a best friend and part of her family. 63 RT 9855:18.

During North's testimony, the trial court sustained relevancy objections to each of the following questions, preventing North from

answering: "With regards to Sandi's character for being a peaceful person as opposed to being an aggressive or violent person, what would you say?" (63 RT 9859:1-6); "The person you knew as Sandi Nieves, would she do harm to her children?" (63 RT 9859:7-13); "Do you see Sandi as a person of someone [sic] of value?" (63 RT 9859:15-19).

The trial court also prevented North from commenting on her understanding of Sandi Nieves's religious attitude about abortion. 63 RT 9857:21-9858:1.

h. Tricia Mulder

Tricia Mulder flew in from Oregon to testify on Sandi Nieves's behalf. 63 RT 9866:21-28. She said that Sandi was her best friend during the time the two lived in Perris. 63 RT 9867:10-14. The two met through their mutual involvement in the local Morman Church. 63 RT 9870:8-11.

The court permitted the witness to give her opinion that Sandi was a caring mother (63 RT 9872:25-9873:6), but again, the trial court sustained a relevancy objection when defense counsel asked whether Mulder valued Sandi Nieves as a person (63 RT 9872:15-18). It also sustained the same objection to the question, "Do you believe that Sandi's life has value?" 63 RT 9873:7-9. Next, the court did not allow her to testify as to whether Sandi Nieves had a character for peacefulness rather than for violence. 63 RT 9873:12-14. Finally, the court sustained yet another objection on the grounds the question was "[i]rrelevent, and totally improper," when defense counsel asked, "Do you miss her presence as a friend?" 63 RT 9874:20-23.

Despite Mulder's involvement in the Mormon Church and her friendship with Sandi Nieves, the court sustained a hearsay objection to the question, "Do you know of her [Sandi Nieves's] views with regards to--against abortion because of the religious training?" 63 RT 9872:20-21.

i. Leila Mrotzek

Leila Mrotzek was the protestant chaplain at Twin Towers Correctional Facility, one of the county jails. 63 RT 9884:1-26. Chaplain Mrotzek testified that she had worked as a correctional facility chaplain for over twenty-three years. 63 RT 9884:27-9885:3. At the jail, she served as senior supervising chaplain, overseeing all religious activities, including bible study, church services, and counseling for the inmates who identify as Protestants. 63 RT 9885:6-14. In her years of work, she had interacted with at least 25,000 inmates, including hundreds of women facing the possibility of a death sentence. 63 RT 9885:19-9886:8.

Chaplain Mrotzek testified that she had become well acquainted with Sandi Nieves over the previous two years through counseling, church services, and bible study. 63 RT 9886:9-14. She interacted with Sandi on average once a week and was able to get to know Sandi in a personal way because of the smaller number of inmates in the high security section of the jail. 63 RT 9886:23-9887:5. In addition, Chaplain Mrotzek personally taught Sandi Nieves's bible study course and corrected Sandi's bible study correspondence work. 63 RT 9887:12-18.

Chaplain Mrotzek testified Sandi showed remorse and grief over what had happened. 63 RT 9888:24-9889:7. Defense counsel attempted to ask the chaplain, "Do you have any opinion of whether Sandi's grieving was of a manipulative management type of thing?" 63 RT 9890:24-26. However, the court sustained an objection on the grounds that the question called for speculation. 63 RT 9890:27-28. Defense counsel re-phrased the question, "Have you seen many people over the years and gotten to be able to judge people and their value as to whether or not they do feel remorse and repentance, as opposed to someone who is just trying to use the

system?" 63 RT 9891:2-6. Despite her many years of experience working in the jails, the trial court prevented Chaplain Mrotzek from answering, sustaining an objection on grounds that the question called for speculation and was irrelevant. 63 RT 9891:7-9.

The court then sustained objections on similar grounds to ten questions in a row about Sandi Nieves's character. 63 RT 9891:12-9892:28. Examples included, "Do you feel Sandi has more to give to others?" (63 RT 9891:23-26); "Do you think Sandi has the character to be of help to people even within the prison system?" (63 RT 9892:17-18); and, "Is Sandi the type of person that has the capacity to help fill other people's lives?" (63 RT 9892:22-24). Recognizing the futility of continuing, counsel gave up on this witness. 63 RT 9892:28.

After a short cross examination, defense counsel requested a chance for re-direct examination. 63 RT 9894:1-5. He asked Chaplain Mrotzek, "Do you believe in the death penalty?" 63 RT 9894:9. The prosecution objected to the question as irrelevant, and the court sustained the objection. 63 RT 9894:11-12. Defense counsel asked to be heard but the court refused. 63 RT 9894:13-14. The trial court also sustained an objection on the grounds that the question went beyond the scope of cross examination. 63 RT 9894:15-17.

B. It is Impermissible to Exclude Relevant Mitigating Penalty Phase Evidence

The Eighth Amendment requires the jury to consider relevant mitigating evidence that Sandi Nieves's friends, family, and other critical witnesses had to give that would humanize her and show why she should not be put to death. "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio (1978) 438 U.S. 586, 604 (plurality opinion of Burger, C.J.) (emphasis in original). See also Penry v. Lynaugh (1989) 492 U.S. 302, 318; Mills v. Maryland (1988) 486 U.S. 367, 375; Skipper v. South Carolina (1986) 476 U.S. 1, 4; Eddings v. Oklahoma (1982) 455 U.S. 104, 114. The mitigating evidence does not have to be related to the underlying crime. Smith v. Texas (2004) 543 U.S. 37, 45. The trial court must not stand in the way and prevent a sentencing jury from giving meaningful consideration and effect to mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual. Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674; Brewer v. Quarterman (2007) 550 U.S. 286, 127 S.Ct. 1706, 1709-1710.

1. The Trial Court Improperly Excluded Relevant Mitigating Character Testimony

The trial court sustained relevancy objections to questions that appropriately elicited information relevant to Sandi Nieves's character. "Many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase." Simmons v. South Carolina (1994) 512 U.S. 154, 162. The defendant's character is among the issues that require consideration at this critical phase. Id.; Lockett, 438 U.S. 586; Eddings, 455 U.S. 104 at 110; Barclay v. Florida (1983) 463 U.S. 939, 948-951. "'What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Barclay, at 958 (quoting Zant v. Stephens (1983) 462 U.S. 862, 879).

California Penal Code §190.3(k) allows a jury to consider any aspect of the defendant's character or record that calls for a sentence less than

death. People v. Rogers (2006) 39 Cal.4th 826, 895. "A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. . . . [T]his evidence is relevant because it constitutes indirect evidence of the defendant's character." People v. Ochoa (1998) 19 Cal.4th 353, 456. In Ochoa this Court held that testimony from the defendant's mother that she loved her son could not be offered for the purpose of making the jury feel sorry for the mother, but the jury could take the testimony into account if it believed the defendant must have possessed redeeming qualities to have earned his mother's love. Id.

In line with its decision in Ochoa, this Court has also held that a defendant facing a death sentence may elicit testimony from family members and close friends regarding the witness's opinion that the defendant deserves to live "because such opinion evidence reflects indirectly upon the defendant's character." People v. Williams (2008) 43 Cal.4th 584, 644; People v. Smith (2003) 30 Cal.4th 581, 622-623; People v. Ervin (2000) 22 Cal.4th 48, 102. The reason family and friends of a capital defendant are allowed to comment on the appropriateness of the death penalty is because "[s]uch evidence 'exemplifie[s] the feelings held toward defendant by a person with whom he [has] had a significant relationship,' and bears on his overall character and humanity." People v. Mickle (1991) 54 Cal.3d 140, 194 (quoting People v. Heishman (1988) 45 Cal.3d 147, 194). Furthermore, evidence from family and friends in the form of an opinion about the defendant is admissible character evidence. See Evid. Code § 1100.[168]

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[168] Evidence Code § 1100 states: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of (continued...)

Sandi Nieves proffered the testimony of the defense penalty phase witnesses to evoke sympathy for herself, to show that the deaths were out of character, and to show she had redeeming qualities. She was not seeking sympathy for the witnesses. She elicited the testimony to show that she possessed sympathetic character traits that the jury could consider when deciding whether she should live or die.

Sandi Nieves sought to put on evidence that would invoke sympathy for her and encourage the jury to give weight to the side of life imprisonment. She had the right to present her witnesses' perspectives on her character in order to give the jury insight into why it should find life imprisonment to be the appropriate punishment. Sympathy for the defendant is an appropriate and necessary objective for defense evidence during the penalty phase. "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase," and death cannot be imposed "without adequate consideration of factors which might evoke mercy." Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223, 1227 (internal quotations omitted). See People v. Easley (1983) 34 Cal.3d 858, 875-880.

Defendant established that she had a significant relationship with all the witnesses she called during the penalty phase, making it appropriate for them to testify she had redeeming qualities. Before asking questions about the witness's opinions or observations of Sandi Nieves, defense counsel laid a foundation with each witness that included an explanation of the witness's relationship with Sandi, how many years the witness had known Sandi, and

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[168](...continued)
such person's conduct) is admissible to prove a person's character or a trait of his character."

whether the witness remained close with Sandi. Driskell, for example, testified that she had known Sandi Nieves since they were children, that they were like sisters, that they remained close, and that Driskell had spent a significant time at the defendant's home. 61 RT 9473:23-27; 9478:26-9479:4. The other witnesses at issue here provided similar testimony that established that they, too, shared a significant relationship with the defendant. See 61 RT 9505:15-9508:20 (Pearce); 61 9547:25-9551:25 (Thompson); 61 RT 9580:27-9582:28 (Jones); 62 RT 9723:27-9725:3 (Hall); 62 RT 9750:3-9751:14 (Lucia); 63 RT 9855:3-18 (North); 63 RT 9867:10-14 (Mulder); 63 RT 9886:9-9887:18 (Mrotzek). In light of this foundation, sustaining objections on the grounds of speculation to questions that elicited testimony regarding Sandi Nieves's character was improper.

It was also unnecessary because the penalty phase jury instruction on lay opinion, which would told the jury how to weigh the testimony of defense character witnesses, would have allowed the jury to put the testimony in proper perspective and allow the jurors to act as the factfinders, CALJIC 2.81.

> In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert, you should consider the believability of the witness, the extent of the witness' opportunity to perceive the matters upon which his or her opinion is based and reasons, if any, given for it. You are not required to accept an opinion but should give it the weight, if any, to which you find it entitled.

64 RT 10082:4-15; 21 RCT 5414. But this instruction had little functional meaning for the defense witnesses because their testimony was shut down on the ground it was speculative. The jurors never had the chance to give this testimony any weight.

Relevancy questions regarding Sandi Nieves's character for nonviolence should have been permitted because these witnesses, who knew Sandi well, were in a position to explain that her actions on the night of June 30, 1998, were out of character for her. See e.g. 61 RT 9512:15-21 (To Pearce: "Can you envision in your knowledge of Sandi and her relationship with the children her doing anything to harm them, let alone kill them?") (sustained as irrelevant); 61 RT 9579:9-10 (To Thompson: "Would the Sandi that you know kill or do harm to her children?") (sustained as irrelevant).

Evidence that Sandi Nieves did not have a character for violence was also relevant and important to rebut prosecution witness Minerva Serna's insinuations that Sandi was an abusive mother. See 60 RT 9305:19-20 (suggestion that the children had suffered abuse prior to death).

Continually, the trial court prevented the witnesses from answering questions about Sandi Nieves's character for nonviolence. See 62 RT 9729:27-9730:27 (Hall); 63 RT 9859:1-13 (North); 63 RT 9873:12-14 (Mulder).

Chaplain Mrotzek's testimony serves as an important and illustrative example of the court's improper exclusion of critical relevant mitigating character evidence. Defendant called the chaplain because she was an individual with whom Sandi Nieves had a significant relationship. 63 RT 9886:9-9887:18. But also, as someone with many years experience with many inmates, the chaplain's decision to come and testify in support of sparing Sandi Nieves's life was likely to carry considerable weight with the jury. As the trial judge observed later: "If an attorney were ever going to get to the penalty phase, I cannot imagine not calling this person [Chaplain Mrotzek] as a witness." 63 RT 9964:6-8

But the court prevented the jury from considering and giving meaningful effect to all the chaplain had to offer. Counsel asked, "Do you feel Sandi has more to give others?" 63 RT 9891:23-26. This was a relevant consideration for the jury. A jail chaplain with her experience could have offered reliable opinions about whether "Sandi ha[d] the character to be of help to people even within the prison system" (63 RT 9892:17-18), and whether "Sandi [was] the type of person that ha[d] the capacity to help fill other people's lives" (63 RT 9892:22-24). But the court would not allow these questions.

The trial court's exclusion of character testimony violated Sandi Nieves's constitutional right to put on mitigating evidence during the penalty phase of her capital case. Skipper, 476 U.S. at 4; Eddings, 455 U.S. at 114; Lockett, 438 U.S. at 604.

2. The Trial Court Improperly Excluded Mitigating Evidence Relevant to the Defendant's State of Mind At the Time of the Offense

The court improperly excluded testimony relevant to the defendant's state of mind the night of the fire. Such evidence about the circumstances surrounding the offense is also admissible under Lockett v. Ohio. See 438 U.S. at 604; Zant v. Stephens, 462 U.S. at 879.

"Before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for the individual in light of his personal history and characteristics and the circumstances of the offense." Abdul-Kabir v. Quarterman (2007) 550 U.S, 233, 127 S.Ct. 1654, 1674 (citing Lockett, 438 U.S. at 605). Likewise, Penal Code § 190.3(a) allows the trier of fact to take into account the circumstances of the crime when determining whether to sentence the defendant to death. People v.

Gay (2008) 42 Cal.4th 1195, 1218-1219; People v. Guerra (2006) 37 Cal.4th 1067, 1154.

"Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime." Guerra, 37 Cal.4th at 1154. Subsection (k) also allows the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Penal Code § 190.3(k). A lay witness may "testify about objective behavior and describe behavior as being consistent with a state of mind." People v. Chatman (2006) 38 Cal.4th 344, 397.

The trial court sustained hearsay objections every time defense counsel attempted to ask witnesses such as Driskell and Thompson about their knowledge of how Sandi Nieves was reacting to her pregnancy and the subsequent abortion. 61 RT 9488:1-9489:2, 9556:4-17. This testimony was offered to show the defendant's state of mind during the days that led up to the death of the children.

Out of court statements relevant to the declarant's state of mind are admissible as an exception to the hearsay rule. Evid. Code. § 1250.[169] Statements about the declarant's state of mind at the time of the statement are admissible when the then existing state of mind is a relevant issue in the case. Adkins v. Brett (1920) 184 Cal. 252, 255. See also People v. Geier (2007) 41 Cal.4th 555, 586; People v. Hernandez (2003) 30 Cal.4th 835,

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[169] Evidence Code § 1250 states that evidence of statements of the declarant's then existing state of mind or emotion are not made inadmissible by the hearsay rule when: ". . . (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶](2) The evidence is offered to prove or explain acts or conduct of the declarant. . . ."

872. Defendant's state of mind leading up to the time of the death of her children was relevant to the jury's determination of her moral culpability.

The court erred when it excluded testimony that would have included statements Sandi Nieves made to others about her pregnancy and the abortion. In addition to statements Sandi Nieves made to Driskell and Thompson, the court also prevented North and Mulder from discussing Sandi's attitude about abortion. 63 RT 9857:21-9858:1; 9872:20-21. This information was especially relevant in light of Lynn Jones's testimony about the strict anti-abortion stance of the Mormon Church. 61 RT 9586:20-9587:19.

The court also prevented Driskell, one of Sandi Nieves's closest friends, from testifying about her perceptions of Sandi's mood during the period leading up to the death of the children. 61 RT 9490:15-9491:5. Driskell testified that she had spoken to Nieves within several weeks preceding July 1, 1998. Nonetheless, the court prevented Driskell from shedding light – for the jury's consideration – on Sandi Nieves's state of mind during this critical period.

Even if the witnesses would have provided testimony that was technically hearsay under California law, exclusion violated Sandi Nieves's constitutional right to due process under the Fourteenth Amendment and the right to a reliable penalty phase verdict under the Eighth Amendment. Green v. Georgia (1979) 442 U.S. 95, 97. At the penalty phase a defendant's due process rights are violated when a trial court excludes proffered hearsay testimony that is (1) highly relevant to the penalty phase of a capital trial and (2) substantial reasons exist to assume its reliability. Id. at 97. 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.

In this case, the trial court excluded testimony that was highly relevant to Sandi Nieves's state of mind, and the circumstances surrounding the crime – a critical issue that would shed light on her moral culpability. See Lockett, 438 U.S. at 604-605. There was no reason to assume statements of the witnesses were unreliable. Defendant certainly could not have manipulated their testimony about circumstances, such as feelings about the abortion, that occurred before the crimes that resulted in her children's deaths.

The exclusion of testimony related to Sandi Nieves's state of mind denied her a fair trial on the issue of punishment. Green, 442 U.S. at 97; Lockett, 438 U.S. at 604-605.

C. The Trial Court Violated Sandi Nieves's Constitutional Right to Put on a Meaningful Defense

The court's error in excluding relevant character testimony also extends to the violation of Sandi Nieves's right to present a defense. Crane v. Kentucky (1986) 476 U.S. 683, 690 ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'") (quoting California v. Trombetta (1984) 467 U.S. 479, 485). This right is fully applicable to the penalty phase of a capital trial. Chambers v. Mississippi (1973) 410 U.S. 284, 302. It is also the elemental "that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" Skipper, at 4 n.1 (quoting Gardner v. Florida, (1977) 430 U.S. 349, 362).

Here, during the prosecution's penalty case-in-brief victim impact presentation, the trial court improperly allowed prosecution witnesses to introduce "bad character" evidence even though its admission was

prohibited unless defendant puts her "good character" at issue. See People v. Boyd (1985) 38 Cal.3d 762, 775-776; see People v. Chatman (2006) 38 Cal.4th 344, 404 (penalty phase rebuttal evidence only proper if it relates to a character trait defendant offers in his own behalf). Then, the court thwarted defense efforts at rehabilitation.[170] After Minerva Serna, Fernando Nieves, and David Folden all characterized Sandi Nieves as controlling, manipulative, and vindictive (60 RT 9311:14, 9338:5-8, 9344:3-7, 9371:21-23), the court prevented defense witnesses from giving examples of contrary behaviors. See e.g. 61 RT 9486:1-9487:28 (Driskell not allowed to testify Sandi Nieves acted out of concern for her children's safety). After prosecution witnesses painted Sandi Nieves as a bad mother, the court did not allow defense witnesses to answer questions such as that posed to Pearce, "If you can tell the jury your description of Sandi as a person, as a mother, what would you say?" 61 RT 9514:12-14.

The trial court effectively prevented Sandi Nieves from presenting a defense to the inflammatory charges leveled against her as part of the victim impact case. While the court admitted limited testimony regarding Sandi Nieves's parenting skills and statements that she was a loving mother, it did not allow witness after witness to tell the jury about the positive traits of Sandi Nieves's character. The court did not allow questions about what the

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[170] Despite the limited amount of mitigating character evidence admitted, the court had no trouble permitting extensive testimony from prosecution rebuttal witnesses such as Elaine Hoggan, who spoke with Sandi Nieves only one time, but testified that Sandi was "very controlling," 63 RT 9934:2, and Marilyn Boyd who said Sandi was "overbearing, hovering," 63 RT 9944:6-7. The court also permitted the prosecution to ask Patricia Rogers, "Can you give the jury some examples of how the defendant controlled her children on a daily basis that you observed?" 64 RT 10015:1-3.

witnesses would miss about Sandi. 61 RT 9491:25-9492:3; 9542:27-9544:5; 9557:19-20; 63 RT 9874:20-23. Nor could the court allow the witnesses to testify about what they valued most about her (61 RT 9557:7-14; 9579:3-4), or to list her redeeming qualities (62 9753:8-11). The court did not allow these witnesses to describe, from their observations, the benefit that Sandi Nieves brought to other people's lives. 61 RT 9579:17-18; 9585:4-8; 63 RT 9859:15-19; 9873:7-9. The court did not even allow testimony about whether a witness felt comfortable being around Sandi Nieves. 62 RT 9730:17-20 (Cindy Hall).

The court's skewed treatment of character evidence deprived Sandi Nieves of the opportunity to prevent a meaningful defense in violation of her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Crane, 476 U.S. at 690; Chambers, 410 U.S. at 302.

D. The Trial Court Improperly Excluded Relevant Evidence That Supported the Credibility of Critical Penalty Phase Defense Witness Chaplain Lelia Mrotzek

The trial court improperly prevented Chaplain Mrotzek from answering questions pertaining to her credibility, including a question about her personal views on the death penalty and whether she frequently testifies for inmates. Her answers would have provided useful information to the jury because it was charged with weighing the evidence and assessing the credibility of the witnesses.

Chaplain Mrotzek testified Sandi Nieves had completed three bible study correspondence courses. 63 RT 9887:12-18. Defense counsel asked the chaplain if some people just "go through the motions" when it comes to bible study. 63 RT 9888:11-12. Chaplain Mrotzek responded: "Well, over my years of experience, there is certainly jailhouse religion. So people obviously are going to try to impress me, or impress God in some way, and

just try to do something. So I am sure that there are people like that, obviously, in my opinion. I wouldn't be here if I thought that Sandi was one of those people." 63 RT 9888:13-19.

Chaplain Mrotzek testified that through getting to know Sandi Nieves in a personal way, she had seen a change in Sandi. 63 RT 9888:22-24. She felt that the defendant was seeking repentance and felt remorse over the tragedy. 63 RT 9888:24-26. Also, Sandi Nieves was trying to do better in her life, especially in regards to her son, whom she and Sandi prayed for together. 63 RT 9888:27-9889:7.

Few other inmates, Chaplain Mrotzek explained, took on the challenge of the bible correspondence course work as Sandi Nieves had. 63 RT 9889:8-21. The chaplain identified 12 certificates of completion of bible study course work awarded to the defendant. 63 RT 9890:2-11. She said that compared to other inmates, Sandi Nieves was one of the few interested in changing her life for the better in jail. 63 RT 9890:12-16.

The court prevented the chaplain from answering questions that could have indicated to the jury that – despite the number of inmates she had encountered in her work – the chaplain rarely testified in court, but had made an exception in Sandi Nieves's case. See e.g. 63 RT 9891:27-9892:1 ("Over the 23 years, 2500 [sic] plus cases of people that you've dealt with, how many times have you come to court like this and testified?"); 63 RT 9892:4-5 ("Is it a usual experience for you to come to court?"). The prosecution objected to these questions as irrelevant. The court sustained the objections. The court also sustained a relevance objection when defense counsel asked the chaplain, "I assume that you knew Sandi was convicted of four counts of murdering her own children before you came here, and you still came?" 63 RT 9892:12-14.

After brief cross-examination of Chaplain Mrotzek, defense counsel requested redirect. 63 RT 9894:1-5. He asked the chaplain: "Do you believe in the death penalty?" 63 RT 9894:9. The prosecution objected to the question as irrelevant, and the court sustained the objection. 63 RT 9894:11-12. Defense counsel asked to be heard, but the court refused. 63 RT 9894:13-14. The trial court also sustained an objection on the grounds the question went beyond the scope of cross-examination. 63 RT 9894:15-17.

Determining the effect and value of evidence, including the credibility of the witness, is a task assigned exclusively to the jury. Evid. Code § 312(b); People v. Boyer (2006) 38 Cal.4th 412, 480. As reflected in the language of CALJIC 2.20, which was given in this case,[171] "In determining the credibility of a witness, the jury may consider, among other things, . . . '[t]he existence or nonexistence of a bias, interest, or other motive,' and the witness's 'attitude toward the action in which he testifies or toward the giving of testimony.'" See People v. Harrison (2005) 35 Cal.4th 208, 229 (citing Evid. Code § 780(f), (j)); People v. Harris (2005) 37 Cal.4th 310, 337. Under the Evidence Code, "The credibility of a witness may be attacked or supported by any party, including the party calling him." Evid. Code § 785; Harrison, 35 Cal.4th at 229.

Defendant called Chaplain Mrotzek to provide critical mitigating testimony to the jury about Sandi Nieves' diligent bible study and sincere remorse about what happened to her children. Chaplain Mrotzek was not proffered as an expert on capital punishment. She was a character witness. However, the trial court prevented defense counsel from asking the chaplain about her views on the death penalty (63 RT 9894:9), which was relevant to

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[171] 64 RT 10075:7-23; 21 RCT 5410-5411.

show whether she lacked "bias, interest, or other motive." Evid. Code § 780(f). The information that she was in fact supportive of the death penalty as a form of punishment, just not in the case of Sandi Nieves, could have bolstered her credibility in the eyes of the jury.

The trial court also excluded defense counsel's other questions as to whether the chaplain testified often on behalf of inmates (63 RT 9891:27-9892:5), and whether she was aware of the defendant's multiple murder convictions (63 RT 9892:12-14), which were equally relevant to show lack of bias or motive, and also to her "attitude toward the action in which he testifies or toward the giving of testimony." Evid. Code § 780(j). Despite its own instruction that the jury consider this type of evidence when evaluating witness credibility, the trial court improperly prevented the chaplain from answering any questions that would have supplied the jury with information useful to evaluating the credibility of this critical penalty phase witness. As this Court recognized in People v. Mickle (1991) 54 Cal.3d 140, "[q]uestions seeking to elicit a partisan expert's philosophical views on capital punishment might disclose some bias bearing on expert's credibility as a witness at the penalty phase." Id. (citing Evid. Code, §§ 210, 780(f)).

The trial court also improperly sustained the prosecution's objection to defense counsel's question about the chaplain's views on the death penalty on the grounds that the question was outside the scope of cross examination. Although the trial court can use its discretion to determine the scope of reexamination, Evid. Code § 774, "[w]ide latitude should be allowed counsel in developing facts which show bias, prejudice, or interest on the part of a witness and which therefore affect the credibility of the witness." People v. Avelar (1961) 193 Cal.App.2d 631, 634.

As we have shown, during the penalty phase of a capital case, the federal constitution prohibits a trial court from imposing barriers to the jury's consideration of any relevant mitigating evidence. See Penry v. Lynaugh (1989) 492 U.S. 302, 318. The jury "must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." Brewer v. Quarterman (2007) 550 U.S. 286, 127 S.Ct. 1706, 1714. Information pertaining to the credibility of a witness, who testified to facts in mitigation of Sandi Nieves's punishment, was vital to the jury's ability properly to weigh the penalty phase evidence.

The court's exclusion of evidence pertaining to the credibility of the chaplain denied Sandi Nieves's constitutional right to put on any relevant mitigating evidence during the penalty phase of her capital case. It also denied her the constitutionally protected right to put on a meaningful defense. Crane v. Kentucky (1986) 476 U.S. 683, 690; Chambers v. Mississippi (1973) 410 U.S. 284, 302.

Crane is particularly on point here because the United States Supreme Court held that exclusion of credibility evidence pertaining to the defendant's confession at issue in that case denied him his constitutional right to present a complete defense. Id. at 691. Here the issue is the credibility of an important mitigation witness.[172]

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[172] People v. Kraft, (2000) 23 Cal.4th 978, 1072-1073 is different. The defendant in Kraft called a rabbi as a character witness who testified that the defendant should not be executed. The rabbi also testified that he did not believe anyone should be executed. Id. The defense was not allowed to bring in testimony that showed the rabbi's views were contrary to "mainstream Jewish thinking" which the defense argued would have

(continued...)

E. The Trial Court's Exclusion of Relevant Mitigating Evidence Was Prejudicial

"Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." Roper v. Simmons (2005) 543 U.S. 551, 568. "'There is no more important hearing in law or equity than the penalty phase of a capital trial.'" Correll v. Ryan (9th Cir. 2008) 539 F.3d 938, 946. The trial court obstructed defendant's ability to put on her case during the penalty phase of her capital trial by excluding mitigating character evidence, state of mind evidence relevant to the circumstances surrounding the commission of the crime, and evidence of witness credibility. The court's error violated Sandi Nieves's rights to due process and a fair trial on the issue of penalty. It created a risk that jury's death verdict was not a reliable determination of punishment. Lockett v. Ohio (1978) 438 U.S. 586, 604; Gardner v. Florida (1977) 430 U.S. 349, 359; Woodson v. North Carolina (1976) 428 U.S. 280, 304.

Sandi Nieves had no criminal record, no disciplinary problems, and there was no evidence of future dangerousness. Even the court admitted this much, when it ruled on the post trial Penal Code § 190.4 motion. 61 RT 9617 ("Well, there's been no evidence presented about her future

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[172](...continued)
supported the rabbi's credibility. Id. at 1073. This Court held that even if the trial court erred, there was no prejudice to the defendant because the rabbi later testified that his "Jewish faith confirmed him in the conviction that capital punishment is a violation of God's law." Id.

Here, the jury was never able to hear the evidence that gave credibility to the Chaplain's testimony. Testimony that Chaplain Mrotzek was pro-death penalty would have given far more credibility than was at stake in Kraft because she was a witness who did not take a blanket anti-death penalty stance but was nonetheless testifying in support of sparing the life of the defendant.

dangerousness, and I don't expect that there would be in prison."). In fact, unlike a career criminal, it is very unlikely she would ever kill again.

Excluding evidence favorable to the defendant gave the jury little to consider when weighting life against death. The exclusion of critical penalty phase mitigating evidence was prejudicial because the evidence, if allowed, could have reasonably led the jury to vote for a sentence less than death. People v. Gay (2008) 42 Cal.4th 1195, 1223; People v. Brown (1998) 46 Cal.3d 432, 448. It was not harmless beyond a reasonable doubt as required by Chapman v. California (1967) 386 U.S. 18, 24.

The court's exclusion of relevant mitigating evidence during the penalty phase renders the sentence in this case unconstitutional under the Eighth and Fourteenth Amendments. Caldwell v. Mississippi (1985) 472 U.S. 320, 323; Woodson, 428 U.S. at 305. Therefore, the penalty of death must be reversed.

F. The Prosecution Cross-Examination of Defense Penalty Phase Witness Shirley Driskell Constituted Prejudicial Misconduct in Violation of Defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

During cross-examination of defense penalty phase witness Shirley Driskell, the prosecution established that her knowledge of Sandi Nieves's relationship with her children during the time leading up to their death was based solely on telephone conversations with Sandi and the children. 61 RT 9498:18-26. The prosecution then asked Driskell whether she believed Sandi Nieves was telling her the truth. 61 RT 9499:1-2. Driskell answered, "Yes." 61 RT 9499:3. The prosecution followed with, "Would it change your opinion about that if I were to tell you that the defendant took the witness stand and committed perjury and lied?" 61 RT 9499:4-6. When the witness answered, "No," the prosecution asked again, "So the fact that she

committed perjury, took the oath, swore to tell the truth and lied would not change your opinion about the defendant telling the truth to you? Is that what you're saying?" 61 RT 9499:8-12. The court overruled defendant's objection to the form of the question. 61 RT 9499:14-28.

The prosecutor's questions to Driskell constituted misconduct for the same reasons set forth in Part XII, discussing the misconduct committed during the guilt phase cross-examination of defense expert Dr. Gordon Plotkin, and are incorporated here.[173] The prosecution may not misstate the facts or refer to inflammatory facts not in evidence. People v. Coffman (2004) 34 Cal.4th 1, 95. The prosecution's questions here constituted a highly prejudicial form of misconduct because of the special regard and prestige afforded to prosecutors by juries. See People v. Hill (1998) 17 Cal.4th 800, 827-828.

The prosecutor's questions to Driskell were highly prejudicial, especially in this phase of the trial when defendant's life was at stake, because they suggested to the jury that it was settled fact that Sandi Nieves committed the crime of perjury. Even after the conclusion of the guilt phase, there was no evidence that the jury had found the defendant committed perjury, nor had she been charged with the offense. Calling the defendant a perjurer has greater prejudicial effect than simply calling her a liar because perjury is a felony offense. See People v. Ellis (1966) 65 Cal.2d 529, 539. The implication that defendant violated her oath increased the prejudicial impact of the statement, which was further compounded

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[173] The prosecution repeated the misconduct again when it asked defense penalty phase witness Carl Hall, "Do you know that she committed perjury on the witness stand?" 62 RT 9670:8-9. The trial court, for the first time, sustained the defense objection that the question assumed facts not in evidence. 62 RT 9670:11-13.

when the prosecutor emphasized the oath's significance to the jury. See 61 RT 9499:8-12 (implying defendant "committed perjury, took the oath, swore to tell the truth and lied").

The prosecutor improperly posed questions in the form of a hypothetical to a lay witness. See People v. Boyette (2002) 29 Cal.4th 381, 449. Counsel may pose questions to expert witnesses that contain hypothetical facts so long as the questions incorporate "material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." Id. (quoting People v. Gardeley (1996) 14 Cal.4th 605, 618). Driskell, testifying as a friend of the defendant, had not been proffered by either side as an expert. Here, the prosecution used a hypothetical question as an improper device to denigrate the defendant in the eyes of they jury and unduly influence their determination of her moral culpability.

The trial court did not sustain the defense objections to these questions, nor did it admonish the jury. Instead, the court permitted the jury to take, as fact, the prosecution's statement that Sandi Nieves committed perjury into consideration when determining her sentence. The impact of the prosecution's misconduct here was amplified because it was a repeat of the earlier misconduct committed during the guilt phase, and the jury was instructed to consider guilt phase evidence as well during their deliberations on penalty. See 64 RT 10067:8-11 (penalty phase instruction informing jury to consider evidence from entire trial).

The prosecution's prejudicial misconduct here violated Sandi Nieves's rights to due process and a fair trial on the issue of penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The convictions must be reversed because the prosecution's misconduct "'infected the trial

with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright (1986) 477 U.S. 168, 181 (quoting Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643). The error meant that the jury could have condemned Sandi Nieves to death for lying, not for the crimes for which she was convicted. Her sentence cannot stand because it was unreliable under the Eighth and Fourteenth Amendments. Caldwell v. Mississippi (1985) 472 U.S. 320, 341; see also Zant v. Stephens (1983) 462 U.S. 862, 879, 885 (capital sentence must not be based on considerations that are constitutionally impermissible).

At the very least, the sentence must be reversed under California law because there was a reasonable likelihood the prosecutor's misconduct influenced the penalty verdict. See People v. Monterroso (2004) 34 Cal.4th 743, 785; People v. Valdez (2004) 32 Cal.4th 73, 132-133; People v. Brown (1988) 46 Cal. 3d 432, 448. Similarly, under the federal standard set forth in Chapman v. California (1967) 386 U.S. 18, 24, the state cannot show that the error was not harmless beyond a reasonable doubt.

XXI. THE TRIAL COURT PREJUDICIALLY INTERFERED WITH, AND UNDERMINED, THE TESTIMONY OF THE ONLY MENTAL HEALTH EXPERT TO TESTIFY FOR THE DEFENDANT AT THE PENALTY PHASE

The trial court undercut the testimony of Dr. Robert Suiter, defendant's only mental health expert witness at the penalty phase of the trial, by erroneously limiting his testimony. The court then delivered a serious blow to Dr. Suiter's testimony, and ultimately the defendant, when it asked a disparaging and offensive question insinuating that the doctor was wrong when he previously recommended that Sandi have custody of her children and that he had some responsibility for the deaths of Sandi Nieves's children.

Dr. Suiter, a clinical and forensic psychologist, had conducted a court ordered evaluation of Sandi Nieves, David Folden, and the children in 1997, a year before the fire, in connection with custody and visitation issues resulting from the defendant's divorce from David Folden. Dr. Suiter recommended to the Riverside County Superior Court that Sandi Nieves have primary physical custody of all five children.

In a show of bias against the defendant, Judge Wiatt stepped into the role of prosecutor and asked Dr. Suiter if knowing what he knew now – that the defendant had been convicted of four counts of murder in the first degree – would he not want to change his 1997 opinion. 62 RT 9786:23-9787:6. Judge Wiatt asked the witness, "[W]ouldn't you, if you could do it?" 62 RT 9787:5-6. Judge Wiatt's question undermined Dr. Suiter's otherwise credible expert assessment of the defendant and detracted from the mitigating value of his testimony. The court's actions in limiting Dr. Suiter's testimony and acting as prosecutor in cross-examining Dr. Suiter unconstitutionally restricted the defendant's ability to present mitigating evidence during the penalty phase of her capital trial. See Penry v. Lynaugh (1989) 492 U.S. 302, 318; Mills v. Maryland (1988) 486 U.S. 367, 374; Skipper v. South Carolina (1986) 476 U.S. 1, 4; Eddings v. Oklahoma (1982) 455 U.S. 104, 114-115. Judge Wiatt's disparaging bias against the defendant denied her her constitutional right to a fair trial. In re Murchison (1955) 349 U.S. 133, 136; Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 288.

The erroneous evidentiary rulings and disparaging remarks also undermined the defendant's right to present a defense and to a reliable capital sentencing determination, in violation of the Sixth, Eighth, and

Fourteenth Amendments. Crane v. Kentucky (1986) 476 U.S. 683, 690; Zant v. Stephens (1983) 462 U.S. 862, 879.

A. The Role of Dr. Suiter's 1997 Report in the Case Against Sandi Nieves

Dr. Suiter did not testify during the guilt phase of the trial. However, the prosecution questioned other expert witnesses during the guilt phase about statements Dr. Suiter made in his 1997 report to the Riverside County Superior Court in an effort to portray Sandi Nieves to the jury as a liar and a manipulator. At the penalty phase the defendant called Dr. Suiter to rebut the prosecution's characterization of his conclusions and to share with the jury mitigating evidence related to Sandi Nieves's character and psychological profile.

1. In 1997, Court-Appointed Expert Dr. Robert Suiter Recommended that Sandi Nieves Have Primary Custody of the Children

In approximately March 1997, Sandi Nieves filed for divorce from her second husband David Folden. 24 RT 3088; see Robert L. Suiter, Ph.D., Psy.D., November 12, 1997 Report of Psychological Assessment, Folden v. Folden, Case # 170465, Exh. ZZ-2, at 6. They had been married since June 2, 1989.[174] Id. at 5. When Sandi Nieves married Folden, she already had three children, David, Nikolet, and Rashel. Id. During their marriage, she and Folden had two more daughters, Kristl and Jaqlene. Id. In February 1994, Folden legally adopted the older three children. Id. at 6. After the divorce, in July 1997, Commissioner Becky Dugan of the Family Law Department of the Riverside Superior Court appointed Dr. Robert Suiter to conduct a comprehensive psychological assessment of Sandi

[174] Before marrying Sandi Nieves, David Folden had been married to Sandi Nieves's mother. See Exh. ZZ-2 at 5.

Nieves, Folden, and their five children and to make a recommendation as to custody and visitation rights. Id. at 1; 62 RT 9760:3-8, 9762:6-8.

As a part of his evaluation, Dr. Suiter conducted mental status examinations and administered psychological tests to both parents, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Millon Clinical Multiaxial Inventory-II (MCMI-II). Exh. ZZ-2 at 1-2. He also observed each parent in interaction with the children. Id. at 2. In addition, he reviewed a series of documents, including correspondence, statements from the parties and other individuals, and the children's school records. Id. at 2-4.

Dr. Suiter submitted a written report dated November 12, 1997 to Commissioner Dugan in which he provided detailed information from his interviews, results from his examinations, his expert psychological opinions regarding each parent, and a custody recommendation. Exh. ZZ-2.

In Dr. Suiter's expert opinion, there was no indication Sandi Nieves had ever harmed or allowed any harm to come to the children. Exh. ZZ-2 at 31. He concluded, "It is evident Ms. Folden [Sandi Nieves] has always been the primary caretaker of the children and has clearly done very well in that role." Id. He recommended that Sandi Nieves should have primary physical custody of the children. Id. at 35.

2. The Prosecution Used Dr. Suiter's Report to Portray Sandi Nieves as a Manipulator and a Liar

Dr. Suiter discussed the results of his mental evaluation of Sandi Nieves in his 1997 report. He stated, "A review of the validity scales from the MMPI-2 was reflective of an individual who made a very concerted effort to present herself in a remarkably favorable light to the degree the profile was most likely invalid." Exh. ZZ-2 at 20. Although Dr. Suiter did

not testify during the guilt phase of the trial, the prosecution questioned other expert witnesses about this statement in his report.

First, the prosecution cross-examined Dr. Lorie Humphrey about Dr. Suiter's report, attempting to get her to agree that Dr. Suiter had found Sandi Nieves to have malingered during her evaluation. 38 RT 5335:18-5341:17. The cross-examination of Dr. Humphrey contained the following exchange regarding Dr. Suiter's report:

> [Ms. Silverman]: So, in other words, what Dr. Suiter is telling us is that the defendant consciously distorted herself in order to present herself in a certain way?
>
> . . .
>
> [Dr. Humphrey]: No. Those would not be the words of Dr. Suiter in the report.
>
> By Ms. Silverman: Did he not indicate that she presented herself in such a light to such a degree of exaggeration that the profile would be invalid?
>
> A You're putting words into Dr. Suiter's report that weren't there. I'm concerned about that.

38 RT 5336:17-5337:9.

Second, prosecution witness Dr. Robert Brook testified that the results of the MMPI-2 administered by Dr. Suiter were inconsistent with brain damage and therefore inconsistent with Dr. Humphrey's conclusions. 38 RT 5415:18-5416:1. The defendant then cross examined Dr. Brook about Dr. Suiter's report in an effort to rebut the allegation of malingering. Defense counsel asked whether it was reasonable for Sandi Nieves to try to cast herself in the most favorable light during an evaluation for custody purposes. 38 RT 5441:24-5442:19. Defense counsel asked Dr. Brook whether the fact Sandi Nieves had been forthcoming with Dr. Suiter about issues such as her difficulty with men and the fact that she had taken antidepressants, indicated that she was being honest as opposed to

malingering. 38 RT 5440:17-5446:3. The defense directed Dr. Brook to where Dr. Suiter reported that Sandi Nieves openly discussed feeling like a failure. 38 RT 5448:2-13. Dr. Brook agreed that these statements were consistent with someone giving honest straightforward answers and not trying to paint an overly positive and false picture of herself. 38 RT 5448:14-24. However, the court sustained objections on the grounds of lack of foundation and hearsay when the defense attempted to ask, "[I]sn't it a fact that Mrs. Nieves admitted that she had been physically abused by a mother's boyfriend?" 38 RT 5448:25-5452:9.

Third, the prosecution asked its expert, Dr. Alex Caldwell, questions about the 1997 MMPI-2 that Dr. Suiter had administered to Sandi Nieves. 44 RT 6600:23-6609:24. The prosecution had submitted the 1997 MMPI-2 to Dr. Caldwell to re-score. 44 RT 6600:23-6601:11. He agreed with the prosecution's characterization of Dr. Suiter's conclusions and but said that Sandi Nieves had been malingering. 44 RT 6601:19-25. He then testified to his analysis of the re-scored 1997 MMPI-2 as it compared to the MMPI-2 conducted in 1999 that he had also scored. 44 RT 6602:16-6612:20. Dr. Caldwell concluded that taken together, the MMPI-2 profiles indicated "conscious distortion" and "impression management." 44 RT 6609:13-24.

Finally, during guilt phase closing arguments, defendant argued that the evidence showed Sandi Nieves was not malingering or engaging in impression management when she met with Dr. Suiter in 1997 and that she was open and honest with him. 55 RT 8509:2-16. However, the prosecution, on rebuttal pointed to Dr. Suiter's report to support its argument that during an evaluation, the defendant was "willing to consciously distort or fake in order to reach a desired result." 56 RT 8777:8-10. The prosecution stated that the jury had heard about Dr. Suiter's

report through various witnesses and that according to Dr. Suiter, it was true that Sandi Nieves was "a manipulator," "a faker" and "a liar." 57 RT 8845:14-8846:4.

B. The Trial Court Violated the Defendant's Constitutional Rights When It Excluded Relevant Mitigating Evidence During the Penalty Phase Testimony of Dr. Suiter

1. The Trial Court Limited Dr. Suiter's Testimony During Direct Examination

Dr. Suiter testified during the penalty phase of the trial. He was the only penalty phase mental health expert to testify for the defense.

Before Dr. Suiter testified, the prosecution requested that the court preclude him from testifying about the evaluations of David Folden and the children on the ground that such information would be privileged. 62 RT 9639:9-11. Defendant argued that there was no privilege barring Dr. Suiter's testimony. 62 RT 9639:12. However, the court commented, "Well, David Folden hasn't put his mental state or marital issues in issue in this case." 62 RT 9639:13-14. Because Folden had already testified for the prosecution during both the guilt and penalty phases, 24 RT 3024:16-3101:21; 25 RT 3172:26-3189:24; 60 RT 9368:2-9400:3, defense counsel argued that Folden had in fact put his feelings about the children and Sandi Nieves as a mother at issue. 62 RT 9639:16-19.

Folden had testified during the penalty phase as a victim impact witness. 60 RT 9368:2-9400:3. During his direct examination, he made derogatory statements that Sandi Nieves was manipulative and controlling. 60 RT 9371:20-23. Defense counsel objected and moved to strike the comments as improper testimony regarding victim impact. 60 RT 9392:11-25. The court overruled the objection. 60 RT 9392:27. During cross-examination, Folden testified that it was not true that he had

acknowledged to Dr. Suiter and others that Sandi Nieves was a good mother who instilled good values in the children. 60 RT 9395:6-15. He also denied that he had never complained about Sandi Nieves's relationship with her children. 60 RT 9395:16-20.

To impeach Folden's previous testimony, defendant sought to introduce statements Folden made to Dr. Suiter. However, the court ruled that Dr. Suiter would not be allowed to testify as to information concerning Folden because, the court said, it would be privileged. 62 RT 9642:5-11.

Defense counsel began the direct examination of Dr. Suiter with questions that focused on his extensive training and experience conducting court-appointed psychological assessments. 62 RT 9757:14-9760:4. Dr. Suiter testified that he had participated in over 1200 child custody evaluations. 62 RT 9759:27-28. He then explained that during his evaluation of Sandi Nieves, Folden, and the children in 1997, he interviewed each member of the family separately. 62 RT 9760:5-9762:2.

Defense counsel asked Dr. Suiter if Folden had ever said anything negative about Sandi Nieves's parenting practices. 62 RT 9763:20-22. The court sustained an objection on hearsay and relevance grounds, then asked Dr. Suiter whether that information was also privileged. 62 RT 9464:26-28. Dr. Suiter replied to the judge that because he was in court under subpoena, "I would have to defer to you regarding the issue of the confidentiality." 62 RT 9764:1-4. The court did not permit the question. 62 RT 9764:7-10.

Dr. Suiter testified that during his interview, he found Sandi Nieves to be open and frank about her difficult childhood, marital problems, and her struggle with depression, including her use of psychotropic medication. 62 RT 9764:11-22. When defense counsel asked Dr. Suiter whether it

would be against Sandi Nieves's interest to be forthcoming about her unstable childhood, this exchange followed:

> . . . Dr. Suiter: My experience has been in conducting this type of evaluation parents tend to be reasonably forthcoming about those issues, at least partly because they're aware that the other parent will likely provide that information in any event.
>
> The one exception to that is that I have found in general women, and I think understandably, tend to be somewhat reluctant to describe experiences of molestation as they were growing up.
>
> By Mr. Waco: And did Mrs. Nieves tell you about an experience about being sexually molested by one of her former boyfriends, or husbands, of her mother?
>
> Mr. Barshop: Objection. Irrelevant.
>
> Ms. Silverman: And hearsay and no foundation.
>
> The Court: Hearsay. Sustained on that ground.
>
> Q By Mr. Waco: Mrs. Nieves, was she forthcoming in telling you about previous sexual experiences where other women would not have told you?
>
> Ms. Silverman: Objection.
>
> Mr. Barshop: Objection. It calls for hearsay.
>
> The Court: Sustained.

62 RT 9765:6-28.

Dr. Suiter testified that Sandi Nieves's psychological test results showed that she was ill-at-ease with men and that she had considered herself a failure for years. 62 RT 9766:25-9767:8. However, when defense counsel asked if Sandi Nieves complained about suffering physical and mental abuse at the hands of her mother, the court sustained a hearsay objection. 62 RT 9767:18-23.

Defense counsel attempted to ask Dr. Suiter, "What about–without going into any details, did Mr. Folden have any significant complaints about Mrs. Folden?" 62 RT 9769:6-8. But the court sustained objections on hearsay and relevance grounds. 62 RT 9769:9-12.[175]

When defense counsel continued its direct examination of Dr. Suiter, the following exchange took place:

> [Mr. Waco]: And with regards to the children, did they each indicate that they felt their mother loved them?
>
> Mr. Barshop: Objection. Irrelevant. It's immaterial.
>
> The Court: It's hearsay. Sustained.
>
> Q By Mr. Waco: Did any of the children voice –
>
> The Court: It would also be privileged information.

62 RT 9771:18-27.

Dr. Suiter testified that there was no indication that Sandi Nieves was abusive to her children. 62 RT 9771:28-9772:6. He concluded that she had been a "loving and caring mother" to her children. 62 RT 9772:7-13. However, the court would not allow defense counsel to inquire whether these conclusions were based on statements made by the children or Folden, sustaining objections on grounds of hearsay and privilege. 62 RT 9772:14-20. Dr. Suiter also testified that he determined that the children would be best served by living with their mother. 62 RT 9773:4-7. Again, the court would not allow testimony that his conclusions were based on the many

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[175] Judge Wiatt interrupted direct examination of Dr. Suiter with his own questions regarding potential bias. Changing the topic, he inquired about who had paid Dr. Suiter for his report and how much had been paid. 62 RT 9769:22-9770:7. After Dr. Suiter answered that David Folden had paid the entire amount, the Judge ceased this line of questioning. 62 RT 9770:8-13.

letters submitted to him by outside sources as well as statements from Folden and the children. 62 RT 9773:8-23.

During cross-examination, the prosecution asked Dr. Suiter to confirm that he concluded that Sandi Nieves had been "faking" during the MMPI-2 that he had administered to her. 62 RT 9779:17-18. Dr. Suiter replied,

> I wouldn't -- I wouldn't characterize it so much as faking. . . . Certainly it's a naive attempt for the person to present themself favorably to deny that they have any even minor faults or weaknesses, which in my experience is stereotypic of individuals seen for this kind of evaluation.

62 RT 9779:19-26.

The prosecution then tried to ask Dr. Suiter to affirm that the prosecution expert, Dr. Caldwell, who had interpreted Sandi Nieves's MMPI-2 scores, was a "world wide expert." 62 RT 9781:5-6. Dr. Suiter said he did not know if he was a world wide expert. 62 RT 9781:7-8. To rehabilitate the prosecutor's view of Dr. Caldwell, Judge Wiatt gratuitously asked how Dr. Suiter "would describe him?" 62 RT 9781:9. Dr. Suiter replied, "Certainly that he is very well-known in the psychological community in terms of MMPI interpretations, computer-generated MMPI interpretations." 62 RT 9781:10-13.

Next the prosecutor tried to get Dr. Suiter to agree that Dr. Caldwell found Sandi Nieves was malingering. 62 RT 9781:23-25. When Dr. Suiter did not readily agree, Judge Wiatt again helped out the prosecution by asking, " Well, without that being the word, what you would use as a substitute for that word, as far as how he characterized the results you administered?" 62 RT 9782:1-4. Then the judge asked if there was anything in Caldwell's report inconsistent with Dr. Suiter's findings. 62 RT

9782:13-15. Dr. Suiter answered that some of Caldwell's conclusions were different. 62 RT 9782:16 ("I would say yes, your honor.").

The prosecution continued to cross-examine Dr. Suiter about his 1997 report to the Riverside Superior Court. 62 RT 9784:14-15. In the middle of the prosecution's examination, Judge Wiatt interrupted with the following questions:

> The Court: Well, you don't have a crystal ball, do you?
>
> The Witness: Certainly not, your honor.
>
> The Court: All right. Now, you're aware that defendant has been convicted of four counts of murder in the first degree, and this is a penalty phase of the trial. Do you understand that?
>
> The Witness [Dr. Suiter]: Yes, your honor.
>
> The Court: *Knowing that now, you would probably want to change your opinion made back in 1997, wouldn't you, if you could do it?*
>
> The Witness: No, your honor.
>
> The Court: *You wouldn't?*
>
> The Witness: No, your honor. My opinion was based upon the data that I had. And based upon the data I had, I stand by that.
>
> The Court: Why don't you get on to something else.

62 RT 9786:23-9787:13 (emphasis added).

Later in the prosecution's cross-examination, Judge Wiatt interrupted again to ask Dr. Suiter whether he had ever sent a corrected report to the Riverside County family court. 62 RT 9806:12-18. Suiter replied that he had not filed any correction and that he stood by his recommendation. 62 RT 9806:19-9807:25.

During re-direct examination, after the court denied another defense attempt to question Dr. Suiter about statements from the children, 62 RT

9816:2-3, defense counsel made an offer of proof outside the presence of the jury:

> Mr. Waco: I would like to ask questions of the doctor in evaluating and coming to his conclusions, did he make significant findings with regards to the statements of the children; including David and the other children, and what those statements were in connection with his opinion.
>
> I think those are valid statements that an expert can and should rely on under the law. They're not coming in for the truth of the matter asserted.
>
> The Court: He's already indicated he relied on what they said. You don't have to get into the specific content.
>
> Mr. Waco: The law allows it. Not for the truth. You can tell the jury that.
>
> The Court: Any other offer of proof?
>
> Mr. Waco: It helps to evaluate – to evaluate his opinion.
>
> The Court: Any other offer of proof?
>
> Mr. Waco: Yes, sir. I believe I would like to have him further express himself in why he believes that the Caldwell report does not reflect his opinion and doesn't find that of any value.
>
> The Court: Well, number one, he never saw the Caldwell report until just a few days ago, and he is not going to change his opinion about his evaluation back in 1997. So any further questions on that are not necessary, and the probative value is outweighed by the undue consumption of time.
>
> Mr. Waco: I believe he would impeach the Caldwell report, and that's the purpose of those questions. I can do so, can't I?
>
> The Court: No, you can't. Bring back the jury.

62 RT 9821:16-9822-22. The court excused Dr. Suiter and did not allow the defense further inquiry. 62 RT 9823:6.

2. The Trial Court's Evidentiary Rulings were Erroneous under California Law and Violated Sandi Nieves's Constitutional Rights to Due Process, to Introduce Mitigating Evidence, to Present a Defense, and to a Reliable Sentencing Determination

After the guilt phase of the trial, the jury may have been given the impression, created by the prosecution, that Dr. Suiter's 1997 report showed Sandi Nieves was a faker. However, Dr. Suiter's conclusions were actually favorable to Sandi. He had ultimately recommended that she have primary custody of the children. 62 RT 9773:4-7; Exh. ZZ-2 at 35. The defense called Dr. Suiter during the penalty phase to speak for himself, explain his conclusions, and explain why he came to those conclusions. 62 RT 9756:19-9822:22. As a part of the defense case for mitigation, defense counsel sought to share with the jury Dr. Suiter's findings that Sandi Nieves did not malinger during his evaluation of her, but was forthcoming and honest. 62 RT 9764:11-9765:28. Dr. Suiter could show the jury that his evaluation indicated that she was not a child abuser, but a mother who was trying to do her best by her children despite her troubled childhood, struggle with depression, and feelings of failure. His objective insight into Sandi Nieves's psychological profile represented important mitigating evidence that could have led a juror to conclude that the tragic events in 1998 were out of character and mitigated by other aspects of her life.

First, the trial court ruled that Dr. Suiter could not testify as to prior statements by David Folden or Sandi Nieves's children because the communications were privileged. 62 RT 9642:5-11; 9764:7-10; 9771:18-27; 9772:14-20. But these communications were made in the course of a court ordered evaluation conducted by a court appointed psychotherapist. 62 RT 9760:3-8; 9762:6-8. Under California Evidence Code § 1017 there

is no privilege for court-appointed psychotherapists.[176] See People v. Perry (1972) 7 Cal.3d 756, 782. "Psychotherapists" include California licensed psychologists. Evid. Code. § 1010(b). Dr. Suiter, license number PSY9946, Exh. ZZ-2 at 36, was therefore included under this definition of psychotherapist. A privilege would have existed only if the appointment was made at the request of the defense in a criminal proceeding. Evid. Code §1017(a); People v. Martinez (2001) 88 Cal.App.4th 465, 484; Perry at 782. Since Dr. Suiter's 1997 evaluation for family court was not conducted in connection with the criminal proceeding, defense counsel correctly argued that no privilege attached to his testimony. The trail court was wrong when it ignored this argument. 62 RT 9639:6-9642:11.

Second, the questions that drew objections from the prosecution did not call for hearsay. As an expert, Dr. Suiter should have been allowed to testify to all facts upon which he reasonably relied when forming his opinions, even if they included otherwise inadmissible hearsay. People v. Gardeley (1996) 14 Cal.4th 605, 618. "[B]ecause Evidence Code section

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[176] Confidential communications between patient and psychotherapist are privileged under Article 7 of the California Evidence Code. However,
the statute states:

> There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where 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 so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

Evid. Code § 1017(a).

802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." Id. But see People v. Pollock (2004) 32 Cal.4th 1153, 1172 (a trial court may exclude from an expert's testimony hearsay that is irrelevant, unreliable, or the potential for prejudice outweighs the probative value).

In precluding Dr. Suiter from testifying to the out-of-court statements he relied upon to form his expert opinions, the trial court's ruling violated the Due Process Clause of the Fourteenth Amendment as well as Sandi Nieves's Sixth, Eighth, and Fourteenth Amendment rights to adduce mitigating evidence, to present a defense, and to a reliable, individualized sentencing determination. In Green v. Georgia (1979) 442 U.S. 95, the Supreme Court held that a defendant's due process rights are violated when a trial court excludes proffered hearsay testimony that is (1) highly relevant to the penalty phase of a capital trial and (2) substantial reasons exist to assume its reliability. Id. at 97. See also Chambers v. Mississippi (1973) 410 U.S. 284, 302 (in a capital case "the hearsay rule may not be applied mechanistically to defeat the ends of justice").

The petitioner in Green sought to introduce hearsay testimony during the penalty trial from a witness who had a conversation with the co-defendant in which he confessed to killing the victim and confided that the petitioner was not present when the killing took place. Green, 442 U.S. at 96. Under Georgia law, statements against penal interest were not recognized as an exception to the hearsay rule. Id. at 96 n.1. The Court held that regardless of Georgia's hearsay rule, exclusion of the proffered highly relevant and reliable testimony constituted a violation of due process.

Id. at 97 (citing Lockett v. Ohio (1978) 438 U.S. 586, 604-605 (plurality opinion of Burger, C.J.).

Here, Sandi Nieves should have had less hurdles to overcome than the petitioner in Green because the evidence she proffered was not inadmissible hearsay under California law. Furthermore, like the statements in Green, the out-of-court statements made to Dr. Suiter constituted highly relevant mitigating evidence and substantial reasons existed to assume their reliability.

First, the relevance of the comments regarding the defendant's character from the children and her former husband was two-fold: the testimony would have served the mitigating purpose of helping the jury comprehend the basis of Dr. Suiter's conclusions about Sandi Nieves and it would have given those conclusions credibility. Furthermore, Dr. Suiter's testimony as to statements made to him by Folden that were favorable to Sandi Nieves would have served to impeach Folden's earlier disparaging testimony about her character. In addition, out-of-court admissions made by Sandi Nieves about abuse she suffered as a child showed that she was honest and forthcoming. The same was true of her statements to Dr. Suiter about her use of psychotropic medication to fight depression and her feelings of failure. Such testimony was highly relevant to rebut the prosecution's portrayal of her credibility as a liar and a faker.

Nieves's statements to Dr. Suiter concerning her childhood abuse, depression and use of psychotropic medication were particularly reliable because they were made when she would have had no self-serving reason for saying such things if they were not true. Indeed, the very fact that she had made such statements in 1997 was relevant to counter the prosecution contention that the case in mitigation had been manufactured.

The out-of-court statements from Sandi Nieves, Folden, and the children would have aided the jurors to evaluate Dr. Suiter's conclusions that Sandi Nieves was making a good effort to provide for her children's needs despite her troubled childhood, her struggles with depression, and feelings of failure. This information could have invoked sympathy for the defendant from the jury. See Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223 ("death cannot be constitutionally imposed without adequate consideration of factors which might evoke mercy").

In a capital case, the jury must be allowed the opportunity to give meaningful consideration to any potentially mitigating evidence. See Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674 (jury must be allowed to consider defendant's moral culpability before deciding death sentence); Brewer v. Quarterman (2007) 550 U.S. 286, 127 S.Ct. 1706, 1714 (jury must be allowed to respond to evidence in a "reasoned, moral manner").

Second, the out-of-court statements made to Dr. Suiter in 1997 were reliable because they were made in the course of an evaluation completely unrelated to the murder charges against the defendant. As further indicia of reliability, Dr. Suiter testified that the children were interviewed alone to prevent influence from their siblings or parents. 62 RT 9761:5-17. There were no signs that the children were coached in any way. 62 RT 9773:2-3. Dr. Suiter's perception of Sandi Nieves as open, frank, and forthcoming also lent reliability to the out-of-court statements because someone with his extensive experience in conducting similar evaluations would likely detect dishonesty.

The trial court could have easily instructed the jury that the comments made to Dr. Suiter in the course of his evaluation were not being

offered for the truth of the matters asserted, but to explain the basis for Dr. Suiter's conclusions. See People v. Catlin (2001) 26 Cal.4th 81, 137 (expert allowed to testify to hearsay evidence because the court stated twice that the evidence was "being received only for the purpose of indicating the basis for the witness's opinion").

The court's refusal to permit Suiter to explain why he disagreed with Caldwell's analysis of the 1997 is untenable. 62 RT 9821:16-9822-22. The defense should have been permitted to present Dr. Suiter's testimony as part of the defendant's right to respond to prosecution evidence and make her defense. The judge's rationale for barring such testimony in a death case makes no sense at all: (1) that Dr. Suiter only saw Caldwell's report a few days earlier has no bearing on whether Suiter had reasons to disagree with it; (2) that Suiter would not change his opinion about his 1997 evaluation does not make his views on Caldwell's analysis irrelevant or unimportant – indeed, that may make Suiter's views on Caldwell all the more important; and (3) given the prosecutor's reliance on Caldwell to undermine the defense case, and the fact that the defendant's life was on the line, the court's Evidence Code § 352 ruling is constitutionally wrong.

During the penalty phase of the trial, the Eighth and Fourteenth Amendments require that the defendant must be allowed to present any mitigating character evidence that may lead the jury to vote for a sentence less than death. Lockett v. Ohio (1978) 438 U.S. 586, 604 (plurality opinion of Burger, C.J.). See also Skipper v. South Carolina (1986) 476 U.S. 1, 4 ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'") (quoting Eddings v. Oklahoma (1982) 455 U.S. 104, 114). Further, the Sixth and Fourteenth Amendments guarantee a criminal defendant "a meaningful opportunity to

present a complete defense" (Crane v. Kentucky, supra, 476 U.S. at 690), a right fully applicable at the penalty phase of a capital trial. Chambers v. Mississippi, supra, 410 U.S. at 302.

The exclusion of Dr. Suiter's testimony denied the defendant the fair penalty phase trial required by the Fifth, Sixth, Eighth, and Fourteenth Amendments the trial court violated these constitutional provisions, and further precluded the reliable individualized capital sentencing determination to which Nieves was constitutionally entitled. Zant v. Stephens, 462 U.S. at 879.

C. The Trial Court's Inflammatory Questions to Dr. Suiter were Fundamentally Unfair and Prejudicial to the Defendant

The trial court inappropriately interjected in an attempt to rehabilitate Dr. Caldwell in front of the jury. Then, Judge Wiatt asked Dr. Suiter a completely inappropriate question designed to undermine both Dr. Suiter and Sandi Nieves's defense.

Throughout the cross-examination of Dr. Suiter, Judge Wiatt continually interjected and assisted the prosecution. His unwarranted questions, geared toward rehabilitating Dr. Caldwell, were inappropriate and gratuitous. But most egregious were his questions that suggested to the jury that because Sandi Nieves had been convicted of setting fire to the house and killing her children there was something retrospectively wrong with Dr. Suiter's clinical assessment in his report. Judge Wiatt's questions were inflammatory, prejudicial, and improper.

The trial court may not take on the role of prosecutor. People v. Cook (2006) 39 Cal.4th 566, 597; People v. Carlucci (1979) 23 Cal.3d 249, 258. California law allows the court to ask questions of a witness, "provided this is done in a an effort to elicit material facts or to clarify confusing or unclear testimony." Cook, 39 Cal.4th at 597. Here, Judge

Wiatt was doing neither. The judge's questions to Dr. Suiter did not ask for material facts, but rather suggested that the witness suffered a personal dilemma related to his conclusion that Sandi Nieves was a good mother. Coming from the judge, it sent a strong signal to the jury, improperly indicating the judge's view of Sandi Nieves. See People v. Rigney (1961) 55 Cal.2d 236, 241; McCartney v. Commission On Judicial Qualifications (1974) 12 Cal.3d 512, 533. Judge Wiatt took the questioning in a wholly different direction, indicating that he had his own agenda to discredit this witness.

When a trial court steps in and asks a witness questions of its own, the questions must be "'temperate, nonargumentative, and scrupulously fair.'" Cook, 39 Cal.4th at 597 (quoting People v. Hawkins (1995) 10 Cal.4th 920, 948); see also People v. Sturm (2006) 37 Cal.4th 1218, 1232. Judges must "maintain a strictly judicial attitude and...refrain from comment or other conduct which borders upon advocacy." People v. Robinson (1960) 179 Cal.App.2d 624, 632 (citing People v. Mahoney, (1927) 201 Cal. 618, 626-627 ("Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. . . .a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant.")). See also Cooper v. Superior Court (1961) 55 Cal. 2d 291, 301 ("The judge's function as presiding officer is preeminently to act impartially.").

Juries, particularly in criminal trials, give great weight to the words of the trial judge. Frantz v. Hazey (9th Cir. 2008) 533 F.3d 724, 742-743. See also Carter v. Kentucky (1981) 450 U.S. 288, 302 n.20 (noting that "'[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with

deference, and may prove controlling.'" (quoting Starr v. United States (1894) 153 U.S. 614, 626)); Bollenbach v. United States (1946) 326 U.S. 607, 612 (noting that jurors are "ever watchful of the words that fall" from the judge); United States v. Blanchard (7th Cir. 2008) 542 F.3d 1133, 1151 (noting that the "magnitude of [the judge's] influence is difficult to overstate").

This court has recognized the strong influence that a judge has over a jury. People v. Sturm 37 Cal. 4th 1218, 1237. "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.'" Id. (quoting People v. Zamora (1944) 66 Cal.App.2d 166, 210). In Sturm, this Court held that the judge's disparaging comments about defense witnesses in that case was prejudicial. 37 Cal.4th at 1233-1244. This Court commented that "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." Id. at 1233.

Likewise, the jury here was easily influenced by Judge Wiatt. The effect of his inflammatory question to Dr. Suiter was to detract the jury's attention from the substance of Dr. Suiter's testimony. Despite the judge's restrictions on his testimony, nonetheless Dr. Suiter provided some evidence regarding Sandi Nieves's character. Dr. Suiter was effectively defending the credibility of his conclusions when the court improperly shifted the direction of Dr. Suiter's testimony and interfered with the defense's ability to put on their mitigation case. See People v. Linwood (2003) 105 Cal.App.4th 59, 73 ("The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's

consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power.").

Judge Wiatt's question –"you would probably want to change your opinion made back in 1997, wouldn't you, if you could do it?" – was fundamentally unfair. Instead of asking this independent expert about his opinions or conclusions, the judge insinuated that the witness had failed in predicting that Sandi Nieves would kill her children someday and that his testimony was worthless in light of later events. When Dr. Suiter did not waiver and stood by his original conclusions, Judge Wiatt then expressed surprise and incredulously emphasized the point by asking, "You wouldn't?" 62 RT 9787:8. The jury could not have missed the judge's insinuation and disdain.

When determining the effect of a trial court's question or comment before the jury, courts have noted that "'[t]he propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.'" People v. Melton (1988) 44 Cal.3d 713, 735. Here, Judge Wiatt's questions were inflammatory because they implied to the jury that a court appointed psychologist played some inadvertent role in the ultimate tragedy underlying this case. Although tone and inclination may not be possible to ascertain from the record, the leading nature and content of the court's question are enough to determine that Judge Wiatt's questions inevitably had a detrimental effect on the jury.

Although the defense did not object when the court interjected during Dr. Suiter's testimony, this Court is not precluded from reviewing the judge's behavior. Failure to object does not forfeit misconduct claims "'when an objection and an admonition could not cure the prejudice caused by' [the court's] misconduct and when objecting would be futile." Sturm,

37 Cal.4th at 1237 (quoting People v. Terry (1970) 2 Cal.3d 362, 398); People v. Perkins (2003) 109 Cal.App.4th 1562, 1567. The facts in Sturm are similar to the present case in that the disparaging comment in that case was only one of several occasions in which the judge made derogatory comments to defense witnesses and defense counsel. Sturm, 37 Cal.4th at 1237. In Sturm, this Court held that "[g]iven the evident hostility between the trial judge and defense counsel during the penalty phase, it would also be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal." Id. See also People v. Hill (1998) 17 Cal.4th 800, 821 (defense counsel excused from legal obligation to continually object to on-going prosecutorial misconduct because such frequent objections would have been "futile and counterproductive to his client"). Further, even if Judge Wiatt been open to considering an objection to his own improper remarks, it is hard to fathom how he could effectively have undone the harm created when he conveyed to the jury his dismissive view of Dr. Suiter's testimony.

Dr. Suiter was the only defense penalty phase mental health witness. His expert testimony was intended to counter Dr. Caldwell's testimony and also to provide the jury with mitigating information about the defendant from an independent source. Judge Wiatt's inflammatory interjection during cross-examination detracted from the value of Dr. Suiter's otherwise credible expert assessment of the defendant and her relationship with her children.

Judge Wiatt's improper questions exposed his bias. As a result Sandi Nieves did not receive a fair trial on the issue of punishment.

D. Conclusion

The trial court's actions during the testimony of Dr. Suiter interfered with the defendant's ability to present mitigating evidence and have it meaningfully considered without disparagement by the trial judge. See Penry v. Lynaugh (1989) 492 U.S. 302, 318; Mills v. Maryland (1988) 486 U.S. 367, 374; Skipper v. South Carolina (1986) 476 U.S. 1, 4; Eddings v. Oklahoma (1982) 455 U.S. 104, 114-115. The exclusion of the highly relevant and reliable hearsay statements made to Dr. Suiter during his evaluation of the defendant, her children and former husband, and the court's refusal to permit Dr. Caldwell to explain why he disagreed with the prosecution expert's analysis of the defendant's psychological testing, resulted in structural error in violation of due process guaranteed by the Fourteenth Amendment. Green v. Georgia (1979) 442 U.S. 95; Chambers v. Mississippi (1973) 410 U.S. 284, 302, and a reliable penalty verdict. The unfair interruption from the trial court disparaged the witness and was highly prejudicial to the defendant. The trial judge was not unbiased during the penalty phase of her trial and the process was therefore fundamentally unfair. In re Murchison (1955) 349 U.S. 133, 136; Haupt v. Dillard, (9th Cir. 1994) 17 F.3d 285, 288. Even under the harmless error standard of Chapman v. California (1967) 386 U.S. 18, 24 and the reasonable possibility test of People v. Brown (1988) 46 Cal.3d 432, the errors affected the verdict.

Reversal of the penalty is required.

XXII. THE PROSECUTION COMMITTED MISCONDUCT DURING THE PENALTY PHASE CLOSING ARGUMENT REQUIRING REVERSAL OF THE DEATH SENTENCE

During the penalty phase closing argument, the prosecutor interjected her personal views that she would be "satisfied" if Sandi Nieves

was sentenced to death. Her statement constituted misconduct in violation of the defendant's constitutional rights to due process, a fair trial on the issue of penalty, and a reliable sentence under the Eighth and Fourteenth Amendments.

A. The Prosecution Interjected Her Personal Views in the Penalty Phase Closing Argument and Vouched for a Sentence of Death

During the prosecution's rebuttal argument at the close of the penalty phase Ms. Silverman made the following statement:

> And doesn't the horror of those crimes deserve the ultimate punishment?
>
> I will be satisfied and justice will be done if you show her again the same mercy that she showed to her own children.

64 RT 10122:18-22 (emphasis added). Defendant objected, but the court overruled the objection. 64 RT 10122:23-25. Outside the presence of the jury, defense counsel raised the objection again, arguing that the prosecutor's personal opinion was irrelevant. He asked that the court admonish the jury. 64 RT 10130:9-23. The court again overruled the objection and refused the request for an admonishment. 64 RT 10130:28-10131:4.

The prosecutor committed misconduct when she injected her personal views into the closing argument. See People v. Bain (1971) 5 Cal.3d 839, 848; In re Brian J. (2007) 150 Cal.App.4th 97, 122-123. A prosecutor may not go beyond the evidence in her argument to the jury. People v. Hill (1998) 17 Cal.4th 800, 827-828. Nor can a prosecutor vouch personally or on behalf of the government for the appropriateness of the verdict that she urges. People v. Ayala (2000) 24 Cal.4th 243, 288; People v. Benson (1990) 52 Cal.3d 754, 794; People v. Kirkes (1952) 39 Cal.2d 719, 723-724. "[I]t is misconduct for prosecutors to vouch for the strength

of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." People v. Huggins (2006) 38 Cal.4th 175, 206-207; see also People v. Roldan (2005) 35 Cal.4th 646, 744 (improper argument to suggest jury should give weight to decision of district attorney to seek death penalty).

The United States Supreme Court has warned that allowing the prosecutor to express his or her personal opinion concerning the guilt of the accused poses two dangers: "Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young (1985) 470 U.S. 1, 18-19; Sechrest v. Ignacio (9th Cir. Dec. 5, 2008) ___ F.3d ___, 2008 WL 5101988 *14. The Ninth Circuit has also held that a prosecutor may not express his or her opinion of the defendant's guilt. See e.g. United States v. Hermanek (9th Cir. 2002) 289 F.3d 1076; United States v. Molina (9th Cir. 1991) 934 F.2d 1440, 1444; United States v. McKoy (9th Cir. 1985) 771 F.2d 1207, 1210-11.

By informing the jury that she would be personally satisfied to see the defendant get death, the prosecutor inappropriately used her influence over the jury: "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight. It must, therefore, be reasonably objective. . . . The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they

say to the jury is necessarily weighted with that prestige." People v. Taylor (1961) 197 Cal.App.2d 372, 382-383. Here, the prosecution used her personal prestige and the prestige of her office unfairly to convince the jury to choose death.

The prosecutor's statement was especially opprobrious because a prosecutor should be satisfied not because a defendant gets sentenced to death, but because justice is served after a fair trial See Berger v. United States (1935) 295 U.S. 78, 88 (prosecutor's interest "is not that it shall win a case, but that justice shall be done).

Defense counsel's objection to the prosecution's injection of her own personal views into her closing argument was timely, yet the trial court allowed the misconduct to stand.

B. The Prosecution's Misconduct Violated Sandi Nieves's Constitutional Rights Rendering Her Death Sentence Unreliable

The prosecutor committed misconduct during the closing argument of the penalty phase when the defendant had the most at stake. See Correll v. Ryan (9th Cir. 2008) 539 F.3d 938, 946 ("'There is no more important hearing in law or equity than the penalty phase of a capital trial.'"); Murtishaw v. Woodford (9th Cir. 2001) 255 F.3d 926, 969 ("[D]eath is a different kind of punishment from any other which may be imposed in this country, and as such, this sentence requires greater scrutiny than others."). By interjecting her personal views into the penalty closing argument, the prosecutor vouched for the death sentence, essentially communicating that a sentence less than death would be a personal affront to her. It is likely that a juror would want to please or "satisfy" the prosecutor, a representative of the state. A juror could feel it was his or her civic duty to do so.

The trial court did nothing here to ameliorate the damage done by the prosecution's misconduct. In People v. Loker (2008) 44 Cal.4th 691, 740, this Court found that the prosecutor had improperly injected his own experience and beliefs into his closing argument, but held that there was no prejudice to the defendant in that case because the court immediately admonished the jury regarding the prosecutor's personal views, and the prosecutor himself explained it was the jury's opinion, not his, that mattered. The trial court in this case did nothing similar to cure the error. Despite the defense request, the trial court refused to admonish the jurors, and they deliberated on Sandi Nieves's capital sentence with the prosecutor's improper statement fresh in their minds.[177]

The death sentence must be reversed because Sandi Nieves's trial on the issue of penalty was so unfair that she was deprived of due process. See Darden v. Wainwright, (1986) 477 U.S. 168, 181-82. Whether the prosecutor would be personally satisfied by the death sentence was utterly irrelevant information to the penalty determination, and by stating so she achieved nothing other than unfair influence over the jury. A capital sentence must not be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens (1983) 462 U.S. 862, 879, 885. Here, the prosecution's vouching

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[177] Compare the manner in which defense counsel was treated for stating personal beliefs. 44 RT 6683:1-5 (trial court told jury it admonished defense counsel for expressing his personal beliefs); 56 RT 8639:20-21 (court scolded defense counsel that he did not want to hear anymore, "I've been challenged," "I believe," or "I apologize" during guilt-phase closing argument); 60 RT 9270:20-9271:17 (court sustained objections to personal comments by defense counsel during penalty phase opening and chastised him in front of the jury:"If you can't tell us what you expect the evidence will show, sit down and don't say anything more.").

for a sentence of death rendered the sentence imposed on Sandi Nieves unreliable under the Eighth and Fourteenth Amendments. See Caldwell v. Mississippi (1985) 472 U.S. 320, 341. Therefore, the sentence must be reversed.

At minimum, the reasonable likelihood that the prosecutor's misconduct influenced the penalty verdict means that the sentence must be reversed. People v. Monterroso (2004) 34 Cal.4th 743, 785; People v. Valdez (2004) 32 Cal.4th 73, 132-133. Whether there was a reasonable possibility that the error affected the verdict, the standard as set forth in People v. Brown (1988) 46 Cal. 3d 432, 448, is the same "'in substance and effect'" as the federal constitutional error standard set forth in Chapman v. California (1967) 386 U.S. 18, 24, requiring the state to show that the error was harmless beyond a reasonable doubt. People v. Abilez (2007) 41 Cal.4th 472, 525-526. Here, it is impossible to show that the prosecution's misconduct did not have an effect on the jury's decision to condemn Sandi Nieves to die. Therefore, the death sentence must be reversed.

XXIII. THE TRIAL COURT'S COMMENTS AND INTERRUPTION OF THE DEFENSE CLOSING ARGUMENT PRECLUDED THE JURY FROM GIVING FULL AND MEANINGFUL CONSIDERATION TO ALL MITIGATING EVIDENCE WARRANTING A SENTENCE LESS THAN DEATH

After denigrating the defendant and her counsel throughout the trial, the court ended the penalty phase with a gratuitous restriction on the defense closing argument and a needless special instruction that distorted the normative process for considering the aggravating and mitigating circumstances and choosing the appropriate penalty. The court told the jury to disregard the defense mitigation argument and instructed the jury that it could only consider one mitigating factor, accusing defense counsel before the jury of giving legally misleading argument because he referred to Penal Code § 190.3(k) "factors," instead of "circumstances." 64 RT 10163:24-10164:12; 65 RT 10195:22-10196:280.

Inasmuch as the court and prosecutors had also interchangeably used the terms "factors" and "circumstances" found in section 190.3, and CALJIC 8.88 intermixed "factors" and "circumstances" in describing the weighing process,[178] there was no reason for the court to interrupt the defense closing argument and specially instruct the jury on a purported

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[178] The pattern instruction given the jury stated: "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of various weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." 21 RCT 5416 (emphasis added); 65 RT 10202:3-10203:6. See CALJIC 8.88.

semantic difference – except to undermine the defense and prevent the jury from giving full and meaningful consideration to relevant mitigating evidence. Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 127 S.Ct. 1654, 1666.

During his penalty phase closing argument defense counsel argued mitigation. Addressing the defendant's background, counsel argued:

> But she was programmed from youth. Programmed by a mother to eventually fail. Lingering doubt. [The jury was instructed that it could consider "lingering doubt." 64 RT 10203:14-20; 21 RCT 5416].
>
> Someday we may have a test, scientific test, to tell us what was the state of Sandi's mind and what is now, and what it was on that day in question. I wish I had one here for you today. But there will always be a lingering doubt on what her state of mind really was. And that is another fact of mitigation in the k category of other factors.
>
> Sympathy and pity for a broken and tortured soul. I have no problem with that. She [sic] not a despot. She is not a person seeking out like a predator on the street. No. That is another factor in mitigation.
>
> The stress and depression she was in from the guilt of the abortion is also another factor under k in mitigation.
>
> Her personal background and the manner and method which she was brought up by her mother, or lack of being brought up, is also a factor to consider in mitigation.

64 RT 10163:15-10164:8.

The prosecution immediately objected that this was a "misstatement of the law." Id. at 10164:9-10. The court then told the jury: "The statement is a misstatement. The jury will disregard it." Id. at 10164:11-12.

Defense counsel quickly finished without further addressing the particular factors in mitigation, other than mercy. Id. at 10164:18-20. When counsel tried to argue that Sandi Nieves was poor and had an

Hispanic surname, the court again instructed the jury to disregard the points. Id. at 10166:15-23. Counsel was therefore left to plead mercy for several minutes before the court told him to "finish up." Id. at 10168:26.[179]

After counsel finished moments later (65 RT 10171:21-22), and the jury left the courtroom, the prosecution raised the factor (k) issue again.

> Ms. Silverman: Your honor, I believe that the defense has misstated the law as to how the jury is to weigh the factors. Counsel indicated stress, lingering doubt, sympathy, pity, defendant's background, compassion, mercy -- all of those are separate factors, and that's what he said, that they were factors that the jury could consider under factor k.
>
> The jury needs to be instructed that they can only count each factor one time. You can't count Factor k six times just because the defense attorney told them so.

Id. at 10172:6-17.

The next morning, after reviewing the transcript, the court expressed the view that "I think the people's position is Mr. Waco is trying to convert mitigating evidence that falls under factor k, each single item of evidence into a separate factor." Id. at 10178:25-28. Defense counsel correctly replied that "according to the law, you can put in 100 different factors in factor k." Id. at 10179:11-12. The court responded:

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[179] The Court: How much more do you have, Mr. Waco? It's 4:00 o'clock now.

Mr. Waco: I wasn't looking at the time, your honor.

The Court: Well, I am. So my question is: how much more time do you have?

Mr. Waco: Maybe 15, 20 minutes at the most.

The Court: All right. Let's finish up.

64 RT 10168:17-26.

> The Court: You're identifying them as factors. They're not factors. They're pieces of evidence that might establish that factor k has more weight than some of the other factors.
>
> Mr. Waco: Well, it's my understanding --
>
> The Court: The only other factor that can be used by the people in this case is basically a.
>
> Ms. Silverman: Right.
>
> The Court: That's it.
>
> . . .
>
> The Court: But, Mr. Waco, I don't think you see the argument. The argument is you're trying to establish that there are hundreds of factors in mitigation when there's evidence to suggest, perhaps from your viewpoint, that factor k is a mitigating factor because all of the evidence is there to support it.
>
> But you're setting up, you know, all the little bits and pieces of evidence as separate mitigating factors.
>
> Mr. Waco: And they are.
>
> The Court: Which is not the law.

Id. at 10179:13-10180:8.

Counsel told the court that "they are separate things that they can consider. The jury can consider whatever weight they want."[180] The court then abruptly said, "I've heard enough from you on this issue." Id. at 10181:15-19. Later the court told defense counsel:

> If you choose to articulate something in an inappropriate way using inappropriate language and the objection is sustained, and you can't figure it out at the time, then you're stuck with that, as is your client.

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[180] Counsel cited the court to Skipper v. South Carolina, (1986) 476 U.S. 1; Eddings v. Oklahoma, (1982) 455 U.S. 104, and People v. Easley, (1983) 34 Cal.3d 858. 65 RT 10180:26-10181:3. See also 21 RCT 5375-5379.

Id. at 10188:13-17.

The prosecution requested a supplemental instruction advising the jurors "that they can't count factor k six times." Id. at 10190:9-11. But defense counsel correctly pointed out that the prosecution was "trying to diminish counsel's argument with words when, in fact, they [the jurors] have a right to consider various aspects and weigh them accordingly." Id. at 10190:16-18.

The court ruled that it would give the supplemental instruction and explained its decision.

> The people's argument is not what you say. And I don't know why you can't get this in your head, Mr. Waco. There's a difference when you use the word "factor" as opposed to "evidence" or "circumstance."
>
> "Factor" is a word of art in the instruction and under the law. There is but one factor k, and the way your argument was is you have multiple factor k's.
>
> That's what you said. It's wrong. And I am going to clear it up for the jury. And if that's the language you chose to use, that is your error.

Id. at 10190:20-10191:2. The supplemental instruction read to the jury chastised the defense for misleading argument and then diminished its case for mitigation.

> Yesterday during argument there was a reference made by Mr. Waco with regard to factor k; that there were numerous factor k's, words to that effect. The instruction that I read to you at the beginning yesterday, which is 8.84.1 (sic), that would be on page 1 and 2 of the instructions you're going to receive, it talks about, in part -- I'm not going to reread the entire instruction, but I'll read you the first paragraph.
>
> (Reading:)
>
> > In determining which penalty is to be imposed on the defendant, you should consider all of the

> evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable.
>
> The law talks about a factor is one of the factors listed in the law, and the factors are a part of that instruction. They are factors a through k.
>
> Any suggestion that there are more than one factor k factors here is wrong.
>
> There's a lot of evidence perhaps that could be considered as a circumstance under factor k, but that doesn't transform each piece of evidence into a separate factor.
>
> So, for example, when Mr. Waco argued her personal background and the manner and method which she was brought up by her mother, or lack of being brought up, is also a factor to consider in mitigation -- it is certainly evidence you can consider in mitigation, but it's not a separate factor k factor.
>
> I mean, it's a consideration that is important, that needs to be remembered by you. You can consider that as evidence under that factor, or for any other purpose you want to consider it for, but it's a separate factor.

Id. at 10195:22-10197:5.

The court turned what would have been a straightforward, standard weighing instruction, CALJIC 8.85, into a directive that told the jury the defense was "wrong," and then diminished the weight the jury could give to mitigation in selecting the appropriate punishment. The court turned the normative process required by People v. Brown (1985) 40 Cal.3d 512 and its progeny, and Lockett v. Ohio (1978) 438 U.S. 586, and its progeny, into a counting exercise and forced the jury to view the mitigating evidence through the artificial filter that undercut its impact.

The instruction was unnecessary and gratuitous. It served no legitimate purpose, and misled the jury as to the nature of the weighing process to be used in reaching a sentencing verdict. This was structural error of the most basic kind.

It is true, as the trial judge and prosecutor may have been thinking, that there are eleven statutory sentencing "factors" and factor (k) is one of them. But it is equally true that evidence admitted under factor (k) can support multiple mitigating circumstances to be weighed on the side of life — just as evidence relevant under factor (a) (the circumstances of the crime) can support multiple aggravating factors to be weighed on the side of death.[181] From the perspective of jurors making a capital sentencing determination it makes no difference whether the aggravating and mitigating matters to be weighed on either side of the sentencing scale are dubbed "factors" or "circumstances." Nor does it matter how many such factors are on the other side of the scale. What matters is the relative persuasive weight of these factors (or circumstances). People v. Brown, 40 Cal.3d at 541. But the trial judge clearly suggested otherwise, telling the jury that defense counsel had committed legal error by arguing that there were multiple factor (k) factors in mitigation. A jury would have assumed

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[181]See CALJIC 8.88, par. 3 ("An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself."). 65 RT 10202.

Evidence relevant under factor (a) ("circumstances of the crime") can also, of course, support the finding of mitigators. See, e.g., People v. Hernandez (2003) 30 Cal.4th 835, 864 (evidence indicating that a murder was committed to satisfy a drug habit can be argued as "a mitigating circumstance warranting a sentence of life imprisonment without possibility of parole rather than death").

that this was important. Otherwise why would the court have taken the time to provide a special instruction to correct counsel's argument?

Having been specially instructed that there was only one factor (k) factor, and that defense counsel was wrong in suggesting otherwise, the jury would have thought counsel had tried to improperly manipulate them and to enhance the relative strength of the case for life, that the number of mitigating factors mattered, and that the various mitigating circumstances coming within the scope of statutory factor (k) (e.g., childhood abuse, possible seizure disorder, cognitive deficits, depression, financial and personal stressors, etc.) were not entitled to as much mitigating weight as they might have been had they been separate statutory factors expressly identified in the court's instruction.

The jurors would have been discouraged from giving full consideration to the mitigating factors, and would almost certainly have been led to accord them less weight than they would have but for the court's improper instruction.

Penal Code section 190.3 groups together in a list, labeled (a) though (k), categories of factors, some of which can be aggravating, and some of which can be both aggravating and mitigating, depending on the jury's appraisal of the evidence (factors (a), (b), (c), and (I)). Penal Code § 190.3 calls the list "factors," even though the important considerations are aggravating and mitigating "circumstances." The factor labels (a) through (k) do not serve a purpose other than limiting aggravating evidence and conveniently categorizing types of relevant evidence.[182] Factor (a), the

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[182] While the list of enumerated factors restricts the circumstances that can aggravate, the circumstances that can mitigate are open-ended. But there is a critical difference between mitigating evidence and aggravating

(continued...)

"circumstances of the crime" factor, for example, "instructs the jury to consider a relevant subject matter" (Tuilaepa v. California (1994) 512 U.S. 967, 976), and, as previously noted, invites identification and weighing of multiple aggravating and/or mitigating circumstances. See Brown v. Sanders (2006) 546 U.S. 212, 222 (The "circumstances of the crime" factor [a] can hardly be called "discrete." It has the effect of rendering all the specified factors nonexclusive[.]") Factor (k) clearly functions in the same way. Its opening words ("[a]ny other circumstance which extenuates . . .") clearly envision the possibility of multiple mitigating circumstances to be weighed as factors in favor of sentence of life.

Here there was thus nothing wrong with counsel's identifying and urging consideration of multiple factor (k) mitigators. That he used the word "factors" as opposed to "circumstances" to describe them had no bearing whatsoever on the task before the jury and was in no way improper.

What makes the judge's special instruction all the more gratuitous and pernicious is how commonly the terms "factors" and "circumstances" are used as interchangeable equivalents in describing the considerations relevant to a capital sentencing determination. This is reflected not only in this Court's opinions, the standard jury instructions, the statute, but even the trial proceedings in this very case. See e.g. People v. Hinton (2006) 37 Cal.4th 839, 912 (Court approves "instructions [that] informed the jury that sympathy and compassion were legitimate factors for its consideration and that either alone could justify a sentence of life imprisonment without the

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[182](...continued)
evidence. "The jury may consider in aggravation only evidence relevant to the factors listed in Penal Code section 190.3. By contrast, the jury may consider any mitigating evidence." People v. Carpenter (1997) 15 Cal.4th 312, 416. See People v. Boyd (1985) 38 Cal.3d 762, 772.

possibility of parole"); People v. Ledesma (2006) 39 Cal.4th 641, 736 (referring to mitigating factors, mitigating circumstances, and mitigating evidence); People v. Pollock (2004) 32 Cal.4th 1153, 1189-1192 (Court approves special instruction regarding "permissible mitigating considerations": "[t]here may be factors in mitigation which have nothing to do with a crime, but these factors you must consider in determining which punishment you consider."); People v. Mayfield (1997) 14 Cal.4th 668, 807 (trial court instructed that "[m]itigating factors are unlimited. Anything mitigating should be considered. [¶] Mitigating factors provided in the instructions are merely examples of some of the factors you may take into account in deciding not to impose a death sentence."); People v. Johnson (1992) 3 Cal.4th 1183, 1252 ("defendant may urge his possible innocence to the jury as a factor in mitigation."); People v. Melton (1988) 44 Cal.3d 713, 760 (trial court instructed that "[m]itigating factors are unlimited"); People v. Raley (1992) 2 Cal.4th 870, 919 (trial court instructed that "[m]itigating factors are unlimited"); CALJIC 8.88 ("You are free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider."); CALCRIM § 673 (2008) (defining "a mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime."). See also, CALCRIM § 766 (equating "factors" and "circumstances.").

Penal Code section 190.3 itself uses the terms interchangeably, introducing what we have referred to as factors (a) through (k) with the statement that "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant," and then in the next paragraph declaring that "the trier of fact shall consider, take into account

and be guided by the aggravating and mitigating circumstances referred to in this section." Section 190.3, pars. 6 and 7 (emphasis added).

In this case, the jury questionnaire that was written by the court and given to every juror before the trial even began said:

> The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating factors (bad things) and mitigating factors (good things) that relate to the facts of the crime and the background and character of the defendant, including consideration of mercy. The weighing of these factors is not quantitative, but qualitative, in which the jury, to fix the penalty of death, must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without parole.

See e.g. 12 RCT 2667 (page 10 of final juror questionnaire). Plainly, the trial court here was using "factors" to mean the ultimate factors or circumstances to be weighed in determining sentence, rather than the enumerated Penal Code § 190.3 factors, because, as noted above, a number of those statutory sentencing factors can encompass both aggravating ("bad things") and mitigating ("good things") considerations.

Prior to penalty phase closing arguments the trial court equated factors and circumstances as it described one of the charts that the prosecution intended to use in closing argument, Exhibit 113: "Under the 'aggravation' it has just a list of what I guess the People believe are aggravating factors, and on the other side what the People believe could be mitigating factors." 64 RT 10089:3-12. The chart listed as mitigating: no prior violent crimes, no convictions, sympathy, defendant was depressed, unhappy childhood. See Exh. 113. The court obviously considered these to be the mitigating "factors' it referred to as it described the chart.

The prosecution even argued in its closing, without correction by the court, that the jurors "balance the factors that may or may not exist in mitigation[.]" 64 RT 10113:24-25.

But the most telling equation of "factors" and "circumstances" occurred in the trial court's own ruling on the mandatory Penal Code § 190.4 motion to modify the sentence after the jury's penalty verdict. At this point, the court had already heard argument regarding "factors" versus "circumstances," had chastised defense counsel, and had specially instructed the jury. Nonetheless the court said in its § 190.4 ruling, when it addressed factor (k): "(K), Other factors extenuating the gravity of the crime. ¶ While the defense has cited a number of areas, the principal ones were: one, defendant was herself physically abused as a child by her mother. ¶ Two, this physical abuse might have caused her to suffer from seizures. ¶ Three, she felt a sense of hopelessness, stress, and depression over her marriages, boyfriend, lack of a job and weight, and ¶ Four, a number of friends and loved ones believe she is a caring and loving mother and not capable of committing the crimes in this case." 65 RT 10373:3-16 (emphasis added).[183] Referring to factor (k) as "other factors extenuating the gravity of the crime" is what was argued by defense counsel to the jury, but the court had responded by chastising counsel, specially instructing the jury to disregard counsel's argument, and later specially instructing there could only be one factor (k) factor.

The Eighth Amendment does not permit any distinction between statutory and nonstatutory mitigating considerations. Hitchcock v. Dugger,

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[183] This Court's opinion in People v. Ramos, (1997) 15 Cal.4th 1133, 1184 referred to a trial judge's ruling on a Penal Code § 190.4 motion, using "circumstances" and "factors" in mitigation interchangeably.

(1987) 481 U.S. 393, 398-399. Abdul-Kabir v. Quarterman, (2007) 127 S.Ct. at 1666, explained that the "the mere availability of relevant mitigating evidence" is not sufficient to meet Eighth Amendment requirements. The jury must be "permitted to 'consider fully' such mitigating evidence and that such consideration 'would be meaningless' unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence." 127 S.Ct. at 1672, citing Penry v. Lynaugh, (1989) 492 U.S. 302, 321.

The trial court's instruction to disregard multiple factor (k) factors and its special instruction, correcting defense counsel's purported error, undoubtedly put a prosecution friendly imprimatur on the prosecution side of the scale. It also abruptly cut off the defense mitigation argument at the point where counsel focused on the character and background of the defendant. The court, astonishingly, sustained the prosecution objection to defense counsel's argument that Sandi Nieves's depression and stress, and her miserable upbringing, were factors to consider in mitigation. 64 RT 10164:11-14 ("the statement is a misstatement. The jury will disregard it.")

Because the instruction to disregard the factors in mitigation was given near the end of the defense closing argument, the instruction cast doubt on everything that came before it. The court's admonition to disregard mitigating factors mentioned by counsel expressly "precluded [the] jury from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. at 604 (plurality opinion) (italics in original).

The court's instructions were not fair and balanced; they were designed to weight the scale of justice in favor of the prosecution and prevent effective and meaningful consideration of the multiple mitigating considerations that could have swayed the jury to give a sentence less than death. Further, the court's instructions invited the jury to count "factors," despite its contradictory instructions to weigh the aggravating and mitigating circumstances.

The trial court apparently believed that the distinction between "factors" and "circumstances" mattered and could make a difference– at least when defense counsel equated them. But the only way mixing them could have mattered at all was if defense counsel's argument had adversely affected the weighing process.

The court's order to disregard the defense mitigation factors, and its special instruction restricting factor (k) factors were clearly meant to diminish the jury's identification of circumstances to be weighed on the side of life or to diminish the weight accorded to them. It is very likely that the jury paid particularly close attention to the supplemental instructions, expressly directed to correct a purported legal error by defense counsel, because the court made it clear that the jury was to "disregard" counsel's argument about multiple factor (k) factors. And the court made this one of the first matters it addressed when court reconvened the morning after the objection was sustained. 65 RT 10178:23-10195:22. It was specially instructing the jury on the point rather than simply sustaining the prosecutor's objection and moving on.

The Attorney General may argue that the court's penalty phase instructions were otherwise correct and sufficient. But, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction

will not suffice to absolve the infirmity." People v. Gay, (2008) 42 Cal.4th 1195, 1225, quoting, Francis v. Franklin (1985) 471 U.S. 307, 322. Moreover, giving the evidence "sufficient mitigating effect" is not enough. "Full effect" is essential. Brewer v. Quarterman (2007) 550 U.S. 286, 127 S.Ct. 1706, 1713. Sandi Nieves had the right to "full consideration" of her mitigating evidence, not a truncated and condensed consideration that would fit inside an artificial construct labeled as a single factor (k). See Abdul-Kabir, 127 U.S. at 1667 n. 13; Smith v. Texas (2004) 543 U.S. 37. The remaining instructions were insufficient to cure the problem because the court's instructions told the jury "you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." 21 RCT 5416 (emphasis added); 65 RT 10202:22-25.

The prejudice that resulted from chastising counsel for purportedly misleading the jury, telling the jury to disregard multiple factors, and giving the jury a supplemental instruction directed to purported legal misstatements by defense counsel, must also be viewed in the context of the court's treatment of the defendant and defense counsel throughout the trial. The defendant had already been severely denigrated by the court. Among other things, she had been humiliated by the judge when pictures of her dead children were placed before her. She had been singled out for violating the court's order that she submit to mental examinations by prosecution experts and personally blamed for discovery violations. Her defense witnesses had been belittled by the court. Her counsel had been denigrated, chastised, and cited repeatedly. Her only hope was that the jury would give full and meaningful consideration to the mitigating evidence that the trial court would permit in evidence. But here, the court dealt the

final blow to the defense – it told the jury to disregard multiple mitigating factors and it specially informed the jury that defense counsel had tried to mislead them with his characterization of mitigating factors.

The mitigating evidence could have tipped the balance toward life if the court had properly allowed the jury to give it full and meaningful consideration and not forced the jurors to cram it all together into one statutory factor to be weighed against aggravating factors. As the court recognized in its ruling on the mandatory Penal Code § 190.4 motion, defendant did introduce several mitigating considerations. First, she had been physically abused as a child by her mother. Second, the abuse may have caused seizures. Third, she felt a sense of hopelessness, stress, and depression over her marriages, boyfriend, lack of a job and weight. Fourth, a number of friends and loved ones believed she was a caring and loving mother. Fifth, the court inferred from the evidence that defendant "will more than likely be a model prisoner." 65 RT 10373:3-19. Additionally, the jury could have considered defendant's financial devastation when David Folden served her with legal papers shortly before the fire seeking to terminate his child support obligations.

There was also some evidence to show that Sandi Nieves was a controlling mother who was overly protective of her children. There was evidence of guilt from the abortion. Once she decided to commit suicide herself, she could not leave her children to anyone else because no one could care for them as she had. Finally, and most importantly, there was absolutely no evidence to show that Sandi Nieves had otherwise ever engaged in any criminal acts or that she was any sort of killer who was likely to present a continuing threat to society.

Under these circumstances, the court's instructions to disregard the mitigation argument and that there was only one factor (k) violated the Sixth Amendment right to present a defense (Crane v. Kentucky (1986) 476 U.S. 683, 690), Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment. "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Abdul-Kabir, 127 S.Ct. at 1674-1675, quoting Lockett v. Ohio, 438 U.S. at 605. See Brewer, 127 S.Ct. at 1713-1714.

A finding of prejudice is not required to compel reversal in this instance. The trial court's improper instruction and sustaining of objections to counsel's arguing factors in mitigation, which distorted the weighing process and precluded the jury from give full and meaningful consideration to mitigating factors, constituted structural error requiring automatic reversal. The nearest analogy is guilt phase instructional error undermining the proof beyond a reasonable doubt burden of proof. In such a case, where there has not been a jury finding of guilt beyond a reasonable doubt, harmless error analysis cannot be conducted. Sullivan v. Louisiana (1993) 508 U.S. 275. Here there has been no jury finding of the appropriateness of a death sentence by a jury free to give full and separate weight to the factors in mitigation proffered by the defense and supported by the evidence. The

result is a "'structural defect[]in the constitution of the trial mechanism, which defies] analysis by 'harmless-error' standards.'" Id. at 281, quoting Arizona v. Fulminante (1991) 499 U.S. 279, 309.

But even if a showing of prejudice were required, there is no basis for finding "beyond a reasonable doubt that the error[s] . . . did not contribute to the verdict obtained." Chapman v. California (1967) 386 U.S. 18, 24.

The penalty must therefore be reversed.

XXIV. THE TRIAL COURT PREJUDICIALLY INVITED THE JURY TO CONSIDER AS A BASIS FOR THE DEATH SENTENCE DISCOVERY VIOLATIONS ATTRIBUTED TO THE DEFENDANT

A. Relevant Facts

1. Penalty Phase Witness Disclosure

On July 26, 2000, the first day of guilt phase deliberations, the defense filed requests for prepaid transportation for five out-of-town penalty phase witnesses: Tricia Mulder, Shirley Driskell, Cindy Hall, Lenora Frey and Albert Lucia. See 20 RCT 5090-5094. The prosecution was served with the requests, which included the witnesses' names, addresses and telephone numbers. 57 RT 8955:20-23. The prosecutors stated they had no information about three of the witnesses Mulder, Driskell and Hall, and asked for any witness statements. 57 RT 8955:20-27.

Defense counsel explained that he had not finalized his list of witnesses for the penalty phase: "It was only within the past week that I started to look at it more carefully as to who I might call as a defense witness [at the penalty phase]." 57 RT 8958:12-14.

The trial court ordered defense counsel to disclose names and any witness statements for witnesses the defense intended to call during the penalty phase. 57 RT 8958:23-8960:4. The court also threatened to impose sanctions for defense counsel's failure to provide penalty phase discovery prior to the commencement of the guilt phase. 57 RT 8959:20-23.

Defense counsel complied with the court's disclosure order. On the record, he provided the names of the penalty phase witnesses. 57 RT 8993:4-8994:9. The next day, counsel turned over witness statements of Mulder, Driskell, Hall, Tammy Pearce, Shannon North and Lenora Frey, as well as certificates of Nieves's completion of courses with a prison

ministry. 58 RT 9040:11-9041:17. Despite counsel's prompt compliance, the court set a hearing on "possible discovery violations" by the defense. 58 RT 9042:27-9043:6. Defense counsel objected on the ground that he was not obligated to disclose witnesses' names and statements until he reached a decision about whether he intended to call them, which he had only done recently. 58 RT 9044:4-6.

On July 28, 2000, defense counsel notified the prosecution that based on a telephone conversation he had the previous evening with witness Cindy Hall's husband, Carl Hall, the defense was adding Mr. Hall to its witness list for the penalty phase. 58 RT 9052:20-9053:5. Defense counsel immediately turned over to the prosecutors notes from two interviews with Carl Hall. 58 RT 9053:26-9054:8; see also Exhs. SS-7 and SS-8. Carl Hall's address and telephone number appeared in the transportation request form for Cindy Hall that was previously served on the prosecution. See 20 RCT 5093 and 5179.

That same day, the prosecution announced its plans to present evidence that had not been disclosed to the defense. 58 RT 9103:28-9104:1 ("We are adding to our witness list as well."); 9105:8-9107:8. See also 59 RT 9163:25-28, 9169:12-23 (prosecutor states they are still finalizing their penalty phase witness list and deciding what to introduce in evidence the day before penalty phase opening arguments). After the prosecution listed new penalty phase witnesses "in addition to the ones that have already been mentioned," 58 RT 9133:25-9135:6,[184] The court granted defense counsel's request for contact information for the prosecution's new witnesses. 58 RT

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[184] Eight of the prosecution's additional witnesses did not appear on any previous witness list. See 10 RCT 2109-11 (Penal Code § 190.3 Notice with Potential Witness List) and 11 RCT 2588-2591 (People's Potential Witness List (Amended)).

9135:123-21. But it completely ignored the defense's request for sanctions:[185]

> Mr. Waco: They [the prosecutors] have the same obligations under 1054. What's their excuse for not doing it? How about sanctions on the people? How about telling the jury that they didn't give us the information until two days before the trial? . . . How about something? This is all a one-way street here.
>
> The Court [addressing the prosecutors]: It's 4:25. Are both of you going downtown Monday?

58 RT 9142:9-19.[186]

Defense counsel argued that there was no discovery violation because he had turned over the witness names and statements as soon as he decided which witnesses he would be calling: "There was never any intent to hide anything from the prosecution. There was only a question as to who would actually be needed." 58 RT 9070:10-12.

Counsel explained that two circumstances had changed in recent days that affected his strategy. 58 RT 9066:23-9072:14, 9098:1-9. First, the defense had expected to be able to introduce evidence of defendant's PET scan during the penalty phase. With that evidence, counsel planned to limit the penalty phase defense case to witnesses who had already been

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[185]In contrast, when the prosecution requested the court to impose sanctions for defense counsel's failure to provide names, addresses and/or statements of some penalty phase witnesses 30 days before the commencement of the guilt phase, the court held a lengthy hearing on the matter. 58 RT 9059:18-9060:3. The prosecutor asked for monetary sanctions only, and stated "We are not asking for a continuance. We are not asking for sanctions in regard to preclusion or exclusion." 58 RT 9059:23-25.

[186] When defense counsel protested the trial court's failure to sanction the prosecution for delaying disclosure of penalty phase witnesses and evidence (59 RT 9169:27-9170:2), the court responded, "enough of this tit for tat." 59 RT 9169:27-9170:19.

disclosed: "I intended to call the two closest relatives [the Lucias], and the two closest friends [Hill and Wood], and a couple of the experts ... and that would have been all." 58 RT 9098:1-6; see also 58 RT 9068:17-27, 9071:8-10. But after the court ruled that the PET scan could not be admitted at the penalty phase (57 RT 8987:1-4), counsel had to "scurry around to unearth these other people that were on the back burner as potential witnesses. . . ." 58 RT 9071:21-27.

Second, some of the witnesses who testified at the guilt phase were not available to testify at the penalty phase "because of other personal responsibilities; whether it be jobs, vacations, or people being sick." 58 RT 9068:11-16. As a result, defense counsel had to fall back on other people the defense team had interviewed before trial but who "were not on [defense counsel's] original list of witnesses" he expected to call at any penalty phase. 58 RT 9070:20-22.

The court flatly rejected defense counsel's representations: "I don't accept your statement that you expected the PET scan to be ruled admissible at the penalty phase." 58 RT 9078:22-24. The court then made it clear that it believed defense counsel had deliberately delayed disclosing penalty phase witness information. 58 RT 9084:2-9085:3.

The court imposed a series of sanctions for defense counsel's delay in disclosing information about the penalty phase witnesses to the prosecution. First, over strenuous objections by the defense (58 RT 9107:24-27, 9108:4-6, 9128:27-9129:7), the court forced counsel to read the names, addresses and telephone numbers of each of the defendant's new penalty phase witnesses into the record, even though the prosecution

already had this information for several of the witnesses.[187] 58 RT 9107:22-9108:8 (Lynn Jones), 9113:17 (Lelia Mrotzek), 9115:14-18, 26-27 and 9128:20-9129:8 (Tricia Mulder, Cindy Hall, Shirley Driskell, Tammy Pearce, Shannon North). Second, the court set a contempt hearing for August 18, 2000. 58 RT 9122:26-9125:22.

Third, the court decided sua sponte to "instruct the jury with CALJIC Instruction 2.28 as to what has happened and let the jury consider the untimely disclosure [by the defense] for whatever purpose they want to consider it for." 58 RT 9125:23-28 (emphasis added). Later, the court omitted CALJIC No. 2.28 from its proposed list of instructions. 63 RT 9910:20-21. The prosecution reminded the court of the earlier hearing and requested the instruction on the ground that it was the "only other sanction that we're asking for, other than the monetary sanctions, which aren't going to be dealt with until the trial is over." 63 RT 9911:7-10.[188] Defense counsel objected "on the ground that I didn't delay anything." 63 RT 9911:14-15.

2. The Jury Instruction

At the close of the penalty phase evidence, the trial court delivered a version of CALJIC 2.28 over a further objection by the defense (63 RT 9960:23-9965:13):

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to

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[187] The prosecutor claimed he had no addresses or telephone numbers for defense witnesses Mulder, Hall, Driskell, Pearce, North. 58 RT 9114:19-20. But the defense had provided that information for Mulder, Hall and Driskell in the transportation requests served on the prosecution earlier that week. See 20 RCT 5090-5094; 57 RT 8955:20-23.

[188] The prosecution later filed a modified version of CALJIC No. 2.28. 63 RT 9922:16-18.

present at trial so as to promote the ascertainment of the truth, save court time, and avoid any surprise which may arise during the course of the trial. Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or to produce evidence which may exist to rebut the non-complying party's evidence.

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.

In this case, the defendant concealed and failed to timely disclose the following evidence:

1. The name and address of Lelia Mrotzek and Lynn Jones.

2. The name and address and statements of witnesses Shirley Driskell, Cindy Hall, Carl Hall, Shannon North, Tammy Pearce and Tricia Mulder.

Although the defendant's concealment and failure to timely disclose evidence was without lawful justification, the court has, under the law, permitted the production of this evidence during the trial.

The weight and significance of any concealment and delayed disclosure are matters for your consideration.

However, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

RT 64:10078-79.[189]

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[189] The court did grant defense counsel's request to omit reference to witnesses' telephone numbers because that information is not required under Penal Code § 1054.3(a). 63 RT 9965:1-4.

B. The Sanction Was Not Warranted

In Part XIII, supra, we addressed and explained the defects and constitutional flaws in the former version of CALJIC 2.28 and the discovery violation instructions given in the guilt phase. We will not repeat the argument here. However, we do incorporate the argument in this portion of our brief because it applies to the penalty phase CALJIC 2.28 instruction that was additionally given the jury to govern its deliberation was to whether the defendant should live or die.

We do submit that the trial court's findings against defense counsel – that his representations were not worthy of belief and that he wilfully violated discovery obligations – are undermined by the court's pervasive overwhelming bias against the defendant and her counsel as shown in Part III of this Brief and throughout the trial.

Furthermore, there was no prejudice to the prosecution or its case. The alleged violations announced by the court to the jury were relatively trivial in the context of the case. The prosecutors did not even ask for the instruction until the judge brought it up on his own. 58 RT 9125:23-28.

The defense witnesses whose statements were disclosed shortly before the penalty phase began were thoroughly cross-examined about the contents of those statements. See 61 RT 9496:12-9497:25 (questioning Shirley Driskell about her statements to Tina Katz); 63 RT 9862:22-9863:2 (questioning Shannon North about her statements to Tina Katz); 63 RT 9875:3-23 & 9877:11-9878:7 (questioning Tricia Mulder about her own and others' statements to Tina Katz). Leila Mrozek was a jail chaplain; she was easy enough to find. Lynn Jones was a bishop of the Mormon church in Perris. 61 RT 9580:18-26. His home phone number was read into the record. 58 RT 9132:13-14. Counsel did not have an address. Id. He

would not have been difficult to find either. The prosecution did not appear to have any difficulty cross examining Mrotzek or Jones at the penalty phase. Mrotzek's cross-examination is one page in the record. 63 RT 9893. Jones's cross examination covers four pages of transcript. 61 RT 9588-9522. In fact, little cross-examination was even necessary because the court truncated the testimony of the character witnesses by sustaining repeated prosecution objections to many of the mitigating things they had to offer. See Part XX supra.

Additionally, Sandi Nieves was in jail or in court the entire time of the trial. The instruction was wrong, in part, because she had not "concealed and failed to disclose" anything to the prosecution. To the extent there were any discovery violations related to the penalty phase – a point we do not concede (See People v. Superior Court (Sturm) (1992) 9 Cal.App.4th 172, 181)[190] – there is nothing in this record to show Sandi Nieves had anything to do with them. As we have shown in Part XIII supra, and incorporate here by reference, imputing discovery violations to the defendant in this context is both unwarranted and unconstitutional.

C. Giving CALJIC No. 2.28 at the Penalty Phase Prejudicially Violated Sandi Nieves's Statutory and Constitutional Rights

Beside holding the defendant responsible for counsel's failure to produce timely discovery, the court's instruction did not give the jurors sufficient information about the alleged violations to perform the function called for by the instruction, that is, to consider "the weight and significance

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[190]"Nothing in the statutory scheme, however, prohibits the defense from responding to a request for disclosure with a good faith explanation that no decision has yet been made as to which witnesses it will call at the penalty phase." (See Pen. Code §§ 1054.3, 1054.7; Sturm, 9 Cal.App.4th at 181.

of any concealment and delayed disclosures[.]" 64 RT 10079:13-15. This introduced any element of randomness and a bias in favor of the death penalty. See Stringer v. Black (1992) 503 U.S. 222, 235.

Authorizing the jury to weigh counsel's discovery violations against Sandi Nieves, and as a reason for thinking that the prosecution's case would have been even stronger, but for those discovery violations – and providing no evidence as to the circumstances of the violations and their impact on the prosecution's preparation – also undermined the defendant's right to a reliable, individualized sentencing determination. 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). See Maynard v. Cartwright (1988) 486 U.S. 356, 362 ("channeling and limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement"); Furman v. Georgia (1972) 408 U.S. 238, 310 (Stewart, J., concurring) (in the absence of procedural controls and limits on juror discretion, the death penalty will be "wantonly and . . . freakishly imposed.").

"[T]he determination of punishment in a capital case turns on the defendant's personal moral culpability." People v. Rowland (1992) 4 Cal.4th 238, 414; see People v. Sanchez (1995) 12 Cal.4th 1, 81. A discovery violation does not address moral culpability and is not a statutory aggravating factor that can be weighed in favor of death. See People v. Boyd (1985) 38 Cal.3d 762, 772-775. It certainly is not a circumstance of the crime within the meaning of Pen. Code § 190.3(a). The CALJIC 2.28 instruction failed to protect Nieves against the consideration of constitutionally irrelevant or arbitrary matters, in violation of her rights

under the Fifth, Sixth, Eighth and Fourteenth Amendments. See Dawson v. Delaware, (1992) 503 U.S. 159; Sochor v. Florida, (1992) 504 U.S. 527; Penry v. Lynaugh, (1989) 492 U.S. 302; Clemons v. Mississippi, (1990) 494 U.S. 738; McCleskey v. Kemp, (1987) 481 U.S. 279.

Further, insofar as the jury understood the instruction to authorize aggravation upon the basis of the defendant's purported discovery violations, the instruction violated her due process liberty interest in the state's adherence to its own capital sentencing scheme. Allowing the jury to find that death was appropriate on the basis of nonstatutory aggravation , that is, the discovery violations, deprived her of an important state-law procedural safeguard and resulting liberty interest -- the right not to be sentenced to death except upon the basis of statutory aggravating factors. People v. Boyd , 38 Cal.3d at 772-775. Thus, the instructions, as likely understood by the sentencing jury, violated defendant's Fourteenth Amendment right to due process. See Hicks v. Oklahoma (1980) 447 U.S. 343; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512, 522 (noting that "state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause"; and agreeing that Washington state statute created a liberty interest in having state supreme court make certain findings before affirming death sentence).

Allowing the jury to consider a discovery violation as an aggravating factor also violates the Eighth Amendment requirement that a jury's discretion be sufficiently channeled to allow for a principled distinction those death eligible defendants who are given life in prison and those condemned to die. See Zant v. Stephens, (1983) 462 U.S. 862, 876-77). Failing to turn over addresses and a few witness statements on time is not a rational or principled basis for sending a defendant to death. "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 503 U.S. at 235.

D. The Error Requires Reversal of the Death Sentence

Because the effect of the discovery violation instruction, CALJIC 2.28, on the penalty phase verdict is incalculable, it is a structural error that goes to the heart of the penalty phase verdict. Like an error in the burden of proof, the effect of the instruction here cannot be determined. Reversal is therefore required. Sullivan v. Louisiana (1993) 508 U.S. 275, 281-282.

But even if the instruction did not create a structural error, it was not harmless beyond a reasonable doubt. First, the instruction provided an additional circumstance for the jury to consider in weighing life against death in fixing the appropriate punishment. Second, the findings embedded in the instruction – that Sandi Nieves had failed to abide by mandatory legal requirements – compounded the evidence of "bad character" that the court allowed into evidence during the victim impact presentation by the

prosecution. See Part XVII. And, it compounded the evidence admitted during the guilt phase that Sandi Nieves was a manipulator. Third, the defendant did present some sympathetic evidence throughout the trial, including a dysfunctional family history, mental impairments, lack of any criminal record, and extreme stress and a physiological inability to cope with it. Under these circumstances, the instruction was not harmless beyond a reasonable doubt because no other statutory factor in this case "enable[d] the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders (2006) 546 U.S. 212, 220; Chapman v. California (1967) 386 U.S. 18, 24.

Even under the applicable state-law harmless error test, reversal of the death verdict is mandated because there is a reasonable possibility the jury would have rendered a different verdict. People v. Brown (1988) 46 Cal.3d 432; People v. Ashmus (1991) 54 Cal.3d 932, 983-84.

XXV. THE DEATH PENALTY IS DISPROPORTIONATE TO SANDI NIEVES'S INDIVIDUAL CULPABILITY

The death penalty is disproportionate to Sandi Nieves's culpability. Its imposition in this case would violate the state and federal constitutions. Although this Court has previously held that proportionality analysis is not required (see, e.g., People v. Carpenter (1999) 21 Cal.4th 1016, 1064), the Court does have the inherent discretion to conduct an intracase proportionality analysis in the interests of justice. See People v. Lang (1989) 49 Cal.3d 991, 1043. In addition, appellant respectfully urges reconsideration of Carpenter and this Court's other decisions holding proportionality analysis is not required in capital cases, in view of the following analysis. Defendant also raises this argument here in order to preserve it for federal review.

"The cruel and unusual punishments clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and moral guilt." People v. Padilla (1995) 11 Cal.4th 891, 962. As the Court said in Enmund v. Florida (1982) 458 U.S. 782, 798 (citing Lockett v. Ohio (1978) 438 U.S. 586, 605; Woodson v. North Carolina (1976) 428 U.S. 280, 304), "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' . . . which means that we must focus on 'relevant facets of the character and record of the individual offender.'"

First, the trial court's Penal Code § 190.4 ruling on the automatic motion to modify the sentence "is subject to independent review: it resolves a mixed question that implicates constitutional rights and hence must be deemed predominantly legal." People v. Marshall (1990) 50 Cal.3d 907, 938. The motion should have been granted in this case and the death

sentence should have been modified to life without possibility of parole following the Penal Code § 190.4(e) hearing.

Second, this Court has an obligation to give the sentence meaningful appellate review. Defendant has a right, under the Eighth Amendment and the Due Process Clause, to meaningful appellate review to assure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger (1991) 498 U. S. 308, 321. "It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Id. at 321, quoting Zant v. Stephens (1983) 462 U.S. 862, 879.

In analyzing a sentence to determine whether it is disproportionate under the circumstances of the individual case, the Court should examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." People v. Dillon (1983) 34 Cal.3d 441, 479, citing In re Lynch (1972) 8 Cal.3d 410, 425-429. With respect to the nature of the offense, the court should consider both the severity of the crime in the abstract and the facts of the crime in question. Dillon, 34 Cal.3d, at 479. With respect to the nature of the offender, the court must ask "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." Id. This requirement follows from the principle that "a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability." Id. at 480. This requirement is also mandated by the federal Constitution, because the "individualized considerations [are] a

constitutional requirement in imposing the death sentence, which means that the Court must focus on relevant factors of the character and record of the individual offender." Enmund at 79.

In People v. Dillon, a 17-year-old boy was convicted of murder during an incident in which he and six other youths had conducted a well-planned invasion of a marijuana plantation they intended to rob. The defendant fired nine rifle shots into the victim, who was merely attempting to protect his property. There was no dispute that the crime of which he was convicted was reprehensible. Id. at 483. Nevertheless, this Court reduced Dillon's conviction to second degree murder, primarily because of his individual background. The court focused primarily on the defendant's youth, the fact that he lacked the intellectual and emotional maturity of an average 17-year-old, his lack of a prior record, and the petty chastisements given to the other six youths involved in the incident. Id. at 483-488.

Death is a disproportionate punishment for Sandi Nieves. The deaths of four girls, the near death of her young son, and the fire, were tragic. They brought suffering to the victims, the surviving family, and to Sandi Nieves, the natural mother of each victim. She will have to live with the consequences of the death of her four girls for the rest of her life.

But that does not mean she, too, is deserving of death. Sandi Nieves had no prior criminal record. There was no evidence she had ever abused any of her children. There is no evidence that she would be dangerous in prison or that she would ever likely kill again. There was evidence that she had been a good and devoted mother.

The record shows Sandi Nieves was confronted with a series of life tragedies. The father of two of her daughters sought a court order annulling his adoption and absolving him of paying child support, her only source of

income. Exh. 36C. Her young boyfriend had abandoned her while she was pregnant with his child. See Exh. 20 (letter to Scott Volk). She had an abortion despite strong religious objections. 30 RT 4049:14-22, 4058:12-22. See 61 RT 9586:22-9587:19 (Bishop Lynn Jones). Her world was caving in: "I cannot live my life like this – I am going crazy! The walls are closing in on me. I am crying all the time." Exh. 27 (letter to Alethea Volk).[191] And, as the prosecutor said in his closing argument to the jury, there is evidence she tried to commit suicide and take the children with her because she could not trust them with anyone else and they would be better off in heaven with her. 54 RT 8416:10-13, 8458:25-8459:17. See 47 RT 7179:7-7187:15 (rebuttal guilt phase testimony of Dr. Sadoff).

These circumstances, coupled with evidence that Nieves simply did not have the neuropsychological coping ability to handle the implosion of her life, compel the conclusion that death is an inappropriate and disproportionate penalty for the tragedy of this woman. "The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." Cf. Kennedy v. Louisiana (2008) ___ U.S. ___, 128 S.Ct. 2641, 2665.

Death under the circumstances of this case would violate the Eighth Amendment and the California Constitution, Art. 1, Section 17.

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[191] Emphasis in original.

For the foregoing reasons, defendant submits that the death sentence imposed is disproportionate as applied to her and should be set aside.

XXVI. THE TRIAL COURT'S CUMULATIVE ERRORS REQUIRE REVERSAL OF THE CONVICTIONS AND PENALTY

In the preceding portions of this argument, we have demonstrated numerous prejudicial errors. But even if the Court disagrees and finds that only some claims are valid, or finds some claims valid, although lacking prejudicial effect taken in isolation, the cumulative result is nonetheless prejudicial and requires reversal. See People v. Holt (1984) 37 Cal.3d 436, 459. The jury considered the trial as a whole. It was instructed at the close of the penalty phase to consider the facts from the evidence received during the entire trial. 64 RT 10067:8-11; 21 RCT 5407; CALJIC 8.84.1. To satisfy due process and the Eighth Amendment the cumulation of errors must be viewed in the context of the entire trial as well. "'A balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of errors in the context of the evidence introduced at trial against the defendant." United States v. Frederick (9th Cir. 1996) 78 F.3d 1370, 1381.

"The Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle v. Runnels (9th Cir. 2007) 505 F.3d 922, 928. Even when no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. See Chambers v. Mississippi, 410 U.S. 284, 289, 290 n. 3, 303-303; Killian v. Poole (9th Cir. 2002) 282 F.3d 1204, 1211 ("even if no single error were prejudicial, where there are several

substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"); Cooper v. Fitzharris (9th Cir. 1978) 586 F.2d 1325, 1333 ("prejudice may result from the cumulative impact of multiple deficiencies").

This Court has recognized that reversal is required when the whole is greater than the sum of its parts. See People v. Sturm (2006) 37 Cal. 4th 1218, 1244 (reversing due to cumulative misconduct); People v. Hill (1998) 17 Cal.4th 800, 844-847 (reversing for multiple cumulative errors).

Here, defendant has identified numerous errors that occurred during the guilt and penalty phases of the trial. Each of these errors individually, and cumulatively, deprived her of a fair trial, a fair tribunal, the right to confront the witnesses against her, the right to put on a meaningful defense, and fair and reliable guilt and penalty determinations in violation of defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Further, each error, by itself and cumulatively with others, is sufficiently prejudicial to require reversal of defendant's convictions and death sentence.

XXVII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Many features of California's capital sentencing scheme, alone or in combination with each others, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, we present these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

In People v. Schmeck (2005) 37 Cal.4th 240, 303-304, this Court held that what it considered to be "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of this Court's directive in Schmeck, we briefly present the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, defendant requests the opportunity to present supplemental briefing..

This Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on

review of that system in context." Kansas v. Marsh (2006) 548 U.S. 163, 179 n. 6.

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. California's death penalty statute potentially sweeps virtually every murderer into its grasp. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, who may not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims to put to death.

A. Penal Code § 190.2 Is Impermissibly Broad

A constitutionally valid death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. People v. Edelbacher (1989) 47 Cal.3d 983, 1023, citing Furman v. Georgia (1972) 408 U.S. 238, 313 (conc. opn. of White, J.). Meeting this criteria requires a state genuinely to narrow, by rational and objective criteria, the class of murderers eligible for death. Zant v. Stephens (1983) 462 U.S. 862, 878. California's capital

sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. People v. Bacigalupo (1993) 6 Cal.4th 857, 868. However, the special circumstances found true in this case – multiple murder, including murders based on a single act (Pen. Code § 190.2(a)(3)), murder committed while engaged in the commission of the crime of arson (Penal Code § 190.2(a)(17)), murder committed while lying in wait (Penal Code § 190.2(a)(15) – lack any meaningful narrowing. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to making every murderer eligible for death. The Court should reconsider and overrule its prior precedent and hold section 190.2(a) is so broad that it fails in violation of the Eighth and Fourteenth Amendments properly to narrow the set of murders eligible for death.

B. The Broad Application of Section 190.3, Factor (a), Violated the Defendant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors can weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case the prosecution relied solely on factor (a) in support of its call for death. It relied on the circumstances of the crime itself and victim impact evidence, which this Court has said comes within the ambit the circumstances of the crime. People v. Zamudio (2008) 43 Cal.4th 327, 324-325.

This Court has not applied a limiting construction to factor (a). People v. Blair (2005) 36 Cal.4th 686, 749. The "circumstances of the crime" factor can hardly be called "discrete." Brown v. Sanders (2006) 546

U.S. 212, 222. The concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." See Maynard v. Cartwright (1988) 486 U.S. 356, 363; but see Tuilaepa v. California (1994) 512 U.S. 967, 987-988 (rejecting challenge to factor (a)).

We are aware the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3(a) results in the arbitrary and capricious imposition of the death penalty. People v. Kennedy (2005) 36 Cal.4th 595, 641. But we urge the Court to reconsider this decision.

C. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question whether to impose the death penalty for Sandi Nieves hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CALJIC 8.88; 65 RT 10203:7-13; 21 RCT 5416. The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is

vague and directionless. See Maynard v. Cartwright (1988) 486 U.S. 356, 362. This Court has found that the use of this phrase does not render the instruction constitutionally deficient. People v. Breaux (1991) 1 Cal.4th 281, 316, fn. 14.) We ask this Court to reconsider.

D. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Mills v. Maryland (1988) 486 U.S. 367; Lockett v. Ohio (1978) 438 U.S. 586. We are aware that the Court has rejected this argument (People v. Avila (2006) 38 Cal.4th 491, 614), but urge reconsideration.

E. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034. The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. Zant v. Stephens (1983) 462 U.S. 862, 879.

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments. But see People v. Morrison (2004) 34 Cal.4th 698, 730.

The very real possibility that defendant's jury aggravated her sentence on the basis of nonstatutory aggravation deprived her of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (People v. Boyd (1985) 38 Cal.3d 762, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. See Hicks v. Oklahoma (1980) 447 U.S. 343; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512, 522 (same analysis applied to state of Washington).

It is likely defendant's jury aggravated her sentence on the basis of what were, as a matter of state law, non-existent factors and did so believing the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. For example, the court permitted extremely expansive testimony attacking defendant's character under the guise of victim impact testimony. It did so while at the same time narrowly limiting the good character evidence and the neuropsychological evidence defendant was permitted to present on her own behalf. This violated not only state law, but the Eighth Amendment,

for it made it likely the jury treated appellant "as more deserving of the death penalty than [she] might otherwise be by relying upon . . . illusory circumstance[s]." Stringer v. Black (1992) 503 U.S. 222, 235.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

F. The Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. CALJIC Nos. 8.86, 8.87; see People v. Anderson (2001) 25 Cal.4th 543, 590; People v. Fairbank (1997) 16 Cal.4th 1223, 1255 Nieves's jury was not told it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

But the Supreme Court's decisions in Cunningham v. California (2007) 549 U.S. 270, 127 S.Ct. 856; Blakely v. Washington (2004) 542 U.S. 296; Ring v. Arizona (2002) 536 U.S. 584; and Apprendi v. New Jersey (2000) 530 U.S. 466, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt.

In Ring, the Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. 536 U.S. at 593.

Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In Cunningham, the Court rejected this Court's interpretation of Apprendi, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range set by the sentencing statute. It explicitly rejected the reasoning used by this Court to find that Apprendi and Ring have no application to the penalty phase of a capital trial.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial relied on as an aggravating circumstance, except as to prior criminality– and even in that context the required finding need not be unanimous. See People v. Hawthorne (1992) 4 Cal.4th 43, 79.

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), which was read to the jury in this case (65 RT 10201:18-10203:13; 21 RCT 5416), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself" (CALJIC No. 8.88; emphasis added).

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In People v. Loker (2008) 44 Cal.4th 691, 755, this Court held that notwithstanding Cunningham, Apprendi, and Blakely, a defendant has no constitutional right to a jury finding as to the facts supporting a death sentence.

In the wake of Cunningham, however, it is clear that in determining whether or not Ring and Apprendi apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. Under California law, once a special circumstance has been found true, life without possibility of parole is the default. Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. Pen. Code § 190.3. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring, 530 U.S. at 604. The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be

imposed. In California, as in Arizona, the answer is "Yes." Ring and Cunningham, require the requisite fact-finding in the penalty phase to be made unanimously and beyond a reasonable doubt.

California law violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. We urge the Court to reconsider its decisions holding that California law is consistent with Cunningham, Ring, Blakely, and Apprendi. We further urge the Court to reconsider its holdings that the Eighth and Fourteenth Amendments do not require the trier of fact to be convinced death is the appropriate penalty and that the factual bases supporting the penalty are true beyond a reasonable doubt.

G. California Law Violates the Sixth, Eighth, and Fourteenth Amendments by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of her federal Sixth, Eighth, and Fourteenth Amendment rights to meaningful appellate review. California v. Brown (1987) 479 U.S. 538, 543; Gregg v. Georgia (1976) 428 U.S. 153, 195. Because California juries have discretion without significant guidance on how to weigh potentially aggravating and mitigating circumstances (People v. Fairbank, supra), there can be no meaningful appellate review without written findings. It is impossible to "reconstruct the findings of the state trier of fact." See Townsend v. Sain (1963) 372 U.S. 293, 313-316.

This Court has held that the absence of written findings by the sentencer does not render the death penalty scheme unconstitutional. People v. Fauber (1992) 2 Cal.4th 792, 859; People v. Rogers (2006) 39

Cal.4th 826, 893. Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings and routinely in administrative law proceedings.

A convicted prisoner who believes that he or she has been improperly denied parole must proceed by filing a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. In re Sturm (1974) 11 Cal.3d 258. The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." Id. at 267.[192] Similarly, administrative decisions must be supported by written findings. Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514-515. The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. Pen. Code § 1170, subd. (c). Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. Harmelin v. Michigan (1991) 501 U.S. 957, 994. Since providing more protection to a non-capital defendant

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[192]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, Cal. Code Regs., §§ 2280 et seq.

or a civil litigant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. See Mills v. Maryland (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" and "moral" its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See Kansas v. Marsh, supra (statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors.)). The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

This Court has rejected these contentions. People v. Cook (2006) 39 Cal.4th 566, 619. We urge the Court to reconsider.

H. The Death Verdict Was Not Premised on Unanimous Jury Findings

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. See Ballew v. Georgia (1978) 435 U.S. 223, 232-234; Woodson v. North Carolina (1976) 428 U.S. 280, 305. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." McKoy v. North Carolina (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." People v. Taylor (1990) 52 Cal.3d 719, 749.

The failure to require jury unanimity also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. See, e.g., Pen. Code § 1158a. Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see Monge v. California (1998) 524 U.S. 721, 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" violates the right to equal protection and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. We urge this Court to reconsider.

I. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. Evid. Code § 520. Section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore Sandi Nieves is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. Cf. Hicks v. Oklahoma (1980) 447 U.S. 343, 346. Accordingly, the jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. People v. Lenart (2004) 32 Cal.4th 1107, 1136-1137. This Court also has rejected any instruction on the presumption of life. People v. Arias (1996) 13 Cal.4th 92, 190. Sandi Nieves is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider these decisions.

J. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (Trop v. Dulles (1958) 356 U.S. 86, 101). People v. Cook (2006) 39 Cal.4th 566, 618-619; People v. Ghent (1987) 43 Cal.3d 739, 778-779.) Standards of decency are never static. Trop, at 101. In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (Roper v. Simmons (2005) 543 U.S. 551, 554), we urge the Court to reconsider its previous decisions and hold the death penalty unconstitutional because, among other things, it violates the "evolving standards of decency that mark the progress of a maturing society" (Trop, 356 U.S. at 101), and a violation of international law.

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." Kennedy v. Louisiana (2008) ___ U.S. ___, 128 S.Ct. 2641, 2650.

XXVIII. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHTS AT THE RESTITUTION HEARINGS

The trial court violated Sandi Nieves's rights to due process and to confront the evidence against her when, in her absence, it held hearings to determine the amount of restitution. At a hearing on October 10, 2000, the court ordered Nieves, who was not present, to pay a restitution fine of $10,000. 22 RCT 5641. On December 1, 2000, the court held a second hearing, also in her absence, and ordered her to pay at least $15,579.99 in victim restitution. 1 Supp. RCT 2-3. Nieves had a right to be present at the hearings under California Penal Code §§ 977, 1043, and 1193 and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution because the hearings constituted a critical stage in the criminal prosecution against her. Sandi Nieves did not waive her right to be present; nonetheless, the trial court imposed restitution amounts without her.

In addition, the trial court ordered Nieves to pay the maximum restitution fine of $10,000 and the full amount of victim restitution requested by the prosecution without making any findings regarding her inability to pay.

For these reasons, if any convictions are affirmed remand is required for a new hearing on the issue of restitution.

A. The Trial Court Held Hearings to Determine Restitution in the Absence of the Defendant

1. October 10, 2000

On October 10, 2000, the trial court convened without the defendant. The court stated on the record, "Howard Waco is present for the defendant; Ken Barshop for the People. The defendant is not present. I ordered her out for today, but she was a miss-out for some reason." 66 RT 10404:9-12.

There is no indication that the defendant was voluntarily absent or had waived her presence.

The court, however, announced: "The court neglected to impose a restitution fine which is mandatory under the law. So I will set a restitution fine in the amount of $10,000. That's the maximum." 66 RT 10404:25-10405:1. Defense counsel stated, "I'd like to be heard with regards to the restitution fine." 66 RT 10405:2-3. The court ignored defense counsel and moved on to the issue of victim restitution. 66 RT 10405:4-8.

The court indicated it would determine the amount of victim restitution, pursuant to Penal Code § 1202.7(f), on December 1, 2000. 66 RT 10405:15-17. Defense counsel brought up the fact that the fathers of the victims, David Folden and Fernando Nieves, had benefitted from a $60,000 life insurance policy on the lives of the victims. 66 RT 10405:18-24. Sandi Nieves had paid the life insurance premiums. 66 RT 10406:4-7. Counsel asked the court to order David Folden and Fernando Nieves to be present at the hearing if the court intended to consider their expenses. 66 RT 10406:14-17.

The court finally indicated that it was willing to hear from the defense on the issue of the restitution fund fine. 66 RT 10406:21-22. The following exchange occurred:

> Mr. Waco: Well, my client obviously has -- if it's not obvious, she has no assets of her own.
>
> With regards to the particular nature of the charge, and especially the penalty involved, I checked briefly with my office, and they thought it was a bit strange that the court would seek a restitution fine against her, considering the penalty imposed by the court.
>
> The Court: Well --
>
> Mr. Barshop: It's mandatory.

The Court: 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. A restitution fund fine is mandated by law. It's non-discretionary. The court must impose it absent really exceptional circumstances.

So I mean, what is the exceptional circumstance not to impose a restitution fine in this case?

Mr. Waco: My client was given the death penalty.

The Court: So the argument is for the most serious of offenses, that automatically results in the waiver of the restitution fine? Is that your suggestion, in every death penalty case any time somebody is sentenced to death that means that restitution fund fines are not imposed? Is that your position?

Mr. Waco: I think it's strange that it would be imposed under such circumstances. I don't know where the court gets to the $10,000 as opposed to $200.

The Court: The 200 is the minimum, and the 10,000 is the maximum, and that is general way of calculating. It's $200 for every year of confinement.

Mr. Barshop: She was also sentenced on count 5, which is a life sentence.

Mr. Waco: That was stayed, wasn't it?

The Court: It was. I ran that concurrent. I stayed the sentence on count 6 under 654.

Mr. Waco: Well, the court's rulings --

The Court: I have heard your argument. I will put the restitution fine of $10,000 is [sic] imposed pursuant to 1202.4 of the penal code.

December 1st will be the date for the determination of restitution to the victims.

66 RT 10406:23-10408:11. See 22 RCT 5641. Although the court made this statement on October 10, 2000, the Abstract of Judgment says, "The

defendant is to pay a restitution fine pursuant to Penal Code section 1202.4(b) in the amount of $10,000.00." 22 RCT 5629. It was signed October 6, 2000, four days before the hearing. Id.

2. December 1, 2000

On December 1, 2000, the court convened again without the defendant present.[193] 67 RT 10410:7-10. There is no indication that the defendant waived her right to be present.

The prosecution supplied the court with a list of names and the amounts of benefits paid from the State Board of Control's Victims of Crime Program for each individual. 22 RCT 5650-5651. The list included $1,890.00 for David Nieves, $450.00 for Charlotte and Fernando's daughter, Jaqueline Nieves, an amount to be determined for Christine Nieves, another daughter, $900.00 for Fernando Nieves, an amount to be determined for Charlotte Nieves, an amount to be determined for David Folden, $2,914.58 for Kristl Folden, $2922.58 for Nikolet Folden, $2,922.58 for Rashel Folden, and $3,580.25 for Jaqlene Folden. Id. The prosecution explained that the amounts covered funeral expenses, burial expenses, and psychiatric expenses. 67 RT 10419:3-24. The prosecution said that the state had kept the file open because some of the individuals had not yet used or billed for approved psychiatric counseling services. 67 RT 10419:25-10420:6.

The defense argued Sandi Nieves did not owe any restitution to the individuals listed, that there was no showing to explain the amounts listed, and no relationship between Sandi Nieves and some of the individuals

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[193] The Reporter's Transcript of December 1, 2000, includes the court's statement, "The defendant is not present." 67 RT 10410:8. The minute order for December 1, 2000, incorrectly states that the defendant was present in court. 1 Supp. RCT 2.

listed. 67 RT 10420:23-10421:4. The defense also provided documentation from the insurance company that it had already distributed over $40,000 in life insurance proceeds. 67 RT 10421:5-10422:2; 22 RCT 5643-5648. The prosecution argued that the insurance money was irrelevant, that the issue was restitution to the state for the funds administered to the victims. 67 RT 10422:3-11. The defense countered that the defendant had paid the premiums on the insurance policy, and that the funds from the policy should be used to pay the restitution. 67 RT 10422:20-26.

The court ordered Sandi Nieves to pay the full amount of victim restitution requested by the prosecution. 67 RT 10423:1-23. It also ruled that the amount of life insurance money had no bearing on the restitution owed by the defendant. 67 RT 10423:24-10424:1.

In total, the court ruled that Sandi Nieves owed $15,579.99 (plus the amounts left to be determined at a later date) in victim restitution pursuant to Penal Code § 1202.4(f). 1 Supp. RCT 2-3.

B. The Trial Court Denied the Defendant's Constitutional and Statutory Rights to Be Present at the Restitution Hearings

The trial court ordered Sandi Nieves to pay restitution under Penal Code § 1202.4. "Restitution hearings held pursuant to section 1202.4 are sentencing hearings and are thus hearings which are a significant part of a criminal prosecution." People v. Dehle (2008) 166 Cal.App.4th 1380, 1386 (holding that the trial court abused its discretion when it allowed a restitution hearing to go forward without the presence of the public prosecutor). A hearing on restitution is "part and parcel" to the sentencing process. People v. Cain (2000) 82 Cal.App.4th 81, 87. This Court has held that the sentencing process is a critical stage of a criminal prosecution. People v. Rodriguez (1998) 17 Cal.4th 253, 257; People v. Robertson

(1989) 48 Cal.3d 18, 60. See also People v. Dial (2004) 123 Cal.App.4th 1116, 1122.

Sandi Nieves had a constitutional right under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to be present at all critical stages of the criminal prosecution against her. Kentucky v. Stincer (1987) 482 U.S. 730, 745 (defendant has a due process right to be present when "'his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'") (quoting Snyder v. Massachusetts (1934) 291 U.S. 97, 105-106). The constitutional right to be present is rooted in the Confrontation Clause of the Sixth Amendment and the Due Process Clause. United States v. Gagnon (1985) 470 U.S. 522, 526; Illinois v. Allen (1970) 397 U.S. 337, 338. See also United States v. Berger (9th Cir. 2007) 473 F.3d 1080, 1094; United States. v. Rosales-Rodriguez (9th Cir. 2002) 289 F.3d 1106, 1109. "A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 745.

The trial court violated Sandi Nieves's constitutional right to be present for the hearing on October 10, 2000, and then again for the hearing on December 1, 2000. The defendant was the only person with complete knowledge of her personal financial situation and her ability to pay. She also had the best knowledge of the life insurance policy, for which she had paid the premiums, that was discussed at the hearings. Yet the court unfairly proceeded without her. The court prevented the defendant from participating meaningfully in her own defense against restitution amounts that were huge relative to her ability to pay.

Sandi Nieves also had a statutory right to be present for sentencing – and thus the restitution hearings – under the California Penal Code:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . .

Cal. Penal Code § 977(b)(1). In addition, Penal Code § 1043 states that "the defendant in a felony trial shall be personally present at the trial" and absent a waiver under Penal Code § 977, can be voluntarily absent only if charged with "an offense which is not punishable by death."

In People v. Wilen (2008) 165 Cal.App.4th 270, 287-288, the Court of Appeal ruled that the defendant had a right under Penal Code §§ 977 and 1043 to be present at the hearing to determine liability for drug laboratory cleanup costs pursuant to Health and Safety Code § 11470.2. The court reasoned that the defendant had a right to be present because the hearing constituted part of sentencing as well as the pronouncement of judgment.[194] Wilen, 165 Cal.App.4th at 287. See also In re Levi (1952) 39 Cal.2d 41, 45

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[194] Penal Code § 1193 states: Judgment upon persons convicted of commission of crime shall be pronounced as follows: [¶] (a) If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless the defendant, in open court and on the record, or in a notarized writing, requests that judgment be pronounced against him or her in his or her absence, and that he or she be represented by an attorney when judgment is pronounced, and the court approves his or her absence during the pronouncement of judgment, or unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence . . . ." (emphasis added).

("judgment and sentence in felony cases may be imposed only in the presence of the accused").

Like the defendant in Wilen, Sandi Nieves had a statutory right to be present at the two hearings held in her case because a restitution hearing is also considered part of sentencing. Dehle, 166 Cal.App.4th at1386; Cain, 82 Cal.App.4th at 87. At no time did Sandi Nieves waive her right to be present at either hearing. The court imposed the restitution fine and victims restitution in violation of Sandi Nieves's statutory right to be present under Penal Code §§ 977, 1043, and 1193. In addition, the Penal Code section pertaining to victims restitution explicitly provides for the defendant's "right to a hearing before a judge to dispute the determination of the amount of restitution." Penal Code §1202.4(f)(1).

The court's error violated her federal constitutional rights to due process and to confront the evidence against her, In Re Oliver (1948) 333 U.S. 257, 273-274, and her rights under the penal code, requiring remand for a new restitution hearing to be held in her presence.

C. The Trial Court Imposed Restitution Without Making Findings Regarding Sandi Nieves's Ability to Pay

In addition to improperly holding the restitution hearings without the defendant, the trial court ordered Sandi Nieves to pay $10,000, the maximum restitution fine permitted under Penal Code § 1202.4(b)(1), as well as the full amount of victims restitution requested by the prosecution. It made no findings regarding her ability to pay.

Penal Code § 1202.4(d) states that in setting the amount of the restitution fine in excess of the statutory $200 minimum, the court shall consider, among other factors, the defendant's inability to pay. See §§ 1202.4(c) and 1202.4(d). In People v. Richardson (2008) 43 Cal.4th 959, 1038, the trial court imposed the maximum $10,000 fine without making a

finding regarding the defendant's inability to pay. This Court remanded the restitution issue for reconsideration. Id.; see also People v. Vieira (2005) 35 Cal.4th 264, 305-306.

Here, the trial court made no findings about the present or the future ability of Sandi Nieves, who was indigent, to pay the fine. The court did not respond to defense counsel's argument that Sandi Nieves had no assets, nor did the prosecution present evidence to the contrary. The court also neglected to consider Sandi Nieves's limited future earning capacity on death row. See Penal Code § 1202.4(d) ("Consideration of the defendant's inability to pay may include his or her future earning capacity.").

Likewise, although the trial court ruled that the life insurance money had no bearing on the amount of victims restitution, the court made no findings on the record with regard to Sandi Nieves's inability to pay. The court imposed against Sandi Nieves the full amount of victims restitution requested by the prosecution.

Remand is required for the determination of the amount of restitution with instructions to the trial court to take into consideration Sandi Nieves's inability to pay.

CONCLUSION

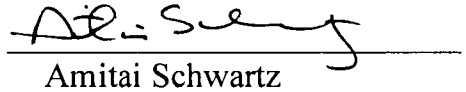
The entire judgment – the convictions, the special circumstance findings, the death sentence, and restitution – should be reversed.

December 19, 2008

Respectfully Submitted,

LAW OFFICES OF AMITAI SCHWARTZ

Amitai Schwartz
Moira Feeney

By: 

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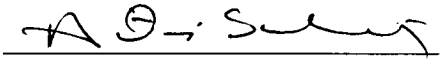
CERTIFICATE OF COUNSEL

I am the attorney for Appellant Sandi Dawn Nieves in this automatic appeal from a judgment of death. The text of the foregoing brief consists of 180,961 words in 13 point Times New Roman font counted by the Corel WordPerfect word-processing program used to generate the brief.

December 19, 2008



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PROOF OF SERVICE BY U.S. MAIL

Re:The People of the State of California vs. Sandi Dawn Nieves ,
California Supreme Court Case No. S092410

Los Angeles County Superior Court, Case No. PA030589-01

I, Caitlin Barth, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, California, 94608. I served a true copy of the attached

APPELLANT'S OPENING BRIEF

on the following, by placing a copy in an envelope addressed to the parties listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid, at Emeryville, California, on December 19, 2008.

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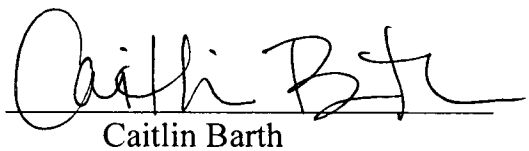
P. O. Box 1508
Chowchilla, CA 93610-15018

Clerk, North Valley District
Los Angeles County Sup. Ct.
300 Third St.
San Fernando, CA 91340

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

Executed on December 19, 2008 at Emeryville, California.



Caitlin Barth