In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **DORA BUENROSTRO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S073823

Riverside County Superior Court Case No. CR59617
The Honorable Patrick F. Magers, Judge Presiding

RESPONDENT BRIEF

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INTRODUCTION

Seeking revenge from her estranged husband, Alex Buenrostro (hereinafter "Alex"), Dora Buenrostro murdered their three children, Susana, age 9, Vicente age 8, and Deidra age 4, by stabbing them to death. In the early stages of the murder investigation, Buenrostro succeeded in placing the blame on Alex which resulted in a high-profile apprehension and arrest at his workplace in Los Angeles. Alex was cleared of suspicion within a short time and Buenrostro was arrested.

Several months after the District Attorney filed murder charges against Buenrostro, the criminal proceedings were suspended for a competency evaluation. Following a competency hearing, Buenrostro was declared competent to stand trial and the criminal matter was reinstated. Thereafter, a jury convicted her of murdering her children.

At the penalty phase, the prosecution introduced victim impact evidence under Penal Code section 190.3, factor (a). As further evidence in aggravation, under Penal Code section 190.3, factor (b), the prosecution presented evidence of two incidents of Buenrostro's violent and threatening conduct while incarcerated awaiting trial. Buenrostro presented the testimony of several family members in mitigation.

In this automatic appeal, Buenrostro contends with respect to the competency proceeding that California's definition of incompetence is unconstitutional; the trial court made unfair and erroneous evidentiary rulings when it excluded defense rebuttal evidence, excluded defense evidence as a sanction for a discovery violation, and admitted Buenrostro's jailhouse writings; the trial court improperly refused a defense instruction; and, the trial court erred in not granting a second competency hearing. Buenrostro raises two challenges related to the trial court's rulings during voir dire proceedings. Specifically, she claims the trial court improperly excluded three prospective jurors and erred in conducting large group voir

dire as opposed to individual sequestered voir dire as requested by the defense. With respect to the guilt phase, Buenrostro challenges the trial court's ruling denying her request to represent herself, the trial court's instructions to the jury on the degree of murder and motive, and contends that two of the three special circumstance findings must be stricken. Buenrostro argues that, in addition to a myriad of issues regarding the constitutionality of the death penalty that are well-settled by this Court, at the penalty phase, victim impact evidence was improperly admitted and the evidence of her other criminal activity did not meet the statutory criteria. With the exception of Buenrostro's claim that two of the three multiple murder special circumstance findings must be stricken, none of her claims have merit. As discussed in greater detail below, Buenrostro received fair competency, guilt and penalty trials and her state and federal constitutional rights were not violated. Therefore, her convictions should be affirmed and her death sentence should be upheld.

STATEMENT OF THE CASE

In October 1994, Dora Buenrostro murdered her three children, Susana age 9, Vicente age 8, and Deidra age 4, by stabbing them to death. On October 31, 1994, the Riverside County District Attorney charged her in a felony complaint with three counts of murder (Pen. Code, § 187), multiple murder special circumstances as to each victim (Pen. Code § 190.2, subd. (a)(3)), and allegations as to each victim that she personally used a knife in the commission of the offenses (Pen. Code, §§ 1192.7, subd. (c)(23), and 12022, subd. (b)). (1CT 1-3 [Riverside County Superior Court

Case No. 59617].)[1] Buenrostro pled not guilty to the charges and denied the allegations. (1CT 9; 1 Pre-Trial RT 13.) On March 14, 1995, the trial court declared a doubt as to Buenrostro's competence to stand trial and suspended criminal proceedings so that she could be evaluated for competency under Penal Code section 1368. (1CT 16-17; 1 Pre-Trial RT 32-37.)

Following a competency trial by jury, on November 13, 1995, the trial court ordered criminal proceedings reinstated. (1CT 18; 1 Pre-Trial RT 38.) Buenrostro was bound over at the preliminary hearing on November 21, 1995. (1CT 19-49) Thereafter, on December 4, 1995, the District Attorney filed an information charging Buenrostro with three counts of murder, as to each count, the District Attorney alleged a multiple murder special circumstance and that Buenrostro personally used a knife.[2] (1CT 51-53.) Several weeks later, on December 27, 1995, the district attorney filed a notice of its intention to seek capital punishment. (1CT 59.)

On January 3, 1996, the trial court denied Buenrostro's request for substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118. (1CT 64; 1 Pre-Trial RT 48; Sealed Marsden Hearing 1/3/96 RT 50.) During that in camera proceeding, defense counsel declared a doubt as to Buenrostro's competence and made a second request for evaluation pursuant to Penal Code section 1368. Without input from the prosecution, the trial court appointed doctors to conduct an evaluation. (1 Pre-Trial RT 53.) However,

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[1] "CT" refers to the Clerk's Transcript and "Pre-Trial RT" and "RT" refer to the Reporter's Transcript in Riverside County Superior Court case number CR 59617.

[2] On May 13, 1998, the District Attorney filed an amended information alleging one multiple murder special circumstance to which Buenrostro entered a plea of not guilty and denied the allegations. (4CT 831-834; 6RT 776-777.)

during proceedings on January 5, 1996, the trial court vacated its ruling appointing the doctors and set the matter for a hearing for a determination of whether there had been a substantial change of circumstances since the jury's finding that Buenrostro was competent to stand trial. (1CT 64-66; 1 Pre-Trial RT 53-55.) At the subsequent hearing to determine whether Buenrostro's circumstances had changed, the trial court denied the defense motion for a second competency hearing under Penal Code section 1368. (1CT 67; 1 Pre-Trial RT 56-68.)

In the following months, defense counsel requested to continue the trial several times. Initially, defense counsel indicated he would be prepared for trial by midsummer. (1CT 70-76; 1 Pre-Trial RT 75-76.) However, several more continuances were sought by the defense. (1CT 77, 79-96; 1 Pre-Trial RT 86, 88, 91.) On May 10, 1996, the trial court granted the defense motion to continue the trial until December 1996. (1CT 107; 1 Pre-Trial RT 126.) Subsequently, Buenrostro renewed her request for substitute counsel and the trial court conducted a *Marsden* hearing. (1CT 107; 1 Pre-Trial RT 134-152 [sealed *Marsden* hearing].) On May 13, 1996, the trial court denied Buenrostro's motion but relieved defense counsel Frank Scott based upon inadequate assurance that he would actually be ready to proceed with trial in December 1996. (1CT 108; 1 Pre-Trial RT 159-166.) Defense conflict panel attorneys Jay Grossman and David Macher were ultimately appointed to represent Buenrostro. (1CT 108, 109, 112; 1 Pre-Trial RT 167, 172.) Following new defense counsels' indications, the trial court set the jury trial for May 5, 1997. (1CT 112; 1 Pre-Trial RT 189, 192-193.)

Thereafter, the defense lodged multiple motions to continue the trial that were granted by the trial court. (1CT 113-117, 123.) The trial date was eventually reset to May 4, 1998. (1CT 123.) On April 2, 1998,

Buenrostro raised a *Marsden* motion that was denied by the trial court. (1CT 143-145; 1 Pre-Trial RT 258-270 [sealed *Marsden* hearing].)

On April 14, 1998, attorney Grossman announced he was engaged in another trial. (1CT 146.) On May 4, 1998, Buenrostro raised her second *Marsden* motion associated with her new attorneys and a motion for self-representation which, after a hearing, the trial court denied in toto. (2CT 468; 2RT 304-312; 2 Pre-Trial RT 303; Sealed *Marsden/Faretta* Hearing 5/4/98 Volume 2-A 304-312.) On May 4 and 6, 1998, in limine hearings were conducted. For the most part, attorney Macher handled the defense motions on Buenrostro's behalf. (2CT 455-468; 3CT 617-623; 2 Pre-Trial RT 345.)

On May 11, 1998, the parties and the trial court addressed the issue of attorney Grossman's scheduling conflict with voir dire proceedings. The trial court overruled the defense objection to the proceedings continuing in attorney Grossman's absence and denied the defense request to reschedule commencement of voir dire. A prospective jury panel was sworn. (3CT 632; 4CT 834; 4 Pre-Trial RT 583, 592-593.) Voir dire proceedings concluded June 1, 1998. (21 CT 5780; 10 Pre-Trial RT 1729.)

Based upon the trial judge's ruling denying the defense request to reschedule voir dire proceedings, attorney Grossman filed a motion to disqualify her. (21 CT 5790-5811.) The defense also made a motion for mistrial, which the trial court denied. (21CT 5812-5813, 5816-5867; 10 Pre-Trial RT 1633-1639, 1740-1776.)

On June 16, 1998, the trial judge recused herself from all further proceedings. (21CT 5868-5917; 10 Pre-Trial RT 830-831.) When the case was reassigned to Judge Patrick Magers, the parties agreed to start anew, discharge the jury, and select a new jury panel. Additionally, the parties stipulated that the pretrial rulings made to date were binding. (21CT 5918-5919, 5954; 10 Pre-Trial RT 1834-1846.)

A new jury was sworn and seated on July 14, 1998. In a closed proceeding, the trial court denied Buenrostro's third *Marsden* motion associated with attorneys Grossman and Macher. (35CT 9831.)

On July 23, 1998, the jury found Buenrostro guilty of three counts of first degree murder, and found true as to each count that she personally used a knife. (35 CT 9950-9955.) Additionally, the jury found the multiple murder special circumstances to be true. (35CT 9956-9958, 9969.)

On July 27, 1998, the penalty trial commenced. (36CT 10081.) The jury returned a verdict of death on July 29, 1998. (36CT 10126, 10129.) The trial court denied Buenrostro's motions for a new trial, to reduce the penalty to life without parole, and to modify the verdict, and imposed a sentence of death on October 2, 1998. (36CT 10178-10179, 10182, 10188, 10192-10199, 10205-10208.) Additionally, the trial court imposed concurrent three-year sentences for the personal use of a knife enhancements associated with counts 1, 2 and 3. (36CT 10188, 10209.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Competency Proceedings

On March 14, 1995, the trial court declared a doubt as to Buenrostro's competency and suspended the criminal proceedings under Penal Code section 1368[3] for a determination of Buenrostro's mental competence to

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[3] Penal Code section 1368 states as follows:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally

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stand trial. (1CT 16-17; 1RT 32-37.) The trial court appointed Dr. Craig Rath at the request of the People and Dr. Jose Moral at the request of the defense to examine Buenrostro. (1RT 35; 5th Supplemental Clerk's Transcript on Appeal ("5th Supp. CT") 2-5.)

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> competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.
>
> (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.
>
> (c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.
>
> If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call.
>
> If the defendant is declared mentally incompetent, the jury shall be discharged.

(Pen. Code, § 1368.)

On October 31, 1995, a jury trial on the issue of competence commenced before Judge J. Thompson Hanks. (CRT 223.)[4] On November 13, 1995, following a nine-day competency trial, the jury returned a verdict that Buenrostro was competent to stand trial in the criminal proceedings.[5] (CRT 1221.) As explained in greater detail below, Buenrostro presented evidence that she suffered from serious mental disorders and was prescribed medication for paranoid schizophrenia. Buenrostro contended that her severe impairment resulting from personality disorders in combination with her refusal to take the medication intended to control symptoms associated with paranoid schizophrenia rendered her incompetent to stand trial. The prosecution countered that Buenrostro was malingering by exaggerating and overstating her symptoms.

B. Defense Case

Dr. Michael Perrotti, a licensed clinical psychologist in private practice retained by the defense, testified on the issue of Buenrostro's competence to stand trial. Dr. Perrotti met with Buenrostro while she was incarcerated seven times; five meetings occurred in March of 1995 and two meetings took place at the end of July, 1995. (CRT 259, 269-270.) Dr. Perrotti gathered information from Buenrostro's self-reported personal history. Buenrostro stated she had a ninth grade education. She had worked in a law firm. Her criminal history involved passing bad checks.

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[4] "CRT" refers to the Reporter's Transcript of the competency proceedings in Riverside County Superior Court case number M-17194.

[5] In California, an individual is mentally incompetent when as a result of a mental disorder or developmental disability, the individual is unable (1) to understand the nature of the criminal proceedings or (2) to assist counsel in the conduct of the defense in a rational manner. (Pen. Code, § 1367, subd. (a).)

She reported that she had been physically abused by her husband. Buenrostro said she did not have many friends because she devoted all of her time to being a wife and mother. (CRT 285-286.)

Regarding Buenrostro's circumstances at the time of the interviews, she reported that the jail staff was conspiring against her, that she was being poisoned by a gas leak in her jail cell, she was hearing voices, and the medical staff at the jail was conducting experiments on her for research purposes. (CRT 287-291.) Buenrostro appeared depressed and confused. Although Buenrostro denied having hallucinations, Dr. Perrotti observed her thoughts were unorganized, her speech pressured, and she was delusional in that she believed people wanted to do bad things to her. (CRT 292-294.) During the fifth visit, Dr. Perrotti administered psychological tests to measure Buenrostro's ability to concentrate. (CRT 274, 277-278.) He concluded that she had severe impairment caused by a mental disorder. (CRT 278.)

In discussing the nature of the proceedings against her, Buenrostro indicated that she was aware of the murder charges but did not know the victims. Buenrostro stated that she wanted to go to court so that she could be released and return home. (CRT 301-302.) Dr. Perrotti opined Buenrostro did not understand the legal system, had no insight into her lack of understanding, and had a break with reality that caused severe interference. He diagnosed her as a paranoid schizophrenic. (CRT 305-306, 311, 313, 316.) Dr. Perrotti testified that he had extensive experience with malingerers and his opinion that there was no evidence of malingering in the present case. (CRT 403-408, 430-433.) Dr. Perrotti admitted that even if his diagnosis of paranoid schizophrenia was accurate, it would not foreclose a determination that Buenrostro was competent to stand to trial. (CRT 361, 437.)

Licensed clinical psychologist Dr. Michael Kania was retained by the defense in November 1994 to evaluate Buenrostro and monitor her condition. (CRT 467-468.) Dr. Kania met with Buenrostro at least six times before he evaluated her for competency in March 1995. He administered a psychological test, the Minnesota Multiphasic Personality Inventory ("MMPI"), on December 17, 1994. (CRT 490.) Dr. Kania explained that the MMPI is not relevant to the issue of competency but is used as an adjunct to the clinical interview; by comparing the test results to the clinician's impressions, a determination as to malingering may be made. Dr. Kania found no evidence that Buenrostro malingered on the MMPI. (CRT 525-526, 533, 536.) Dr. Kania testified that Buenrostro's elevated scores in clinical scales 1, 2, 3, 4, 6, and 8 (of 9 clinical scales that applied), did not indicate a pattern of malingering. (CRT 528, 538, 541-543.) Although Dr. Kania was of the opinion Buenrostro was not malingering on the MMPI, he admitted that her answers were evaluated by Caldwell, an independent company, that produced a computer generated narrative suggesting she was malingering. (CRT 593-595.) Dr. Kania admitted the Caldwell report determined Buenrostro's answers indicated "extensive intentional overstatement" and "some degree of deliberate malingering." (CRT 617.)

Dr. Kania's competency evaluation was based upon his visits with Buenrostro on March 3, 1995, and April 17, 1995. (CRT 471-472.) During the March visit, Buenrostro demonstrated a marginal understanding of court proceedings. (CRT 476-478.) Dr. Kania opined that Buenrostro's thoughts were disorganized and that a mental disorder interfered with her ability to think rationally. (CRT 484.) At that time, he diagnosed Buenrostro as suffering from a delusional disorder with paranoid delusions. (CRT 485.)

Dr. Kania observed there was no improvement during the April 1995 visit. (CRT 488.) He concluded Buenrostro had a basic understanding of

the charges and legal proceedings but was unable to cooperate with her defense attorney in presenting a defense. Buenrostro held delusional beliefs and her thoughts were disorganized. In addition to his earlier March diagnosis of delusional disorder with paranoid delusions, Dr. Kania rendered a diagnosis of psychosis. Dr. Kania testified that he could not diagnosis Buenrostro with schizophrenia because her history was inconsistent with that diagnosis. (CRT 495-496, 545.) In Dr. Kania's opinion Buenrostro was not competent. (CRT 508.)

Dr. Mark Mills, a physician, was contacted by the defense. Subsequently, Dr. Mills met with Buenrostro on November 16, 1994, and again on April 27, 1995. (CRT 739, 742.) At the first meeting in November, at the jail, Buenrostro appeared disheveled and frightened. She told Dr. Mills to leave and threw a box of tissues at him. Defense counsel, who Dr. Mills contacted for assistance, joined the meeting which then lasted about an hour. (CRT 744.)

In April 1995, Buenrostro was not as agitated or hostile toward Dr. Mills. However, her answers to interview questions were vague and unhelpful. Dr. Mills opined that Buenrostro was paranoid and hiding her symptoms from him. (CRT 748-749.) Dr. Mills asked Catherine Moreno, a paralegal associated with defense counsel's law practice, to join the interview. Buenrostro was noticeably more cooperative at that point and talked as though she had no thought disorder. (CRT 751.) Dr. Mills admitted that Buenrostro did not appear psychotic during this visit. He admitted that Buenrostro had never said anything to indicate she was paranoid. He determined that Buenrostro had a psychotic delusional disorder. (CRT 755.) His determination that she was psychotic was derived from the defense generated family members' reports. (CRT 752, 762, 803, 808.)

Dr. Mills conceded Buenrostro was competent to understand the nature of the proceedings against her. (CRT 780, 815-816.) However, in his opinion, the psychotic delusional disorder significantly affected her competence to stand trial because it was difficult for her to work with counsel. (CRT 755-756; see Pen. Code, § 1367, subd. (a).) Dr. Mills explained that although he did not explicitly state in his written report that Buenrostro was incompetent to stand trial, he impliedly concluded in the report that she was incompetent. (CRT 781-783.)

Riverside County Mental Health Department staff psychiatrist Hermino Academia treated Buenrostro on February 26, 1995, at the jail. Buenrostro was transferred to an observation cell in a special housing unit and referred to Dr. Academia because she was complaining that her cell was too hot and she was being gassed. Dr. Academia diagnosed Buenrostro with a nonspecific psychotic disorder and prescribed Haldol to relieve her of delusions and paranoia. Buenrostro refused the medication. (CRT 459-462, 671-678.)

Dr. Austin Anthony, another staff psychiatrist from the Department of Mental Health, treated Buenrostro following her referral to Dr. Academia. On February 27, 1995, Buenrostro was cooperative but continued to complain about her cell temperature and a gas smell. She refused her medication. (CRT 728-729.) On February 28, 1995, Buenrostro was friendly and alert. She was no longer complaining of the gas smell but complained of general body aches and pains. (CRT 730-732.)

Buenrostro made more complaints that her cell was too hot and there was a "bad smell" emanating from the air vents on April 8, 1995. Buenrostro was evaluated in her cell by a nurse who observed that her speech was coherent, but her thoughts were disconnected and her perception of reality distorted. (CRT 679-682.) However, by April 11, 1995, another nurse recommended that Buenrostro be moved from the jail's

special housing unit, which was for the purposes of observation, back into general housing. (CRT 693, 695.)

Buenrostro's sisters Angela Montenegro, Martha Gudino, and Maria Perez testified on her behalf. Montenegro lived with Buenrostro and her three children, along with her own two children, in July 1994. (CRT 440.) Montenegro testified that Buenrostro accused her of feeding Buenrostro's children poisoned taco meat. Buenrostro told Montenegro to move out. (CRT 441-442.) A week later, Buenrostro accused Montenegro of being a witch. Montenegro further testified that about a month later, Buenrostro came to her residence, banged on the door, and accused her of turning into a snake and biting Buenrostro's leg. (CRT 442-444.) Before these incidents occurred, Buenrostro told Montenegro that she saw a monkey's face on their mother. (CRT 445.)

Gudino visited Buenrostro at the jail with their other sister, Perez, and their mother. Defense counsel was also present during the visit. For about an hour they discussed a release of information authorization form that Buenrostro refused to sign. Buenrostro told her family that they were against her. (CRT 452-456.) Perez testified that since Buenrostro was incarcerated, she had spoken with her on the telephone many times. During one of these conversations, Perez said that Buenrostro claimed to have been shot. Later in the conversation, Buenrostro recanted and said that she had been stabbed and was bleeding. Buenrostro told Perez there was no visible wound but that she was in a lot of pain. (CRT 699-701.) Perez had visited Buenrostro at the jail twice. The first time, Buenrostro told Perez that she could hear her children playing and laughing through the floor. (CRT 706, 708, 711.) Perez said that Buenrostro knew she was accused of killing her children. (CRT 709.)

Regena Acosta befriended Buenrostro at the end of 1994. She read about Buenrostro in the newspaper after the murders. Acosta wanted to

"minister" to Buenrostro. She attended one of Buenrostro's court proceedings and told defense counsel that she could be helpful in Buenrostro's defense. Acosta visited Buenrostro at the jail several times. Buenrostro claimed her jailers were making her sick by putting things in her cell and that she did not understand the court proceedings. Acosta gave Buenrostro money. The last time Acosta saw Buenrostro, she appeared more confused. By February 1995, Buenrostro refused to see Acosta on two occasions. Acosta was concerned that Buenrostro's defense attorney had instructed Buenrostro not to speak to her. (CRT 713-723.)

C. Prosecution's Case

On March 25, 1995, Dr. Jose Moral, a psychiatrist appointed by Riverside County Superior Court Judge Vilia Sherman to evaluate Buenrostro's competency to stand trial, examined Buenrostro at the jail. (CRT 823, 827-831.) During Dr. Moral's contact with Buenrostro, she was alert, oriented, and understood the purpose of his visit. Her mood was mixed with sadness and anger. She knew that she had been charged with murdering her three children. Buenrostro was guarded and chose not to discuss certain topics, such as the murder charges. However, Buenrostro offered information about her family, medical, and mental health history to Dr. Moral. (CRT 832-839, 845-847.) Buenrostro demonstrated proficient knowledge and understanding of the criminal legal process when she described its various stages from arrest through trial and sentencing. (CRT 840-843.) Buenrostro expressed great distrust of defense counsel. She complained that he did not permit her to have her say in the case. She also expressed her dissatisfaction with the rate at which the proceedings had progressed. Buenrostro denied having hallucinations or delusional thoughts; she did not exhibit any psychotic symptoms during the interview.

Dr. Moral concluded Buenrostro had no active psychotic symptoms and was rational. (CRT 847, 853, 855.)

At the second interview Dr. Moral conducted on July 26, 1995, again Buenrostro demonstrated her knowledge of the legal system, and particularly, the plea bargaining process. (CRT 864-872.) By this time, Buenrostro had developed a better relationship with defense counsel. She indicated that she understood preparation of her case was time consuming. (CRT 853-856.) Buenrostro knew that multiple doctors were in disagreement regarding her mental status. She denied having the psychotic symptoms that had been reported and provided reasonable explanations for her behavior. (CRT 863.) Buenrostro was more intellectually and emotionally organized at this meeting with Dr. Moral. She emoted remorse and sadness over the murders. (CRT 873-874.) Dr. Moral testified that his opinion as of July 26 was that Buenrostro was competent to stand trial. (CRT 861, 875.)

Dr. Moral interacted with Buenrostro during a break in the competency trial proceedings. After that contact with Buenrostro, his opinion regarding her competency was unchanged. He concluded, again, that she was competent to stand trial. (CRT 876, 942.) On cross-examination, Dr. Moral indicated that in all of his contact with Buenrostro, including the discussion during the break in his trial testimony, she consistently denied experiencing false beliefs or perceptions, and suicidal ideations. Buenrostro told Dr. Moral that others had misinterpreted her. For example, the reports about her seeing snakes and a monkey face were misinterpreted; she actually saw only shadows on the wall. During their discussion at the trial break Buenrostro stated she was not responsible for what other people were saying or reporting about her. (CRT 898-899, 915, 929.)

Prior to his uncontested Penal Code section 1368 court appointment in the case on March 14, 1995 (1RT 30), licensed clinical psychologist Craig Rath was contacted by the District Attorney's office the day after Buenrostro was arrested for the murders. Buenrostro had waived her right against self-incrimination and agreed to speak to a psychologist. Dr. Rath saw Buenrostro on October 28, 1994, and taped the interview. (CRT 948-949, 963, 973-974 [tape played for jury]; Competency Trial Exhibits 3, 4.) Buenrostro's demeanor during the interview was appropriate; she did not exhibit any signs of mental illness or symptoms of psychosis. Dr. Rath opined Buenrostro was unimpaired in her ability to relate events. Any lack of cooperation was volitional. (CRT 962, 975-976.)

During the post-arrest visit, Dr. Rath administered an MMPI test to Buenrostro. Buenrostro completed 400 questions (of 566). Based upon the number of questions Buenrostro completed, Dr. Rath was able to evaluate her answers and rate them on ten clinical scales and three validity scales. (CRT 952, 954.) Buenrostro demonstrated the classic profile of a malingerer. This profile was supported by a "saw-tooth" pattern revealed by Buenrostro's answers. For example, four of the clinical scales [#2, 4, 6, 8] are weighted toward serious pathology. On those scales, Buenrostro portrayed herself as mentally ill. However, if an individual is truly mentally ill the scales are designed to demonstrate a "floating" pattern. (CRT 954-956.)

In accordance with his court appointment to examine Buenrostro under Penal Code section 1368, Dr. Rath attempted to evaluate her on March 24, 1995, and April 3, 1995. In March, Buenrostro refused to see Dr. Rath at the jail. When he returned in April, Buenrostro refused again and indicated she had already been seen by other doctors. (CRT 950-951.) Based upon his meeting with Buenrostro after the murders in October 1994, Dr. Rath was of the opinion that she was competent to proceed with the

criminal action and was not suffering from a mental illness which would preclude her from understanding the nature of the proceedings or cooperating with her attorney in her defense. (CRT 979-980; see Pen. Code, § 1367, subd. (a).)

Dr. Rath testified that although he was originally called upon by the District Attorney's office to evaluate Buenrostro shortly after her arrest, he did not declare a conflict when later appointed by the court to render a competency determination. (CRT 988-989.) Dr. Rath denied that there was a conflict under the Board of Medical Quality Assurance Ethics Committee's standards. (CRT 989.) The committee had in fact declared that Dr. Rath did not conduct himself unethically. (CRT 1040.) Further, once an individual has waived the right against self-incrimination, a doctor may make contact with him or her. Dr. Rath pointed out regarding his initial visit with Buenrostro, it would have been unethical for him to refuse to see her. Buenrostro was willing to talk and potentially suicidal after the deaths of her three children. Dr. Rath explained he was on a fact-finding mission that could have been helpful to Buenrostro in her defense. Ultimately, he concluded that she gave no indication she was incompetent during his initial visit. (CRT 996, 998.)

Dr. Rath fully disclosed that his competency determination was based upon his evaluation of Buenrostro in October 1994. Additionally, the competency determination he was presenting at trial in November 1995 was the same as the determination he made in October 1994. (CRT 1004, 1022.) Dr. Rath explained that his opinion was unchanged because Buenrostro's clinical presentation in October 1994 was consistent with the absence of hallucinations or delusions. An individual does not experience hallucinations or delusions at will. (CRT 1048.) Typically, onset of psychotic symptoms matches remission. Dr. Rath explained that generally, the speed at which an individual becomes mentally ill is commensurate

with speed at which they recover, if ever. A slow onset of mental illness, which is much more common than a fast onset, would then indicate a slow recovery. (CRT 961.)

Jail psychiatrist Dr. Romeo Villar saw Buenrostro on October 28, 1994, November 3, 1994, November 10, 1994, and March 1, 1995. (CRT 1057, 1061-1062, 1063.) In October, Buenrostro denied having any hallucinations and did not exhibit any signs or symptoms they were occurring. (CRT 1058.) Buenrostro showed no remorse concerning the murders. Dr. Villar diagnosed Buenrostro with an adjustment disorder. In his opinion, she did not suffer from any major mental illness. (CRT 1060.) On November 3 and 10, 1994, Buenrostro refused to answer any of Dr. Villar's questions on the advice of her attorney. However, on both occasions she denied having hallucinations or suicidal ideations. (CRT 1061-1063.) In March 1995, Buenrostro again denied having hallucinations or suicidal ideations. Dr. Villar reported that Buenrostro had fair insight and judgment. Buenrostro's affect was subdued. Dr. Villar's last contact with Buenrostro was in March 1995. (CRT 1063-1064.)

D. Defense Rebuttal

Catherine Moreno, a paralegal employed by defense counsel, had contact with Buenrostro approximately ten times by the time she testified at the competency proceedings. (CRT 1083.) She testified that Buenrostro was not helpful when it came to matters of her defense. Buenrostro was vague in her answers and would not disclose the names of potential witnesses. Further, Moreno attempted to obtain Buenrostro's signature for her authorization for release of information at least eight times. Buenrostro refused and failed to provide any explanation. (CRT 1083-1084.)

In rebuttal to Dr. Rath's testimony, clinical and forensic psychologist Sherry Skidmore testified as an expert on the topics of evaluating MMPI

scores and ethics. (CRT 1104, 1006.) In her professional opinion, an evaluation that omitted clinical scales for consideration was incomplete and as such malingering could not be determined. (CRT 1115.) Dr. Skidmore indicated that objective measures, such as an interview, following the MMPI were helpful to clarify the issue of malingering. (CRT 1116-1117.) Dr. Skidmore opined that it was unethical to form an opinion on malingering based upon the limited information one test would provide. Dr. Skidmore stated that such a determination required "a substantial amount of data." (CRT 1120.) Further, Dr. Skidmore stated that it was below the standard of care to render an opinion regarding competency when the interview conducted was not for the targeted purpose of determining competency. (CRT 1120.)

E. Surrebuttal

George Groth, a mental health clinician at the jail, saw Buenrostro on October 27, 1995, at Buenrostro's request because she was feeling "uncomfortable." Buenrostro was anxious over her pending trial. She was communicative, articulate and responsive. Groth concluded that Buenrostro was experiencing a normal level of anxiety under the circumstances and was not exhibiting symptoms of any major mental illness. (CRT 1156-1158.) Groth also saw Buenrostro in March 1995. At that time, her insight, judgment, and concentration were impaired. (CRT 1162, 1165-1166.) However, a few weeks before the current proceedings, Buenrostro appeared lucid. (CRT 1166.)

The parties stipulated that Buenrostro was seen one time by Mental Health personnel from September 1, 1995, to the time of the competency proceedings. They further stipulated that on November 1, 1995, a search warrant was served in Buenrostro's jail cell. (CRT 1170-1171.) There were two documents written by Buenrostro in Spanish that were

confiscated at the time the warrant was served. The documents and English translations were admitted into evidence. One of the documents was entitled, "Another 48-Hours (Appointment With Death)." Untranslated and handwritten, the story is five pages in length and closely tracks Buenrostro's circumstances. The other one-page handwritten document contained Buenrostro's notes regarding her case. (People's Exhibits 11, 11A, 12, 12A, and 13.) The prosecution introduced the evidence to establish Buenrostro's intelligence and ability to write sentences and paragraphs. (CRT 1149-1150, 1171; 5th Supp. CT 130.)

F. Guilt Phase Evidence

The facts of how and when Buenrostro killed her three children are relatively undisputed. From the day the killings were discovered by police up to her testimony at trial, Buenrostro attempted to place responsibility for the murders on her estranged husband Alex, who had an alibi. Indeed, in closing argument, the defense conceded that Alex could not have killed his children. (10RT 1106.) Therefore, the guilt phase centered on whether there was sufficient evidence Buenrostro's conduct constituted willful, premeditated and deliberate murder.

G. Prosecution's Case

Buenrostro and Alex had been married for 11 years. They lived together as a family with their three children, Susana, Vicente, and Deidra, for approximately eight years at 1570 West 35th Street in Los Angeles. (8RT 821-822.) During that time, Alex was employed as an auto paint refinisher and Buenrostro worked at a law firm as a file clerk and interpreter. (8RT 822.) When they permanently separated in 1991, Buenrostro left and moved to San Jacinto with the children. Alex remained

at the Los Angeles residence and saw the children twice a month. (8RT 823-824.) Alex was eventually employed by "Colortone" as a paint salesman and had been with the company in the six years prior to trial. (8RT 825.)

a. Tuesday, October 25, 1994

About 3:00 p.m. on Tuesday, October 25, 1994, Buenrostro was at a San Jacinto-area McDonald's restaurant with her three children. (8RT 865-867.) Later that day, sometime between 5:00 and 6:30 p.m., Buenrostro was seen driving in her car with her three children. (8RT 766, 772.) By 6:30 p.m., Buenrostro went to her neighbor's residence on Shaver Street in San Jacinto and asked if she could borrow $10.00 for gasoline. Buenrostro told her neighbor, David Tijerina, that she was going to drive to Los Angeles to see her husband. Tijerina gave Buenrostro $10.00 and watched her drive out of the complex with Deidra in the car. (9RT884-885.)

Buenrostro arrived at Alex's residence in Los Angeles, alone, unannounced, about 11:00 p.m. Alex let Buenrostro into his residence. Alex had not spoken to Buenrostro personally or seen his children since the previous Sunday when he went to San Jacinto to visit them. During that visit, Buenrostro joined Alex and the children and they saw a movie together. (8RT 827-829.) When Alex asked Buenrostro about the children, she told him "they are fine." (8RT 860.) Buenrostro and Alex had sex in Alex's bedroom. Afterward, Alex stayed in bed but heard Buenrostro get up and go to the kitchen. When she returned to the bedroom, he noticed that she was holding a steak knife and was ready to cut him with it. (8RT 832-833.) He noticed Buenrostro was wearing a red glove. Buenrostro made stabbing motions with the knife and asked Alex why he was afraid of dying. She said that she was going to hit him where "it hurts the most." Alex immediately stood up on the bed, grabbed a telephone and dialed 9-1-

1. (8RT 834, 850.) Buenrostro swung the knife at him. Alex was able to jump off of the bed and run out of the room past Buenrostro unharmed. (8RT 834-835.)

Alex stood outside of his residence waiting for police who arrived within 20 minutes, at 1:15 a.m., in response to a radio call concerning domestic violence. Buenrostro remained by the door of the residence with the knife in her hand. She complied when the police commanded her to drop the weapon. (7RT 709-714, 8RT 836.) Buenrostro told the police that she was there to pick up her daughter. She claimed that Alex had taken the child earlier in the day purportedly to buy the child shoes, but had never returned her. The police observed that there were no children at the residence. (7RT 713-714.) Alex asked that Buenrostro be ordered off the property. (7RT 725, 8RT 837.) The police stood by Buenrostro while she rummaged through the trunk of her car searching for paperwork related to an alleged restraining order against Alex. There was no child's car seat or children in the car. When Buenrostro was unable to produce any paperwork, the police advised her to return to San Jacinto and file a missing persons report if she was concerned over the whereabouts of her child. Buenrostro left Alex's residence then, about 2:00 a.m. (7RT 715-716, 726.)

b. Wednesday, October 26, 1994

On Wednesday, October 26, 1994, Buenrostro entered the San Jacinto Police Department about 10:20 a.m. and inquired of the desk clerk on duty what she could do if her husband took one of her children and failed to return.[6] Buenrostro indicated that she had a restraining order against him.

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[6] Buenrostro's apartment was located less than a mile from the San Jacinto Police Department. (6RT 623, 7RT 744.)

(6RT 601, 8RT 756.) The desk clerk contacted San Jacinto police officer Blane Dillon to talk to Buenrostro. (6RT 602.)

A few minutes later, Officer Dillon met Buenrostro in the lobby. There, she told him that her husband had taken her youngest child two days earlier and had not brought her back. (6RT 613-614.) Officer Dillon informed her that law enforcement would not intervene unless her husband was in violation of a court order indicating that he was not permitted to see the child. (6RT 614.) After their conversation, Buenrostro left the police department. (6RT 615.)

c. Thursday, October 27, 1994

Velia Cabanila was Buenrostro's neighbor at the Shaver Street apartment complex. Cabanilia's and Buenrostro's units shared a common wall. Cabanila was awake with her infant nephew during the night. About 3:00 a.m., Cabanila heard a "loud thump" come from Buenrostro's living room. Cabanila thought the noise was "unusual." She did not hear any other noises emanating from Buenrostro's apartment that night. (8RT 800-802.)

At 6:40 a.m., Buenrostro entered the San Jacinto Police Department. She appeared agitated. She indicated to the desk clerk her husband was at her apartment with a knife. Police were immediately dispatched to Buenrostro's apartment to respond to the report that there was an individual there with a knife. (6RT 603-604, 615-616, 8RT 756.)

Buenrostro had followed Officer Blane Dillon in her car to her house and arrived within minutes. (6RT 604.) Outside her apartment, Buenrostro gave Officer Dillon the keys because the apartment door was locked from the inside. (6RT 617.) Given the report of the knife, Officer Dillon entered with another officer and engaged in a protective sweep of the apartment. It was dark inside; the electric lighting in the apartment was inoperable. The

officers illuminated the apartment with their flashlights. They observed two children, Susana and Vicente, covered with blankets as though sleeping, lying in the living room on a sofa and a love seat. Another sofa was standing on its end physically blocking a hallway that led to the bedrooms and bathroom. Once the officers confirmed that there were no armed individuals in the apartment, they checked on Susana and Vicente and discovered they were dead. (6RT 617-619, 628-630.)

The police went out of the apartment and asked Buenrostro what happened. Buenrostro said Alex came to the apartment that morning and she let him in. She stated that he went to the bathroom. She thought that he was acting strange, so she left the apartment and went to the police station to notify the police of his behavior. At that point, Buenrostro disputed that she had indicated in her initial report to the desk clerk that her husband had a knife. (6RT 622.) Buenrostro left her car parked at the apartment complex and returned to the police department for an interview. (6RT 625-626.)

San Jacinto Police Detective Fred Rodriguez was assigned as the lead investigator. Shortly after the discovery of bodies, he was given the information that two of Buenrostro's children had been murdered and a third child was missing. Additionally, Buenrostro had accused her husband of killing the children in the apartment and taking the missing child. At that point, the focus of the investigation turned to Alex. (6RT 679, 681, 684.)

An all-points-bulletin for Alex was issued. By 9:00 a.m., Alex was taken into police custody for questioning. Alex was located at the office of his employer, Colortone, in Los Angeles, where he had been since 7:30 a.m. The Colortone office was over a two-hour drive from Buenrostro's apartment on Shaver Street. (6RT 684-685, 7RT 744, 8RT 757-758, 811-816, 838-840.) Alex's neighbor confirmed in her trial testimony that she

heard his shower running the morning of October 27 and saw him leave the residence about 7:20 a.m. (8RT 779.) Given the distance and time Buenrostro reported he was allegedly at her apartment with a knife, Alex was ruled out as a suspect. After several hours of questioning, the police informed Alex that Susana and Vicente were dead and that Deidra was missing. (8RT 841-842.) The police did not charge Alex with any crime and eventually brought him to the San Jacinto Police Department to meet with authorities there. (8RT 842.)

About 6:00 p.m., some children who were playing in an abandoned post office in Lakeview discovered Deidra's body. (7RT 732.) The Riverside County Sheriff's Office was contacted. A deputy sheriff responded to the call and confirmed the child was dead. Deidra was dressed, strapped in a child's car seat, and there was visible trauma to her neck. (7RT 733-738.) The deputy observed that an object with a handle was stuck in Deidra's throat. (7RT 739.) Detective Rodriguez was notified of the discovery and arrived at the scene about 7:30 p.m. to investigate. (6RT 638-641.)

As Detective Rodriquez received information throughout the day, the inconsistencies in Buenrostro's version of events became more apparent. (7RT 745.) When confronted with these inconsistencies during her police interview, Buenrostro made denials, claimed lack of memory, and insisted the information the police had gathered consisted of lies. (*See e.g.* 6th Supplemental Clerk's Transcript on Appeal ("6th Supp CT") 46, 51-52, 54, 65, 72-73, 88, 91-92, 94-96, 105-108.)[7]

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[7] Buenrostro's police interview was played for the jury. (6RT 689; 6th Supp. CT 1-141; People's Exhibit No. 166.)

H. Physical Evidence

Buenrostro's car was removed from the apartment complex and was processed for evidence. (6RT 641-642.) Buenrostro's purse and a red knit glove were discovered in the trunk of the car. (6RT 645.) Nine samples of what appeared to be blood were collected from the car for DNA testing. (6RT 644-645.) Six of the nine samples were actually blood. (9RT 935-938.) The six samples matched Deidra's DNA. Buenrostro, Alex, Susana and Vicente were eliminated as sources for the blood. (9RT 944.)

Pieces of hair that were found on Deidra's hand and leg were tested against exemplars from Buenrostro. (9RT 920.) Based upon the characteristics of the hair found on Deidra's body in comparison with the exemplars taken from Buenrostro, a criminalist from the Department of Justice who analyzed the hair concluded that the hair found on Deidra's body could have come from Buenrostro. (9RT 922.)

Tire impressions were lifted from an area near the abandoned post office. There were three different types of tires on Buenrostro's car. The patterns from the three types of tires were represented in both partial and full tire impressions lifted from the area near the abandoned post office. (9RT 904-906.)

Autopsies were performed on Susana, Vicente, and Deidra on October 31, 1994. (9RT 989.) Susana had some defensive cut wounds on her right hand and four stab wounds to the front of her neck. The deepest stab wound, designated stab wound number one, was three inches deep. There was evidence the stabbing implement hit the bone of the vertebral column. Stab wound numbers two and four were each one-inch deep. Stab wound number three was two and a quarter inches deep. The stabbing implement that caused stab wound number three transected the left subclavian artery. (9RT 980-981.) The stabbing implement that caused stab wound number four almost severed in half Susana's external jugular vein. (RT 982.)

Susana lost a large quantity of blood from the stabbing. The coroner determined the cause of death was bleeding on account of the multiple stab wounds to her neck. (9RT 989.)

Vicente's wounds were similar. Vicente had defensive wounds on his hands and two stab wounds to the front of his neck. (9RT 990, 995-996.) The stabbing implement for stab wound number one almost completely transected Vicente's right common carotid artery. Since an artery was cut, he was subject to rapid bleeding and, like Susana, would have been rendered unconscious relatively quickly. (9RT 991-992.) Vicente also suffered abrasions on his neck and blunt force trauma to his right clavicle. The coroner determined the cause of death to be multiple stab wounds to his neck. (9RT 999-1000.)

Deidra suffered a cluster of stab wounds to her neck like her siblings. However, Deidra's wounds were different in that a large piece of a knife blade broke off and was embedded in the bone behind her neck area The piece of knife blade recovered was three-quarters of an inch wide and two to three inches in length. Additionally, the metallic tip of a ball point pen was embedded in the soft tissue of her neck. Deidra had suffered a perforating injury through her chest cavity lining that allowed blood to collect in her right chest area. (9RT 1001-1003.) There was evidence that Deidra had bled under her scalp behind her right ear. This injury was due to blunt force trauma and likely occurred when her head slammed against the side of the car seat due to the shear force of the stabbing. (9RT 1003-1004.) By the time Deidra's body was discovered, there were signs of decomposition. Insect activity was evidenced by maggots in her eyes, mouth and hair. Deidra died from multiple stab wounds to her neck. There were no defensive wounds on her body. (9RT 1004-1006.)

I. Defense evidence

Buenrostro elected to testify on her own behalf. Buenrostro testified the last time she saw Deidra was 9:00 or 10:00 the morning of Tuesday, October 25, 1994, when Alex came over and took her. (10RT 1038.) She testified that she went to the police by 11:00 a.m. when Alex had not returned with Deidra. (10RT 1040.) She then drove to Alex's residence in Los Angeles that evening and checked the house for Deidra. She stated she picked up the knife during an argument to defend herself against Alex; she did not attempt to stab him but only threatened him with the knife. (10RT 1036-1038.) Alex contacted the police and she complied with their command to drop the knife. She stated the Los Angeles police were not helpful when she complained that Alex had taken Deidra and had not returned her. She left Alex's residence and returned to San Jacinto. (10RT 1037, 1039.) Buenrostro testified she went to the San Jacinto Police Department again on Wednesday morning, October 26, 1994, for assistance regarding the disappearance of her daughter Deidra, to no avail. (10RT 1039.)

Buenrostro claimed that on Thursday morning, October 27, 1994, at 5:00 a.m., Alex came to her apartment. She said he told her, "I want to talk to you." When she let him in the residence, he went straight to the bathroom. According to Buenrostro, she then left the apartment because of the prior altercation on Tuesday evening in Los Angeles. She left Susana and Vicente, who were sleeping in the living room on the couches, and went to the police department between 5:30 and 6:00 a.m. Buenrostro said that Alex did not have a knife or other weapon. (10RT 1040-1042.)

Once she alerted the police that Alex was at her apartment, she returned to the apartment complex with police and waited outside. She testified that a priest approached her between 7:30 and 8:00 a.m. and informed her the children were dead. (10RT 1042-1044.) At that point,

Buenrostro went to the police department where she remained all day for questioning. (10RT 1044-1045.) In her testimony, Buenrostro denied killing her children. (10RT 1047.) She claimed that someone planted the blood evidence in her car. She had no explanation for the tire tracks discovered near the abandoned post office that matched her tires. (10RT 1045-1047.)30

On cross-examination, Buenrostro denied that she tried to frame Alex for the murder of their children. She denied that she was angry at Alex. (10RT 1059, 1073-1074.) She denied that she had sex with Alex the night she went to his residence in Los Angeles. (10RT 1072.) She denied that she changed the time line of her version of events during her direct examination after having heard the evidence that was presented in the prosecution's case-in-chief.[8] (10RT 1079.)

J. Penalty Phase

In addition to the aggravating facts of the crime itself, the prosecution presented aggravating evidence of the impact of the murders on the victims'

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[8] For example, Buenrostro testified on direct examination that Alex came over at 5:00 a.m. on Thursday morning and she went to the police station between 5:30 and 6:00 a.m. (10RT 1041-1042.) The San Jacinto Police Department incident log indicates that Buenrostro entered the police department at 6:40 a.m. on Thursday morning. (6RT 603, 8RT 756; 6th Supp. CT 85.) Her apartment was less than a mile from the police station and a two to three minute drive. (7RT 744.) Alex's Los Angeles residence was over a two hour drive to Buenrostro's apartment in San Jacinto. (7RT 744, 8RT 757.) Witnesses testified they saw Alex in Los Angeles at about 7:20 a.m. on Thursday morning. (8RT 779, 790, 811-812.) The police contacted Alex in Los Angeles between 8:00 and 9:00 a.m. (8RT 816.) Given that Alex's whereabouts were confirmed as early 7:20 a.m. on the morning the bodies were discovered, Buenrostro's modified timeline, in which she testified Alex was at her residence as early as 5:00 a.m., potentially allotted enough time for Alex to have killed the children and return to Los Angeles.

family members and the community, as well as evidence of Buenrostro's other crimes while incarcerated and prior felony conviction.

1. Impact on the Victims' Family and Community

Susana and Vicente attended Hyatt Elementary School at the time of their deaths. The school grounds are adjacent to the Shaver Street apartment complex where their bodies were found. There was a lot of police activity nearby the school the morning Susana's and Vicente's bodies were discovered. When the information was released that Susana and Vicente were killed, their deaths affected "everybody" at school, students and staff alike. (11RT 1239.) Principal Deborah Deforge talked to classes individually and also organized a crisis response team to handle the fall-out from the murders. The team consisted of school counselors, Mid-County Mental Health counselors, and counselors from a neighboring school district. The need for the team was ongoing for several weeks after the murders. (11RT 1240-1241.) As an expression of the loss that they experienced, students from Susana's class chose to leave her desk in the classroom with her belongings still in it. Susana's and Vicente's classmates sent messages to Alex. (11RT 1242.)

Alex's daughter from a prior relationship, Alejandra Buenrostro, age 19 at the time of trial, testified that she was close to her half-siblings. She lived with them in 1992. The last time she saw them was in 1993 when she went to San Jacinto with their father for a visit. She testified that she missed them and that holidays and birthdays were difficult. (11RT 1258-1262.)

Alex testified that he loved his children and they did not deserve to die. He was tasked with the funeral arrangements for his children. He testified the funeral was a painful experience and that his children share the same grave. He was affected by the fact that he will never experience high

school graduations, weddings or potential grandchildren because his children were murdered. He thought about his children all the time and particularly in the month of August because several birthdays fell during that month. Alex was not comfortable having fun and living life like a regular person. (11RT 1264-1272.)

The prosecution played a videotape of Alex at the police station depicting the moment he learned that Susana and Vicente were murdered. (11RT 1272-1273; People's Exhibit No. 185.) Additionally, the prosecution presented a videotape of a montage of still life photographs of the victims in life and their shared gravesite. (11RT 1273; People's Exhibit No. 186.)

K. Evidence of Buenrostro's Other Crimes

The parties stipulated that Buenrostro pled guilty to felony grand theft in violation of Penal Code section 487.1 in Los Angeles County Superior Court on September 1, 1988. (12RT 1302.)

Correctional officers of the Riverside County Sheriff's Department assigned to the Robert Presley Detention Center were called to testify to two separate incidents that occurred while Buenrostro was incarcerated awaiting trial for the murders.

On February 26, 1995, Deputy Johnnie Anaya had contact with Buenrostro while assisting a nurse who was administering medications to inmates housed on the medical floor. At the time, Buenrostro was housed on the floor. Buenrostro stepped outside the door of her cell. When she was told to move back, she refused to comply. Instead, Buenrostro raised her hands towards the deputy and the nurse. (11RT 1253-1254.) When Deputy Anaya caught hold of Buenrostro's hands, Buenrostro wrestled free and grabbed the nurse's clothing. Buenrostro did not let go of the nurse's

clothing and the deputy struggled with her. Buenrostro was forced back into her cell. The struggle with Deputy Anaya eventually landed them both on the floor of Buenrostro's cell. Once other staff arrived on the scene to assist, Buenrostro was subdued. (11RT 1254-1255.)

On May 18, 1996, Deputy Stephanie Rigby was supervising inmates in Section 6A. (11RT 1244.) Buenrostro was permitted to leave the day room, however, instead of returning to the day room as directed, she wandered into a sally port area. Buenrostro removed a wringer from a custodial mop bucket. Deputy Rigby was observing Buenrostro from a glass-enclosed control room. She verbally commanded Buenrostro to return to the day room. (11RT 1245-1246.) Buenrostro refused to comply. She held the mop wringer over her shoulder like a baseball bat. When Buenrostro refused to drop the wringer, back-up deputies were called to assist. Buenrostro did not voluntarily release the mop wringer; a deputy had to physically remove it from her grip. (11RT 1246.)

L. Defense Penalty Phase Evidence

Buenrostro elected to testify. (12RT 1303.) Buenrostro insisted that she had been framed by the police. In particular, Buenrostro claimed Officer Dillon had lied regarding the time line of events, and had planted the incriminating evidence against her in her car because he wanted a case to further his professional career. (12RT 1303-1304, 1309, 1314-1315.) Buenrostro indicated, "He just wanted someone, and he picked me." (12RT 1315.) She stated she was framed by somebody who put her tire tracks at the location near the abandoned post office where Deidra's body was found. (12RT 1310.) She pointed out that the hairs found on Deidra were never conclusively proven to be her hairs and could have belonged to anyone. (12RT 1310.) She insisted that reports existed that proved her factual innocence. She did not fault the jury for convicting her, but rather,

stated that had her attorneys done a better job of defending her they would have been able to point out the mistakes made by the District Attorney and the police and the verdict would have been different. (12RT 1305-1308.) Buenrostro informed the jury she wanted to live. She stated the jury should impose life in prison rather than the death penalty because she had been framed for the murders. (12RT 1306, 1311.) Buenrostro testified that she is not mentally ill and she is, "okay." (12RT 1316.) Buenrostro indicated that her perception of reality is not skewed and that she does not hear voices. (12RT 1328-1329.)

M. Defense Mitigating Evidence

In mitigation, the defense presented evidence from Buenrostro's former neighbor David Tijerina (who testified in the guilt phase), her niece Brenda Davalos, and from Buenrostro's sisters, Martha Gudino and Maria Perez, and their mother, Arecelia Zamudio.

David Tijerina testified he was Buenrostro's close neighbor for about two years and that she was a "very good mother." He noticed a change in Buenrostro's demeanor before the murders where she became frightened and withdrawn. He indicated punishment for the murders was "up to God." (12RT 1330-1333.)

Brenda Davalos lived with Buenrostro and her children in 1992 and 1993. She testified that Buenrostro treated the children good. Buenrostro was particularly close to Deidra, who was always with her. Davalos noticed a change in Buenrostro before she moved out. Davalos attributed the change to Buenrostro's "fanatical" participation in bible study and church. She indicated that the family had already been through three deaths and asked the jury to impose life in prison. (12RT 1338-1343.)

Martha Gudino testified that she had one brother and eight sisters. The family moved to the United States from Mexico in 1970 and was

"happy." They were raised in Los Angeles. She described Buenrostro as "kind," "nice," and "helpful." (12RT 1346.) Gudino did not believe that Buenrostro committed the murders. She asked the jury to impose life in prison. (12RT 1247.)

Gudino testified that in the two or three months leading up to the murders, Buenrostro was not herself. She said that Buenrostro admitted to seeing things. For example, Buenrostro said that their sister Angela Montenegro was a snake who had tried to bite Buenrostro in the leg. Another time, Buenrostro said their mother had the face of a monkey. (12RT 1349-1350, 1354.) About two months later, Buenrostro would not permit their mother and Gudino into her apartment when they tried to visit. Gudino testified that Buenrostro opened the door of the apartment but was then uncharacteristically disrespectful toward their mother and used foul language. (12RT 1349-1354.)

Maria Perez did not believe that Buenrostro was capable of murdering her children. (12RT 1364-1365.) Buenrostro was "wonderful" and very caring and loving. Perez and her three children lived with Buenrostro in Los Angeles in 1990 at the residence Buenrostro shared with Alex. (12RT 1362.) Buenrostro was never cruel or neglectful towards her children or uncaring towards Perez's children. (12RT 1369.)

In the four months prior to the murders Buenrostro's attitude changed and she became very aggressive. (12RT 1365.) During telephone conversations with Perez, Buenrostro described different delusions she was having. Perez testified that Buenrostro told her Alex had turned in to a panther and their mother had a monkey face. (12RT 1366.) Perez stated that the loss of Buenrostro's three children was difficult for the family. Perez indicated that their mother had been very sick lately and that if the death penalty were to be imposed, she would "go too." (12RT 1363-1364.)

Arecelia Zamudio had ten children that were born in Mexico. She raised them alone after her husband died when the children were young. Zamudio described Buenrostro as a "good," "calm," and "respectful" girl. Zamudio did not know why Buenrostro had been rude to her the day that she visited San Jacinto with Gudino. She testified that Buenrostro changed a lot in the three months before the children died. For Zamudio, whatever had happened to Buenrostro was unexplainable. Zamudio asked the jury to not to impose the death penalty because Buenrostro was not herself "when she did this." (12RT 1372-1378.)

ARGUMENT

PART ONE: PRETRIAL ISSUES

I. CALIFORNIA'S REQUIREMENTS FOR A FINDING OF INCOMPETENCE DID NOT INFRINGE UPON BUENROSTRO'S CONSTITUTIONAL RIGHTS AND BUENROSTRO'S JURY WAS PROPERLY INSTRUCTED

Buenrostro claims that defects in Penal Code section 1367[9] render the provision unconstitutional. (AOB 55-95.) Buenrostro argues the competency verdict was improper because the jury was given instructions pursuant to Penal Code section 1367 that are constitutionally flawed by: (1) requiring proof the defendant suffers from a mental disorder or

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[9] In pertinent part, Penal Code section 1367, subdivision (a) states as follows:

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

(Pen. Code, § 1367, subd. (a).)

developmental disability as part of a finding of incompetence (AOB 56-78), and (2) omitting two key elements of the definition of competence as enunciated by the United States Supreme Court, namely: (i) they do not require "a rational as well as factual" understanding of the proceedings, and (ii) they do not specify that the requirement is a sufficient "present" ability to understand the proceedings and consult with counsel and assist in the defense. (AOB 78-81). She claims reversal of her conviction is warranted. The jury was properly instructed in accordance with California law that is entirely consistent with the federal constitutional standard.

A. Applicable Law

The governing legal principles are well-settled:

> Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law require a trial judge to suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial.

(*People v. Halvorsen* (2007) 42 Cal.4th 379, 401.) (Internal quotes omitted.)

Federal law requires that the defendant have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational and factual understanding of the proceedings against him. (*Dusky v. United States* (1960) 362 U.S. 402, [80 S.Ct. 788, 4 L.Ed.2d 824] (per curium); *see Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *People v. Stewart* (2004) 33 Cal.4th 425, 513.)

> Similarly, under state law a defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of the defense in a rational manner. [Pen. Code, § 1367, subd. (a).]

(*People v. Halvorsen, supra*, 42 Cal.4th at p. 401.)

A defendant is presumed mentally competent to stand trial unless he meets his burden of showing his incompetence by a preponderance of the evidence. (Pen. Code, § 1369, subd. (f); *Medina v. California* (1992) 505 U.S. 437, 440, 448-451 [112 S.Ct. 2572, 120 L.Ed.2d 353] [placing burden on defendant to prove incompetence does not violate due process].)

B. California's Definition of Incompetency Does Not Offend State or Federal Constitutional Rights

Buenrostro challenges the language of Penal Code section 1367 that states the presumption of competence is rebutted when it is established that the accused is mentally incompetent "as a result of a mental disorder or a developmental disability." (AOB 56-69; Pen. Code, § 1367, subd. (a).) She contends that when the Legislature amended the statute in 1974 with the above-quoted language, it added an element to the determination of incompetency and unconstitutionally narrowed the definition of incompetency because neither a "mental disorder" nor a "developmental disability" is the functional equivalent of legal incompetence. (AOB 69-78; see Stats. 1974, ch. 1511, § 2, p. 3316.) She argues the conviction must be reversed in its entirety because the jury reached its verdict after being improperly instructed.[10] Buenrostro is incorrect. Incompetence to stand

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[10] The trial court instructed the jury in the language of CALJIC No. 4.10 as follows:

> In this proceeding you must decide whether the defendant is mentally competent to be tried for a criminal offense. This is not a criminal proceeding and the innocence or guilt of the defendant of the criminal charge against her is not involved, nor

(continued...)

trial logically stems from a mental disorder.[11] It is the existence of such a disorder that concomitantly limits a defendant's ability to understand the nature of the proceedings and to assist counsel. California's requirement of a mental disorder under Penal Code section 1367, subdivision (a), is not unconstitutional because the existence of a mental disorder is rationally linked to legal incompetence.

As a threshold matter, there was no objection to the trial court's instruction to the jury pursuant to CALJIC No. 4.10. This Court may "review any instruction given" even if Buenrostro's argument has been forfeited by her failure to object, "if [her] substantial rights were affected"

(...continued)

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

(CRT 1219; 5th Supp CT 160-161; see CALJIC No. 4.10.)

[11] Buenrostro's jury was not instructed that she was required to show mental incompetence as a result of a developmental disability. This requirement therefore is not discussed. (CRT 1219; 5th Supp CT 160-161; see CALJIC No. 4.10.)

by the instruction. (Pen. Code, § 1259.) Here, Buenrostro's substantial rights were not affected by the instruction, therefore her claim is forfeited.

Buenrostro relies on the United States Supreme Court decision in *Dusky v. United States, supra,* 362 U.S. 402, and its progeny, in support of her contention. (AOB 61-65.) However, as this Court has stated, California law is not inconsistent with these decisions.

In a per curiam opinion, the Court in *Dusky* observed "it is not enough for competency that the defendant is oriented to time and place and has some recollection of events," instead, the Court announced that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," in addition to "a rational as well as factual understanding of the proceedings against him." (*Id.* at p. 402.) The *Dusky* test is grounded in the common law prohibition of commencing proceedings or continuing proceedings against one who is "mad." (*Drope v. Missouri* (1975) 420 U.S. 162, 171 [95 S.Ct. 896, 43 L.Ed.2d 103] *citing* 4 W. Blackstone Commentaries, 24.) The prohibition "is fundamental to an adversary system of justice" since a mentally incompetent defendant, although "physically present in the courtroom, is in reality afforded no opportunity to defend himself. [Citations.]" (*Ibid.*)

Contrary to Buenrostro's argument, the Legislature did not materially alter and unconstitutionally narrow the definition of incompetence to stand trial in requiring incompetence as a result of a mental disorder or developmental disability. This Court observed in *People v. Stanley* (1995) 10 Cal.4th 764, at page 816, that the language of Penal Code section 1367, from which CALJIC No. 4.10 is drawn, "does not match, word for word, that of *Dusky*[,]" however, "[t]o anyone but a hairsplitting semanticist, the two tests are identical." (Internal quotes and citation omitted.) The focus of the *Dusky* test is cognitive, "whether the defendant's mental condition is such that he or she lacks that degree of rationality required by law

[citation]" meaning "the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 859.) The appellate court in *Timothy J.* duly observed:

> [a]s a matter of law and logic, an adult's incompetence to stand trial *must arise* from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel.

(*Id.* at p. 860, italics added.)

The court in *Timothy J.* was correct. Notwithstanding this logic, Buenrostro argues that under the *Dusky* test, the question is whether the accused has the requisite present ability to stand trial, and not, rather, why the accused lacks such ability. (AOB 65.) In other words, she contends that a mental diagnosis is not a requirement for incompetence. Clearly that cannot be the case. The determination of whether a mental disorder exists provides a basis for an opinion and a finding of incompetence. As the *Dusky* Court indicated, the defendant's ability to be rational is in question, that is, whether, presently, the accused has the ability to communicate with counsel with a reasonable degree of rational understanding and a rational understanding of the proceedings. (*Dusky v. United States, supra,* 362 U.S. at p. 402; *People v. Dunkle* (2005) 36 Cal.4th 861, 895, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, [Term "rational manner" in jury instruction for competency of capital murder defendant to stand trial did not have technical meaning peculiar to the law that required further instruction.].) This rationality finding necessarily requires a determination of the defendant's present mental condition and inextricably links legal incompetence with the existence of a mental disorder.

Additionally, the jury's consideration of whether a mental disorder exists provides a context for the defendant's purported irrationality and

qualifies a defendant's conduct as more than simply bizarre behavior. (See *People v. Lewis* (2008) 43 Cal.4th 415, 524 [entitlement to a competency hearing requires more than "bizarre behavior, strange words, or a preexisting psychiatric condition."].) Moreover, a determination by an expert that a mental disorder exists provides a basis for an opinion that the defendant is incompetent. Such a determination puts the opinion in quantifiable terms that may then be reasonably challenged or defended. Further, although an individual may suffer from a mental disorder that does not preclude legal competence, the existence of a mental disorder for a determination of legal incompetence can help to clarify persistent issues of malingering or intentional behaviors. The finding of a mental disorder may assist a jury in ruling out malingering or other intentional conduct.

The United States Supreme Court has recognized that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations[.]" (*Medina v. California, supra,* 505 U.S. at p. 451.) This is because such diagnoses are "to a large extent based on medical impressions drawn from subjective analysis and filtered through the experience of the diagnostician. [Citation.]" (*Ibid.*) However, constitutional due process does not require that a State "adopt one procedure over another on the basis that it may produce results more favorable to the accused. [Citations.]" (*Ibid.*) It is sufficient and entirely consistent with United States Supreme Court precedent, "that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." (*Ibid.*)

California has done so. The requirement under Penal Code, section 1367, subdivision (a), that mental incompetency exists as a result of a mental disorder provided Buenrostro a reasonable opportunity to demonstrate her incompetence to stand trial and did not violate her

constitutional rights in any way. Despite Buenrostro's protestations to the contrary, the issue of legal incompetence is logically linked to the existence of a mental disorder. Proof of a mental disorder provides a context for the defendant's irrationality, a basis for the defendant's expert's opinion of incompetency that can be defended, and can potentially resolve issues of malingering or other intentional conduct. The statue and its related jury instruction are not constitutionally infirm because proof of a mental disorder is required for a determination of incompetence. Buenrostro's argument should be rejected.

C. California's Definition of Competency Comports with the *Dusky* Standard

Buenrostro further argues that the definition of competency contained in Penal Code section 1367, subdivision (a), omits two key elements from the definition of competence announced by the High Court in *Dusky*. (AOB 78-81.) Specifically, she argues that California's definition does not require "a rational as well as factual" understanding of the proceedings, and fails to indicate that a "present" ability to understand the proceedings and consult with defense counsel must exist. (AOB 78-79.) Buenrostro's argument should be rejected. As stated above, this Court has made clear that the language of Penal Code section 1367, from which CALJIC No. 4.10 is drawn, "does not match, word for word, that of *Dusky*[,]" however, "[t]o anyone but a hairsplitting semanticist, the two tests are identical." (*People v. Stanley, supra,* 10 Cal.4th at p. 816.)

The *Dusky* language that considers whether the defendant has a "rational as well as factual understanding of the proceedings against him" (*Dusky v. United States, supra*, 362 U.S. at p. 402) is clearly embraced in the language of Penal Code section 1367, subdivision (a), which requires that the defendant be "unable [to] understand the nature of the criminal

proceedings" for a finding of incompetence. Nevertheless, Buenrostro argues that the definition of competence contained in Penal Code section 1367, subdivision (a), that the defendant must be *able* to understand the nature of the criminal proceedings against him, does not require a rational and factual understanding. (AOB 80.) Not so. In this sense, one's ability to grasp the nature of the proceedings necessarily encompasses one's capacity to have a rational and factual understanding of the proceedings. In other words, to stand trial, one's understanding of the facts and her relationship to them must be rationally based. In pertinent part, CALJIC No. 4.10 demonstrates this relationship in the following language:

> Although on some subjects her mind may be deranged or unsound, a person charged with a criminal offense is deemed mentally competent to be tried for the crime charged against her if:
>
> 1. She is capable of understanding the nature and purpose of the proceedings against her; [and]
>
> 2. She comprehends her own status and condition in reference to the proceedings[.]

(CALJIC No. 4.10; CRT 1219; 5th Supp CT 160-161.)

The above-quoted language from the instruction clearly implicates the defendant's ability to understand on both a factual and rational basis. For example, the instruction addresses the defendant's understanding of her own "status and condition" in relation to the proceedings. Pursuant to this language, the jury must consider any evidence of how the defendant views herself in relation to the proceedings. Such evidence would tend to shed light on whether her perceptions or factual understanding were rationally based. Further, the jury is instructed that even though the defendant may be irrational "on some subjects," she may be competent to stand trial if certain findings, including the two-sub-parts here, are satisfied, which indicates

there must be a finding of rationality as well as factual understanding. (CALJIC No. 4.10; CRT 1219; 5th Supp CT 160-161.)

Penal Code section 1367, subdivision (a), is also consistent with the *Dusky* requirement of a sufficient "present ability" to consult with one's lawyer. (*Dusky v. United States, supra*, 362 U.S. at p. 402.) California law requires that the defendant be able to "assist counsel in the conduct of a defense." (Pen. Code, § 1367, subd. (a); see CALJIC No. 4.10.) Buenrostro attempts to piggyback her argument that an incompetency determination cannot be properly based upon incompetence resulting from a mental disorder or developmental disability in an attempt to demonstrate a constitutional defect in the absence of the "present ability" language. (AOB 80.) The argument is convoluted. Temporally speaking, "present ability" to consult with one's lawyer and assisting counsel in one's defense are entirely consistent. Both requirements refer to a current ability to rationally interact with one's lawyer.

In sum, Buenrostro's arguments that the factors for determining competence to stand trial in California are unconstitutional and not in conformity with United States Supreme court precedent should be rejected.

D. Error, If Any, In the Jury Instruction, Was Harmless

Buenrostro argues that "cumulative instructional errors" require automatic reversal of the entire judgment on a theory of structural error. (AOB 82-83.) Structural error refers to error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) The United States Supreme Court has found structural error only in a very limited class of cases. (*Johnson v. United States* (1997) 520 U.S. 461, 468-469 [117 S.Ct. 1544, 137 L.Ed.2d 718] and see cases cited in therein; *Gideon v. Wainwright* (1963) 372 U.S.

335 [83 S.Ct. 792, 9 L.Ed.2d 799] [a total deprivation of the right to counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [lack of an impartial trial judge]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598] [unlawful exclusion of grand jurors of defendant's race]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] [the right to self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31] [the right to a public trial]; *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] [erroneous reasonable-doubt instruction to jury]. When an instructional error either "improperly describes or omits an element of an offense," or "raises an improper presumption" or one that "directs a finding or a partial verdict upon a particular element," it is not generally "a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." (*People v. Flood* (1998) 18 Cal.4th 470, 503.)

Here, the language of the instruction at issue did not amount to a total deprivation of Buenrostro's rights and result in an unreliable verdict. Buenrostro's arguments, largely based on semantics, do not demonstrate that the jury failed to receive constitutionally mandated instructions prior to reaching their competency determination. (Compare *Sullivan v. Louisiana, supra*, 508 U.S. at page 281, 113 S.Ct. 2078 [deficient reasonable doubt instruction "vitiates all the jury's findings"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1315 [no instructions on "substantially all" of the elements of an offense]; *Harmon v. Marshall* (9th Cir. 1995) 69 F.3d 963, 966 [instructional error removing all elements of the crime from the jury's consideration]. Prejudice, if any, resulting from the use of one form of a jury instruction correctly stating the law, as opposed to another instruction also correctly stating the same legal principles, does not affect the framework within which the trial proceeds, but is simply an error in the trial

process itself. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 467; citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Thus, even if this Court were to determine that the jury was improperly instructed, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 368, [116 S.Ct. 1373, 134 L.Ed.2d 498] [a defendant's right not to be put to trial when he or she is more likely than not incompetent, is constitutional]; *Medina v. California, supra,* 505 U.S. at p. 451 [instructional error denied defendant "a reasonable opportunity to demonstrate that he is not competent to stand trial"]; see *Pate v. Robinson* (1966) 383 U.S. 375, 386 [86 S.Ct. 836, 15 L.Ed.2d 815] [the defendant's constitutional rights abridged by failure to receive adequate hearing on competence].)

Had the jury been instructed in the language of *Dusky* their verdict would not have been different. Although Buenrostro's expert witnesses testified that she was severely impaired and suffered from mental disorders that rendered her incompetent to stand trial (CRT 278, 305-306, 311, 313, 316 [Dr. Perrotti; paranoid schizophrenia], 484-485, 495-496 [Dr. Kania; delusional disorder with paranoid delusions, psychosis], 755-756 [Dr. Mills; psychotic delusional disorder], the weight of the experts' testimony was weakened by their concessions, and the prosecution's experts who testified that Buenrostro was malingering. The defense experts variously conceded even if the diagnosis was accurate, Buenrostro could still be competent to stand trial (CRT 353, 361, 437 [Dr. Perrotti]), and that Buenrostro was competent to understand the nature of the proceedings against her (CRT 780, 815-816 [Dr. Mills.]). In addition, analysis of Buenrostro's MMPI by an independent company indicated a likelihood that Buenrostro was malingering. (CRT 593-595, 617.) Expert witnesses for

the prosecution opined that Buenrostro was competent to stand trial. (CRT 861, 875-876, 942 [Dr. Moral], 979-980 [Dr. Rath].) Buenrostro demonstrated knowledge of the legal system (CRT 840-843, 864-872 [Dr. Moral]), she consistently denied having hallucinations or delusional thoughts up to the time of trial (CRT 846, 863,898-899, 915, 929 [Dr. Moral], 1058 [Dr. Villar]), and there was evidence that she feigned mental illness on the MMPI administered by Dr. Rath (CRT 954-956). Additionally, there was evidence that Buenrostro had developed a satisfactory relationship with trial counsel after a period of distrust that was based upon Buenrostro's feelings that trial counsel was bossy, did not give her a say in the matter, and moved too slow. (CRT 853-856.) When at first Buenrostro was dissatisfied by the rate at which the proceedings had progressed, she acknowledged that the seriousness of her case required ample time for trial counsel to prepare. (CRT 854.)

The record demonstrates that Buenrostro had the present ability to consult with trial counsel with a reasonable degree of rational understanding, and had a rational and factual understanding of the proceedings. If the trial court erred in instructing the jury in the language of CALJIC No. 4.10, the error was harmless beyond a reasonable doubt. (*People v. Huggins* (2006) 38 Cal.4th 175, 193-194.)

II. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ITS RULING LIMITING DR. SKIDMORE'S TESTIMONY REGARDING PROFESSIONAL ETHICS

Buenrostro argues the trial court abused its discretion in violation of her state and federal constitutional rights to due process, a fair trial, confrontation, compulsory process and to present a defense when it limited defense rebuttal witness Dr. Sherry Skidmore, a forensic psychologist, by precluding her from testifying about Dr. Rath's professional ethical

obligations. According to Buenrostro, she was prejudiced by the trial court's ruling and reversal of the entire judgment is required. (AOB 96-118.) The proffered evidence that the trial court ruled was impermissible was irrelevant and collateral as it had no tendency to prove that Buenrostro was incompetent to stand trial. The trial court exercised sound discretion when it limited Dr. Skidmore's testimony by excluding her opinion of what professional ethical obligations Dr. Rath allegedly breached. Even if the trial court erred in limiting the testimony, Dr. Skidmore did, in fact, testify about Dr. Rath's ethics. Additionally, Dr. Rath's credibility was otherwise adequately tested by the defense. Buenrostro's state and federal constitutional rights were not affected. Her argument should be rejected.

A. Background

Dr. Craig Rath was called by the prosecution and testified that he interviewed Buenrostro and administered the MMPI on October 28, 1994, shortly after her arrest for the murders. Without objection by the defense, Dr. Rath was later court-appointed in the context of Penal Code section 1368 to evaluate Buenrostro. (CRT 948-949, 952, 1043; 1RT 30.) Buenrostro refused to see Dr. Rath after his court appointment. (CRT 949, 950-951.) Based upon his October 28, 1994, contact with Buenrostro, Dr. Rath opined that she was competent to stand trial and was not suffering from any mental illness that would preclude her from understanding the nature of the proceedings or cooperating with her attorney in her defense. (CRT 979-980.)

The defense attempted to establish that Dr. Rath's opinion was wrought with conflict, which he failed to declare at the time of his court-appointment, because he was originally referred by the District Attorney to evaluate Buenrostro after her arrest. Additionally, the defense sought to impeach Dr. Rath by placing his ethics in issue because he was relying on

information gathered in the 1994 interview and testing that was not originally for the purpose of determining competency. During cross-examination, Dr. Rath indicated that he fully disclosed in his written report of his Penal Code section 1368 evaluation that his opinion was based upon his contact with Buenrostro in October 1994. (See 5th Supp. CT 17-19.) Further, during his contact at that time with Buenrostro, he was on a fact-finding mission that could have been beneficial to the defense, i.e., he was not motivated to form a prosecution-friendly opinion. (CRT 996, 998, 1004, 1022.) Dr. Rath testified he had confirmed with the Board of Medical Quality Assurance Ethics Committee that a conflict did not exist. (CRT 989.) On re-cross-examination, the trial court sustained the prosecutor's scope and relevance objections to further questioning on the topic of the ethical obligations placed upon Dr. Rath by his profession. The trial court indicated, "[w]e have covered this ethics thing completely," and "we are done talking about ethics." (CRT 1049.)

Before resting and outside the presence of the jury, the prosecution objected to the testimony of defense rebuttal witness Dr. Sherry Skidmore on the ethics of psychologists. The prosecutor moved to exclude the testimony as collateral and under Evidence Code section 352. (CRT 1074.) The defense proffered Dr. Skidmore's testimony in rebuttal to Dr. Rath to establish the ethical principles that Dr. Rath should have followed under the circumstances and that he violated the professional code of conduct. The defense proffered that Dr. Skidmore's testimony in this regard would impeach Dr. Rath's testimony that a conflict of interest did not exist based upon the October 1994 referral by the District Attorney's office. (CRT 1075.) Further, the defense wanted to question Dr. Skidmore on whether it is "unethical and scientifically invalid to reach a conclusion on the question of competency when [Dr. Rath] never actually interviewed [Buenrostro] and performed a specific competency evaluation." (CRT 1075-1076.) The

defense argued that the jury had no basis upon which it could reach a determination regarding ethics except Dr. Rath's testimony that he acted ethically and that rebuttal on the topic was therefore proper. (CRT 1078.)

The trial court ruled that the defense had thoroughly questioned Dr. Rath on the issue of professional of ethics and how he understood his obligation but that further inquiry into the ethical considerations connected to the case was collateral. The trial court issued a ruling that declined to permit Dr. Skidmore's testimony on the matter. [12] (CRT 1076-1077.)

At trial, Dr. Skidmore testified on behalf of the defense in rebuttal that she had specialized experience in the areas of ethics in the profession and on scoring and evaluating MMPI tests. She testified that an incomplete evaluation would be rendered if the MMPI scoring omitted certain scales. (CRT 1106-1108.) She stated that conducting an interview after the MMPI is administered provides clarity on the issue of malingering. (CRT 1116-1117.) Dr. Skidmore opined that it would be unethical to form an opinion on malingering based upon limited information contained in an MMPI. Further, she asserted it is below the standard of care to render an opinion on competency when an interview upon which the opinion is based is not for the specific purpose of determining competency. (CRT 1120.) When the defense inquired of Dr. Skidmore whether a forensic psychologist could reach a valid conclusion if, at the time of the interview, they were working "in a dual role," the trial court sustained the prosecution's objection. (CRT 1120-1121.)

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[12] The defense also proffered Dr. Skidmore's testimony to refute Dr. Rath's testimony regarding the MMPI he administered to Buenrostro in 1994. (CRT 1076.) The trial court indicated Dr. Skidmore's testimony on the scientific interpretation of the testing would be allowed. (CRT 1077.) That ruling is not at issue here.

B. The Trial Court Did Not Abuse Its Discretion When It Limited Dr. Skidmore's Testimony Because The Testimony Was Irrelevant and Collateral to the Issue of Whether Buenrostro Was Competent to Stand Trial

Buenrostro argues that the trial court committed prejudicial error in its ruling that limited Dr. Skidmore's testimony. Buenrostro maintains that the proffered testimony was relevant for impeachment purposes because it would have demonstrated to the jury that Dr. Rath's competency evaluation was "a sham" and that he was biased in favor of the prosecution. (AOB 104-105.) As the trial court observed in its ruling, the proffered testimony concerning professional ethics was collateral and irrelevant. The trial court's ruling was proper.

Only relevant evidence is admissible. Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) Under the general rule:

> "the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." [Citation.]

(*People v. Lawley* (2002) 27 Cal.4th 102, 155.)

Thus, the trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) The trial court's discretion will not be disturbed on appeal unless its exercise is arbitrary, capricious, or absurd and results in a miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 534; *People v. Cash* (2002) 28 Cal.4th 703, 727.) The trial court

"retains discretion to admit or exclude evidence offered for impeachment" and any "exercise of discretion in admitting or excluding evidence" is reviewed under the abuse of discretion standard. (*People v. Brown, supra,* 31 Cal.4th at p. 534 *quoting People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court did not abuse its discretion when ruled to limit Dr. Skidmore's testimony to a discussion of the scientific validity of Dr. Rath's interpretation of the MMPI he administered to Buenrostro and to exclude the proffered testimony concerning professional ethics. Dr. Skidmore's testimony was proffered to impeach Dr. Rath who previously testified that he had not performed his task of evaluating Buenrostro for competency unethically. (CRT 989, 996, 1004.) According to the proffered evidence, Dr. Rath had acted unethically and did not act within the standard of care of the profession because his evaluation was based upon an interview and test not designed for the purpose of determining competency. The defense also argued that Dr. Rath acted unethically by not disclosing to the court prior to his appointment that a potential conflict existed because he was initially referred by law enforcement to interview Buenrostro shortly after the murders.

The proffered evidence of professional ethics was collateral to the issue of Buenrostro's competency. "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) A collateral matter may be relevant to the credibility of a witness who presents evidence on an issue. (*Ibid.*) However, the evidence of professional ethics was irrelevant as it had no tendency to prove the material issue of whether Buenrostro was competent to stand trial. Moreover, the facts that Dr. Rath was referred initially by law enforcement and based his competency evaluation on the October 28, 1994, contact with Buenrostro, which raised

an inference of bias and suggested that his opinion was based upon potentially stale or insufficient information for the purposes of evaluating competency, were disclosed to the jury for their consideration.

Additionally, the defense had ample opportunity to impeach Dr. Rath directly during cross-examination. For example, the defense questioned Dr. Rath about the District Attorney's referral to interview Buenrostro, the guidelines contained in the ethical handbook for the American Psychological Association for notifying the parties of a potential conflict of interest (CRT 988), and the impact on the reliability of his report given that it was based upon his only contact with Buenrostro in October 1994 (CRT 1002-1006, 1022).

Furthermore, during trial, despite the trial court's ruling that specifically limited Dr. Skidmore's testimony to the purported deficiencies of Dr. Rath's scientific interpretation of the test and his report, the defense also questioned Dr. Skidmore on ethics. The jury heard Dr. Skidmore's testimony that based upon the limited MMPI results of October 1994, it was unethical to form an opinion regarding malingering and, in Dr. Skidmore's opinion, it was below the standard of care to render an opinion regarding competency when the testing and interview that took place in October of 1994 were not for the purpose of reaching such a conclusion. (CRT 1120.) Clearly, notwithstanding the trial court's ruling, Dr. Skidmore's testimony put in issue not only Dr. Rath's practical approach, but also his ethical approach.

The trial court did not abuse its discretion in its ruling that sought to exclude the evidence of professional ethics which was proffered to undermine Dr. Rath's credibility. As discussed above, Buenrostro had ample opportunity to impeach the credibility of Dr. Rath's opinion and promote her theory of the case that Dr. Rath's competency determination was unreliable because it was biased and based upon insufficient

information. The jury was made aware of Dr. Rath's relationship with law enforcement shortly after the murders and that after Buenrostro refused to see Dr. Rath following his uncontested Penal Code section 1368 court-appointment, he relied upon the information he gathered during his contact with Buenrostro in October 1994 to render a competency opinion. The record establishes that Buenrostro was able to place Dr. Rath's opinion in proper perspective. Dr. Rath's "credibility was thoroughly questioned, and the weight of his testimony was put to a proper test. The jury was afforded full opportunity to appraise the witness and his testimony. [Citation.]" (*People v. Redmond* (1981) 29 Cal.3d 904, 913.) The trial court's ruling did not impermissibly infringe upon Buenrostro's state or federal constitutional rights.

Additionally, as discussed above, the jury did in fact hear Dr. Skidmore testify as to Dr. Rath's ethical obligations. Therefore, the defense succeeded putting Dr. Rath's credibility in issue not only in its cross-examination of Dr. Rath, but during Dr. Skidmore's testimony. Accordingly, even assuming that the trial court's ruling that intended to exclude the details of the ethics of the profession contained in the defense proffer was in error, the error was harmless under the state standard of error set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, that in the absence of the error complained of, a different verdict was not reasonably probable. And, assuming *arguendo* that the error implicated Buenrostro's rights under the federal Constitution, the error was harmless beyond a reasonable doubt under the standard set forth in *Chapman v. California, supra*, 386 U.S. at pp. 23-24. (*People v. Cash, supra,* 28 Cal.4th at p. 729.) Buenrostro's convictions and sentence should be affirmed.

III. THE TRIAL COURT PROPERLY EXCLUDED THE UNEXPECTED TESTIMONY OF BUENROSTRO'S EXPERT WITNESSES

Buenrostro contends the trial court improperly excluded evidence as a discovery sanction under Penal Code section 1054 et seq. Buenrostro contends that the parties and the trial court were erroneously proceeding pursuant to pretrial discovery rules for criminal cases when the prosecutor's objections to some of her experts' testimony were sustained because they had not been disclosed in discovery.[13] She argues the application of the criminal discovery statute was improper, rather, the provisions of the Civil Discovery Act of 1986 (the "1986 Act" or the "Civil Discovery Act")[14]

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[13] Under the pretrial discovery rules for criminal cases:

> The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> (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.

(Pen. Code, § 1054.3, italics added.)

[14] The Discovery Act of 2004 (the "2004 Act") became effective July 1, 2005 (Code of Civ. Proc., § 2016.010). The 2004 Act reorganized and renumbered the provisions of the Civil Discovery Act of 1986, but the 2004 Act was not intended to effect any substantive changes in the law. (Stats. 2004, ch. 182, § 61 ["Nothing in this act is intended to substantively change the law of civil discovery"].) Buenrostro refers to the repealed provisions of the 1986 Act because they would have applied at her 1995

(continued...)

apply to competency proceedings. She further argues under the civil rules for discovery there was no violation for the trial court to sanction. Buenrostro asserts the exclusion of the evidence resulted in a prejudicial abuse of discretion that denied her constitutional rights to due process, a fair competency trial, to present evidence in support of her case, and to contest the prosecution's case. (AOB 119-131.) Buenrostro's arguments should be rejected. The trial court did not abuse its discretion in excluding evidence Buenrostro's experts relied upon that was not previously disclosed to the prosecution. Even if the evidence was improperly excluded, the error was harmless.

During re-direct examination of Dr. Kania, trial counsel sought to follow-up on questions the prosecutor asked during cross-examination regarding Buenrostro's delusions. (CRT 641.) Trial counsel inquired about discussions Dr. Kania had with Buenrostro concerning her delusional belief about computers. (CRT 641.) Dr. Kania indicated that Buenrostro had stated that computers were running the world and that computers were killing people. He stated that Buenrostro was not clear on whether the people she saw were alive or were computers. (CRT 641.) At that point the prosecutor objected to the line of questioning on the ground that it was beyond the scope of cross-examination. The prosecutor also indicated that it was "all new information" that had "never been brought anywhere in a report or anything." (CRT 641-642.)

The trial court acknowledged that trial counsel had moved into a new area that was not previously covered. The trial court permitted trial counsel to reopen on the issue. (CRT 642.) The prosecutor objected again on the

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(...continued)
competency proceeding. (AOB 123 fn. 47.) For ease of reference, respondent does the same.

ground that discovery had not been provided. The prosecutor reiterated that no materials were ever provided mentioning Buenrostro's delusional beliefs in this regard. Trial counsel admitted that the information did not appear in Dr. Kania's report. The trial court then sustained the prosecutor's objection and granted his request to strike the testimony regarding Buenrostro's delusions about computers. The jury was admonished to disregard the testimony. (CRT 642.)

Later, following Dr. Mills's testimony where he opined Buenrostro was not malingering and had a psychotic disorder that significantly affected her competence because it made it very difficult for her to work with an attorney, trial counsel inquired whether Dr. Mills had reviewed Buenrostro's MMPI scores. (CRT 755-756.) Dr. Mills indicated that he took the scores of the MMPI administered by Dr. Rath, "put them on the appropriate MMPI coding form," and "sent them off to Caldwell." (CRT 756.) At that point, the prosecutor asked to approach the bench. The prosecutor indicated he was unaware that Dr. Mills sent the MMPI administered by Dr. Rath to Caldwell for an evaluation. The jury was excused for a break. (CRT 756.)

The prosecutor objected to any reference to the Caldwell report that was derived from the test Dr. Mills re-coded because the prosecution did not receive any discovery on the matter. (CRT 757.) Trial counsel examined Dr. Mills outside the presence of the jury. Dr. Mills testified that he "marked" the MMPI administered by Dr. Rath and sent it to Caldwell. Subsequently, he received a Caldwell report that differed slightly from the report Dr. Kania had received from Caldwell following his submission of Dr. Rath's MMPI. (CRT 757-758.) The trial court asked trial counsel why he wanted Dr. Mills to testify to the Caldwell report if it was virtually the same as the Caldwell report handled by Dr. Kania. Trial counsel indicated that the report assisted Dr. Mills in reaching his opinion. Additionally, trial

counsel asserted the report was not new material that the prosecution was entitled to because the prosecutor had Dr. Kania's report. The trial court presented a hypothetical to trial counsel as to what his reaction would be if, in the context of a criminal trial, he was not provided a police report to which a prosecution witness testified he prepared and referred to during his testimony. (CRT 758-759.) Trial counsel indicated he would not be concerned unless the report offered new material. (CRT 759.)

In sustaining the prosecutor's objection to the testimony, the trial court stated: "The test is whether or not [trial counsel] provided discovery to the opposing side as to the information [he] intended to elicit from this witness. And [he] did not." (CRT 760.) The trial court excluded Dr. Mills's testimony related to the Caldwell report. (CRT 760.)

The thrust of Buenrostro's argument on appeal is that there was no discovery violation on the part of the defense. (AOB 122.) She contends that competency proceedings are not criminal but, rather, special proceedings governed by the rules applicable to civil proceedings, including the 1986 Act. (AOB 123.) Buenrostro argues that the trial court and the parties were operating erroneously under the discovery rules applicable to criminal proceedings. Relying on *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478 (*Baqleh*), that held that the civil discovery rules apply to competency hearings, Buenrostro contends competency hearings are governed by the civil rules of discovery. She further argues that a civil discovery violation on her part cannot exist because the prosecutor did not comply with the civil discovery requirements, thus there was no basis for the trial court to exclude the evidence under the 1986 Act. (AOB 124-125.) Initially, respondent submits that Buenrostro has forfeited her claim for her failure to raise the argument in the lower court that she now asserts on appeal. As discussed in further detail below, even if the claim has not been forfeited, it should be rejected. The trial court did not

abuse its discretion in limiting the testimony of Buenrostro's experts. In any event, if the trial court erred in limiting the testimony, any error was harmless.

Penal Code section 1369, which governs competency trials, specifies how mental examinations are to proceed to determine the question of mental competence, but does not otherwise specify which rules of discovery are to apply. (See Pen. Code, §1369.) That section is codified in Part Two of the Penal Code, "Of Criminal Procedure," under Title 10, entitled "Miscellaneous Proceedings."[15] (See Pen. Code, § 1369.) As Buenrostro points out in her opening brief, competency proceedings are special proceedings "governed *generally* by the rules applicable to civil proceedings." (Emphasis added.) (AOB 123 citing *Baqleh v. Superior Court, supra,* 100 Cal.App.4th at p. 490 citing *People v. Lawley, supra,* 27 Cal.4th 102, 131.) At the time of Buenrostro's competency trial there was no authority that the 1986 Civil Discovery Act specifically applied to competency proceedings. Thus, although competency hearings are generally governed by the rules applicable to civil proceedings, at the time of trial it was not clear whether civil discovery rules would apply and in what context.

A competency proceeding must still be viewed in the context of the criminal case. Because of the relationship between competency and the criminal case, not all issues arising regarding a competency hearing lend themselves to application of civil rules. For example, in *Medina v. California, supra,* 505 U.S. at p. 452 the United States Supreme Court rejected a due process claim to California's competency proceedings based

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[15] Other "miscellaneous proceedings" that are identified in Title 10 of the Penal Code include for example, proceedings related to bail, compelling the attendance of witnesses, examination of witnesses, detainer agreements, and the disposition of evidence in criminal cases.

on the statutory presumption that a defendant is competent, and the requirement that a defendant has the burden of proof on the issue of competency. In so doing, the Court rejected the defendant's argument that it should use the balancing test it had previously set forth in *Mathews v. Eldridge* (1976) 424 U.S. 319 [96 S.Ct. 893, 47 L.Ed.2d 18] to evaluate procedural due process claims related primarily to civil matters, and instead used the narrower test used in criminal law. (*Medina v. California, supra*, 505 U.S. at pp. 442-443.) As the Court explained, "[i]n our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process. *E.g., People v. Fields* (1965) 62 Cal.2d 538 [competency hearings 'must be regarded as part of the proceedings in the criminal case']." (*Medina v. California, supra*, 505 U.S. at p. 443.)

Turning to Buenrostro's argument that the rules of civil discovery applied at trial and, because the prosecutor failed to comply with 1986 Act, there was no discovery violation on the part of the defense to sanction, the claim is forfeited. Buenrostro failed to raise the prosecution's alleged noncompliance as a basis to admit the evidence at trial. Therefore, her claim under the 1986 Civil Discovery Act should be deemed forfeited. (*People v. Anderson* (2001) 25 Cal.4th 543, 592, fn. 17; *People v. Williams* (1997) 16 Cal.4th 153, 250; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119, fn. 22; *People v. Garceau* (1993) 6 Cal.4th 140, 173, disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066; *Estate of Leslie* (1984) 37 Cal.3d 186, 202.)

Because neither the parties nor the lower court proceeded under the rules for civil discovery, and no objection was made that criminal rules of

discovery did not apply, presumably all agreed that the discovery rules for criminal matters applied to Buenrostro's competency trial. Given that the law was not clearly settled, the criminal discovery statutes were logically relied upon in the context of a competency proceeding arising in connection with a criminal case.[16] Thus, under the circumstances, although Buenrostro has forfeited her claim on appeal, the trial court and the parties appropriately litigated the prosecution's objections to the evidence under the discovery rules applicable to criminal proceedings. (See *People v. Burney* (2009) 47 Cal.4th 203, 237 [abuse of discretion reviewed based on facts at the time the trial court ruled on them]; see also *In re Scott* (2003) 29 Cal.4th 783, 813-814 [although criminal discovery statute inapplicable in habeas proceeding, court's citation to such statue was logical in fashioning fair discovery order].)

Under the rules applicable to criminal discovery, the express purpose of discovery is the exchange of information "to promote the ascertainment of truth in trials by requiring timely pretrial discovery." (Pen. Code, § 1054, subd. (a).) The criminal discovery statute indicates that any "reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, [. . .] which the defendant intends to offer in evidence at the trial," be provided to the prosecution in

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[16] Penal Code section 1368 et seq. contains the statutory scheme for competency hearings. Clearly many civil discovery rules have no application to a competency hearing. For example, it is clearly not contemplated that interrogatories are propounded (See Code Civ. Proc., § 2033), or depositions are taken of parties or others (e.g. Code Civ. Proc., § 2034, subd. (i)) , as the delay and expense attendant with such procedures is inconsistent with the purpose and process that is identified for the competency proceedings. The criminal proceedings are suspended while the competency proceedings are conducted (Pen. Code, § 1368, subd, (c)), and the statute even contemplates a jury may be on hold until determination of the competency proceedings (Pen. Code, § 1368, subd. (a)).

discovery. (Pen. Code, § 1054.3, subd. (a).) Pursuant to subdivision (c) of section 1054.5 of the Penal Code, exclusion of evidence is a remedy of last resort. The trial court "may prohibit the testimony of a witness" in the event of a discovery violation but only if "all other sanctions have been exhausted." (Pen. Code, § 1054.5, subd. (c).) The trial court's ruling on a matter regarding discovery is generally reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Here, the defense failed to disclose the "statements of experts made in connection with the case" and the results of the mental examination as required by Penal Code section 1054.3. The defense elicited the information during Dr. Kania's testimony regarding Buenrostro's delusional beliefs about computers which assisted him in reaching his opinion that she was incompetent. Additionally, the defense elicited Dr. Mills' opinion regarding Buenrostro's competence that relied in part on a re-coded MMPI examination that Dr. Mills sent to the Caldwell organization for scoring. However, the prosecution was not provided any of this information in discovery. The prosecution was never provided any indication that Dr. Kania stated he had discussed Buenrostro's delusions concerning computers, nor was the prosecution provided the re-coded MMPI test results. Clearly, this presents an element of surprise at trial, which the criminal discovery statutes are designed to minimize. By its terms, the purpose of the discovery statutes is to "promote *ascertainment of truth"* through a discovery scheme which allows the parties to obtain information to prepare their cases and reduce the chance of surprise at trial. (Pen. Code, § 1054 , subd. (a), italics added); see *Taylor v. Illinois* (1988) 484 U.S. 400, 411 fn. 16 [108 S.Ct. 646, 98 L.Ed.2d 798] ["the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial"].) The

trial court properly determined the defense failure to disclose constituted a discovery violation.

Further, and at issue here, the trial court's remedy for the discovery violation was proper. Rather than imposing the harshest of sanctions under subdivision (c) of section 1054.5, which would have "prohibit[ed] the testimony of the witness[es]," the court's sanction was limited in scope and excluded only these two discrete areas of testimony that had not been disclosed to the prosecution. The remedy of a continuance would have been inadequate because the trial was underway. Under the circumstances, the trial court did not abuse its discretion in excluding the evidence.

Additionally, the defense could not have been prejudiced by the remedy imposed by the trial court. Buenrostro's alleged computer delusions were not the only basis for Dr. Kania's opinion. His opinion and diagnosis that Buenrostro suffered from a delusional disorder was based on other delusions she allegedly experienced such as gas being pumped into her jail cell and her sister speaking to her children in a different language. (CRT 481-482.) Additionally, it was determined that the re-coded MMPI was cumulative since it largely duplicated results that were already in evidence. (CRT 757-759.)

Even if Buenrostro had timely raised an objection that the criminal discovery rules did not apply, her claim that there was no discovery violation should be rejected. Under either the criminal or civil pretrial rules of discovery, the exchange of information regarding experts is essential to a fair proceeding. This Court stated in *Bonds v. Roy* (1999) 20 Cal.4th 140, a medical malpractice case, "The very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial." (*Id.* at p. 146.) "When an expert is permitted to testify at trial on a wholly undisclosed subject area," the opposing party is not given "a fair

opportunity to prepare for cross-examination or rebuttal." (*Bonds v. Roy, supra,* 20 Cal.4th. at p. 147.)

Under Code of Civil Procedure section 2034, subdivision (a), of the 1986 Act, any party may demand the exchange of expert witness information. (*Id.,* at p. 143.) Such an exchange "shall also include or be accompanied by an expert witness declaration" made under penalty of perjury. (Code Civ. Proc. § 2034, subd. (f)(2).) The declaration must contain, inter alia, "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (Code Civ. Proc. § 2034, subd. (f)(2)(B).)

The issue this Court decided in *Bonds* was whether under Code of Civil Procedure section 2034, which Buenrostro argues applies here, a trial court may preclude an expert witness from testifying at trial on a subject where its general substance was not previously described in an expert witness declaration. (*Bonds v. Roy, supra*, 20 Cal.4th at p. 142.) Although the Civil Discovery Act was not invoked by either party in the current case, and there was no exchange of expert witness declarations pursuant to the Act, *Bonds* is instructive on the rationale that supports the remedy of exclusion. This Court held:

> the statutory scheme as a whole envisions timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial so long as a party has submitted any expert witness declaration whatsoever is inconsistent with this purpose. We therefore conclude that the exclusion sanction of [Code of Civil Procedure section 2034,] subdivision (j) applies when a party unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of [Code of Civil Procedure section 2034,] subdivision (f)(2), including the requirement that the declaration contain "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." ([Code of Civ. Proc, § 2034] [s]ubd. (f)(2)(B).) This encompasses

> situations, like the present one, in which a party has submitted an expert witness declaration, but the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial. To expand the scope of an expert's testimony beyond what is stated in the declaration, a party must successfully move for leave to amend the declaration under subdivision (k).

(*Bonds v. Roy, supra*, 20 Cal.4th at pp. 148-149.)

Here, the essential objective of the demand process, i.e., disclosure of the experts and their reports, was satisfied and pretrial discovery of the experts' reports was effectuated. (CRT 642 [prosecutor indicated Dr. Kania's written report furnished to the prosecution]; CRT 757 [prosecutor stated in his objection that Dr. Mills's report made no mention of the re-coded Caldwell results].) However, Buenrostro failed to provide the expert information in question during pretrial discovery, and then sought to introduce the information at trial. Buenrostro should not now be allowed to use the rules of civil discovery as a shield against the remedy of exclusion imposed by the trial court. In the spirit of the pretrial discovery rules that are grounded in fairness, trial counsel's attempt to expound on the topics of Buenrostro's alleged computer delusions and the report Dr. Mills received from Caldwell based upon a re-coded MMPI was justifiably denied by the trial court when it sustained the prosecution's objections to the evidence. An abuse of discretion is demonstrated only upon a clear showing the trial court exceeded all bounds of reason under the circumstances. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) The trial court's exclusion of the evidence was reasonable under the circumstances. Further, even if the prosecution failed to make a pretrial discovery demand that would have triggered Buenrostro's experts to submit witness declarations pursuant to the Act, punishing the prosecution for technical noncompliance by denying a remedy is entirely unwarranted where *both* parties and the trial court were

operating under the reciprocal discovery rules applicable to criminal cases and the defense was not prejudiced by the remedy.

Buenrostro relies on *Baqleh* in support of her position the trial court erred in imposing the evidence sanction. (AOB 124.) She contends that under the decision in *Baqleh*, the parties must comply with the requirements of the Civil Discovery Act in order to obtain pretrial discovery of experts in a competency proceeding. (AOB 124.)

In *Baqleh*, a non-capital murder trial was suspended for the purpose of competency proceedings. The trial court appointed an expert to evaluate the defendant's competency to stand trial. The prosecution made a motion for an order compelling the defendant to submit to an examination by an expert retained by the prosecution. The defense, in turn, moved to be examined instead by the director of the regional center for the developmentally disabled pursuant to Penal Code section 1369. The trial court ordered that the defendant be examined by both the director of the regional center for the developmentally disabled and prosecution's retained expert. (*Baqleh v. Superior Court, supra*, 100 Cal.App.4th at pp. 485-486.) The question presented was whether the trial court had the authority to order the defendant to submit to an examination by the prosecution's retained expert and the nature of an examination that may be ordered. (*Id.* at p. 482.)

The Court of Appeal concluded that the trial court had the statutory authority to order the defendant to submit to an examination by the prosecution's expert, but it did so in a manner that did not comport with the Civil Discovery Act. (*Baqleh v. Superior Court, supra*, 100 Cal.App.4th at p. 493.) The prosecution had failed to make its request pursuant to the Civil Discovery Act that required specifics such as time, place, manner, conditions, scope, and the nature of the examination. The prosecution sought an order simply compelling the defendant to submit to an evaluation

by the People's yet unnamed expert. The trial court's order incorporated the deficiencies of the request, "which had the effect of granting the prosecution considerably greater license than the civil discovery statutes permit." (*Baqleh v. Superior Court, supra*, 100 Cal.App.4th at pp. 488, 491.) Although it did not comply with the civil discovery scheme, the reviewing court held the trial court's order was not constitutionally defective; the order did not implicate the defendant's federal constitutional rights under the Fifth and Sixth Amendments. (*Id.* at p. 505.) The Court of Appeal vacated the order in question because of its lack of specificity. (*Id.* at pp. 505-506.)

The *Baqleh* case does not help Buenrostro for two reasons. First, as noted, the case was not in existence at the time Buenrostro's competency was being litigated. And secondly, *Baqleh* specifically addressed the applicability of the Civil Discovery Act to the issue of whether the trial court abused its discretion in ordering the defendant to submit to an examination by the prosecution's retained experts which is not at issue here.

It is well-settled competency proceedings are not criminal proceedings and the rules for civil trials generally apply to special proceedings of a civil nature. (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1269 citing *People v. Lawley, supra*, 27 Cal.4th at p. 131 ["Although it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings"].) However, given the unique relationship between a competency proceeding and its companion criminal case, it less clear that civil discovery rules governing the exchange of expert information apply. Indeed, any lack of clarity was demonstrated in the lower court by the defense failure to object on this basis. This Court has not ruled on the issue of whether the rules for civil discovery apply to the exchange of expert

information in a competency proceeding under Penal Code section 1369. This Court need not reach the issue here nor adopt the reasoning of the court in *Baqleh* to resolve the question presented in the current case of whether the trial court erred in excluding the evidence of Buenrostro's alleged computer delusions and the re-coded MMPI submitted to Caldwell. Regardless of the statutory scheme relied upon, error, if any, in the exclusion of the evidence was harmless.

Even if the prosecution's failure to strictly adhere to the demand requirements of the Act permitted Buenrostro license to introduce previously undisclosed and unexpected expert witness testimony that contained information the experts relied upon in reaching their opinions, she was not prejudiced by the trial court's exclusion of the testimony. Contrary to her assertion, reversal is not required on this basis. (AOB 128-131.) Any error was harmless. When the trial court improperly excludes evidence, such error does not require reversal of the judgment unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) The reviewing court determines whether the appellant has met her burden of showing "it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*Id.* at pp. 332, 334-335.)

Dr. Kania's testimony regarding Buenrostro's computer delusions was offered in support of Dr. Kania's diagnosis of psychosis. On cross-examination, Dr. Kania indicated that in order to conclude that Buenrostro suffered from psychosis, he had to determine that she was delusional. (CRT 565-566.) On re-direct, his testimony regarding an alleged delusional belief Buenrostro had regarding computers was stricken. (CRT 641.) However, the jury had already heard evidence of Buenrostro's other delusional beliefs. Dr. Kania testified on direct examination that Buenrostro held delusional beliefs concerning her sister speaking a

different language and influencing her children in this language, gas being pumped into her jail cell, that she was being physically harmed by the gas and that people were trying to kill her. (CRT 481-482.) Dr. Perrotti had testified that Buenrostro was delusional in her belief that people wanted to do bad things to her. She believed that she was being poisoned by the gas in her cell. She believed that the doctors at the jail were conducting experiments on her. (CRT 288, 293, 303.) Further, the reports by family members of Buenrostro's beliefs supported the experts' defense determination that she was delusional. (CRT 762.)

Exclusion of Dr. Mills's testimony about the re-coded MMPI he submitted to Caldwell for analysis was also not prejudicial. In response to the prosecutor's objection to Dr. Mills's testimony regarding the Caldwell analysis, trial counsel argued that Dr. Mills's testimony would be the same as Dr. Kania's in that the results obtained from Caldwell by Drs. Kania and Mills were similar. (CRT 757-759.) Dr. Kania testified at length about the MMPI analysis by Caldwell. He compared Caldwell's analysis of the MMPI Dr. Rath administered to Buenrostro shortly after the murders and the analysis of the MMPI he administered to Buenrostro in December 1994. (CRT 519, 549-550, 584-586, 593-594.) Given that the jury heard the evidence of Dr. Kania's analysis from Caldwell and trial counsel's proffer that Dr. Mills's testimony would be similar, Buenrostro could not have been prejudiced by the exclusion of the evidence. Another similar presentation of a Caldwell analysis of Buenrostro's MMPI would have added little to persuade the jury Buenrostro was incompetent. Accordingly, it is not reasonably probable Buenrostro would have benefitted from the evidence and obtained a more favorable result had it been presented over the prosecution's objection.

In sum, Buenrostro's constitutional rights to due process, a fair competency trial, to present evidence in support of her case, and to contest

the prosecution's case were not violated. The trial court did not abuse its discretion when it excluded the evidence. The judgment should not be reversed on this ground.

IV. BUENROSTRO'S JAILHOUSE WRITINGS WERE PROPERLY ADMITTED IN THE PROSECUTION'S SURREBUTTAL CASE

Buenrostro argues the trial court erred when it admitted her jailhouse writings in the prosecution's surrebuttal case because the prosecutor withheld the evidence during the trial and indicated that he would not use the writings as evidence. Buenrostro contends the admission of the evidence violated her state and federal rights to due process and a fair trial. (AOB 132-143.) The writings were highly probative of Buenrostro's ability to communicate and were properly admitted by the trial court. The writings were introduced directly in response to a defense rebuttal witness's testimony that Buenrostro was incoherent and could not communicate effectively. The defense was on notice of the prosecutor's intention to introduce the writings which were slightly delayed by the fact that they were required to be translated from Spanish to English. Error, if any, in the introduction of the writings was harmless. Given the totality of the evidence, it is not reasonably probable the jury would have returned a verdict of incompetence had they not been presented the evidence of Buenrostro's writings.

On November 9, 1995, during the morning session Buenrostro called paralegal Catherine Moreno to testify on her behalf in rebuttal. (CRT 1082.) Moreno testified that she visited with Buenrostro about ten times over the course of the prior year in an attempt to get her to cooperate in her defense. In four or five conversations she had with Buenrostro regarding her defense, specifically witnesses, she was not helpful and not coherent.

Additionally, Buenrostro refused numerous times to sign an authorization for release of her medical information without explanation. (CRT 1083-1085.) Moreno testified that during their discussions Buenrostro was not able to remain on topic. (CRT 1085.)

Following Moreno's testimony, during the afternoon session and outside the presence of the jury, the prosecutor indicated that a search of Buenrostro's jail cell was conducted the week before and writings were seized. The prosecutor provided trial counsel copies of the writings that were confiscated. The prosecutor then stated:

> I have been debating back and forth, and I am still not convinced this second, but I think I would like to introduce the writings that we found in her cell to the jury.
>
> [¶] The only hesitancy I have is, the majority of it is in Spanish, and I don't know how the Court would feel about them getting a document that somebody's going to need to interpret.

(CRT 1140.)

The trial court indicated that under the circumstances, "when. . . there is something written in a different language, it's translated, and then the translated version is what is utilized[.]" (CRT 1141.) The trial court expressed its reluctance to send the original Spanish-written document back to the jury because, given the varying degrees of Spanish language fluency, "you don't know what is going to be the result." (*Ibid.*) The prosecutor responded, "All right. That's fine. I will pass." (*Ibid.*) The trial court then proposed that they bring the jurors in and "end for the day." (*Ibid.*)

The session subsequently adjourned with an evidentiary ruling outstanding. Trial counsel raised a hearsay objection to the admissibility of a jail record that was prepared by "forensic mental health" that contained a declaration by the custodian of records and a one-page follow-up progress note. (CRT 1142.) The prosecution indicated the progress note, showing Buenrostro as lucid and insightful, qualified under the business records

exception to the hearsay rule and was offered in surrebuttal to Moreno's testimony that she was noncommunicative. (CRT 1143.) The trial court took the matter under submission over the weekend. (CRT 1143.)

On November 13, 1995, the parties and trial court reconvened. The defense objection to the admissibility of the progress note (People's Exhibit 10) was eliminated when the prosecution indicated it would call the writer of the note to testify. (CRT 1146-1148.) The prosecutor revisited the matter of Buenrostro's jailhouse writings and represented that the writings were translated over the weekend by a certified interpreter. Copies were provided to trial counsel earlier that morning. The prosecutor offered the translations into evidence to show Buenrostro's "ability to form paragraphs and sentences." (CRT 1147, 1150.) Recalling the earlier proceeding, the prosecutor added, "because they were in Spanish, and the Court told me without a translator that I couldn't use them, but that—we did get a translator." (CRT 1151.)

Trial counsel, taking the position the case had closed to evidence at the prior proceeding on November 9, objected to reopening and to the prosecution's proffer of Buenrostro's jailhouse writings because the writings "should have been in the case-in-chief" and the prosecutor indicated at the prior proceeding that they would not be offered. (CRT 1148.) The trial court stated as follows:

> [W]e did not close it to evidence. I did indicate we were going to leave it open for a ruling on People's 10. During the trial, the seizure of this documentation was brought up. [The prosecutor] mentioned last week it was in Spanish. I mentioned to him last week, "How do you intend to introduce it, it is written in some Spanish, we can't have the jurors translate it, we will have to have a translator translate the information." He did not indicate, necessarily, he intended to introduce it, it was considered, it was considered for purposes of introduction as evidence. [¶] I clearly remember that because I remember, "Isn't that interesting, how are we going to go ahead with documents in

> Spanish when, obviously, they haven't been translated?" So, you are not going to be successful with an objection on those bases.

(CRT 1149.)

The trial court further stated regarding the jailhouse writings, "It is not a surprise, we did discuss the information." (CRT 1151.) Since trial counsel had only just received the translated jailhouse writings, to accommodate any additional objection to content, the trial court granted trial counsel the opportunity to "take the next 15 minutes or so" to read them. (CRT 1151.) When trial counsel indicated he would want to further consult with his experts to determine if there was any change in their diagnoses based upon the writings, the trial court reiterated the order of trial and asked if trial counsel had authority which permitted Buenrostro to present "a second rebuttal." (CRT 1152.) Trial counsel said he did not have case authority, but under the circumstances Buenrostro should be permitted a second rebuttal because the character of the proffered evidence was "more in the nature of a case in chief." (CRT 1152.) The trial court disagreed with trial counsel's assessment of the circumstances and stated:

> You offered the testimony of Ms. Moreno from your office who testified on rebuttal that your client could not form paragraphs, that she couldn't put thoughts together and hold them together. Just perusing this, it clearly seems to rebut that presentation by you. [¶] Now, if you don't have any authority for a second rebuttal, that ends the issue here on that basis. [¶] [. . .] [. . .I] will give you an opportunity to make any further objections[.]

(CRT 1152-1153.)

Upon returning from a recess, the trial court confirmed trial counsel had read the translated jailhouse writings and asked if he wished to be heard to which trial counsel responded, "I have nothing additional." (CRT 1154.)

People's Exhibit 11 contained a ten-page handwritten document entitled "Another 48 Hours (cita con la Muerte)." The body of the document was written in Spanish. People's Exhibit 11A was the English translation of that document. At two-and-a-half pages typed, People's Exhibit 11A translated a story about a woman named "Dora" who went to her former residence where her husband "Alejandro" lived, shot and killed him, and then turned the gun on herself, apparently fulfilling her death wish. (Peo.'s Ex. 11A.) People's Exhibit 12A was a one-page handwritten document in Spanish. The English translation, People's Exhibit 12, began with the words "throw it" and consisted of three complete sentences that referenced going to trial within a year and the writer's perception that "these cases" take at least two to three years. (Peo.'s Ex. 12.)

The trial court has authority to "regulate the order of proof" in the exercise of "its discretion." (Evid. Code, § 320.) As a general rule, an appellate court reviews a trial court's ruling as to the order of proof for abuse of discretion. (*People v. Tafoya* (2007) 42 Cal.4th 147, 175.) Likewise, the trial court's decision to admit rebuttal evidence is discretionary and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. Evidence that is "a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime," is not proper rebuttal evidence. (*People v. Harris* (2005) 37 Cal.4th 310, 335-336.) Rebuttal evidence "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." [Citations.] (*People v. Harris, supra,* 37 Cal.4th at pp. 335-336; *People v. Young* (2005) 34 Cal.4th 1149, 1199; Pen. Code, § 1093, subd. (d).) The restrictions imposed on rebuttal evidence are meant to: (1) ensure that the presentation of evidence is orderly and avoids confusion of the jury; (2) prevent the prosecution from unduly emphasizing

the importance of certain evidence by introducing it at the end of the trial; and (3) avoid unfair surprise to the defendant with critical evidence late in the trial. (*People v. Young, supra*, 34 Cal.4th at p. 1199.)

The record demonstrates the trial court exercised sound discretion when it permitted the prosecution to introduce Buenrostro's jailhouse writings. The writings were seized during a lawful search of Buenrostro's jail cell on November 1, 1995. (CRT 1170-1171.) On November 9, 1995, during a break in Buenrostro's rebuttal case, the prosecutor indicated his intention to introduce the writings that were seized. (CRT 1140.) In overruling Buenrostro's objection to the writings, the trial court found the writings rebutted Moreno's testimony Buenrostro was generally incoherent and noncommunicative during the prior year. (CRT 1140-1143; *People v. Harris, supra,* 37 Cal.4th at pp. 335-336.) Given that the writings were in Spanish, the prosecutor deferred to the trial court's procedure to first have the writings translated before introducing them to the jury. At the next court proceeding on November 13, 1995, the prosecution proffered the translated writings over Buenrostro's objection. (CRT 1148-1149.) The trial court overruled the objection and specifically found that there was no unfair surprise. (*People v. Young, supra*, 34 Cal.4th at p. 1199.)

Buenrostro asserts that the evidence was improper because it should have been introduced in the prosecution's case in chief and the prosecutor "sandbagged" Buenrostro by indicating, "I will pass." (CRT 1141; AOB 138-139.) However, as this Court has explained, "the fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 68-69.) Indeed, the writings would have supported the prosecutor's case in chief, but were not material to it. (*People v. Harris* (2005) 37 Cal.4th 310, 335-336.) This is evidenced by prosecutor's indication he had been "debating back and forth" whether to

introduce the writings. (CRT 1140.) Despite his "hesitancy" on the matter, the prosecutor clarified his intent and articulated a valid theory of admissibility; the evidence was proffered to rebut Moreno's testimony of Buenrostro's general lack of coherence for the past year. (CRT 1140, 1143.) Buenrostro's writings were highly probative on the issue because they provided the jury the opportunity to evaluate her competence from a unique perspective, that is, through her own words and thoughts as compiled in the story "Another 48 Hours (Appointment with Death)" and in the writing in which the English translation begins, "throw it." (Exhibits 11A, 12.) Once the prosecutor stated his intent to introduce the writings he acted swiftly in getting the writings translated and copies of the translations to trial counsel. (CRT 1147.) Further, the trial court provided trial counsel ample opportunity to review the translations for any further objection to content. (CRT 1153.)

Additionally, undue emphasis was not placed on the writings by the prosecutor in his closing argument. (*People v. Young, supra*, 34 Cal.4th at p. 1199.) The prosecutor presented an argument that was reasonably balanced and asked the jury to take into consideration all of the evidence, including the writings, tending to show Buenrostro was competent to stand trial. (CRT 1174 [Groth testimony], 1176 [taped interview, Dr. Moral testimony], 1178 [evidence of employment with law firm], 1186 [MMPI].) The reporter's transcript contains approximately 17 pages of the prosecutor's closing argument. (CRT 1173-1190.) Of the 17 pages, the prosecutor referred to the writings only briefly. (CRT 1176, 1178.) Trial counsel specifically rebutted the prosecutor's reference to the writings when he cautioned jurors in his closing remarks that the writings should not be accorded too much weight since they were not educated on how to interpret such evidence given its late production into the case. (CRT 1206-1207.)

Buenrostro makes much of the prosecutor's comment, "I will pass," to support her argument that the prosecutor "sandbagged" Buenrostro's case. (AOB 138-139.) However, taken in context, the prosecutor's comment does not lend itself entirely to the notion that the prosecutor represented he was abandoning his intent to introduce the writings. Moreover, even if his comment was understood in that way, it has no effect. The trial court directed the prosecutor to obtain English translations of the writings for the sake of conformity. At that point, Buenrostro had notice of the prosecutor's intent to introduce the writings and was also apprized of the fact that no further action could be taken until translations were procured. Buenrostro's argument that the prosecutor "sandbagged" her case by producing the translations at the next court proceeding is specious.

Even if the trial court abused its discretion in admitting the writings in the prosecution's surrebuttal, the error was harmless. Buenrostro agues the error was prejudicial because the writings were not dated and were given an "aura of recency" and permitted the jury to find her competent even though her ability to write is not the same as her ability to assist counsel rationally in her defense. (AOB 140-141.) Buenrostro appears to suggest the writings were misleading on the issue of competence. Although not dated, Buenrostro drafted the writings within a year or less of the murders, the writings were not too remote, and were entirely pertinent to the issue of her competency. The writings were introduced to rebut Moreno's testimony that Buenrostro was unable to communicate. As discussed above, the writings were not unduly emphasized. Further, the jury was entitled to reject Buenrostro's evidence and the opinion of her experts that she was incompetent to stand trial. The prosecution presented the testimony of two court appointed experts who found her to be competent. Moreover, the results of the MMPI indicated that she was malingering. It is not reasonably likely the jury would have determined that Buenrostro was

incompetent to stand trial had they not been presented with the evidence of the jailhouse writings. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

V. BUENROSTRO'S GENERAL ATTACK ON THE TRIAL COURT'S EVIDENTIARY RULINGS IN THE COMPETENCY HEARING SHOULD BE REJECTED BECAUSE SHE FAILS TO DEMONSTRATE HER DUE PROCESS RIGHTS WERE VIOLATED IN ANY WAY

Buenrostro contends that the trial court's evidentiary rulings discussed in Arguments II, III, and IV, *supra,* establish that the trial court applied the rules of evidence unequally and in such a way that the rulings favored the prosecution and were unfavorable to the defense. Buenrostro maintains that her due process rights under the state and federal constitutions were violated. (AOB 144-145.) Buenrostro's general attack as to the fairness of the trial court's evidentiary rulings should be rejected. As demonstrated above in respondent's Arguments II, III, and IV, the trial court's rulings at issue were well-reasoned and fair. Even if error occurred, it was harmless and Buenrostro' due process rights were not violated.

The exclusion of Dr. Skidmore's testimony regarding ethics could not have prejudiced Buenrostro. As noted, Buenrostro was given ample opportunity to impeach Dr. Rath's credibility. Further, the jury was informed that Dr. Rath's opinion was based upon his visit with Buenrostro in October 1994. The exclusion of Dr. Kania's testimony regarding Buenrostro's delusional beliefs concerning computers and Dr. Mills's testimony regarding the re-coded MMPI was also not prejudicial. Dr. Kania testified that he determined Buenrostro was delusional. There was a generous amount of evidence presented by the defense that sought to establish Buenrostro's delusional beliefs. The defense proffered that Dr. Mills's testimony regarding the re-coded MMPI was the same as Dr. Kania's because the test results were similar. Thus, given the evidence

presented at trial, Drs. Kania's and Mills's excluded testimony was cumulative. Buenrostro could not have been prejudiced by the exclusion of this evidence. Finally, the evidence of Buenrostro's jailhouse writings was not unduly prejudicial. The writings were offered to rebut the defense evidence that Buenrostro was incoherent and unable to communicate. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) The defense was on notice of the prosecutor's intent to introduce the writings and the trial court's directive that the writings had to be translated before being presented to the jury. Even if the writings had not been introduced, the jury would not have found Buenrostro incompetent. The prosecution presented the testimony of two expert witnesses who determined Buenrostro was competent to stand trial. The results of the MMPI suggested that she was malingering. The jury was entitled to reject the defense experts' opinions on the issue of competency. Buenrostro has not shown that she was denied her right to due process or to a fair trial. (*See People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 ["the litmus test is whether defendant received due process and a fair trial"].) Buenrostro's general attack on the trial court's evidentiary rulings should be rejected.

VI. BUENROSTRO'S PROPOSED INSTRUCTION INFORMING JURORS THAT AN INCOMPETENCY VERDICT WOULD NOT PERMIT HER TO BE RELEASED FROM CONFINEMENT WAS PROPERLY REJECTED BY THE TRIAL COURT

Buenrostro argues the trial court committed instructional error when it declined to instruct the jury that she would not be released from custody if the jury determined that she was incompetent to stand trial. She argues that she was entitled to such an instruction under state and federal law and the trial court's error requires reversal of the entire judgment. (AOB 146-166.)

The instruction was not warranted and properly denied by the trial court. Post competency verdict events were irrelevant to the jury's competency determination. Additionally, it is unreasonable to assume that jurors would vote for competency because they believed Buenrostro would otherwise be released from confinement.

Buenrostro requested the jury be instructed that she would not be released from custody if it found that she was incompetent to stand trial. To that end, Buenrostro proposed the following instruction in pertinent part:

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

(5th Supp. CT 166.)

The trial court refused Buenrostro's proposed instruction. (5th Supp. CT 166; 5CRT 1081.) Before retiring to deliberate, Buenrostro's jury was instructed as follows:

> In this proceeding you must decide whether the defendant is mentally competent to be tried for a criminal offense. This is not a criminal proceeding and the innocence or guilt of the defendant of the criminal charge against her is not involved, nor is the question of her legal sanity at the time of the commission of the offense involved.

(CRT 1218.)

According to Buenrostro, the proposed instruction was required because of the risk that jurors would make a competency determination, even if they believed Buenrostro was incompetent, based upon the mistaken belief that if a verdict of incompetence was returned, she would be released from custody and a verdict of competence guaranteed that she would remain in custody. (AOB 149-150.) Buenrostro's argument fails for two reasons. First, generally, it is totally improper and inconsistent with the jury's decision-making role for it to consider potential post-verdict action, or in this case, post-competency verdict action. (See *People v. Ramos* (1984) 37 Cal.3d 136, 155-156; *People v. Morse* (1964) 60 Cal.2d 631, 636-653.) Moreover, the record here does not support that the jury was operating under any assumed facts or misconceptions regarding the consequences of their verdict.

Second, Buenrostro misapplies the law regarding sanity proceedings. Buenrostro bases her argument on the principles expressed in *People v. Moore* (1985) 166 Cal.App.3d 540, where the court held that a defendant in a sanity proceeding is entitled upon request to an instruction that a finding of not guilty by reason of insanity does not entitle the defendant to immediate release as would an ordinary acquittal. Under those circumstances, such an instruction precludes the possibility that jurors would find the defendant sane simply because they perceived no other way to prevent him or her from returning to the community. (*Id.* at p. 556.) The court in *Moore* reasoned that because the consequence of an insanity verdict is not commonly known to jurors, they would speculate on what might happen if a defendant was found not guilty by reason of insanity. (*Id.* at. pp. 552-554.) Thus, the court concluded, "the danger of an erroneous assumption during jury deliberations overshadows any possible invitation to speculate on matters likely to be discussed anyway." (*People v. Moore, supra,* 166 Cal.App.3d at p. 554.)

The court in *People v. Dennis* (1985) 169 Cal.App.3d 1135, agreed with this analysis and explained at page 1140:

> Because the consequences of an NGI verdict go to the very nature of the disposition, rather than the length of punishment, the *Moore* court determined that an instruction of the sort proposed by defendant is not inconsistent with the general rule prohibiting jurors from considering postverdict punishment in reaching their decision.

CALJIC No. 4.01 [Effect of Verdict of Not Guilty by Reason of Insanity] was drafted in response to *Moore* and its progeny.[17] That instruction was

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[17] The instruction states as follows:

> A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, [he] [she] will remain in confinement while the courts determine whether [he] [she] has fully recovered [his] [her] sanity. If [he] [she] has not, [he] [she] will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of [his] [her] present mental illness.
>
> Moreover, [he] [she] cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had [he] [she] been found guilty.
>
> So that you will have no misunderstandings relating to a verdict of not guilty by reason of insanity, you have been informed as to the general scheme of our mental health laws relating to a defendant, insane at the time of [his] [her] crimes. What happens to the defendant under these laws is not to be considered by you in determining whether the defendant was sane or insane at the time [he] [she] committed [his] [her] crime[s]. Do not speculate as to if, or when, the defendant will be found sane.
>
> You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time

(continued...)

intended to assist the defense by informing the jury "not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*People v. Kelly* (1992) 1 Cal.4th 495, 538.)

This Court has repeatedly rejected arguments to extend *Moore* beyond its original context and should do so here again. (*People v. Dunkle* (2005) 36 Cal.4th 861, 896 disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn 22; *People v. Marks* (2003) 31 Cal.4th 197, 222; *People v. Thomas* (1992) 2 Cal.4th 489, 539.) This Court explained in *Dunkle* when it rejected the argument that a jury charged with determining competency must be instructed on the consequences of a verdict of incompetency based upon the *Moore* case, that in this context, given the uncertainty of when a defendant's competency might be restored, "an instruction patterned after *Moore* and CALJIC No. 4.01 is necessarily speculative." (*People v. Dunkle, supra*, 36 Cal.4th at p. 897; *see also People v. Marks, supra*, 31 Cal.4th at p. 271 [same].)

(...continued)

> [he] [she] committed [his] [her] crime[s]. If upon consideration of the evidence, you believe defendant was insane at the time [he] [she] committed [his] [her] crime[s], you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and that they will not release this defendant unless [he] [she] can be safely returned into society.
>
> It is a violation of your duty as jurors if you find the defendant sane at the time [he] [she] committed [his] [her] offense[s] because of a doubt that the Department of Mental Health or the courts will properly carry out their responsibilities.

(CALJIC No. 4.01; see CALCRIM No. 3450.)

Buenrostro acknowledges the competency cases in which this Court has refused to apply the principles of *Moore*, but argues that the circumstances of those cases are distinguishable from the present case. (AOB 152-159.) Buenrostro distinguishes the cases in terms of the instructional arguments made on appeal in those cases but cannot demonstrate that there is any meaningful difference that would necessitate a different result. (AOB 152-153.) Buenrostro's assertion that this Court's consistent rejection of the application of *Moore* in the context of competency trials "does not establish a well-reasoned and justified rule that the requirement of an instruction of the consequences of a not-guilty-by-reason-of-insanity verdict cannot and should not be adapted to a competency trial" ignores or simply fails to reconcile the fundamental differences between an NGI trial and a competency trial. (AOB 158.)

NGI findings, unlike competency determinations, "go to the very nature of the disposition." (*People v. Dennis, supra*, 169 Cal.App.3d at p. 1140.) Thus, in a sanity trial the jury must decide "whether the defendant was sane at the time he committed his crimes." (CALJIC No. 4.01.) In a departure from the general rule, under CALJIC No. 4.01 the jury is permitted to consider "postverdict punishment" and informed of the consequences of an NGI finding because the consequence of an insanity verdict is not commonly known to jurors. (*People v. Dennis, supra*, 169 Cal.App.3d at p. 1140; *People v. Moore, supra*, 166 Cal.App.3d at pp. 552-554.)

By contrast, a competency determination asks whether, presently, the accused has the ability to communicate with counsel with a reasonable degree of rational understanding and a rational understanding of the proceedings against him. (*Dusky v. United States, supra,* 362 U.S. at p. 402; *People v. Dunkle, supra,* 36 Cal.4th at p. 893.) There is no context for disposition in a competency trial. In other words, there is no basis for the

fear that the accused will be released into the community in something akin to an acquittal. The jurors here were expressly instructed that "[t]his is not a criminal proceeding and the innocence or guilt of the defendant of the criminal charge is not involved." (CRT 1218; 5th Supp. CT 160; see CALJIC No. 4.10 [Doubt of Present Mental Competence].) Further, in its prefatory remarks to the jury panel, the trial court stated:

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

(CRT 78.)

During voir dire proceedings, the trial court inquired of prospective jurors:

> You heard what the underlying charges are here. And did you all understand that that we are not trying the underlying charges here, that we are trying whether or not the defendant is currently competent to stand trial?

(CRT 146.)

Given that no juror indicated he or she misunderstood, the trial court then stated:

> Okay. So, it has nothing to do with whether she is guilty or innocent of the underlying charge, only whether she is currently competent to stand trial. If she is not competent, the case does not go away, it simply waits until she regains her competence. If she is found competent, then the matter goes on to trial. So, I want you to understand it is not a not guilty or a guilty kind of a situation.

(CRT 147.)

Therefore, the concern related to an NGI trial embraced by the *Moore* court and subsequently by CALJIC No. 4.01 did not exist here, nor in any competency trial. The danger that jurors would render an outcome

determinative verdict to prevent a defendant from returning to the community cannot exist because competency proceedings are not determinative of criminal liability.

Further, it defies common sense that jurors would contemplate an incompetency verdict acts as a release from custody by dissolving the criminal proceedings before a not guilty verdict is even rendered at a criminal trial. It is highly unlikely that jurors would believe an incompetency verdict permits the accused to walk away without the consequence of answering up to the criminal charges at some point in the future, i.e., when competency is restored. (*See People v. Thomas, supra,* 2 Cal.4th at p. 539.) Clearly, there is no logical ground to release an incompetent defendant whose criminal offenses have not yet been adjudicated. Indeed, the jury knew Buenrostro was confined before and during the competency proceedings, without having been tried for the murders. (E.g. CRT 239-240 [Attorney Scott opening statement indicated four defense doctors visited Buenrostro in her jail cell over course of several months to determine if she was competent to stand trial].) An incompetency verdict cannot reasonably be understood to justify a change her confinement status. Accordingly, the proposed instruction was properly denied by the trial court.

Even assuming the trial court erred when it denied Buenrostro's proposed instruction on the consequences of an incompetency verdict, because "the proposed instruction is not constitutionally based, its erroneous omission does not warrant reversal unless a different result would have been reasonably probable." (*People v. Marks, supra*, 31 Cal.4th at p. 222.) The record demonstrates a different result is not reasonably probable.

The evidence substantially supports Buenrostro's competence to stand trial. Expert witnesses for the prosecution testified that Buenrostro was

competent to stand trial. (CRT 861, 875-876, 942 [Dr. Moral], 979-980 [Dr. Rath].) Buenrostro demonstrated knowledge of the legal system (CRT 840-843, 864-872 [Dr. Moral]), she consistently denied having hallucinations or delusional thoughts up to the time of trial (CRT 846, 863,898-899, 915, 929 [Dr. Moral], 1058 [Dr. Villar]), and there was evidence that she feigned mental illness on the MMPI administered by Dr. Rath (CRT 954-956).

Additionally, there was evidence that Buenrostro had developed a satisfactory relationship with trial counsel after a period of distrust that was based upon Buenrostro's feelings that trial counsel was bossy, did not give her a say in the matter, and moved too slow. (CRT 853-856.) When at first Buenrostro was dissatisfied by the rate at which the proceedings had progressed, she later acknowledged that the seriousness of her case required ample time for trial counsel to prepare. (CRT 854.) The evidence supports that Buenrostro had sufficient present ability to consult with her attorney with a reasonable degree of rational understanding and a factual and rational understanding of the proceedings against her. (*Dusky v. United States, supra*, 362 U.S. at p. 402; see Pen. Code, § 1367, subd. (a) and CALJIC No. 4.10.)

The jury was entitled to reject Buenrostro's experts who testified that she was severely impaired and suffered from mental disorders that rendered her incompetent to stand trial (CRT 278, 305-306, 311, 313, 316 [Dr. Perrotti; paranoid schizophrenia], 484-485, 495-496 [Dr. Kania; delusional disorder with paranoid delusions, psychosis], 755-756 [Dr. Mills; psychotic delusional disorder]. The weight of the experts' testimony was weakened by their concessions, and the prosecution's experts who testified that Buenrostro was malingering. The defense experts variously conceded even if the diagnosis was accurate, Buenrostro could still be competent to stand trial (CRT 353, 361, 437 [Dr. Perrotti]), and that Buenrostro was competent

to understand the nature of the proceedings against her (CRT 780, 815-816 [Dr. Mills.]). In addition, analysis of Buenrostro's MMPI by an independent company indicated a likelihood that Buenrostro was malingering. (CRT 593-595, 617 [Dr. Kania].)

Further, Buenrostro argues that the trial court's preamble to jury selection was insufficient, and the prosecutor's argument to the jury made the proposed instruction all the more necessary. (AOB 150-151.) However, trial counsel expressly addressed the issue in his closing remarks to the jury. Trial counsel foreclosed any juror doubt as to Buenrostro's confinement status when he stated:

> *You are not acquitting her, you are not setting her free*, you are simply giving her what she really needs in order to become competent so that she can participate, so that she can have a fair trial, medication.

(CRT 1207, emphasis added.)

Accordingly, it is not reasonably probable that giving the requested instruction would have resulted in a verdict of incompetency. Buenrostro's argument that the entire judgment must be reversed because her state and federal constitutional rights have been violated should be rejected.

VII. THERE WAS NO CUMULATIVE ERROR IN BUENROSTRO'S COMPETENCY TRIAL

Buenrostro contends that the cumulative effect of the trial court's alleged errors asserted in the foregoing arguments of Buenrostro's opening brief related to the competency proceedings compels reversal of the judgment. (AOB 167-169.) Buenrostro's contention lacks merit, as there was neither error nor prejudice.

As discussed above, there was no error in the trial court's instructions to the jury. The jury was properly instructed in accordance with state and federal law on competence. Further, the defense requested instruction

relating to Buenrostro's continued confinement following an incompetency verdict was properly denied by the trial court. Buenrostro's future confinement was irrelevant to the jury's competency determination.

The trial court exercised sound discretion in limiting Dr. Skidmore's proffered rebuttal testimony on professional ethics. The testimony was irrelevant and collateral to the issue of whether Buenrostro was competent to stand trial. Further, the trial court properly excluded Dr. Kania's unexpected testimony related to Buenrostro's delusional beliefs about computers and Dr. Mills's unexpected testimony regarding a Caldwell report derived from a re-coded MMPI administered to Buenrostro by Dr. Rath. Buenrostro failed to provide to the prosecution any of this information that the defense experts' purportedly relied upon in reaching their conclusions.

The trial court did not err in admitting the evidence of Buenrostro's jailhouse writings in the prosecution's surrebuttal case. The writings properly rebutted the defense claim that Buenrostro was incoherent. There was no element of surprise. The writings were fully discussed and the introduction of the writings by the prosecution was pending based upon the Spanish to English translations.

Collectively, the trial court's evidentiary rulings were not unfairly skewed to favor the prosecution. The record establishes the trial court's rulings were well-reasoned and impartially based decisions. "If none of the claimed errors [are] individual errors, they cannot constitute cumulative errors that somehow effected the . . . verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.)

Even assuming that the trial court erred in some respect, Buenrostro has not shown that she was denied her right to due process or to a fair trial. (*See People v. Kronemyer, supra,* 189 Cal.App.3d at p. 349.) A defendant is entitled to a fair trial, not a perfect one. (*People v. Mincey* (1992) 2

Cal.4th 408, 454.) There was overwhelming evidence of Buenrostro's competence to stand trial. Buenrostro had an impartial jury that was made fully aware of the defense theory of the case that she was incompetent based upon her delusional thought disorder and refusal to take her medication. The trial court's rulings were fair. Buenrostro had ample opportunity to present her case of incompetence. Her view of the case however was incredible in the eyes of the jury. Any errors, therefore, had little if any significance. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [Buenrostro's] detriment." (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *see also People v. Bunyard* (1988) 45 Cal.3d 1189, 1236 [given strong prosecution case, cumulative effect of errors did not prejudice defendant].)

In sum, Buenrostro has not demonstrated any errors, and even if she has, such possible errors were harmless, either individually or cumulatively. Thus, their alleged cumulative effect does not warrant reversal of the judgment. (*People v. Geier* (2007) 41 Cal.4th 555, 620; *People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Panah* (2005) 35 Cal.4th 395, 479-480.)

VIII. BUENROSTRO FAILED TO ESTABLISH THE THRESHOLD REQUIREMENTS FOR THE TRIAL COURT TO GRANT HER REQUEST FOR A SECOND COMPETENCY HEARING

Buenrostro contends the trial court erred when it denied her request for a second competency hearing. She argues that after the first competency hearing, the prosecution announced its intention to seek the death penalty and, at that time, she became irrational and nonresponsive. Buenrostro argues this event established a change in circumstances and

raised a bona fide doubt as to her competency to stand trial. She contends the denial of a second competency trial denied her state and federal constitutional rights to due process, a fair trial, and the related rights to assistance of counsel, to present evidence, to confront witnesses, and to a reliable determination of guilt and penalty. (AOB 170-186.) The trial court did not violate any of Buenrostro's constitutional rights when it denied her request for a second competency hearing because she failed to establish a change in circumstances sufficient to warrant one.

On November 13, 1995, following a nine-day competency trial, the jury returned a verdict that Buenrostro was competent to stand trial in the criminal proceedings. (CRT 1221.) On January 3, 1996, during an in camera *Marsden* proceeding in the prosecutor's absence, trial counsel expressed doubt as to Buenrostro's competence and made a second request for hearing pursuant to Penal Code section 1368. Without input from the prosecution, the trial court appointed doctors to conduct an evaluation. However, during proceedings on January 5, 1996, the trial court vacated its ruling appointing the doctors and set the matter for a hearing in another department for a determination of whether there had been a substantial change of circumstances since the jury's finding that Buenrostro was competent to stand trial. (1CT 64-66; 1RT 53-55.)

At the subsequent hearing to determine whether Buenrostro's circumstances had changed, trial counsel indicated Buenrostro had not received any new diagnoses, however new facts existed. (1RT 58.) Trial counsel stated that he had met with Buenrostro on two occasions since the jury's verdict of competence. During those visits, Buenrostro talked in a "rambling fashion" about her dissatisfaction with her representation. (1RT 60.) Trial counsel stated he tried to determine the nature of her dissatisfaction and to discuss her options. (1RT 60-61.) Trial counsel believed, after observing Buenrostro's conduct during their attorney-client

meetings and during court proceedings, that she did not have an understanding of the proceedings against her. Buenrostro's conduct, according to trial counsel, supported a "deepened inability to cooperate with counsel" and "to understand legal procedures," "ramifications," and "options." (1RT 62.) Trial counsel discussed with Buenrostro the District Attorney's decision to seek the death penalty. (1RT 62.) Trial counsel reported that Buenrostro did not exhibit a response. Trial counsel explained to the trial court:

> [TRIAL COUNSEL:] I asked a number of questions, could not determine that there was any understanding of the impact of [the District Attorney's decision] and what that did procedurally. And I think that those—those two meetings demonstrate two of the three points under [Penal Code section] 1368; that she does not now understand the nature of the proceedings against her and she is not now able to cooperate with counsel.
>
> [TRIAL COURT:] How was her response to you in discussing matters with her different from how it was previous to the jury trial on this issue? Did it differ substantively at all?
>
> [TRIAL COUNSEL:] Yes. It differed in that there was less discussion on her part, less evidence of any weighing or evaluation, no questioning. Just sort of a—not exactly, but most resembling—well, not a blank stare, but in terms of responding or comprehending, that's the way I would characterize it.

(1RT 62-63.)

The prosecutor represented that Buenrostro's lack of coherence was generally raised at the prior competency trial. Additionally, Buenrostro had previously raised her inability to understand the issues in the case. (1RT 65.) Recalling the original competency trial, the prosecutor indicated, "[I]n a general sense it was all about Miss Buenrostro, she couldn't understand what was going on and she couldn't cooperate with her counsel." (1RT 65-66.)

Trial counsel clarified that it was not his client's position that the issues were different from the last trial, rather, "factually this situation is different." (1RT 66.) The trial court disagreed and denied the motion for appointment of doctors and evaluation under Penal Code section 1368. (1CT 67; 1RT 66.)

When, as in the current case, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless "it 'is presented with a substantial change of circumstances or with new evidence' that gives rise to a 'serious doubt' about the validity of the competency finding." (*People v. Marshall* (1997) 15 Cal.4th 1, 32 *quoting People v. Jones* (1991) 53 Cal.3d 1115, 1153.) Thus, more is required than "bizarre conduct or statements by the defendant to raise a doubt of competency. [Citations.]." (*People v. Marshall, supra*, 15 Cal.4th at p. 32.) The lower court's decision whether to hold a competency hearing is afforded great deference by the reviewing court. (*Ibid.*)

Buenrostro's conduct, as a matter of law, did not constitute a change in circumstances sufficient to trigger a second competency evaluation. Trial counsel reported that when he told Buenrostro that the District Attorney intended to seek the death penalty, her response resembled a "blank stare." (1RT 63.) As noted above, a defendant's conduct, standing alone, is not sufficient. Her response did not present a substantial change of circumstances or new evidence that cast a serious doubt on the validity of the prior finding. (*People v. Lawley* (2002) 27 Cal.4th 102, 136.) Buenrostro's behavior was thoroughly explored by the experts in the prior proceeding. Following a nine-day trial, the jury resolved the question of Buenrostro's competence.

Trial counsel indicated the issues were the same and argued that factually, the situation was different, presumably based upon the

prosecutor's announcement the death penalty would be sought. However, Buenrostro knew that the charges against her rendered her case death penalty eligible. She indicated to Dr. Moral in March 1995 that she knew she was facing life in prison or death for murdering her three children. (CRT 849 [Dr. Moral, 3/95]; 5th Supp. CT 13-14.) Further, Dr. Moral's competency evaluation took into consideration Buenrostro's ability to work with counsel on a death eligible case. (5th Supp. CT 15.) On February 28, 1995, when asked about whether she was having suicidal feelings, Buenrostro told Dr. Anthony, "I guess someone can do the job for me." (CRT 736-737.)

The trial court did not abuse its discretion when it determined that Buenrostro's conduct after the prosecution formally announced its intention to seek the death penalty failed to establish a substantial change of circumstances. (*People v. Kelly* (1992) 1 Cal.4th 495, 543.) Therefore, the trial court's ruling denying a second competency hearing should be sustained and this Court should reject Buenrostro's constitutional claims. (*People v. Huggins* (2006) 38 Cal.4th 175, 220.)

PART TWO: VOIR DIRE ISSUES

IX. PROSPECTIVE JURORS BOBBIE R., FRANCES P., AND RICHARD J. WERE PROPERLY EXCUSED BECAUSE THEY EACH HAD PERSONAL VIEWS THAT PREVENTED OR SUBSTANTIALLY IMPAIRED THEIR ABILITY OR WILLINGNESS TO SERVE AS JURORS

Buenrostro argues the trial court committed reversible error when it excused three prospective jurors because they were opposed to the death penalty. (AOB 187-239.) The jurors were properly excused. As discussed more fully below, the record demonstrates in each instance that the jurors were substantially impaired to serve on the case. Buenrostro's argument

that the death sentence must be reversed should be rejected and the judgment affirmed.

The right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16 of the California Constitution. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154, *People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) The Sixth Amendment does not compel the states to provide a jury determination of penalty in a capital case, but when a state does so provide (as in California), the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial, and the state Constitution provides the same guarantee. (*People v. Williams* (1997) 16 Cal.4th 635, 666.) In this regard, the federal Constitution "does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*People v. Chatman* (2006) 38 Cal.4th 344, 536, *quoting Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492].) Thus, the right to voir dire, like the right to peremptory challenges, is not a constitutional right but a means to achieve the end of an impartial jury. (*People v. Robinson* (2005) 37 Cal.4th 592, 613.)

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based upon his or her views regarding capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581].) This Court adopted the standard enunciated in *Witt* in *People v. Ghent* (1987) 43 Cal.3d 739, 767, as the test for "determining whether a defendant's right to an impartial jury under article I, section 16 of

the state Constitution was violated by an excusal for cause based upon a prospective juror's views on capital punishment." (*People v. Moon* (2005) 37 Cal.4th 1, 13, *quoting People v. Griffin* (2004) 33 Cal.4th 536, 558.) The *Witt* standard also applies to someone excusable for bias in favor of the death penalty. (*People v. Danielson* (1992) 3 Cal.4th 691, 712-713.) Given the issue raised by Buenrostro in the present case, the question is whether the jurors' views on the death penalty would "prevent or impair the juror's ability to return a verdict of death in the case before the juror. [Citations.]" (*People v. Cash* (2002) 28 Cal.4th 703, 719-720.)

Death qualification of the jury does not result in a death oriented jury. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Stankewitz* (1990) 51 Cal.3d 72, 104.) The trial court has wide discretion to determine the qualifications of jurors. (*People v. Stitley* (2005) 35 Cal.4th 514, 540; *People v. Carpenter* (1997) 15 Cal.4th 312, 358.) Thus, the trial court "possesses discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (*People v. Robinson* (2006) 37 Cal.4th 592, 614; *People v. Carter* (2005) 36 Cal.4th 1215, 1250 [manner of conducting voir dire not basis for reversal unless it makes resulting trial fundamentally unfair.].)

The standard for reviewing a ruling regarding a prospective juror's views on the death penalty is essentially the same as the standard for other claims of bias. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) However, when the trial court's ruling is based solely on the "cold record" of the prospective jurors' answers on a written questionnaire, it is the same information that is available on appeal. (*People v. Avila* (2006) 38 Cal.4th 491, 529.) Therefore, the reviewing court reviews the record de novo to determine whether the trial judge had sufficient information regarding the state of mind of the prospective juror who was removed for cause to permit the trial court to reliably determine whether the prospective juror's views

would prevent or substantially impair the performance of duties in the case before the prospective juror. (*People v. Cook* (2007) 40 Cal.4th 1334, 1343; *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

Otherwise, generally "appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record." (*People v. Stewart, supra,* 33 Cal.4th at p. 451.) The trial court's rulings under such circumstances are afforded deference on appeal. (*People v. Avila, supra*, 38 Cal.4th at p. 529.) The United States Supreme Court has explained that it is appropriate for the reviewing court to give deference to the trial court because the trial court "is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014]; accord, *Wainwright v. Witt* (1985) 469 U.S. 412, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 ["deference must be paid to the trial judge who sees and hears the juror"].)

Where a prospective juror gives "conflicting or confusing answers regarding his or her impartiality or capacity to serve, the trial court must weigh the juror's responses in deciding whether to remove [the juror] for cause." (*People v. Moon, supra,* 37 Cal.4th at p. 14.) The trial court's determination is binding on appeal if supported by substantial evidence. (*Ibid.*) Further, if the statements are consistent, the trial court's ruling will be upheld if supported by substantial evidence. (*People v. Schmeck , supra,* 37 Cal.4th at p. 262; *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

The erroneous exclusion for cause requires reversal of the death sentence without showing prejudice. (*People v Stewart, supra,* 33 Cal.4th

at pp. 454-455.) This is because "the right to an impartial adjudication is so basic to a fair trial that [its] infraction can never be treated as harmless error. [Citations and internal quotes omitted.]" (*United States v. Chanthedara* (10th Cir. 2000) 230 F.3d 1237, 1272-1273.) However, when error occurs under these circumstances it does not require reversal of the guilt judgment or special circumstance findings. (*People v Stewart, supra,* 33 Cal.4th at pp. 454-455.)

Buenrostro argues that the trial court erroneously excluded prospective jurors Bobbie R. (AOB 193-210), Frances P. (AOB 211-223), and Richard J. (AOB 223-239) because under the *Witt* standard their views on the death penalty did not substantially impair their ability to serve as jurors. The trial court did not abuse its discretion when it excluded the named jurors. Each potential juror is discussed in turn in further detail below. Substantial evidence supports the trial court's determination that prospective jurors Bobbie R., Frances P., and Richard J., were substantially impaired.

A. *Bobbie R.*

Buenrostro contends that the trial court erred in excluding Bobbie R. on the basis of her juror questionnaire alone because even if she was generally opposed to the death penalty, her answers provided no insight as to whether her ability to sit as a juror was substantially impaired. She argues reversal of the death sentence is required. (AOB 193-210.) Bobbie R.'s juror questionnaire demonstrates her unwillingness and inability to sit as a juror on this case.

Bobbie R. was a member of the sworn fourth prospective jury panel. The clerk of the court administered the oath as follows:

> You and each of you do understand and agree that you will accurately and truthfully answer under penalty of perjury all

> questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter now pending before this Court.

(2RT 117.)

After the fourth prospective jury panel was sworn, the trial court made its prefatory remarks. Specifically, the trial court advised potential jurors of the importance of the juror questionnaire, that it would be studied carefully by the attorneys and used to assist in picking members of the jury. (2RT 117, 127.) The "Instructions for the Juror Questionnaire" explained that if the potential juror could not answer a question, the juror should "leave the response area blank." (33CT 9222.) However, the instructions clearly indicated that the questionnaire was designed to determine a potential juror's qualifications to sit as a juror in the pending case and used in the interest of expediency. (33CT 9222.) In this vein, the instructions stated the questions should be filled out "as completely as possible." The instructions indicated:

> As you answer the questions that follow, please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long and tiresome questioning unnecessary and by doing that they shorten the time it takes to select a jury.

(33CT 9223.)

In her juror questionnaire, Bobbie R. indicated she was a widowed 70-year old retired payroll clerk. At the time of trial, Bobbie R. had been a resident of Riverside for 42 years. (2RT 112, 115; 117 33CT 9225-9226.) Bobbie R. indicated that she worked on the questionnaire for approximately an hour. (33CT 9249.)

Of the 81 questions contained in the juror questionnaire, Bobbie R. left 32 questions (more than one-third or 39.5%) entirely unanswered. Bobbie R. only answered one of the twelve death penalty qualifying

questions completely. (33CT 9243-9248.) She answered only three of nine or one-third of the subparts to the longest death penalty question included in the juror questionnaire and left the remaining two-thirds blank. (33CT 9244-9245 [Death Penalty Question 68 a-i].)

Regarding the death penalty, when asked about her general feelings on it, Bobbie R. wrote that she "wouldn't want to make that decision." (33CT 9243.) On a scale of one to ten, Bobbie R. indicated she was one, the most strongly against the death penalty. (33CT 9244.) She stated it would be difficult for her to vote for the death penalty, regardless of the evidence in the case. (33CT 9244.) Bobbie R.'s opinion about the death penalty has always been the same. (33CT 9245.) Bobbie R. stated that she did not have an opinion as to whether the death penalty or life imprisonment was the more severe punishment. (33CT 9247.)

Lastly, Bobbie R. indicated that one of the potential witnesses in the case, Deputy Jeffery Mullins of the Riverside County Sheriff's Department, was her nephew. (33CT 9231, 9250.) Bobbie R. signed the juror questionnaire under penalty of perjury. (33CT 9252.)

Buenrostro's contention that the trial court erred in excluding Bobbie R. on the basis of her juror questionnaire alone should be rejected. In addition to her unambiguous anti-death penalty views, under the circumstances of Bobbie R.'s substantially incomplete questionnaire, she was properly removed. Her failure to obey the juror oath, follow the instructions of the trial court and respond to the juror questionnaire renders her substantially impaired. Moreover, the defense failed to request further questioning of Bobbie R. Given the defense acquiescence of the trial court's procedure and assessment of Bobbie R., and stipulations to the removal of other prospective jurors like her, Buenrostro has forfeited her claim on appeal.

Defense counsel's failure to object to the excusal of a juror for cause may be interpreted as counsel concurring with the trial court's assessment that the juror was excusable. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) Here, before the fourth jury panel was called into the courtroom for oral voir dire, the trial court indicated to the parties there were 29 potential jurors from the 122 questionnaires that it determined were substantially impaired and would be excused for cause if their answers in open court were consistent with their questionnaires. The trial court requested that the parties stipulate to the dismissal of these potential jurors. (3RT 134.) The first potential juror the trial court and the parties discussed was Bobbie R. The prosecutor indicated that he had marked her "for cause" based upon the answers in her questionnaire. (3RT 135.) Rather than object, defense attorney Grossman submitted the matter and stated, "[w]e can't stipulate to them obviously, Your Honor, but we know what the Court's concerns are." (3RT 135.) The defense did not request further voir dire and the trial court excused Bobbie R. (3RT 136.)

Defense counsel's failure to object to the removal of Bobbie R. cannot be overlooked. "[A]s a practical matter, [defense counsel] did not object to the court's excusing the juror, but . . . also refused to stipulate to it." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 82 *quoting People v. Cleveland* (2004) 32 Cal.4th 704, 734.) Generally, "this failure to object does not forfeit the right to raise the issue on appeal." (*People v. Hawthorne, supra,* 46 Cal.4th at p. 82 *quoting People v. Cleveland, supra,* 32 Cal.4th at pp. 734-735.) Respondent notes that the defense stipulated to the removal of other jurors who, like Bobbie R., had failed to respond to substantial portions of the juror questionnaire. (E.g., Robin H. neglected to answer "about two-thirds of her questionnaire" (3RT 138) and Catherine T. failed to answer "about a third of the questions." (3RT 143-144).) Albeit there was no stipulation regarding Bobbie R., the defense failure to object

to Bobbie R.'s removal is consistent with the notion that it concurred with the trial court's assessment ("we know what the Court's concerns are") and its position that potential jurors who had failed to respond to substantial portions of the questionnaire should be dismissed.

Under these circumstances, Buenrostro has forfeited her complaint regarding the trial court's failure to conduct follow-up questioning of Bobbie R. Absent any request by the defense to question Bobbie R. or objection to the procedure employed by the trial court, Buenrostro's complaint should be deemed forfeited. (*See People v. Cook* (2007) 40 Cal.4th 1334, 1342 [where parties expressly waived further questioning following an agreement to "submit on the questionnaires," the defense forfeited the right to complain on appeal that the trial court failed to further question prospective juror].) When the trial court explained it had determined from the questionnaires that there were prospective jurors who were substantially impaired, the defense acquiesced in the trial court's determination of Bobbie R.'s fitness that was based solely on her juror questionnaire. If the defense was truly interested in rehabilitating Bobbie R., it should have said so. Given Bobbie R.'s failure to obey her oath, follow the instructions of the trial court, substantially answer her questionnaire, and the defense preference to excuse other jurors who also failed to substantially answer their juror questionnaires, it is apparent the defense was not interested in pursuing Bobbie R.'s qualifications, if any, to sit as a juror in this case. Indeed, in light of defense counsel's failure to follow-up with Bobbie R., it seems that no one in the courtroom questioned her inability to sit as a juror. (*Wainwright v. Witt, supra*, 469 U.S. at pp. 434-435.) Under the circumstances, Buenrostro should not be permitted to now complain on appeal that the trial court erroneously excused Bobbie R. on the basis of her juror questionnaire.

Even if Buenrostro's claim was properly before this Court, the claim fails. A prospective juror can be discharged for cause based solely on answers to a written questionnaire, provided it is clear from the answers that the prospective juror is unwillingly to temporarily set aside his or her own beliefs and follow the law. (*People v. Wilson* (2008) 44 Cal.4th 758, 787; *People v. Avila* (2006) 38 Cal.4th 491, 531.) The trial court may properly exclude a prospective juror if she is "unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

The trial court's ruling was based upon the "cold record" of Bobbie R.'s juror questionnaire, thus, the same information is available on appeal as in the lower court. (*People v. Avila, supra,* 38 Cal.4th at p. 529.) Accordingly, this Court undertakes de novo review to determine whether the trial court had sufficient information regarding Bobbie R.'s state of mind to permit a reliable determination of whether Bobbie R.'s views would prevent or substantially impair the performance of her duties in this case. (*People v. Cook, supra,* 40 Cal.4th at p. 1343; *People v. Stewart, supra,* 33 Cal.4th at p. 445.)

Bobbie R. was substantially impaired. Under the circumstances of the present case, follow-up questions were not required. This Court has reviewed potential jurors' questionnaires to determine if they are substantially impaired by looking to the written content of the questionnaires. (See *People v. Wilson, supra,* 44 Cal.4th at p. 787, *People v. Avila, supra*, 38 Cal.4th at pp. 1104-1107.) By contrast, the instant case presents a scenario where it can be determined from the overwhelming *absence* of written content that Bobbie R. was substantially impaired and unable to sit as a juror in the case. The critical inquiry is whether Bobbie R. could follow the trial court's instructions, apply the law, and obey her

oath, in light of her unambiguous anti-death penalty views (discussed in further detail below). Her substantially incomplete questionnaire demonstrates that she was not fit to sit as juror on this case. (*See United States v. Chanthadara, supra*, 230 F.3d at p. 1270.)

Despite being sworn, the trial court's prefatory remarks, and the instructions to the juror questionnaire, all of which clearly emphasized the importance of providing truthful and complete answers, Bobbie R. failed to answer a significant portion of the juror questionnaire. There were 81 questions contained in the questionnaire. Bobbie R. failed to answer over one third or 39.5% of the questions. Bobbie R.'s questionnaire contained blank response after blank response. There were twelve death qualifying questions that spanned six pages of the juror questionnaire. The longest death qualifying question had nine subparts. Yet in the death qualifying section of the questionnaire, Bobbie R. wrote one complete sentence containing seven words. (33CT 9243 ["I wouldn't want to make that decision."].) Given the multiple admonitions to answer the questionnaire completely and the sworn oath Bobbie R. took to answer accurately and truthfully, Bobbie R.'s juror questionnaire demonstrates without a doubt that she was unable and unwilling to obey her oath and follow the instructions of the trial court. (*See People v. Wilson, supra,* 44 Cal.4th at p. 787.) Under *Witt,* Bobbie R.'s ability to perform the duties of a juror in accordance with the jury instructions and oath were substantially impaired. (*Wainwright v. Wit, supra,* 469 U.S. at p. 424.)

Further, based on the responses that Bobbie R. provided in the section entitled "Opinions About the Death Penalty," her view on capital punishment was unambiguous. She stated that it was a decision she did not want to make, that she was the most strongly opposed to the death penalty on a scale of one to ten, that, regardless of the evidence, it would be

difficult for her to vote for the death penalty, and that her views on the death penalty had not changed.

In the section of the juror questionnaire dedicated to "Trial Issues," Bobbie R. provided responses that were less certain. For example, she was unsure if she (1) could be a fair judge of the credibility of witnesses (33CT 9240); (2) agreed with the adequacy of the testimony of a single witness rule (33CT 9240); (3) could reconsider her position if she was convinced she was wrong during deliberations (33CT 9241); (4) would change her position because other jurors disagreed (33CT 9241); and, significantly, (5) could give Buenrostro and the People a fair trial (33CT 9242).

Additionally, Bobbie R. was inconsistent in her response to the impact her religious beliefs would have on her ability to sit as a juror. Initially, she indicated that her religious beliefs did not prohibit or make it difficult for her to sit as juror. (33CT 9228.) She then stated that she had religious or moral feelings that made it difficult for her to sit in judgment of another person. (33CT 9235.)

The record establishes that when taken together, both Bobbie R's responses to the juror questionnaire and the considerable lack thereof demonstrate that her ability to conscientiously consider the death penalty and perform her duties as a juror was substantially impaired. (*See People v. Avila, supra*, 38 Cal.4th at pp. 532-533.)

This case is unlike other cases where, had the trial court taken some extra time to clarify the prospective juror's responses, the follow-up questions would have changed the outcome on appeal. (*People v. Stewart, supra*, 33 Cal.4th at p. 454 [had the trial court taken "the few extra minutes" to clarify the prospective jurors' responses the penalty judgment would not have been "doomed from [its] inception."]; *People v. Heard* (2003) 31 Cal.4th 946, 968 [this Court reversed the penalty judgment and noted "the trial court's expenditure of another minute or two in making

thoughtful inquiries, followed by a somewhat more thorough explanation of its reasons for excusing or not excusing [the prospective juror]" would not have been "unduly burdensome."].) Trial courts certainly have a duty "to devote sufficient time and effort to the process" in order to gather "sufficient information regarding the prospective juror's state of mind to permit a reliable determination" as to that juror. (*People v. Stitely, supra*, 35 Cal.4th at p. 539.)

Here, however, as discussed above, it is clear without further questioning that Bobbie R.'s ability to sit as a juror in this case was foreclosed by her inability and unwillingness to obey the juror oath and follow the instructions of the trial court by completing the questionnaire, her strong views against the death penalty and her uncertainty regarding her religious views and the trial process itself, especially whether she could even be fair to the parties.

Moreover, had the trial court permitted oral voir dire of Bobbie R., the proceedings would have been unreasonably delayed. Follow-up questioning in the present case would have gone beyond seeking clarification of the responses and would have required a multitude of responses in the first instance. For example, in relation to her knowledge of the case, Bobbie R. would have been asked to respond in the first instance to one question and asked at least two clarifying questions (33CT 9237-9238), she would have been asked to respond to nine questions in the first instance and to clarify seven responses relating to trial issues (33CT 9238-9242), finally, she would have been asked her response to sixteen questions (including subparts) in the first instance regarding the death penalty (33CT 9243-9248). Additionally, depending upon whether the trial court or the defense conducted the oral voir dire, one or both parties would have then been given the opportunity to question Bobbie R. as well. As described, this scenario runs counter to the objective that voir dire and the jury

selection process, "a long and tedious business," be conducted expediently. (*People v. Wilson, supra*, 44 Cal.4th at p. 790.) Additionally, the time invested in follow-up questioning of a potential juror like Bobbie R., who has left a substantial portion of the questionnaires unanswered, completely defeats the purpose of having a juror questionnaire which is a "valuable addition to the process" and serves as a "screening tool during death qualifications of jurors." (*People v. Wilson, supra*, 44 Cal.4th at p. 790.)

In sum, Bobbie R.'s juror questionnaire demonstrates her inability to sit as a competent juror in this case. Follow-up questioning was unnecessary under *Witt*. She was properly removed. Despite Buenrostro's protestations to the contrary, reversal of the death judgment is not warranted on this basis.

B. *Frances P.*

Buenrostro contends that Frances P., who, like Bobbie R., was excused by the trial court from serving as a juror on the basis of her juror questionnaire, did not provide information sufficient for the trial court to remove her for cause. She argues Frances P.'s excusal requires reversal of the death sentence. (AOB 211-223.) Not so. Frances P.'s written responses warranted exclusion.

Frances P. was a member of the first panel of prospective jurors. (28CT 7908.) The panel was sworn.[18] (1RT 14.) The trial court made its

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[18] The clerk administered the oath as follows:

> You and each of you do understand and agree that you will accurately and truthfully answer under penalty of perjury all questions propounded to you concerning qualifications and competency to serve as a jury member in the matter now pending before this court?

(continued...)

prefatory remarks and indicated that the case pending before the court was a capital murder trial. (1RT 14-27.) The trial court specifically addressed the juror questionnaire. The trial court informed the jury panel members that the questionnaire was an important tool and would be reviewed closely by the attorneys in the case to become acquainted with jurors' views on the death penalty. (1RT 16-17, 21.)

In her juror questionnaire Frances P., age 64 at the time of trial, indicated she had not been married and resided in Corona, California, her entire life. (28CT 7911-7912.) She had retired from the Corona-Norco Unified School District after 36 years of service as a secretary. (28CT 7913.) She dedicated approximately one hour and thirty minutes to complete all 81 questions of her juror questionnaire. (28CT 7936.)

Regarding the charges before the jury in the instant case, Frances P. stated that a woman who kills her children must have been temporarily insane. (28CT 7922.) She believed that such a person should be held criminally responsible and should still face a possible death sentence. (28CT 7922.) Frances P. indicated that there was nothing in connection with the charges in the case that would make it difficult or impossible for her to be impartial. Additionally, she did not hold any religious or moral feelings that would prevent her from sitting in judgment of another person. (28CT 7922.)

In her written "Opinions About the Death Penalty," Frances P. stated that she did not believe in capital punishment and that "[l]ife without parole is preferable." (28CT 7930.) On the scale of one to ten, she was three in

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(...continued)
(1RT 13-14.)

To which the panel members responded collectively, "I do." (1RT 14.)

terms of the strength of her opposition to the death penalty (one being the strongest). Frances P. felt that the death penalty did not provide the criminal with an "opportunity to think [about] and regret his crime." (28CT 7931.) She was unsure as to whether she could vote in favor of the death penalty regardless of the evidence in the case. (28CT 7931.) Frances P. had always held the same opinion about the death penalty. She believed that it served no purpose and was not appropriate under the circumstances of any crime. (28CT 7932.) Frances P. indicated that life imprisonment without the possibility of parole was the "best punishment for murder." As a practicing Catholic, Frances P. indicted that she was taught, "a life for a life is wrong." (28CT 7932.) Frances P. indicated that if the defendant was convicted of a special circumstance murder, she would "consider all of the evidence and the jury instructions as provided by the court and impose the penalty [she] personally [felt was] appropriate." (28CT 7933.)

Frances P. believed that the penalty of life imprisonment was more severe than the death penalty. She opined that for prisoners, "Death is a release from their troubles." (28CT 7934.) Frances P. believed that adults should be held accountable for their behavior and that people had a tendency to blame others for their problems. (28CT 7934.)

Frances P. wrote that she was able to set aside the economic considerations of life imprisonment versus bringing an individual to execution. (28CT 7934.) She stated that it would not be difficult for her to fairly evaluate the testimony of murder victims' family or the testimony of the defendant's family if such testimony was permitted during the penalty phase of trial. (28CT 7935.)

During discussions outside the presence of the prospective jury panel, the prosecutor indicated that he had marked Frances P. and quoted her responses that she did not believe in the death penalty and that, as a Catholic, a life for a life was wrong. (3RT 151-152.) The trial court

observed that Frances P. indicated that her belief that life in prison without parole was the more severe punishment and that she knew someone with the same last name as the defendant. (3RT 152.) The prosecutor asked the trial court to excuse Frances P. (3RT 152.) Defense attorney Grossman stated, "Technically she's not a juror that's going to end up on this jury because of peremptories, so we'll submit." (3RT 152.) The trial court confirmed the defense had no opposition and then excused Frances. P. (3RT 152.)

This Court reviews the trial court's ruling de novo to determine whether the trial court had sufficient information regarding Frances P.'s views to permit a reliable determination of whether she was prevented or substantially impaired by those views to perform her duties in this case. (*People v. Cook, supra,* 40 Cal.4th at p. 1343; *People v. Stewart, supra,* 33 Cal.4th at p. 445.)

The trial court properly granted the prosecutor's request to excuse Frances P. on the basis of her juror questionnaire and without further questioning because she was substantially impaired. Frances P.'s responses were unambiguously opposed to the death penalty. It was clear from her juror questionnaire that her personal views dictated she vote for life in prison. (*People v. Avila, supra*, 38 Cal.4th at p. 531.) She indicated she did not believe in the death penalty, that capital punishment serves no purpose and is not appropriate under the circumstances of any crime. She clearly articulated in her juror questionnaire that life imprisonment is the "preferable" and "best" punishment for murder. Frances P. believed that death was a release for prisoners who should be held accountable for their behavior. Frances P. believed that life in prison provided an opportunity for prisoners to think about and regret their crimes. As a practicing Catholic, Frances P.'s religion taught her that a "life for a life" was wrong. The quality of Frances P.'s responses in her juror questionnaire goes

beyond mere difficulty in imposing the death penalty, it leaves no doubt that she would be unwilling to set aside her personal views and impose capital punishment. (*People v. Stewart, supra* 33 Cal.4th at p. 446; *People v. Avila, supra*, 38 Cal.4th at p. 531.)

Further, Buenrostro's claim that Frances P.'s response to question 70[19] that she would consider all of the evidence and the instructions provided by the court and impose the penalty she personally felt appropriate shows she would have been an impartial juror is not persuasive. (AOB 215.) There is no doubt she was substantially impaired based upon her other anti-death penalty responses in the juror questionnaire. When

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[19] Question 70 of the juror questionnaire stated in its entirety:

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

(28CT 7932-7933.)

taken together, Frances P.'s responses demonstrate she was not competent to sit on this case. The balance of Frances P.'s responses indicate that personally she would not vote for death and that life in prison is the "best" penalty for the crime of murder. Frances P.'s death qualifying responses were internally consistent. Even though Frances P. did not check that she would "ALWAYS" vote for life in prison as the response to question 70 b. indicated, her responses taken together demonstrate that Frances P. was substantially impaired. (*See People v. Wilson, supra,* 44 Cal.4th at p. 790.) Additionally, the defense had no opposition to Frances P.'s excusal; the defense may be viewed as having concurred in the trial court's assessment that Frances P. was substantially impaired. (*People v. Schmeck, supra*, 37 Cal.4th at p. 262.)

Frances P.'s juror questionnaire left no doubt that she was opposed to the death penalty and was unable or unwilling to set aside her personal view that life in prison was the best punishment for murder. Her questionnaire provided sufficient information of her state of mind for a reliable determination that she was prevented or substantially impaired by her personal views on capital punishment to perform her duties as a juror in this case. Given this, the trial court properly excused Frances P. Reversal of the death judgment is not warranted on this basis.

C. *Richard J.*

Buenrostro contends that the record of the voir dire proceedings does not support the trial court's decision to remove Richard J. as a prospective juror but, rather, refutes it. Buenrostro argues the lower court's decision is therefore not entitled to deference on appeal. (AOB 229-238.) Her argument should be rejected. The trial court's voir dire questioning of Richard J. reasonably tested his bias and partiality. Under the circumstances, the trial court was in the best position to evaluate Richard

J.'s demeanor. Consequently, the trial court's impression that Richard J. was substantially impaired is entitled to deference. The ruling should be upheld.

Richard J., age 67 at the time of trial, took approximately an hour and a half to complete all but one question in his questionnaire. A retired elementary school teacher, Richard J. taught 4th, 5th, and 6th grade in La Puente and Buena Park, California. (24CT 6599, 6601, 6624.) Richard J. participated in a Catholic church group, a men's golf club, and was involved in Pro-Life Network and Crusade for Life. (24CT 6603.) He was a former member of the National Rifle Association. (24CT 6611.)

Richard J. stated that a woman who kills her children might not be crazy but is certainly "mentally disturbed." (24CT 6610.) He believed that a person who kills her children should be held criminally responsible but should not face a death sentence if "so extremely mentally ill that the mother really didn't know what she was doing." (24CT 6610.) Richard J. indicated that because of the nature of the charges in the current case it would be difficult or impossible for him to be a fair or impartial juror. (24RT 6610.) Richard J. stated that he was "Pro-life (anti-abortion)." (24CT 6610.) Richard J. then stated, "I am ambiguous about capital punishment because murderers often made that choice to kill." (24CT 6610.)

Richard J. had 14 grandchildren, some between the ages of 4 and 10, that he saw a couple of times a week. He was unsure as to whether he could objectively view and consider graphic photographs of dead children. Richard J. indicated that he would try to be an impartial juror but that he might be biased because he was pro-life and the deaths of children were involved in the case. He stated that these feelings were not strong enough to impair his ability to be fair. (24CT 6612-6613, 6617.) He thought he could be fair because when he was a teacher, he tried to be fair and

impartial in handling children's disputes. (24CT 6617.) Richard J. stated he would follow the law as instructed by the trial court. (24CT 6613-6614.) When asked whether a defendant should be required to prove her innocence, Richard J. responded in the negative and stated:

> That is one of the safeguards of the constitution—one of our liberties. Even though the law has taken away the right to life for the unborn we cannot ignore assaults on our other liberties.

(24CT 6614.)

Richard J.'s general feelings about the death penalty had changed since his work in the pro-life community. Given this work, he was unsure about his former belief in capital punishment that was based upon a "kill and be killed" philosophy. (24CT 6618, 6620.) Richard J.'s pro-life commitment affected how he rated himself on a scale of one to ten (with 1 as strongly opposed and 5 as no opinion) as a 4 regarding the strength of his feelings on the death penalty. (24CT 6619.) Richard J. candidly admitted that he was not sure of the degree of his belief in the death penalty. (24CT 6619.) He believed the purpose of capital punishment was to set an example that one could not take the life of another without consequences. He believed that capital punishment should be imposed in cases where a killing is preplanned, hit men are hired, and assaults resulting in death. (24CT 6620.) Richard J. thought that life imprisonment was an expensive option but "easier for society's soul." (24CT 6620.) In the eyes of the Catholic Church to which Richard J. had recently converted, "all life is precious." (24CT 6620.) Richard J. marked in his juror questionnaire that he would consider all of the evidence and the jury instructions as given by the trial court and impose the penalty he personally felt was appropriate. (24CT 6621.)

After potential jurors were removed on the basis of their written answers to the juror questionnaire, the panels were combined and

remaining jurors were brought in, the trial court made some preliminary remarks concerning the voir dire procedure. The panel was then excused. (3RT 155-156, 158-160.) During discussions outside the presence of prospective jurors, the trial court requested that the parties name their "problem" jurors for the purpose of follow-up questions during oral voir dire. The prosecutor indicated Richard J. was on his list for cause. (3RT 176.) The defense provided its list of problem jurors. The trial court requested that the parties attempt to resolve some of the conflicts with the prospective jurors. (3RT 179.)

Subsequently, during voir dire questioning, the trial court addressed Richard J. (4RT 227-230.) The following exchange took place:

> [TRIAL COURT:] On the issue of death, you indicate that you have a prolife position with regards to abortion. Obviously, it's not an abortion issue in this case. But you felt compelled to tell us about that because you feel it might affect how you ultimately vote as a judge in this case.
>
> Do you feel that your prolife feelings, which you're entitled to have, do you feel that that would prejudice you in the penalty phase, so it would influence how you would vote?
>
> [RICHARD J.:] *I could vote for the death penalty, but I would probably lean more the other, probably give weight to life in prison over the death penalty.*
>
> [TRIAL COURT:] At this point in time?
>
> [RICHARD J.:] At this point in time.
>
> [TRIAL COURT:] *At this point in time, you feel you are leaning towards life without possibility of parole because of your personal views?*
>
> [RICHARD J.:] Yes.
>
> [TRIAL COURT:] And that's without hearing any further evidence?
>
> [RICHARD J.:] Yes, of course, I could change my mind.

[TRIAL COURT:] I'm sorry?

[RICHARD J.:] *I could change my mind upon hearing the evidence. But I do have more weight to life imprisonment side.*

[TRIAL COURT:] All right.

You indicate also that you might be a little bias because the death of children is involved in this case. Am I reading that you might be a little bias against the defendant?

[RICHARD J.:] No. I don't think so because as I indicated, also that I try to be fair and law abiding throughout my life.

[TRIAL COURT:] All right.

[RICHARD J.:] And at this point in time, you say at this point in time, and that's my opinion, that *I might be biased.*

[TRIAL COURT:] [. . .]

And at this point in time, where do you feel that you fit in?

[RICHARD J:] *I've always tried to pride myself on open mind, but I do tend to shy away from the death penalty.*

[TRIAL COURT:] And, do you—

[RICHARD J.:] *But as I indicated earlier, in my life an eye for an eye, I would certainly think the death penalty would be easy. But now it would be hard to say.*

[TRIAL COURT;] It would be hard to say?

[RICHARD J.:] (Witness nods head.)

[TRIAL COURT:] At this point in time, again, as you stated before, you feel you are leaning towards life without possibility of parole?

[RICHARD J.:] Yes, without hearing any evidence or anything.

(4RT 227-230, emphasis added.)

The prosecutor lodged a challenge for cause against Richard J. The defense objected to the challenge and asked to be heard. The trial court excused Richard J. because, based upon his answers, the trial court determined he was substantially impaired. (4RT 230.)

Subsequently, during a break in the proceedings and outside the presence of the prospective jurors, the defense stated that it was submitting its objection to the excusal of Richard J. without being heard. The defense observed that the trial court used the same standard in excusing Richard J. as when it excused purported "prodeath" prospective juror Peter M. (see 4RT 234-235). (4RT 238.) The trial judge then explained that he had read Peter M.'s questionnaire and that in conjunction with his responses to voir dire questioning, that prospective juror was substantially impaired. (4RT 239.) Presumably, the defense believed that the trial court had reviewed Richard J.'s questionnaire and, along with his responses to voir dire questioning, the trial court's questions were adequate upon which to base its ruling Richard J. was substantially impaired.

Buenrostro contends that Richard J.'s oral and written voir dire responses did not sufficiently establish that he was substantially impaired to serve as a juror under *Witt*. She argues that the potential juror's mere uncertainty about capital punishment was inadequate to support the trial court's excusal. Buenrostro argues the exclusion of Richard J. requires reversal of the death sentence. (AOB 223-239.)

Although the death penalty voir dire "seeks to determine only the views of the prospective jurors about capital punishment in the abstract" (*People v. Clark* (1990) 50 Cal.3d 583, 597), a challenge for cause should be sustained as to any prospective juror whose views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the court's instructions and the juror's oath (*Wainright v. Witt, supra*, 469 U.S. at p. 424). Courts have broad discretion

in deciding what questions to ask on voir dire. (*People v. Cleveland, supra,* 32 Cal.4th at p. 737.) Such discretion is abused "if the questioning is not reasonably sufficient to test the jury for bias or partiality." (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141.)

Here, in addition to the information gleaned from Richard J.'s juror questionnaire, the trial court personally questioned Richard J. on his views about the death penalty. Richard J.'s views on capital punishment had changed since his religious conversion to Catholicism and his participation in organizations grounded in the pro-life movement. For example, in response to the trial court's questioning, Richard J. stated that he would "lean more the other [way], probably give weight to" imposing life in prison over the death penalty. Richard J. tended to "shy away from the death penalty." For Richard J., it was "hard to say" if he could vote for death. (4RT 228-230.) The record demonstrates that the trial court's questions were reasonably sufficient to test Richard J.'s bias or partiality for life imprisonment.

The trial court's decision to excuse Richard J. is entitled to deference by this Court. (*People v. Avila, supra*, 38 Cal.4th at p. 529.) The rule is well-established that such a decision "involves an assessment of a prospective juror's demeanor and credibility that is 'peculiarly within a trial judge's province.' [Citation.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 133 (as modified August 27, 2008). Further,

> the trial court's assessment of a prospective juror's state of mind will generally be binding on the reviewing court if the juror's responses are equivocal and conflicting . . . and the reviewing court generally must defer to the judge who sees and hears the prospective juror, and forms the definite impression the juror is biased even when the juror's views are not clearly stated.

(*People v. Salcido, supra*, 44 Cal.4th at p. 133.) (Internal quotes and citations omitted.)

Based upon Richard J.'s written and oral responses, the prosecutor raised a challenge for cause. Even if Richard J.'s responses were, at times, equivocal, the trial court had the necessary information to make a determination that Richard J. was substantially impaired and grant the motion. After speaking directly with Richard J., the trial court determined that his personal views would prevent him from performing his duties as a juror because he was unable or unwilling to set them aside even temporarily. Richard J. informed the court no less than five different times during the voir dire exchange that he was biased based upon the circumstances of the case and that he was inclined to vote in favor of life imprisonment. The court was able to observe and take into consideration Richard J.'s demeanor when weighing his responses. The trial court's impression that Richard J. was substantially impaired is amply supported by his written responses and his responses during oral voir dire. The record substantially supports the trial court's ruling that he be excused. (*People v. Moon, supra,* 37 Cal.4th at p. 14.) Accordingly, the ruling should be upheld by this Court.

In sum, Bobbie R., Frances P., and Richard J. were properly excused from the jury panel by the trial court. Based on their written responses to the juror questionnaire, there was no doubt that Bobbie R. and Frances P. were unable or unwilling to set aside their personal views, follow the trial court's instructions and perform their duties as jurors on the case. Follow up questioning for either potential juror was unnecessary. Indeed, in both instances, the defense failed to object to the excusals or request that the potential jurors be further questioned. There was substantial evidence to support the trial court's decision to grant the prosecution's motion to exclude Richard J. for cause. Moreover, the trial court's decision in this regard is entitled to deference because it conducted oral voir dire and

observed Richard J.'s demeanor first hand. Buenrostro's argument that the death sentence must be reversed should be rejected.

X. THE TRIAL COURT DID NOT ERR IN CONDUCTING GROUP VOIR DIRE BECAUSE GROUP VOIR DIRE WAS PRACTICABLE UNDER THE CIRCUMSTANCES AND THE TRIAL COURT'S INQUIRY WAS SUFFICIENT TO REVEAL PROSPECTIVE JURORS' POTENTIAL BIASES

Buenrostro contends the trial court prejudicially erred when it failed to make a case-specific determination regarding large group voir dire. Alternatively, she contends that the trial court erred in denying her request for individual sequestered voir dire. She claims the death-qualification inquiry employed by the trial court was insufficient to identify potential jurors who could not be impartial. (AOB 240-250.) Buenrostro's claim that the trial court erred in conducting voir dire has been forfeited for her failure to raise a motion for attorney conducted sequestered voir dire. Even on the merits, the claim fails. The trial court did not abuse its discretion in conducting group voir dire; under section 223 of the Code of Civil Procedure group voir dire was practicable. Additionally, the trial court's inquiry of prospective jurors was sufficient to reveal any potential biases that would form the basis of challenges for cause. Consequently, Buenrostro's argument should be rejected.

A. Background Facts

Prior to trial and before Judge Sherman, counsel for Buenrostro made a motion for attorney conducted sequestered voir dire. (2 Pretrial RT 349; 1CT 147-155.) The trial court indicated its suggested procedure was

"essentially a modified *Hovey*."[20] (2 Pretrial RT 349.) The trial court explained:

> The reason that I intend to examine jurors in groups of 18 once they're time qualified is based on prior experience there's usually anywhere from three to six jurors in that group that it doesn't really pay to waste much further time on based on the answers to their questionnaire.
>
> So it's usually no more than 10 to 12 jurors that you are questioning as a group. And even if the two of you don't stipulate to dismiss the automatic life, automatic death jurors that are completely obvious from their questionnaires and want me to do a follow-up, I will tell you I don't waste a great deal of what is your time on those jurors so that you can have individual attorney voir dire after I've done whatever I need to do with the balance of the panel that are likely to remain.
>
> [. . .]
>
> So I would tell you up front that I do a modified *Hovey* in groups out of the presence of the other groups. And I don't do the whole lot at once.

(2 Pretrial RT 350.)

Defense counsel and the prosecution submitted the issue based upon the trial court's suggested procedure. The trial court indicated that the defense motion for attorney conducted sequestered voir dire was granted in part. (2 Pretrial RT 350.)

After Judge Sherman's recusal, Judge Magers granted the defense request that the panel selected be excused and that jury selection start anew. (1RT 1-2.) Further, the parties stipulated to all prior rulings made by Judge Sherman on pretrial motions. The trial court indicated with the exception of jury selection, it would adopt those rulings unless there was an objection otherwise. (1RT 2.)

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[20] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

As for jury selection and without objection by the defense, the trial court indicated that it would bring in the panels and time qualify or excuse jurors for hardship. The remainder of jurors would then be provided questionnaires. Based upon this procedure, the trial court anticipated that if three panels were called, there would be approximately 120 to 140 juror questionnaires.[21] The jurors would then be seated for voir dire in groups of 18. (1RT 3.) Following the time qualifying process and hardship excusals, the initial four panels of prospective jurors were combined and totaled 122. Rather than conduct voir dire outside the presence of the other groups, Judge Magers conducted voir dire in the presence of the entire panel. (2RT 131, 155, 158-159.)

B. Applicable Law

In *Hovey v. Superior Court, supra,* 28 Cal.3d 1, 80, this Court determined that in capital prosecutions the death-qualification portion of each prospective juror's voir dire should be sequestered, i.e., conducted out of the presence of other prospective jurors. This Court did not hold that sequestered voir dire was constitutionally required; but, rather, mandated this practice as a rule of procedure. (*People v. Jurado* (2006) 38 Cal.4th 72, 100.) However, the rule was abrogated by the enactment of section 223 of the Code of Civil Procedure. (*Ibid.*) When California voters enacted Proposition 115 in 1990, ten years after this Court's decision in *Hovey*, section 223 of the Code of Civil Procedure was added. That statute provides, in part, "where practicable" the trial court must conduct voir dire "in the presence of the other jurors in all criminal cases, including death

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[21] Four panels of prospective jurors were ultimately called. (1RT 99-100, 2RT 112.)

penalty cases." (*People v. Jurado, supra,* 38 Cal.4th at p. 100; Code Civ. Proc., § 223.)[22] Whether large group voir dire is practicable is an issue for the trial court to decide. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1182.)

Pursuant to section 223 of the Code of Civil Procedure, the question of whether individual, sequestered voir dire should take place is within the trial court's discretion. (*People v. Box* (2000) 23 Cal.4th 1153, 1179.) The trial court abuses such discretion "if the questioning is not reasonably sufficient to test the jury for bias or partiality." (*People v. Box, supra*, 23

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[22] Code of Civil Procedure section 223 provides:

> In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Cal.4th at p. 1179, *quoting People v. Chapman, supra,* 15 Cal.App.4th at p. 141.)

C. The Argument That the Trial Court Failed to Make a Case-Specific Determination of Whether Group Voir Dire Was Practicable Has Been Forfeited

Buenrostro argues reversal is required because the trial court failed to make a case-specific determination that group voir dire was practicable. (AOB 241-247.) According to Buenrostro, the trial court failed to exercise its discretion as required by section 223 of the Code of Civil Procedure when it failed to provide an explanation for denying her request for individual sequestered voir dire. (AOB 244.) As a threshold matter, Buenrostro's argument has been forfeited for her failure to object to the jury selection procedure utilized by the trial court. (*People v. Mayfield* (1997) 14 Cal.4th 668, 728.) Although the parties stipulated to Judge Sherman's prior rulings on pretrial matters, in starting the jury selection process anew, it was incumbent upon Buenrostro to raise her motion for attorney conducted sequestered voir dire. This is especially true since the voir dire procedure outlined by Judge Magers did not resemble the "modified *Hovey*" implemented by Judge Sherman, who had earlier granted the defense motion "in part." Further, the trial court explicitly indicated it would adopt the prior pretrial rulings *except* on jury selection. (1RT 2.) However, despite the trial court's invitation to litigate the issue, the defense fell silent. Thus, the claim has been forfeited. (See *People v. Anderson* (2001) 25 Cal.4th 543, 581 [court gave tentative decision in limine but set forth procedure whereby final ruling could be obtained when witness called to stand; defendant failed to utilize procedure for final ruling and forfeited claim]; *People v. Samayoa* (1997) 15 Cal.4th 795, 827 ["provisional ruling" for purposes of jury voir dire did not preserve claim regarding improper

restriction of cross-examination, where defendant never requested final ruling].)

Buenrostro appears to contend that the pretrial motion for individual and sequestered voir dire, which was ruled upon by Judge Sherman, was automatically before Judge Magers and he was obligated to provide his own explanation as to why that procedure would not be implemented. (AOB 243-244.) Clearly, when the defense failed to renew its request when invited to do so by the trial court, it failed to alert the trial court as to its preference for individual voir dire and that this aspect of jury selection was even contemplated by the defense. Absent such a request, the trial court did not proceed unreasonably under section 223 of the Code of Civil Procedure in conducting group voir dire. Since individual and sequestered voir dire is not required, implicit in its unchallenged ruling that it would conduct group voir dire was a finding that group voir dire was practical. Absent an express challenge by the defense, the trial court's ruling is entitled to the presumption that its official duty has been performed, that is, the trial court exercised its discretion in conducting group voir dire, and that the law has been followed. (Evid. Code, §§ 664, 666.)

In sum, Buenrostro failed to raise the issue of individual voir dire before the trial court. Buenrostro's claim is therefore not preserved on appeal. (*People v. Viera* (2005) 35 Cal.4th 264, 287.) Consequently, the argument has been forfeited.

D. The Trial Court Did Not Abuse Its Discretion in Conducting Group Voir Dire

Even if Buenrostro's claim had not been forfeited, it fails on the merits. "[S]ection 223 vests the trial court with discretion to determine the advisability or practicability of conducting voir dire in the presence of the other jurors." (*Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p.

1184.) Group voir dire may be determined to be impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias. (*People v. Viera, supra,* 35 Cal.4th at p. 287.) Buenrostro fails to meet her burden of establishing that group voir dire in the present case was impracticable to the extent that it resulted in actual prejudice.

Buenrostro argues that group voir created the substantial risk identified by the *Hovey* court that jurors would be more likely to sentence her to death, not remain impartial, become desensitized to the duty of recommending life or death, and mimic responses that appear to please the court. (AOB 245-246.) She further contends that the comments made during group voir dire including potential jurors' views on the expediency of the death penalty, people that murder small children, the expense of life without parole, and a panel member's prior jury experience potentially prejudiced the jury. (AOB 246.) However, Buenrostro identifies "at most potential, rather than actual, bias" which does not provide "a basis for reversing a judgment." (*People v. Viera, supra*, 35 Cal.4th at p. 287.)

Further, underlying the trial court's decision to conduct group voir dire was the court's understanding that the jury questionnaire filled out by the jurors would allow the jurors to freely and privately express their views regarding the death penalty. The court was aware of the breadth of the 31-page questionnaire and the multiple incisive questions it posed regarding the death penalty. (1RT 12, 21.) The trial court informed prospective jurors in its introductory remarks that the attorneys review the questionnaires "very closely" to get an idea on a potential juror's view on the death penalty. (1RT 16.) The trial court indicated that by completing the questionnaire, jurors would not necessarily be asked the same questions in open court. (1RT 16.) The trial court assured prospective jurors that the questionnaire was not meant to invade jurors' privacy but nonetheless, the questions were important and jurors' answers would be "kept in

confidence." (1RT 16-17.) Thus, the trial court's approach in conducting group voir dire still accomplished many of the objectives fulfilled by a *Hovey*-like voir dire because an individual questionnaire was obtained from each prospective juror. (*People v. Waidlaw* (2000) 22 Cal.4th 690, 713.) The juror questionnaires provided potential jurors the ability to speak freely about their views regarding the death penalty. The trial court did not abuse its discretion in its determination that group voir dire was practicable.

E. The Trial Court's Inquiry Was Sufficient to Identify Jurors Whose Views on Capital Punishment Subjected Them to Removal for Cause

Buenrostro additionally argues that the trial court's questions were inadequate and violated her right to an impartial jury. (AOB 247-250.) Not so. The record demonstrates that the trial court's inquiry repeatedly revealed potential biases and was the underlying basis for challenge for cause by the parties.

The trial court's questions must be "reasonably sufficient to test the jury for bias or partiality." (*People v. Box, supra*, 23 Cal.4th 1153, 1179, *quoting People v. Chapman* (1993) 15 Cal.App.4th 136, 141.) Jurors, whether unalterably in favor of, or opposed to, the death penalty are "by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." (*Morgan v. Illinois, supra,* 504 U.S. at p. 735.) The specific concern of partiality in the context of capital punishment should not be left unprobed. (*Ibid.*)

Here, the trial court's inquiry clearly sought to ascertain from the prospective jurors whether they harbored any improper bias. (E.g. 4RT 204-205 [prospective juror with grandchildren], 211-212 [trial court probes potential juror's "eye for an eye" comment], 221 [potential juror's personal

tragedy involving death of loved one would not affect evaluation of evidence because children involved], 226-227 [trial court probes potential juror who responded death penalty should be imposed for multiple slayings], 228-230 [trial court probes potential juror regarding prolife values and stated bias because children involved, prosecutor challenge for cause based on trial court's questions granted].) For example, Buenrostro herself cites to the court's questions regarding a potential juror's proclivity to vote for death when the victims were small children. (AOB 246; 4RT 234.) Based on the court's questions, the defense successfully challenged the potential juror for cause and he was excused. (4RT 235; also 4RT 223 [defense challenge for cause granted following potential juror's response to trial court's question regarding ability to be fair].) The record establishes the trial court's inquiry was sufficient to expose potential biases of prospective jurors.

Additionally, potential jurors were subject to attorney voir dire. This Court recently explained in determining that juror bias had not been established in connection with group voir dire:

> When first called to the capital venire, prospective jurors frequently know little about death penalty law and procedure and have reflected little on their own attitudes; their responses often change between the questionnaire and voir dire as well as during examination. Dishonesty, of course, is also possible under either system; voir dire, whether collective or sequestered, provides counsel the chance to ferret out hidden biases. Defense counsel had that opportunity here and availed himself of it, notwithstanding that questioning was in the presence of other jurors. As in other recent cases, defendant has not shown on this record that questioning prospective jurors in the presence of other jurors prevented him from uncovering juror bias.

(People v. Brasure (2008) 42 Cal.4th 1037, 1053.) (Internal footnotes, quotations and citations omitted.)

Similarly here, the defense was granted the opportunity to examine prospective jurors and follow-up on their questionnaire responses as well as their responses to the court's voir dire questioning. Initially, the trial court indicated the attorneys would be permitted 30 minutes of voir dire questioning. (3RT 159.) This time allowance was increased by 10 minutes upon the request of the defense once the questioning was underway. (4RT 277.) Attorney voir dire continued throughout the process as panel members replaced potential jurors that had been excused and the panel was eventually deemed acceptable by the parties and sworn. (4RT 330, 370, 403, 5RT 462, 500, 530.) The record demonstrates that the defense had ample opportunity to "ferret out hidden biases." (*People v. Brasure, supra*, 42 Cal.4th at p. 1050.)

The parties had ample opportunity to follow-up on the jurors' responses to the questionnaires and the trial court's voir dire questioning. The record demonstrates group voir dire was practicable, the trial court's questions were sufficient to identify jurors' views on capital punishment, and Buenrostro's right to an impartial jury was not violate.

F. Any Error in Conducting the Voir Dire Was Harmless

California Code of Civil Procedure section 223, provides that any abuse of discretion in the manner a trial court conducts voir dire "shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice . . . ." In cases challenging the method of voir dire, this Court has held there is no prejudicial error where the defendant does not claim any of the final jurors was incompetent or was not impartial. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1086; *see Ross v. Oklahoma* (1988) 487 U.S. 81, 86 [108 S.Ct. 2273, 101 L.Ed.2d 80].)

Under both of these standards, it is clear Buenrostro was not prejudiced by the trial court's voir dire. Buenrostro has not alleged, nor can

she prove, that any of the persons who ultimately sat on her jury were incompetent or impartial. The trial court's voir dire resulted in an impartial jury capable of following the court's instructions and evaluating the evidence. Any error in the manner in which the voir was conducted was not prejudicial.

PART THREE: GUILT PHASE ISSUES

XI. THE TRIAL COURT PROPERLY DENIED BUENROSTRO'S MOTION FOR SELF REPRESENTATION

Buenrostro argues the trial court erred in denying her request for self-representation. (AOB 251-281.) The trial court properly denied Buenrostro's motion. The motion for self-representation was untimely and equivocal.

A. Factual Background of Claim

On Monday July 20, 1998, the second day of the prosecution's case-in-chief, the prosecutor played the tape of Buenrostro's police interview for the jury. (7RT 689.) Subsequently, the trial court announced a 15-minute recess and defense attorney Grossman requested an in camera hearing. (7RT 689.) The trial court closed the courtroom. (7-A RT 691.)

The trial court inquired of defense attorney Grossman who then explained that, earlier that morning, Buenrostro had expressed her dissatisfaction with the representation she was receiving. Buenrostro indicated that the tape of her police interview was a fraud and that she was being framed for the murders. Based upon Buenrostro's complaint to her attorneys that they were not adequately assisting her, defense attorney

Grossman explained to Buenrostro she had the option of requesting self-representation. (7-A RT 691; 7-B RT 697-698.)

The defense attorneys explained to the trial court that Buenrostro was very dissatisfied in the way they were conducting her defense because she wanted them to attack the validity of the tape of the police interview. Under the circumstances, the defense attorneys did not believe that was a proper approach. (7-B RT 702.) Attorney Macher stated, "What Ms. Buenrostro has proposed to us we believe would be a disaster for both guilt and penalty, and we can't do it." (7-B RT 703.) He further stated, "it's just not based in reality." (7-B RT 703.)

Defense attorney Macher objected to Buenrostro waiving her right to counsel and requesting self-representation based upon the untimeliness of such a motion and that it would not be in Buenrostro's best interest. (7-A RT 692.) The defense attorneys indicated that they had been assigned to the case since mid-1996. (7-B RT 699.) The trial court asked Buenrostro if at that point in time she was requesting to represent herself, to which she responded, "yes." (7-B RT 700.)

The trial court noted that the lead defense attorney, Grossman, had been assigned to the case for two years and that the prosecution was "halfway" through its presentation of the evidence. The trial court indicated that it overheard Buenrostro yelling at her defense attorneys in an angry manner earlier that morning while they conferenced in a holding cell next to the courtroom. (7-B RT 700.)

The trial court asked Buenrostro a second time whether she was requesting to represent herself. (7-B RT 703.) Buenrostro stated she was and that she was able to proceed in the case without any further delay. (7-B RT 703-704.)

The trial court indicated that Buenrostro's conduct in requesting self-representation at this "late stage" of the proceedings was "either an

obstructionist tactic or one of delay." (7-B RT 704.) Further, the trial court found that under the circumstances, the request for self-representation was not made in good-faith. The trial court found the request was untimely. The trial court denied the motion. (7-B RT 705.)

B. Pertinent Legal Principles

A defendant has a right to represent himself or herself under the federal Constitution. (*Faretta v. California* (1975) 422 U.S. 806, 819 [95 S.Ct. 2525, 45 L.Ed.2d 562]; *People v. Doolin* (2009) 45 Cal.4th 390, 453.) In *Faretta*, the Supreme Court declared:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." [Citation.]

(*Faretta v. California, supra*, 422 U.S. at p. 834 fn. omitted, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350-351 [90 S.Ct. 1057, 25 L.Ed.2d 353] [Brennan, J., concurring].)

For these reasons, *Faretta* error is structural error and reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [104 S.Ct. 944, 79 L.Ed.2d 122]; *People v. Joseph* (1983) 34 Cal.3d 936, 945-948.)

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis.

(*McKaskle v. Wiggins, supra*, 465 U.S. at p. 177, fn. 8.)

> Any rule which purported to assess the quality of a would-be *Faretta* accused's representation by the harmless error standard would inevitably erode the *pro se* right itself.

(*People v. Joseph, supra,* 34 Cal.3d at p. 946.)

The right of self-representation is absolute, but only if knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court's sound discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129.) Thus, where a request to proceed pro per is not made "within a reasonable time prior to the commencement of trial," the court is not obligated to grant the motion. (*People v. Windham, supra*, 19 Cal.3d at p. 128.) The timeliness requirement "serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice." (*People v. Doolin, supra*, 45 Cal.4th at p. 454 quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110.)

Moreover, whether timely or untimely, a request for self-representation must be unequivocal. (*People v. Marshall* (1997) 15 Cal.4th 1, 22-23.) Indeed, the "*Faretta* right is forfeited unless the defendant 'articulately and unmistakably' demands to proceed in propia persona." (*People v. Valdez* (2004) 32 Cal.4th 73, 99, quoting *People v. Marshall, supra*, 15 Cal.4th at p. 21; *id.* at p. 23 ["[T]he court should draw every reasonable inference against waiver of the right to counsel"]; see *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404 [97 S.Ct. 1232, 51 L.Ed.2d 424] ["courts indulge in every reasonable presumption against waiver" of the post-arraignment right to counsel].) "[A] motion made out of temporary

whim, or out of annoyance or frustration, is not unequivocal -- even if the defendant has said he seeks self-representation." (*People v. Marshall, supra,* 15 Cal.4th at p. 21.)

The reviewing court independently evaluates the record to determine whether the defendant knowingly and intelligently invoked his right to self-representation. (*People v. Stanley* (2006) 39 Cal.4th 913, 932.)

C. Buenrostro's *Faretta* Motion Was Neither Timely Nor Unequivocal

Buenrostro's request that the trial court relieve counsel and permit her to represent herself was untimely. Buenrostro made her request the second day of the prosecution's case-in-chief. The trial court noted that not only was the request made "halfway" into the prosecution's case, but that the defense team had been assigned to the case for the past two years and that Buenrostro's request was designed for the purpose of delay. (7-B RT 704.) Buenrostro's request was not made within a reasonable amount of time before the commencement of trial and was properly denied on this basis. (*People v. Windham, supra*, 19 Cal.3d at p. 128.)

Further, Buenrostro's request was not unequivocal. Buenrostro directly responded to the trial court two times during the *Faretta* hearing that she wished to represent herself. However, the record demonstrates that Buenrostro made the request to represent herself out of frustration with her attorneys who refused to present her theory of the case to the jury. Buenrostro's attorney indicated to the court that she had insisted on an approach that would be a "disaster" to the guilt and penalty phases of trial and that her approach simply was "not based in reality." (7-B RT 703.) The trial court noted that, earlier that morning, Buenrostro was overheard angrily yelling at her attorneys. (7-B RT 700.)

This Court has determined that even if a defendant's words appear to demonstrate an unequivocal expression of one's intent to invoke his or her right to self-representation, a defendant's conduct, other words, and emotional state must be taken into consideration by a trial court before permitting a defendant to waive the right to counsel. This Court explained in *People v. Marshall, supra,* as follows:

> The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.

(*People v. Marshall, supra*, 15 Cal.4th at p. 23.)

The trial court commented that the motion was untimely and also, that it was not made in good-faith. (7-B RT 705.) Under the circumstances, although Buenrostro's words that she wished to represent herself were clear, her underlying intent was not. Her apparent anger and frustration with the defense attorneys in refusing to conduct her defense in the manner in which she insisted is not a ground upon which to grant her *Faretta* request. Indeed, given the constitutional right at stake, the effective assistance of counsel which is "a right that secures the protection of many other constitutional rights as well," the trial court properly questioned the sincerity of Buenrostro's request after taking into consideration the defense attorney's statement and Buenrostro's angry words to her attorneys overheard earlier that morning. (*People v. Marshall, supra,* 15 Cal.4th p. 23.)

The record establishes that Buenrostro's motion for self-representation was properly denied. The motion was untimely as it was not reasonably made before the commencement of trial. Additionally, Buenrostro's request was made out of anger and frustration; the request was insincere and failed to rebut the presumption against waiver of counsel. (*Brewer v. Williams, supra*, 430 U.S. at pp. 391, 404.) Under the circumstances, Buenrostro's constitutional right to self-representation was not infringed upon. Accordingly, the judgment should be upheld.

XII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT HAD TO FIND UNANIMOUSLY AND BEYOND A REASONABLE DOUBT BUENROSTRO COMMITTED FIRST DEGREE MURDER AND ON MOTIVE

Buenrostro contends the trial court's instructions to the jury on the degree of murder and motive diluted the prosecution's burden of proof. (AOB 282-292.) Buenrostro failed to raise any objection to the instructions to which she now assigns error. Her arguments should be deemed forfeited. In any event, the trial court properly instructed the jury on murder, the degrees of the offense and that in order to convict Buenrostro of first degree murder it had to find unanimously and beyond a reasonable doubt the elements of the offense. Further, the jury was properly instructed that it was allowed to give Buenrostro the benefit of the doubt and return a verdict of second degree murder if appropriate. Buenrostro's contention that the instructions provided in this regard were confusing and ambiguous must be rejected. Moreover, this Court has repeatedly rejected the claim that the standard jury instruction on motive dilutes the prosecution's burden and erroneously requires a defendant to establish innocence. Buenrostro does not raise any compelling argument for this Court to revisit its prior ruling on the matter. Accordingly, the jury's verdicts of guilt and the judgment of death should be upheld.

A. Instructions Relating to First and Second Degree Murder

Following instructions on murder (35CT 9906; 10RT 1137-1138; CALJIC No. 8.10 [Murder—Defined (Pen. Code, § 187)]), the presumption of innocence and the prosecution's burden of proving murder beyond a reasonable doubt (35CT 9903; 10RT 1136-1137; CALJIC No. 2.90 [Presumption Of Innocence—Reasonable Doubt—Burden Of Proof]), the trial court instructed the jury that "[m]urder is classified in two degrees." (35CT 9912; CALJIC No. 8.70 [Duty Of Jury As To Degree Of Murder].) The trial court instructed the jury that if they convicted Buenrostro of murder, they had to determine whether it was murder in the first or second degree. (*Ibid.*) As to first degree murder, the trial court instructed the jury under CALJIC No. 8.20 [Deliberate And Premeditated Murder] which states, in pertinent part:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder in the first degree. [. . .] [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

(35CT 9908; 10RT 1138-1139.)

The jury was instructed that second degree murder was an intentional unlawful killing with malice aforethought "but the evidence is insufficient to prove deliberation and premeditation." (35CT 9910; 10RT 1140; CALJIC No. 8.30 [Unpremeditated Murder Of The Second Degree].) Additionally, the jury was instructed that second degree murder occurs under circumstances where malice is implied. (35CT 9911; 10RT 1140;

CALJIC No. 8.31 [Second Degree Murder—Killing Resulting From Unlawful Act Dangerous To Life].)

The jury was instructed on the sufficiency of circumstantial evidence generally (beyond a reasonable doubt) and the sufficiency of circumstantial evidence to prove specific intent or mental state. (35CT 9884-9885; 10RT 1128-1130; CALJIC Nos. 2.01 [Sufficiency Of Circumstantial Evidence—Generally], 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State].)

Buenrostro's jury was also instructed in the language of CALJIC No. 8.71 [Doubt Whether First Or Second Degree Murder] as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(10RT 1140-1141; 35CT 9913.)

Following CALJIC No. 8.71, the trial court instructed the jury under CALJIC No. 8.74 [Unanimous Agreement As To Offense—First Or Second Degree Murder]:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find her guilty of an unlawful killing, you must agree unanimously as to whether she is guilty of murder of [the] first degree or murder of the second degree.

(10RT 1141; 35CT 9914.)

Additionally, the court instructed the jury to "[c]onsider the instructions as a whole and each in light of all the others[,]" and, further, "[t]he order in which the instructions have been given has no significance as to their relative importance." (35CT 9879; 10RT 1127; CALJIC No. 1.01 [Instructions To Be Considered As A Whole].) The concluding

instruction provided that "to reach a verdict, all 12 jurors must agree to the decision and to any finding you have been instructed to include in your verdict." (35CT 9938; 10RT 1159; CALJIC No. 17.50 [Concluding Instruction].)

B. The Jury Was Properly Instructed That a Verdict of First Degree Murder Had to Be Unanimous and Determined Beyond a Reasonable Doubt and Was Provided Instructions That Permitted Them to Give Buenrostro the Benefit of the Doubt and Return a Lesser Verdict If Appropriate

Buenrostro argues the trial court's instructions under CALJIC Nos. 8.71 and 8.74 were confusing and ambiguous on the issue of the degree of murder. Specifically, Buenrostro argues that rather than provide CALJIC No. 8.71, the trial court should have instructed the jury, pursuant to Penal Code section 1097,[23] that if they unanimously found her guilty of murder beyond a reasonable doubt, they would have to find murder in the first degree unanimously and beyond a reasonable doubt and, if not unanimously satisfied of murder in the first degree beyond a reasonable doubt, they would have to find her guilty of murder in the second degree. (AOB 283-284.) She asserts the jury was never clearly instructed that to find her guilty of first degree murder, it had to unanimously and beyond a reasonable doubt find the elements of first degree murder, here, premeditation and deliberation. (AOB 285-286.) Buenrostro's failure to

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[23] In pertinent part, Penal Code section 1097 state:

> When it appears that the defendant has committed a public offense, [. . .], and there is reasonable ground of doubt in which of two [. . .] degrees of the crime [. . .] he is guilty, he can be convicted of the lowest of such degrees only.

request such clarifications at trial bars appellate review of the issue. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; 9RT 1019.) In any event, Buenrostro's argument should be rejected. The jury was properly instructed. Taken together, the instructions conveyed to the jury that a verdict of murder in the first degree had to be unanimous and supported by the evidence beyond a reasonable doubt. Further, the instructions clearly provided pursuant to Penal Code section 1097 that if the jury unanimously found Buenrostro killed her children beyond a reasonable doubt but there was unanimous reasonable doubt as to the degree, they had to return a verdict of second degree murder.

As a threshold matter, "[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Thus, this Court presumes "that jurors are intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Butler* (2009) 46 Cal.4th 847, 873.) Here, the jury was fully instructed on murder, the definitions of first and second degree murder, the prosecution's burden of establishing guilt beyond a reasonable doubt, that the applicable intent or mental state, i.e., premeditation and deliberation, had to be established beyond a reasonable doubt, and unanimity. (See CALJIC Nos. 2.01, 2.02, 2.90, 3.31.5, 8.00, 8.10, 8.11, 8.20, 8.30, 8.31, 8.70, 8.74, 17.50.) Buenrostro fails to rebut the presumption that jurors understood these instructions and followed the law in reaching their verdict of first degree murder.

Instead, Buenrostro asserts that CALJIC No. 8.71 (on doubt as to whether first or second degree murder) did not properly instruct the jury on its task of determining first degree murder unanimously and beyond a reasonable doubt. (AOB 284.) Buenrostro further asserts that CALJIC No. 8.74 (requiring unanimity on whether first or second degree murder) failed

to clarify the alleged confusion created by CALJIC No. 8.71. (AOB 286.) Buenrostro's argument is fundamentally flawed because, unlike the instructions referenced in the preceding paragraph, CALJIC No. 8.71 does not serve the purpose of instructing the jury on the requirement that it must determine the offense and the degree of the offense unanimously beyond a reasonable doubt. Rather, CALJIC No. 8.71 is a benefit of the doubt instruction.

It is well-established that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*); Pen. Code, § 1097.) Such instruction applies whether the jury must choose between statutory degrees of the same offense or between a principal offense and a lesser included offense. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262; *People v. Dewberry, supra*, at pp. 555-556.)

In *Dewberry*, the trial court instructed the jury on the elements of murder and manslaughter, explained that there were two degrees of murder and that, if the jury decided defendant had committed murder but had a reasonable doubt as to the degree, "they should give defendant the benefit of the doubt and find him guilty of second degree murder." (*People v. Dewberry, supra,* 51 Cal.2d at p. 554.) Although the jury in *Dewberry* also was instructed that if it had a reasonable doubt whether the killing was manslaughter or justifiable homicide, it was to acquit, the trial court refused a general defense instruction that would have told the jury that if it found the defendant "'was guilty of an offense included within the charge . . . , but entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense.'" (*Ibid.*) The California Supreme Court reversed Dewberry's second degree murder

conviction on the ground that a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to all crimes with lesser degrees or related or included offenses. (*People v. Dewberry, supra*, 51 Cal.2d at p. 556.)

The challenged CALJIC instruction given here fully expresses "the *Dewberry* mandate." (*People v. St. Germain* (1982) 138 Cal.App.3d 507, 522.) The so-called benefit of the doubt instruction that applies to "the situation where crimes are classified by statute into degrees (e.g., CALJIC No. 8.71: "Doubt Whether First or Second Degree Murder")[,]" was correctly provided. (*Ibid;* see 35CT 9913; 10RT 1140-1141.)

Most recently, this Court observed that "CALJIC Nos. 8.70, 8.71, and 8.72 instruct the jury as to the degrees of murder and this [benefit of the doubt] principle from *Dewberry*." (*People v. Friend* (2009) 47 Cal.4th 1 (*Friend*).) Approving of these benefit of the doubt instructions (of which Buenrostro was instructed under CALJIC Nos. 8.70 and 8.71), this Court explained that

> CALJIC No. 8.70 describes the two degrees of murder and instructs the jury, if they find defendant guilty of murder, to state in the verdict the degree of which they are finding him guilty. CALJIC Nos. 8.71 and 8.72 apply the *Dewberry* benefit of the doubt principle to deciding between first and second degree murder and between murder and manslaughter, respectively.

(*Id.* at p. 55.)

In *Friend*, the trial court failed to instruct the jury under CALJIC No. 8.71. This Court found the omission was not prejudicial. Even though "the trial court omitted CALJIC No. 8.71 with its specific application of the *Dewberry* principle to second degree murder[,]" it provided other instructions "which stated the general principle[.]" (*People v. Friend, supra*, at p. 55.)

Here, CALJIC No. 8.71 was provided and Buenrostro's jury was properly instructed on the *Dewberry* benefit of the doubt principle and its application to second degree murder. Once the jury found beyond a reasonable doubt that Buenrostro committed the unlawful killings, the instructions gave the jury the options of unanimously finding her guilty of murder in the first degree, or murder in the second degree, or unanimously having a reasonable doubt as to the degree, in which situation they must return a verdict of murder in the second degree. In this regard, Buenrostro's suggestion that when read together CALJIC Nos. 8.71 and 8.74 create contradictory requirements for finding murder in the second degree should be rejected. (AOB 287-288.) The trial court's instruction as to the benefit of the doubt pursuant to CALJIC No. 8.71 was proper. Further, CALJIC No. 8.74 was proper in its instruction to the jury it had to be in unanimous agreement as to the degree of the offense without mentioning the requirement that the jury had to find murder in the first degree beyond a reasonable doubt. As discussed, the other instructions provided made this requirement clear.

In sum, Buenrostro's contention that the instructions provided under CALJIC Nos. 8.71 and 8.74 were "incomplete and inaccurate, lessened the prosecution's burden of proof, and prejudiced [her] chance that the jury would return a second degree murder verdict" is forfeited and must be rejected. (AOB 285.) Even if she had raised a timely objection and the alleged defects in CALJIC Nos. 8.71 and 8.74 existed, a due process violation from instructional error does not arise unless the ailing instruction so infected the entire trial that the resulting conviction violated due process. The instruction must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, then the question is whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. (*People v. Huggins* (2006) 38 Cal.4th 175,

192.) "'[A] commonsense understanding of the instruction in light of all that has taken place at the trial is likely to prevail over technical hairsplitting.'" (*Id.* at p. 193 quoting *Boyde v. California* (1990) 494 U.S. 370, 381 [110 S.Ct. 1190, 108 L.Ed.2d 316].) In light of all of the instructions provided, there is not a reasonable likelihood that the jury applied the instructions regarding the degree of murder on a standard less than the constitutionally mandated beyond a reasonable doubt. (*People v. Huggins, supra,* 38 Cal.4th at p. 192; AOB 288.)

C. The Trial Court's Instruction on Motive Did Not Permit the Jury to Find Guilt Based Solely on Motive, and Did Not Shift the Burden of Proof to Buenrostro

Buenrostro contends that the trial court's instruction on motive under CALJIC No. 2.51 [Motive][24] undermined the requirement that the prosecution show guilt beyond a reasonable doubt because it allowed the jury to find guilt based upon motive and shifted the burden to Buenrostro to show absence of motive to establish innocence. (AOB 289-291.) Buenrostro forfeited any error by failing to object or request clarifying language for this instruction. Moreover, this Court has repeatedly rejected

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[24] The instruction states:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(CALJIC No. 2.51; 35CT 9897; 10RT 1134.)

the same claim on the merits, holding that CALJIC No. 2.51 neither impermissibly permits motive to suffice as guilt nor inappropriately places a burden on a defendant to prove innocence.

Initially, Buenrostro's contention that the trial court erred in reading CALJIC No. 2.51 to the jury is forfeited. If Buenrostro believed the instruction was unclear, she had the obligation to request clarifying language. She did not. (9RT 1014.) Buenrostro's failure to request such clarifications at trial bars appellate review of the issue. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1192.) Accordingly, she has forfeited the opportunity to complain about the instruction on appeal.

Moreover, the claim lacks merit. This Court has repeatedly rejected the same challenges to CALJIC No. 2.51. (*People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Prieto* (2003) 30 Cal.4th 226, 254 (*Prieto*); *People v. Snow* (2003) 30 Cal.4th 43, 57 (*Snow*).)

As this Court has explained, "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) In *Snow*, the defendant argued CALJIC No. 2.51 suggested to the jury that proof of motive alone could establish guilt as the instruction did not further caution the jury that proof of motive alone was insufficient to establish guilt. (*People v. Snow, supra*, 30 Cal.4th at p. 97.) This Court disagreed, explaining:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of the murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC

> No. 8.10), there is no reasonable likelihood (*People v. Frye, supra*, 18 Cal.4th at p. 958) it would be read as suggesting that proof of motive alone may establish guilt of murder.

(*People v. Snow, supra*, 30 Cal.4th at p. 97-98.)

Soon after *Snow*, in *Prieto*, this Court rejected the contention that the phrase "tend to establish innocence" in CALJIC No. 2.51 led the jury to believe that the defendant had to establish his innocence. (*People v. Prieto, supra*, 30 Cal.4th at p. 254.) This Court reasoned:

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle-motive." [Citation.] "The instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." [Citation.] Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as "a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." [Citation.] Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid; accord, People v. Crew, supra*, 31 Cal.4th at p. 848.)

Here, there is no reasonable likelihood the jury read CALJIC No. 2.51 as suggesting that proof of motive alone was sufficient to establish guilt. First, the instruction told the jury that motive was not an element of the crimes charged, "which leaves little conceptual room for the idea that motive could establish all the elements" of the charged crimes. (*People v. Snow, supra*, 30 Cal.4th at p. 43.) Second, the instructions regarding murder outlined their elements and advised the jury every single element had to be proved. (35CT 9906-9912; 10RT 1137-1140.) Third, CALJIC No. 3.31.5 [Mental State] instructed the jury that, for murder, there had to be a concurrence of the act with a specific intent. (35CT 9904; 10RT 1137.) Finally, the jury was instructed on reasonable doubt with CALJIC No. 2.90 (35CT 9903; 10RT 1136-1137), so there is no reasonable

likelihood the jury would construe CALJIC No. 2.51 as a burden of proof instruction. In light of this, there is no reasonable likelihood the jury read CALJIC No. 2.51 as Buenrostro suggests.

Buenrostro acknowledges that this issue has already been resolved by this Court, but asks that the issue be revisited. She indicates she has raised the claim for possible federal court review. (AOB 291.) However, Buenrostro offers no persuasive reason to revisit this Court's rejection of this claim in *Crew, Snow*, and *Prieto*, and more recently, as pointed out by Buenrostro in *People v. Rundle* (2008) 43 Cal.4th 76, 154-155 and *People v. Kelly* (2007) 42 Cal.4th 763, 792. (AOB 291.) The argument should be rejected.

XIII. THIS COURT SHOULD SET ASIDE TWO OF THE JURY'S REDUNDANT MULTIPLE MURDER SPECIAL CIRCUMSTANCE FINDINGS

Buenrostro argues that two of the three multiple murder special circumstance findings must be stricken. (AOB 293-296.) Because two of the three multiple murder special circumstances findings are superfluous, respondent has no objection to this Court setting those findings aside.

A. Background Facts

On May 13, 1998, the prosecution filed an amended information that alleged one multiple murder special circumstance. (4CT 831-833.) Once trial was underway, on July 20, 1998, the prosecutor offered drafts of verdict forms and instructions to the defense and the trial court. (6RT 676.) At that time, the trial court commented that the draft of the verdict form contained only one multiple murder special circumstance allegation. (7RT 676.) The prosecutor indicated that the format was different than usual

because, the prosecutor explained, the District Attorney's format usually repeats the allegation as to every count even though there is only one allegation in the information. The prosecutor recognized that the law required only one special circumstance allegation and stated, "[w]e need to work on it." (6RT 677.)

Several days later during a break in the proceedings, the prosecutor raised the issue of the verdict form draft. The defense objected to the prosecutor's stated preference to include a special circumstance finding as to each count. The defense indicated the special circumstance finding should appear one time with the verdicts, as opposed to with each count. (9RT 962-963.) The trial court then indicated, "If you are proposing to do a special allegation as to each count, then I would approve of that. Mr. [Prosecutor]. That solves the problem, and I don't think there would be any error in doing that." (9RT 964.)

The trial court instructed the jury as to each count of murder and the attendant deadly weapon use allegations. (10RT 1145-1146.) The trial court then instructed the jury:

> The District Attorney of the County of Riverside further charges that in the commission of the crimes charged in Counts 1, 2, and 3 of the amended information the defendant, Dora Buenrostro, committed more than one offense of murder in the first or second degree, within the meaning of Penal Code Sections 190.2 [subdivision](a)(3).

(10RT 1147.)

The trial court explained the form of the verdict to the jury as to each count. (10RT 1147-1149.) The trial court informed the jury that if it determined Buenrostro was guilty as to the counts, then it had to determine the truth of the use of a deadly weapon allegation as to each count. (10RT 1149-1150.) Likewise, the trial court instructed the jury that it had to

determine the truth of the multiple murder special circumstance allegation as to each count in which it determined guilt. (10RT 1150-1153.)

After instructing the jury as to what findings were required as to each count in which it determined guilt, the trial court called a side bar. (10RT 1153.) Out of the hearing of the jury, the trial court indicated some concern regarding the dates contained in the special circumstance allegation. (10RT 1153.) The prosecutor acknowledged this and also indicated the wording of the special circumstance allegation was in the conjunctive (i.e., "Susana and Vincent and Deidra") when it should have been in a disjunctive format, that is, "Susana and/or Vincent and/or Deidra." (10RT 1153-1154.) The trial court and the parties resolved the issue regarding the date. Further, the trial court indicated that the use of the conjunction "and" was relatively inconsequential because under the facts of the case, the jury would not find her guilty of one murder—"either she did murder [Susana, Vincent, and Deidra] or she didn't." (10RT 1154.) The prosecutor requested the trial court instruct the jury that the multiple murder special circumstance only requires two murders, a first degree murder and a first or second degree murder, even though the special circumstance was listed as to each count. (10RT 1155.)

Thereafter, in concluding its instructions, the trial court informed the jury:

> As far as the special circumstance is concerned, the way that it is worded is a little confusing. In the abstract, what we're talking about is a defendant being convicted of murder in the first degree and at least one other conviction for murder, either in the first or second degree.
>
> So, in the abstract, in this particular case, if the jury finds first-degree murder on any particular count, on that particular count they would have to consider the special circumstance. And that special circumstance would be true if the jury found at least one conviction for murder. It doesn't have to be two, because multiple murder means two or more.

[. . .]

Because the way that the charging instruction was, there is "and" in here, and it should be "and/or."

[. . .]

All right. And if the jury needs further clarification on that, I would be happy to do that with the foreperson. But I think that's –that's pretty clear. If not, then I'll help you out a little more with the foreperson.

(10RT 1156-1157.)

The jury did not request further clarification on the matter. The jury returned verdicts of guilt as to each count. The jury found the deadly weapon use allegation to be true as to each count. (10RT 1164-1167; 35CT 9950-9955.) Additionally, the jury found the multiple murder special circumstance allegation true as to each count. (10RT 1167-1169; 35CT 9956-9958, 9969.)

B. Applicable Law

Pursuant to Penal Code section 190.2, subdivision (a)(3), under which Buenrostro was charged, a special circumstance occurs where "[t]he defendant has [. . .] been convicted of more than one offense of murder in the first or second degree." Buenrostro correctly points out that the jury was improperly permitted to return true findings as to more than one multiple murder special circumstance. (AOB 295.) A plurality of this Court held in *People v. Harris* (1984) 36 Cal.3d 36, that the information should allege one multiple-murder special circumstance separate from the individual murder counts. (*Id* at p. 67; *People v. Diaz* (1992) 3 Cal.4th 495, 565.) Given this rule, it follows that any more than one multiple murder special circumstance true finding is superfluous. (*People v. Allen* (1986) 42 Cal.3d 1222, 1273.) Because one special circumstance finding rendered

Buenrostro death penalty eligible, she has not been prejudiced by the jury's redundant findings. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422.) Accordingly, respondent agrees, this Court should set aside two of the three multiple murder special circumstance findings.

PART FOUR: PENALTY PHASE ISSUES

XIV. VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3, FACTOR (A), AND STANDARD PENALTY PHASE INSTRUCTIONS REGARDING VICTIM IMPACT TESTIMONY ADEQUATELY INSTRUCTED THE JURY

Buenrostro argues the trial court erroneously admitted victim impact evidence and committed further error when it refused to provide the jury with a cautionary instruction as to how to use such evidence. (AOB 297-331.) All of the victim impact evidence and specifically, the school principal's testimony, and the videotapes of the children's photographs and Alex Buenrostro when he learned of his children's deaths, was properly admitted under Penal Code section 190.3, factor (a). Standard penalty phase instructions adequately instructed the jury on victim impact evidence. Even if error occurred, it was harmless.

A. Background

During in limine motions at the start of the penalty phase, the defense generally objected to the victim impact evidence and, submitting on its written motion, moved to exclude it. (11RT 1191-1192.) In Buenrostro's written motion, the defense objected to the prosecution's first amended statement in aggravation under Penal Code section 190.3 based on her rights to a fair trial, due process, equal protection and her rights under the

Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution and article I, sections 1, 7, 13, and 15 of the state Constitution. (36CT 9987-9988.) The defense specifically objected to evidence of

> [t]he effect of each victim's death, including, but not limited to the manner of death, notification of fact of the killing, and circumstances regarding the impact of the killings on families, friends, and acquaintances of the victims.

(36CT 9989; see 1CT 125, 2CT 444.)

At the hearing, the prosecutor indicated that he intended to call Alex Buenrostro, Alejandra Buenrostro, the victims' half-sister, and the principal of the school the children attended. (11RT 1192.) The defense argued the school principal's testimony did not qualify under *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed. 2d 720] as appropriate victim impact evidence. (11RT 1195.)

Additionally, the prosecutor sought to show a videotape to the jury. (11RT 1192.) The prosecutor explained the video consisted of still photographs of the children when they were alive and showed their gravesite. It was set to music. (11RT 1196.) The defense complained that the video was designed to make the jury upset and more inclined to vote for death; that it was designed to be a "quasi-religious experience" and portrayed like a "docudrama." (11RT 1197-1198.)

The prosecutor intended to present a second video of Alex Buenrostro in the Los Angeles police interview room when he was first told that two of his children were dead. (11RT 1200-1201.) The defense objected on the ground the video was too emotional and also argued the video was cumulative. (11RT 1201.)

As to the testimony of the victims' father and half-sister, the trial court determined it was proper factor (a) evidence.[25] (11RT 1194.) The trial court deferred its ruling on the school principal's testimony but later decided to allow it. (11RT 1195, 1237.) The trial court determined that the photographs of the children contained in the videotape were relevant. However, the trial court reviewed the video to see if it was unduly prejudicial.[26] (11RT 1199, 1203.) After viewing the videotape, the trial court ruled that it was admissible factor (a) evidence; it was not unduly prejudicial or unduly inflammatory. (11RT 1204.) The trial court also determined, after viewing the videotape of Alex Buenrostro when he first learned of his children's deaths, that it was the best evidence and highly

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[25] In pertinent part, Penal Code section 190.3, factor (a) states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding [.]

[26] The trial court stated after watching the video:

> Five minutes and 42 seconds.
>
> And, for the record, the video consists of still photographs of all three victims in various stages of life in growing up. And there is one still photograph toward the very end of the video which is a picture of their common grave, with a picture of their headstone, followed by three live photographs of the victims.
>
> There is background music. The music is an instrumental music. It sounds to me like the music is of standard commercial variety, like John Tesh or Kenny G. and I've heard that. As a matter of fact, I have that tape myself. It's a Kenny G. tape, background tape. It doesn't appear to me that the music has any religious connotation. It's merely background music.

(11RT 1203.)

probative of his physical and psychological reaction to the news. (11RT 1201-1202, 1231.)

B. General Legal Principles

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed. 2d 720], the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had generally barred the admission of victim impact evidence and prosecutorial argument concerning it at the penalty phase of a capital trial. In overruling *Booth* and *Gathers* in *Payne*, the Court conversely held that the Eighth Amendment does not bar the admission of victim impact evidence in the sentencing phase of a capital trial. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 824-827.) For example, the Eighth Amendment does not per se bar a capital jury from considering victim impact evidence relating to a victim's personal characteristics and the impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. Victim impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.* at pp. 825, 829.)

In California, Penal Code section 190.3, factor (a), specifically permits the prosecution to establish aggravation by the circumstances of the crime. This Court has explained:

> The statutory provision declares that evidence of the "circumstances" of the offense are admissible at the penalty phase. In *People v. Edwards* (1991) 54 Cal.3d 787, 833, this court held that the scope of the term extends beyond the

"immediate temporal and spatial" context of the crime to "[t]hat which surrounds [it] materially, morally, or logically."

(*People v. Fauber* (1992) 2 Cal.4th 792, 868.)

Thus, factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4h 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster, supra*, 1 Cal.4th at pp. 865, 959.) The prosecution has a "legitimate interest" in rebutting defense mitigating evidence "by introducing aggravating evidence of the harm caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1286 quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 825.) As a result, "jurors may in considering the impact of the defendant's crime, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 369.)

While victim impact evidence is generally admissible under California law as a circumstance of the crime under Penal Code section 190.3, factor (a), "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Harris, supra*, 37 Cal.4th at pp. 310, 351, internal citations and quotations omitted.) There are limits on the permissible "emotional evidence and argument," and "[t]he jury must face its obligation soberly and rationally and should not be given the impression that emotion may reign over reason." (*People v. Robinson* (2005) 37 Cal.4th 592, 650-651.) Moreover, victim impact

evidence that is so inflammatory that it tends to encourage the jury toward irrationality and an emotional response untethered to the facts of the case will violate due process under *Payne*. (*People v. Boyette* (2002) 29 Cal.4th 381, 444.)

This Court reviews the trial court's determination, "which concerns the admissibility of evidence," for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 671.) Stated another way, a trial court's exercise of its broad evidentiary discretion under Evidence Code section 352[27] will be disturbed on appeal only if it "manifestly" constituted an abuse of that broad discretion, i.e., only where the trial court's decision "exceeds the bounds of reason." (*People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) Application of this deferential standard of appellate review here mandates that the trial court's exercise of its sound discretion be upheld.

C. The Trial Court Properly Admitted the Victim Impact Evidence

Buenrostro acknowledges *Payne* is binding on this Court but argues for the purpose of collateral review that it was wrongly decided. (AOB 299-300.) The United States Supreme Court determined in *Payne* the federal Constitution permits evidence of the "specific harm" caused by the offense and bars victim impact evidence only if it is "so unduly prejudicial"

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[27] Evidence Code section 352 provides that,

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

as to render the trial "fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) State law is consistent with these principles. (*People v. Edwards, supra*, 54 Cal.3d 787, 835-836.)

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). [Citations.]

(*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057.) This Court recently stated as follows:

> The applicable law is settled. "In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. [Citation.] Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

(*People v. Dykes* (2009) 46 Cal.4th 731, 781.)

Buenrostro fails to set forth any persuasive argument for this Court to revisit the issue.

Buenrostro argues, notwithstanding *Payne*, the victim impact evidence was wrongly admitted here because it served no legitimate purpose. Specifically, Buenrostro contends the evidence was not required to achieve parity between the defense and the prosecution or humanize the victims under the circumstances of the case because the evidence presented during the guilt phase satisfied these objectives. (AOB 300-306; see *Payne v. Tennessee, supra,* 501 U.S. at pp. 825-826.) Alternatively, Buenrostro argues that the only victim impact evidence properly admitted was the testimony of Alex Buenrostro and the victims' half-sister, Alejandra Buenrostro. According to Buenrostro, the other victim impact evidence--

the school principal's testimony, and the videotapes of the children's' photographs and Alex Buenrostro when he learned of his children's deaths-- exceeded allowable victim impact evidence under *Payne*. (AOB 306-324.)

Respondent disagrees. The victim impact evidence did not adversely impact Buenrostro's constitutional rights. The record instead shows that the trial court's sound exercise of the broad discretion conferred upon it by Evidence Code section 352 should be upheld. Respondent addresses the prosecution's victim impact evidence in turn below.

1. Victim Impact Testimony

Deborah Deforge was the principal the elementary school Susana and Vicente attended at the time of their deaths. The school grounds were adjacent to the Shaver Street apartment complex where their bodies were found. There was a lot of police activity nearby the school the morning Susana's and Vicente's bodies were discovered. When the information was released that Susana and Vicente were killed, their deaths affected "everybody" at school, students and staff alike. (11RT 1239.) Principal Deforge talked to classes individually and also organized a crisis response team to handle the fall-out from the murders. The team consisted of school counselors, county mental health counselors, and counselors from a nearby school district. The need for the team was ongoing for several weeks after the murders. (11RT 1240-1241.) As an expression of the loss that they experienced, students from Susana's class chose to leave her desk in the classroom with her belongings still in it. Susana's and Vicente's classmates sent messages to Alex Buenrostro. (11RT 1242.)

Alex Buenrostro's daughter from a prior relationship, Alejandra Buenrostro, age 19 at the time of trial, testified that she was close to her half-siblings. She lived with them in 1992. The last time she saw them

was in 1993 when she went to San Jacinto with her father for a visit. She testified that she missed them and that holidays and birthdays were difficult. (11RT 1258-1262.)

Alex Buenrostro was the last witness called by the prosecution in its case-in-chief. He testified that he loved his children and they did not deserve to die. Alex related that when he was interviewed by the Los Angeles police as a suspect in the murders, he did not learn until three or four hours into that process that Susana and Vicente were dead. Alex testified that the news "destroyed" him. Although he was hoping that Deidra was still alive, approximately six hours after learning of Susana's and Vicente's fates, he was informed that Deidra was dead. Alex Buenrostro was tasked with the funeral arrangements for his children. He testified the funeral was a painful experience and that his children share the same grave. He was affected by the fact that he will never experience high school graduations, weddings or potential grandchildren because his children were murdered. He thought about his children all the time and particularly in the month of August because several birthdays fell during that month. Alex was not comfortable having fun and living life like a regular person. (11RT 1264-1272.)

Buenrostro insists that the evidence admitted during the guilt phase was sufficient to carry over to the penalty phase to counteract the defense mitigating evidence so that any victim impact evidence presented was excessive. (AOB 302-306.) However, under *Payne*, victim impact evidence is not limited to evidence that was *not* presented during the guilt phase of a capital trial. Indeed, the High Court acknowledged in *Payne* that, "In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial." (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.) Rather, *Payne* limits victim impact evidence by ensuring that it is not "so unduly prejudicial that

it renders the trial fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S. at pp. 825, 829.) And in California, Penal Code section 190.3, factor (a), specifically permits the prosecution to establish aggravation by circumstances of the crime. The word "circumstances" does not mean merely immediate or temporal or spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) thus allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards, supra*, 54 Cal.3d at pp. 787, 833-836; *see also People v. Brown, supra*, 33 Cal.4th at pp. 382, 398; *People v. Taylor, supra*, 26 Cal.4th at pp. 1155, 1171.)

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). [Citations.]

(*People v. Dykes, supra,* 46 Cal.4th at p. 781.) Moreover, "evidence concerning the impact of the death of a child on his or her family and friends is particularly poignant," and under *Payne* "such evidence remains relevant to the jury's understanding of the harm caused by the crime." (*Ibid; see People v. Smith* (2005) 35 Cal.4th 334, 365 [permissible victim-impact evidence included mother's testimony concerning the loss of her child: " 'I don't think the pain will ever go away . . . I think the worst part of it is . . . what goes on in my mind what happened to him. What he went though is . . . just very difficult' "]; *People v. Benavides* (2005) 35 Cal.4th 69, 105 [permissible victim-impact evidence was admitted through the testimony of the aunt and cousins of an infant victim, concerning the agony caused to the family, including the infant's sister, by the victim's death].)

Here, the testimony of the school principal, and Alex and Alejandra Buenrostro, was relevant and probative not only to humanize the children,

but to demonstrate the impact of the loss on their family and the community. The witnesses comments were entirely logical under the circumstances; the school principal related that an elementary school community mourned the loss of two of its students and how grief counseling was handled, and two family members talked about their grief over the senseless loss of three small children. "The evidence concerned the kinds of loss that loved ones commonly express in capital cases." (*People v. Lewis, supra*, 39 Cal.4th at p. 1057.) Further, here, Buenrostro knew her victims. This Court has acknowledged under similar circumstances that, "The whole purpose of the capital crimes was to inflict maximum damage on one family. The jury's consideration of such damage on surviving family members was not unfair or improper." (*Ibid.*)

Buenrostro makes much of the school principal's testimony as impermissible attenuated victim impact evidence. (AOB 316-321.) The trial court did not abuse its discretion in admitting the evidence. "The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct." (*People v. Pollock, supra*, 32 Cal.4th at p. 1182.) The High Court in *Payne* recognized the loss caused by a defendant's conduct occurs "namely, [. . .] to society and the victim's family." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Similarly, this Court has held the impact on the victims' "loved ones and the community is relevant and admissible as a circumstance of the crime under [Penal Code] section 190.3, factor (a)." (*People v. Edwards, supra*, 54 Cal.3d 787, 835-836.)

The school principal's testimony described both the loss inflicted on Susana's and Vicente's friends, that is, their fellow students whom they sat with daily and who were compelled to leave Susana's and Vicente's desks undisturbed in a silent tribute, as well as the broader community-based loss felt by "everyone" at the school. This Court has repeatedly upheld

admission of victim impact evidence relating to the loss of personal friends of the victims. (See, e.g., *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017 [prosecutor's comments about likely suffering of victims' friends was "well within the boundaries of permissible victim impact argument"]; *People v. Pollock, supra*, 32 Cal.4th at p. 1183 [this Court rejected argument that only family members can give victim impact testimony].) Further, the jury was entitled to hear of the specific harm and devastating effect the deaths had on the community to which Susana and Vicente belonged. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) The school principal's testimony "illustrated quite poignantly some of the harm that [defendant's] killing[s] had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Id.* at p. 826.)

The issue before the Court is whether victim impact evidence provided by the school principal, and Alex and Alejandra Buenrostro was "so unduly prejudicial" as to render the trial "fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S at p. 825) As discussed above, the victim impact evidence presented here satisfied *Payne* and did not violate the applicable constitutional principles. "Nor was such evidence excessive, inflammatory, or otherwise prejudicial under state law." (*People v. Lewis, supra*, 39 Cal.4th at p. 1057.) The record demonstrates that there was no testimony introduced that could have invited a purely irrational response from the jury that ultimately returned Buenrostro's death verdict. Accordingly, Buenrostro's claim and her concomitant constitutional challenges should be rejected because admission of the victim impact testimonial evidence comported with constitutional guidelines. (See *People v. Boyette, supra*, 29 Cal.4th at p. 444.)

2. Victim Impact Videotapes

Following Alex Buenrostro's testimony, the prosecution played a videotape of Alex at the police station depicting the moment he learned that Susana and Vicente were murdered. (11RT 1272-1273; People's Exhibit No. 185.) The trial court did not abuse its discretion or violate any of Buenrostro's constitutional rights when it admitted the videotape of Alex Buenrostro learning of his children's deaths for the first time.

As this Court has explained:

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Stated another way, a trial court's exercise of its broad evidentiary discretion under Evidence Code section 352 will be disturbed on appeal only if it "manifestly" constituted an abuse of that broad discretion, i.e., only where the trial court's decision "exceeds the bounds of reason." (*People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Here, after reviewing the proffered evidence, the trial court permitted the jury to view a two-minute segment of video of Alex Buenrostro first learning of his children's deaths because the video was the "best evidence" of the impact of the killings. (11RT 1202, 1231; People's Exhibit 185.) The trial court concluded that Alex Buenrostro could testify to his reaction after learning of the murders, but four years after the fact, the video would provide the most accurate portrayal of his reaction to the murders. (11RT

1202.) The jury viewed a father's reasonable response to the information that two of his children were dead. (11RT 1272-1273.) The videotape "clearly showed the immediate impact and harm" Buenrostro caused Alex and the videotape was relevant because it "could provide legitimate reasons to sway the jury to . . . impose the ultimate sanction. [Citation and internal quotes omitted.]" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 102.) It cannot be said that the trial court's decision admitting the videotape "exceed[ed] the bounds of reason." (*People v. Siripongs, supra,* 45 Cal.3d at p. 574.) The court's ruling was not arbitrary and capricious, and did not result in a miscarriage of justice. The evidence was not unduly prejudicial. Buenrostro's rights were not violated. Accordingly, the trial court's ruling that allowed the jury to view the videotape of Alex Buenrostro should be upheld.

Additionally, the prosecution presented a five and a half minute victim impact videotape. There was no narration, but the images on the video were accompanied by an instrumental soundtrack. The video depicted the children through still photographs of their lives and concluded with an image of their shared gravesite, followed by a live picture of each child. (11RT 1273; People's Exhibit No. 186.)

This Court has advised that the trial courts must "exercise great caution" in admitting victim impact evidence that is presented "in the form of a lengthy videotaped or filmed tribute to the victim." (*People v. Prince, supra*, 40 Cal.4th at pp. 1179, 1289.) Particularly if the presentation "lasts beyond a few moments, emphasizes the childhood of an adult victim, or is accompanied by stirring music." (*Ibid.*) The videotape format may have a greater emotional impact on the jury than "what the jury might experience by viewing still photographs of the victims or listening to the victim's bereaved parents." (*Ibid.*) Further, in order to avert this potentiality, "courts must strictly analyze evidence of this type and, if such evidence is

admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion." (*People v. Kelly* (2007) 42 Cal.4th 763, 796 quoting *People v. Prince, supra*, 40 Cal.4th at p. 1289.)

Given the penalty trial took place in 1998, the trial court did not have the benefit of this Court's preferred approach as discussed above. Nevertheless, the record demonstrates the trial court exercised great caution with respect to the videotape. The trial court studied the videotape carefully. After evaluating it, the trial court concluded that it was not unduly prejudicial or inflammatory. (11RT 1204.) The trial court specifically noted that the soundtrack to the videotape was a "standard commercial variety" that had no religious connotations. (11RT 1203.) By evaluating the tape prior to its ruling on the matter, the trial court ensured it would not inject the proceedings with an "impermissible level of emotion." (*People v. Kelly, supra*, 42 Cal.4th at p. 796.) The trial court exercised sound discretion in admitting the tape and Buenrostro's constitutional rights were not adversely affected.

The relevant inquiry is whether the videotape is unduly emotional and presents material relevant to the penalty determination. (*People v. Zamudio, supra*, 43 Cal.4th at 365.) In the instant case, the videotape, at five and one half minutes, was a brief montage of still photographs of the short lives of three murder victims. The videotape was relevant because the still photographs depicting the children humanized them and assisted the jury in understanding the loss of their young lives to their family and to society. (*People v. Zamudio, supra*, 43 Cal.4th at p. 365.) Further, the image of the children's shared grave was properly admitted as circumstances of the crime. (*Id.* at p. 367 citing *People v. Kelly, supra*, 42 Cal.4th at p. 797 [videotape concluding with view of victim's gravemarker]; *People v. Harris, supra*, 37 Cal.4th at pp. 310, 352

[photograph of victim's gravesite]). Despite Buenrostro's criticisms, it cannot be said that admission of the victim impact videotape rendered the penalty trial fundamentally unfair. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

Buenrostro asserts the fact that the videotape here was set to music was "particularly troubling" because it was designed to evoke an emotional response. (AOB 314.) The trial court specifically determined the instrumental music here did not enhance or add any emotional impact. The trial court stated, "It's merely background music[,]" of a "standard commercial variety." (11RT 1203.) Moreover, Buenrostro fails to present any case law that suggests background instrumental music prophylactically renders a victim impact videotape inadmissible. Admittedly, the court in 1998 did not have the benefit of this Court's preferred method to use narration and not any audio or music track. (*People v. Zamudio, supra*, 43 Cal.4th at p. 366.) But inasmuch as in all other aspects the videotape in this case was admissible and proper, the fact that it was set to instrumental music – observed by the court to not enhance any emotional impact—did not result in any prejudicial impact.

In sum, at most the jurors reviewed a videotape that humanized the children. It may have affected and moved jurors, but there is no evidence the videotape evoked an overly improper emotional response. Instead, it allowed them to better understand the loss to the children's family and to society. Under the principles set forth by this Court, the videotape was properly admitted and did not render the penalty trial fundamentally unfair. Consequently, Buenrostro's claim and her concomitant constitutional challenges should be rejected because admission of the victim impact videotape comported with constitutional guidelines. (See *People v. Boyette, supra*, 29 Cal.4th at p. 444.)

D. Buenrostro's Argument Concerning The Trial Court's Alleged Failure to Instruct on Use of Victim Impact Evidence Must Be Rejected

In a related argument, Buenrostro contends the trial court erred when it refused the proposed defense instruction on the proper use of victim impact evidence. (AOB 324-326.) The trial court properly refused the proposed instruction.

On July 27, 1998, the defense filed a memorandum of law on penalty phase jury instructions which included its objections to various CALJIC instructions, modifications to the CALJIC instructions, and additional proposed penalty phase instructions. (36CT 10035-10074.) In item number 10, the defense objected to "CALJIC No. 8.85 (a), Victim Impact Evidence." (36CT 10051.) The defense requested an alternative instruction that it had based upon the principles of *People v. Edwards, supra*, 54 Cal.3d 787 and *Payne v. Tennessee, supra*, 501 U.S. 808, as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by Dora Buenrostro's crimes. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether he [*sic*] should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument.

(36CT 10051.)

During discussions on jury instructions, after refusing the defense request to modify CALJIC No. 8.84, the trial court stated

> [. . .] I am very reluctant to tamper with the approved instructions. ¶ The death penalty instructions under 800, in my opinion at least are very straightforward, unlike a number of CALJICs, the instructions are very straightforward, and unless they need some modification because of the facts and

> circumstances in this case, that is a different issue. But I am very reluctant to modify the existing CALJIC instructions.

(12RT 1278.)

The trial court asked the parties if they would prefer to handle the death penalty instructions collectively, to which the parties agreed. (12RT 1279.) Following a brief review of Buenrostro's penalty instructions memorandum, the trial court then stated:

> The Court has reviewed again the memorandum and the request to modify the 800 series death penalty instructions, and at this time, the Court is not going to be modifying the CALJIC 800 series regarding the penalty phase instructions. I think the instructions are very straightforward, and they are clear, and I don't feel that any supplemental instructions are necessary. ¶ The 800 series have been approved, and the Court is going to follow the California Supreme Court.

(12RT 1280.)

Buenrostro assigns error to the trial court's refusal to instruct the jury with its special instruction. She acknowledges that this Court has repeatedly rejected claims involving similar instructions. (AOB 324 citing *People v. Zamudio, supra*, 43 Cal.4th at pp. 368-370; *People v. Harris* (2008) 43 Cal.4th 1269, 1318; *People v. Carey* (2007) 41 Cal.4th 109, 134; *People v. Ochoa* (2001) 26 Cal.4th 398, 455.) She invites this Court to reconsider those rulings but also indicates that she raises the claim simply to preserve it for federal court review. (AOB 325, fn. 133.) In pertinent part, the jury was instructed on how to evaluate victim impact evidence in the language of CALJIC No. 8.85 [Penalty Trial—Factors For Consideration] as follows:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take in to account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(36CT 10096; 12RT 1394.)

CALJIC No. 8.85 sets forth the applicable factors, derived from Penal Code section 190.3 factors (a) through (k), to be weighed by the jury to reach a penalty determination. (*People v. Farnam* (2002) 28 Cal.4th 107, 191.) California's capital sentencing factors are not flawed even though they do not instruct the jury how to weigh the facts in deciding which of the two possible sentences to impose. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976-979 [114 S.Ct. 2630, 129 L.Ed.2d 750].) This Court has held that CALJIC No. 8.85 adequately "instruct[s] the jury how to consider" victim impact evidence. (*People v. Zamudio, supra*, 43 Cal.4th at p. 369 quoting *People v. Brown* (2003) 31 Cal.4th 518, 573.) Buenrostro does not present any argument to cause this Court to revisit the issue. Her claim on appeal that the trial court erred in refusing the defense special instruction on victim impact evidence should be rejected.

E. The Cumulative Effect of the Victim Impact Evidence of the Videotapes and the School Principal's Testimony and the Denial of the Defense Requested Victim Impact Instruction Does Not Warrant Reversal of Buenrostro's Death Judgment

Buenrostro agues individually or cumulatively, the alleged errors of the admission of the videotapes and the school principal's victim impact testimony require reversal of the death sentence. (AOB 326-331.) As discussed above, the trial court did not err when it allowed the school principal's victim impact testimony. The jury was entitled to hear of the specific harm and devastating effect the deaths had on the community to which Susana and Vicente belonged. (*Payne v. Tennessee, supra*, 501 U.S.

at p. 825.) Additionally, the trial court committed no error when it permitted the jury to view the victim impact videotape of Alex Buenrostro's reaction when he first learned that two of his children were dead. Under the circumstances, it cannot be said that the trial court's decision to admit the videotape as the best evidence of the event "exceed[ed] the bounds of reason." (*People v. Siripongs, supra,* 45 Cal.3d at p. 574.) With respect to the victim impact videotape of the still photographs of the children in life and their gravesite, the trial court exercised great caution in admitting the evidence. (*People v. Prince, supra*, 40 Cal.4th at pp. 1179, 1289.) The videotape was not unduly prejudicial or overly inflammatory. Further, the trial court properly refused tc instruct with the defense special instruction on the proper use of victim impact evidence. This Court has held that CALJIC No. 8.85, under which Buenrostro's jury was instructed, adequately "instruct[s] the jury how to consider" victim impact evidence. (*People v. Zamudio, supra*, 43 Cal.4th at p. 369 quoting *People v. Brown, supra,* 31 Cal.4th at p. 573.) "If none of the claimed errors [are] individual errors, they cannot constitute cumulative errors that somehow effected the . . . verdict." (*People v. Beeler, supra,* 9 Cal.4th at p. 994.)

Nevertheless, even assuming that the trial court erred in some respect, Buenrostro has not shown that she was prejudiced by any state law error or denied her right to due process or to a fair trial. When assessing errors of state law at the penalty phase of a capital trial, this Court applies a "more exacting standard review" than the standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and normally applied to state law errors that occur during the guilt phase of a trial. (*People v. Brown* (1988) 46 Cal.3d 432, 446-447.) The issue is whether there is a "reasonable possibility" the nonfederal error affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 447.) Errors of constitutional dimension are evaluated for

prejudice under *Chapman v. California supra,* 386 U.S. 18 at page 23, that requires an assessment of whether the error was harmless beyond a reasonable doubt.

Here, under either standard, Buenrostro was not prejudiced by any of the alleged errors. Assuming that the school principal's victim impact testimony was improper, it could not have affected the verdict. In addition to the school principal's testimony, the jury heard from two other victim impact witnesses, which Buenrostro concedes "was straightforward and not unduly inflammatory." (AOB 327.) The school principal's testimony reminded the jury that Susana's and Vicente's deaths had an impact not only on their family but on the community as well. However, it is not reasonably possible or realistic to assume that had the jury not heard the school principal's testimony, it would have voted for life in prison as opposed to death. Conversely, it is not realistic to assume that the school principal's testimony moved the jury towards a death verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) Given the other victim impact testimony that was not unduly inflammatory, the videotaped victim impact evidence, the other crimes evidence presented of Buenrostro's conduct in jail, and the mitigating evidence presented that Buenrostro was a good mother and of her deteriorating mental state in the months before the murders, the school principal's testimony was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 23.)

Similarly, the videotapes of the children and Alex Buenrostro first learning of Susana's and Vicente's deaths could not have affected the jury's verdict even if improperly admitted. Alex Buenrostro testified before the jury about when he learned of his older children's deaths. Albeit four years after the fact, the jury heard first hand from Alex Buenrostro regarding the devastating effect of the news that he testified "destroyed" him. The videotape of the still photographs of the children in life and of their

gravesite presented to the jury could not have adversely affected their verdict in the way Buenrostro suggests. The video was a brief tribute to the lives of three victims at five and one half minutes, there was no narration, and it was set to a "standard commercial variety" music track. Even if it was improperly admitted as alleged, it is not reasonably possible or realistic that the victim impact videotape of the children made the jury vote in favor of death. (*People v. Brown, supra*, 46 Cal.3d at p. 448.) Further, the victim impact videotape of the children was harmless beyond a reasonable doubt because it was not overly inflammatory and there was other aggravating evidence the jury could properly consider in reaching its penalty verdict. (*Chapman v. California, supra*, 386 U.S. at p. 23.)

Nor was Buenrostro unduly prejudiced by the trial court's refusal to instruct the jury with the defense special instruction on victim impact evidence. The gist of the defense special instruction was that the jurors should not impose a death verdict based upon an emotional reaction to the aggravating evidence and argument presented. The jury was instructed on the aggravating victim impact evidence in the language of CALJIC No. 8.85, to consider, take into account and be guided by "the circumstances of the crime" in reaching their decision. (12RT 1394; 36CT 10096-10097.) Additionally, the other jury instructions provided fully instructed the jury not to be "influenced by bias [or] prejudice against the defendant, nor swayed by public opinion or public feeling," and that in order to return a death verdict "the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without possibility of parole." (12RT 1399; 36CT 10095, 10106.) The jury was instructed to consider all of the instructions "as a whole and each in light of all the others." (12RT 1400; 36CT 10108.) The trial court's refusal to modify the penalty instructions could not have affected the jury's verdict. (*People v. Brown, supra*, 46 Cal.3d at p. 448.) The other

instructions provided conveyed that the jurors were not to irrationally impose a verdict of death. Accordingly, any error in the trial court's ruling was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 23.)

A defendant is entitled to a fair trial, not a perfect one. (*People v. Mincey, supra*, 2 Cal.4th at p. 454.) Despite the alleged errors, the jury's verdict was rationally based upon the evidence and just. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [Buenrostro's] detriment." (*People v. Sanders, supra,* 11 Cal.4th at p. 565.)

In sum, Buenrostro has not demonstrated any errors, and even if she has, such possible errors did not realistically affect the jury's verdict and were harmless beyond a reasonable doubt, either individually or cumulatively. Thus, their alleged cumulative effect does not warrant reversal of the judgment. (*People v. Geier, supra,* 41 Cal.4th at p. 620; *People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 35 Cal.4th at pp. 479-480.)

XV. THE TRIAL COURT CORRECTLY DETERMINED THAT BUENROSTRO'S OTHER CRIMINAL ACTIVITY QUALIFIED AS PENAL CODE SECTION 190.3, FACTOR (B), EVIDENCE; THE JURY WAS PROPERLY INSTRUCTED ON THE EVIDENCE

Buenrostro contends the trial court abused its discretion and committed reversible error when it admitted evidence of two incidents that occurred in jail while she was awaiting trial—the "pill run" (battery) and "mop wringer" (exhibiting a deadly weapon) incidents. She argues the incidents, proffered by the prosecution as aggravating evidence under Penal Code section 190.3, factor (b), were too trivial to justify their use as aggravating factors. Additionally, she argues that the evidence violated her federal constitutional rights under the Sixth, Eighth and Fourteenth

Amendments. Buenrostro further contends the trial court's instruction to the jury regarding the evidence was inadequate because it failed to inform the jury that there were two separate requirements concerning "force" and "violence" that applied to their assessment of the battery. (AOB 332- 369.) The trial court correctly determined that the pill run and mop wringer incidents qualified as aggravators under Penal Code section 190.3, factor (b). The jury was properly instructed as to the pill run battery incident on the element of force and violence. No further instruction was required. Buenrostro's constitutional rights were not violated.

In limine at the penalty phase, the defense objected to the prosecution's motion to introduce aggravating evidence of Buenrostro's other crimes under Penal Code section 190.3, factor (b).[28] (11RT 1187.) The prosecution sought to introduce evidence of Buenrostro's jailhouse conduct. In its first amended statement in aggravation, the prosecution proffered incidents in aggravation in which Buenrostro assaulted a correctional officer (item # 5) on January 9, 1998; used a mop wringer as a weapon against correctional staff (item #6) on May 18, 1996; and, fought with correctional staff (item #7) on February 28, 1995. (11 RT 1188; 2CT 444.)

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[28] In pertinent part, Penal Code section190.3, factor (b) states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> [. . .]
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

The defense objected to the evidence of item #5 on the grounds that it was irrelevant, did not meet the criteria of Penal Code section 190.3, factor (b), because it was too trivial, and violated Buenrostro's Eighth and Fourteenth Amendment rights. (11RT 1188.) The trial court indicated that factor (b) of Penal Code section 190.3 did not require felony behavior. (11RT 1189.) The defense requested a *Philips*[29] hearing on the evidence. The trial court deferred its ruling on item #5. (11RT 1189.) The defense lodged the same objections to item #6 and also requested a hearing on the matter. (11RT 1190.) The trial court then indicated that a hearing would be held on all three items, #5, #6, and #7, for a determination as to whether the incidents met the criteria of Penal Code section 190.3, factor (b). (11RT 1191.)

At the hearing on the issue of Buenrostro's prior criminal conduct, the prosecutor called a correctional deputy from the Robert Presley Detention Center who supervised Buenrostro on May 18, 1996. On that day, Buenrostro was let out of her day room for a visit. Instead of returning to her day room when required to do so, Buenrostro walked around a sally port area of the unit. She picked up a mop wringer from a custodial mop bucket and held the mop wringer like a baseball bat over her shoulder. She refused to step back into her day room. The correctional deputy, partitioned from inmates by glass, directed Buenrostro from about an eight-foot distance. When Buenrostro failed to comply, the deputy called for back-up. A back-up deputy talked to Buenrostro at the sally port and eventually was able to take the mop wringer from her. Buenrostro did not try to hit any of the deputies with the mop wringer. (11RT 1216-1217, 1219-1220.)

The prosecutor argued that Buenrostro had threatened violence towards jail staff. Under the facts, Buenrostro failed to obey jail rules,

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[29] *People v. Phillips* (1985) 41 Cal.3d 29.

back-up deputies had to be called, and Buenrostro still refused to desist the threatening conduct with the mop wringer until it was eventually taken from her, albeit without incident. (11RT 1221.) The defense posited that the conduct did not rise to the level of Penal Code section 190.3, factor (b), conduct. (11RT 1222.) The trial court determined that the incident qualified as misdemeanor conduct of exhibiting a deadly weapon in a threatening manner under Penal Code section 417[30] and was admissible as factor (b) evidence. (11RT 1223.)

Another correctional deputy from Robert Presley was called to testify regarding an incident that occurred in February 1995. The deputy and a nurse had contact with Buenrostro during a "pill run" on the medical floor on which Buenrostro was housed. (11RT 1225.) Buenrostro was prescribed ointment for a skin condition and other oral medication. While the medications were being distributed, Buenrostro stepped out of her cell, resulting in a security violation. When she was told to step back into her cell, Buenrostro raised her hands. Her gesture was interpreted as assaultive. When the deputy attempted to secure Buenrostro's hands, Buenrostro grabbed the nurse's clothing and would not release her grip. Buenrostro struggled with the deputy who tried to free the nurse from Buenrostro's grip. The deputy forced Buenrostro into her cell and a struggled landed

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[30] Penal Code section 417, subdivision (a)(1), in pertinent part, states:

> Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor[.]

them on the floor. Back-up deputies arrived to assist and Buenrostro was secured in her cell. (11RT 1226-1227.)

The defense objected that the pill run incident was too remote. Finding "several" violations of the Penal Code, the trial court ruled the incident was admissible as a factor (b) aggravator.[31] (11RT 1228.)

During the penalty trial, the jury heard the testimony regarding the mop wringer and pill run incidents (11RT 1243-1257) and was subsequently instructed on the evidence. (See CALJIC Nos. 8.85 [Penalty Trial—Factors For Consideration]; 8.87 [Other Criminal Activity—Proof Beyond A Reasonable Doubt]; 2.90 [Presumption Of Innocence—Reasonable Doubt—Burden Of Proof]; 16.140 [Battery (Pen. Code, § 242)]; 16.141 [Battery—"Force and Violence"—Defined]; 16.290 [Exhibiting Firearm/Deadly Weapon (Pen. Code, § 417 (a) or (b)]; 16.291 [Exhibiting Firearm—"Deadly Weapon"—Defined]; 36CT 10096-10097, 10099-10104.)

Pursuant to Penal Code section 190.3, factor (b), at the penalty phase, the jury is permitted to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code § 190.3, factor (b).) Evidence of prior violent conduct is admitted under Penal Code section 190.3, factor (b) "to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed." (*People v. Grant* (1988) 45 Cal.3d 829, 851.) For the purposes of factor (b), "criminal activity" includes only conduct that violates a penal statute. (*People v. Pollock, supra*, 32 Cal.4th at p. 1178; *People v. Phillips, supra,* 41 Cal.3d

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[31] The prosecution did not present any witnesses in support of the incident that occurred in January 1998 (item #5).

at p. 72.) There must be sufficient evidence for the trier of fact to determine that the elements of the offense have been proved beyond a reasonable doubt. (*People v. Philips, supra,* 41 Cal.3d at pp. 72-73.) It is the conduct of the defendant that gives rise to the offense that is probative at the penalty phase. Therefore, it is irrelevant that the defendant was not convicted or formally charged with the criminal conduct. "Indeed, Penal Code section 190.3, factor (b), 'expressly permits proof of any violent "criminal activity" regardless of whether it led to prosecution or conviction.'" (*People v. Thornton* (2007) 41 Cal.4th 391, 464 *quoting People v. Davis* (1995) 10 Cal.4th 463, 544.) The trial court's determination of the admissibility of factor (b) evidence is reviewed for abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1082.)

Buenrostro does not contend that her conduct in either incident did not constitute criminal activity. Rather, she argues that the prosecution failed to establish her conduct "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b); AOB 338-339.)

Under the facts, Buenrostro's argument with respect to the mop wringer incident should be summarily rejected. "It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 529.) This Court recently explained in *People v. Dykes, supra,* 46 Cal.4th 731:

> Evidence establishing that a defendant knowingly possessed a potentially dangerous weapon while *in custody* is admissible under section 190.3, factor (b), even when the defendant has not used the weapon or displayed it with overt threats. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589 [15 Cal.Rptr.2d 382, 842 P.2d 1142].) Even in a *noncustodial* setting, illegal possession of potentially dangerous weapons may "show[ ] an implied intention to put the weapons to unlawful use," rendering the

evidence admissible pursuant to section 190.3, factor (b). (*People v. Michaels* (2002) 28 Cal.4th 486, 536 [122 Cal.Rptr.2d 285, 49 P.3d 1032].)

(*People v. Dykes, supra,* 46 Cal.4th at pp. 776-777.)

Buenrostro knowingly possessed the mop wringer. The record established she was let out of her day room and instead of returning, she walked into a sally port area and removed the mop wringer from a custodial mop bucket. Buenrostro held the mop wringer like a baseball bat over her shoulder. Her "mere possession of a potentially dangerous weapon in custody involves an implied threat of violence. [Citation.]" (*People v. Lewis, supra*, 43 Cal.4th at p. 529.) The prosecution was not required to show that Buenrostro intended to use the weapon in a provocative or threatening manner. (*People v. Lewis* (2006) 39 Cal.4th 970, 1053.) The trial court did not err in denying Buenrostro's motion at the penalty phase to exclude the evidence that she exhibited a potentially deadly weapon, the mop wringer, while incarcerated in county jail awaiting trial in this case. As the trial court correctly determined, Buenrostro's conduct during the incident meets the criteria of Penal Code section 190.3, factor (b).

Turning to the pill run incident, the facts establish that Buenrostro committed a battery against correctional staff.[32] Buenrostro failed to follow the rules of the medical floor and stepped out of her cell during the process wherein the nurse was distributing medications. When told to step back into her cell, Buenrostro raised her hands in an assaultive manner. The correctional deputy who escorted the nurse on her rounds took hold of Buenrostro's hands. Rather than submit to the deputy's authority however, Buenrostro grabbed the nurse's clothing and refused to release her grip. Buenrostro struggled with the deputy and, once the nurse was freed from

[32] The Penal Code defines battery as "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.)

Buenrostro's grip, further resisted the deputy until they fell to the ground. Buenrostro's conduct towards the nurse constituted a battery. Based upon the correctional deputy's testimony, "a rational trier of fact could find the existence of violent activity by [Buenrostro] beyond a reasonable doubt." (*People v. Wallace, supra,* 44 Cal.4th at p. 1082.) The trial court did not abuse its discretion when it determined that the evidence of the battery that occurred during the pill run was admissible factor (b) evidence. (*See People v. Burgener* (2003) 29 Cal.4th 833, 868.)

Nevertheless, Buenrostro argues that the pill run incident does not meet the criteria of Penal Code section 190.3, factor (b) because her conduct constituted simple battery which does not embrace the concept of "force or violence" embodied in factor (b). According to Buenrostro, the force or violence required for simple battery is not the same as the force or violence required for consideration under factor (b), therefore her technical battery cannot qualify as an aggravator. (AOB 339-346.) First, despite Buenrostro's attempt to minimize her behavior as a simple battery or "simply a technical violation of the least adjudicated [. . .] elements of the offense" (AOB 342), the fact remains that, rather than comply with the deputy, Buenrostro chose to respond with force when she grabbed the nurse's clothing and would not let go. Battery does not require that bodily harm is actually inflicted, but clearly here, Buenrostro's conduct constituted more than "the slightest touching." (See CALJIC No. 16.141; 36CT 10102.) Further, factor (b) does not require that any specific crime, such as battery, inherently involve force or violence, only that the actual criminal activity be committed by force, violence, or the threat of violence. (*People v. Livaditis* (1992) 2 Cal.4th 759, 777; Pen. Code, § 109.3, factor (b).) The battery described here indisputably involved force, violence and the threat of even further violence. (S*ee People v. Davis, supra*, 10 Cal.4th at p. 542.) Indeed, Buenrostro's conduct evolved into a full blown struggle with the

deputy that landed them in a scuffle on the floor and required assistance from back-up deputies to secure her in her cell.

Secondly, the circumstances surrounding the incident support that Buenrostro acted with force or violence or the threat of violence within the meaning of factor (b). She violated security procedure when she stepped outside her cell, failed to obey a correctional deputy's command, and responded with force when the deputy attempted to secure her hands that she had raised in an assaultive manner, by grabbing the nurse's clothing and refusing to release her grip. When the nurse was finally freed, Buenrostro continued to struggle with the deputy to the floor. Other deputies assisted in securing Buenrostro in her cell.

> "[A]ll crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent." [Citation.]

(*People v. Pinnholster* (1992) 1 Cal.4th 865, 961.) Thus, in addition to the actual battery that occurred, the surrounding circumstances place Buenrostro's conduct in context for the jury to have had the fullest opportunity to determine its seriousness when deciding the appropriate penalty. (*Ibid.*) Buenrostro's argument that her conduct during the pill run incident did not rise to the level of conduct contemplated by factor (b) should be rejected.

In a related argument, Buenrostro contends that the trial court did not properly instruct the jury on the force or violence elements of factor (b). (AOB 359-366.) Buenrostro argues that without a definition of "force or violence" in the context of factor (b), the jury would likely equate the simple battery definition of "force and violence," that was given here in CALJIC No. 16.141, with the "force or violence" requirement of factor (b). (AOB 365.) The jury was correctly instructed under CALJIC No. 8.87 regarding the force or violence requirement of factor (b); CALJIC. No. 8.87

is valid. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Further, whether the offense involved the threat of force or violence is a legal issue to be decided by the court, as this Court has repeatedly held. (*People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028.)

Buenrostro argues that this Court is mistaken in its "unexplained" and "unsupported" holdings that the trial judge decides the issue. She asserts a jury must determine "not just whether the alleged crime is proved, but also whether it qualifies as a factor (b) aggravator." (AOB 363-365.) No so. Once a California jury convicts a defendant of first degree murder with a special circumstance "the defendant stands convicted of an offense whose maximum penalty is death." (*People v. Ochoa*, (2001) 26 Cal.4th 398, 454.) The verdict of guilty of first degree murder and the true finding on the special circumstance are each based on unanimous determinations by the jury and on the jury's application of the beyond a reasonable doubt standard of proof. The issue need not be submitted to a jury under California's death penalty scheme because a penalty phase verdict does not produce a sentence any greater than that already authorized by the jury's conviction with a unanimous finding beyond a reasonable doubt of at least one special circumstance. The penalty phase verdict merely represents a choice between two previously authorized sentences - death or life without the possibility of parole - but the sentence range is not, and cannot be, raised at the penalty phase. (*See Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] [in deciding sentencing bases that must be determined by a jury beyond a reasonable doubt, Court specifically excludes state capital sentencing schemes requiring judge, after jury verdict of guilt of capital crime, to find specific aggravating factors before imposing sentence of death]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] [when state's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense,

Sixth Amendment requires they be found by a jury].) Buenrostro's argument must be rejected.

In sum, the sentencing factors considered by the California capital jury at sentencing do not increase the maximum potential sentence but merely provide a basis for determining which of the authorized sentences should be imposed. Once the defendant has been convicted of first degree murder and at least one special circumstance has been found to be true beyond a reasonable doubt, "death is no more than the prescribed statutory maximum for the offense" and the only alternative is life in prison without the possibility of parole. (*People v. Anderson* (2001) 25 Cal. 4th 543, 589-590.) Accordingly, the Sixth Amendment does not require that the jury determine beyond a reasonable doubt that the evidence established force and violence or the threat of violence under factor (b). As such, the penalty phase determination "is inherently moral and normative, not factual...." (*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Buenrostro's jury was properly instructed.

Even if the trial court had abused its discretion in admitting the factor (b) evidence regarding either the pill run or the mop wringer incidents, the foregoing testimony was harmless. At most, it suggested Buenrostro "had difficulty submitting to authority and controlling her violent impulses." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 591.) Despite the evidence of the mop wringer and pill run incidents, the jury "could draw the same unfavorable character inferences from other evidence properly admitted in aggravation." (*Ibid.*) For example, prior crime evidence showed that Buenrostro had been convicted of grand theft. (12RT 1302.) Further, the circumstances of the capital crime included Buenrostro's attempt to stab Alex Buenrostro, after she had already murdered and abandoned Deidra and left Susana and Vicente alone in the apartment their last night on this earth before returning, barricading them in the living room and killing them.

Buenrostro murdered her three children in cold blood. There is no reasonable possibility the penalty verdict would have been different absent evidence of the mop wringer and pill run incidents. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 591.)

In conclusion, the mop wringer and pill run incidents both qualify as "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).) The evidence was properly introduced under factor (b). Therefore, "there was no violation of [Buenrostro's] right to a reliable penalty determination under the Eighth and Fourteenth Amendments to the federal Constitution. [Citations.]" (*People v. Thornton, supra*, 41 Cal.4th at pp. 463-464.) The jury's death verdict should be upheld.

XVI. BUENROSTRO WAS NOT ENTITLED TO AN INSTRUCTION THAT DEATH IS A MORE SEVERE PENALTY THAN LIFE WITHOUT POSSIBILITY OF PAROLE

Buenrostro next contends that the trial court erred in violation of her state and federal constitutional rights to a fair trial and reliable and non-arbitrary determination of penalty when it failed to inform the jurors that death is the more severe penalty over life imprisonment. (AOB 370-374.) Buenrostro failed to request such an instruction and her claim is forfeited. In any event, she was not entitled to the instruction. Further, the instruction provided under CALJIC No. 8.88 adequately conveyed to jurors that death is the more severe punishment of the two penalties.

Buenrostro failed to request that an instruction be provided on the severity of the death sentence. (12RT 1285.) Even if the argument she now raises on appeal-- that the trial court erred in failing to provide such an instruction-- has not been forfeited (see Pen. Code, § 1259), this Court has

held that there is not "any legal requirement that the jury be specifically instructed that death is the greater penalty" over life in prison. (*People v. Ochoa* (1998) 19 Cal.4th 353, 478 (*Ochoa*).) "Indeed, it is the worse punishment as a matter of law." (*Ibid* citing *People v. Memro* (1995) 11 Cal.4th 786, 879-880 and *People v. Hill* (1992) 3 Cal.4th 959, 1016.) In *Ochoa,* this Court noted that "the penalty trial itself, including the instructions given, made clear that the state viewed death as the extreme punishment." (*Ibid.*)

In pertinent part, Buenrostro's jury was instructed in the language of CALJIC No. 8.88 [Penalty Trial—Concluding Instruction] as follows:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [the] [each] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> 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 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. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(36CT 10105-10106; 12RT 1398-1399.)

In *People v. Memro, supra*, 11 Cal.4th 786, this Court explained:

> At the time the jury decides the penalty for a death-eligible individual that person will already have been convicted of first degree murder and one or more special circumstances will have been found true, meaning that a minimum penalty of life imprisonment without possibility of parole must be imposed, or the accused will have been convicted of another offense imposing a sentence either of death or of life imprisonment without possibility of parole (e.g., Mil. & Vet.Code, § 1672, subd. (a); Pen. Code, § 128). Thus, the law's command to the trier of fact to weigh aggravating and mitigating circumstances at that time can only mean to consider the possibility of a worse punishment than what the individual was already automatically subject to. (§§ 190.2, subd. (a), 190.3.)

(*Id.* at pp. 879-880.)

Given that the jury is instructed that aggravating and mitigating circumstances are "weighed in the context of determining which of the law's two most serious penalties applies," this Court has reasoned that "the jury must understand that the decision is not whether the 'bad' evidence outweighs the 'good' but whether the defendant is deserving of the most severe punishment-death." (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 592.) The instructional language of CALJIC No. 8.88 "makes manifestly clear that death may be imposed only where aggravation 'so substantially' outweighs mitigation that death, rather than life imprisonment, is appropriate." (*Ibid.*) Buenrostro's jury could not have been misled in the way that she asserts.

Buenrostro heavily relies upon the jurors' answers to their juror questionnaires in support of her contention that the jury was ignorant of the

law. (AOB 371, fn. 142-145.) However, the jurors' responses occurred before the guilt phase wherein they convicted Buenrostro and found true the special circumstances, before the presentation of aggravating and mitigating evidence in the penalty trial, and, significantly, before they were instructed on how to evaluate such evidence. As this Court has explained, those instructions make clear that death is the more severe punishment to life in prison. The instructions provided "coupled with the jurors' common sense, clearly indicated that death was always the ultimate punishment." (*People v. Cook* (2007) 40 Cal.4th 1334, 1363.) Accordingly, the instruction now proposed by Buenrostro was unnecessary, argumentative, and duplicative. (*Ibid.*) Her argument should be rejected. There was no violation of her state and federal constitutional rights. Reversal of the death sentence is not warranted on this basis.

XVII. BUENROSTRO'S SENTENCE IS CONSTITUTIONAL

Buenrostro contends California's death penalty statute as interpreted by this Court and applied at Buenrostro's penalty trial violated the federal Constitution. (AOB 375-395.) She raises numerous challenges to California's death penalty law. Buenrostro acknowledges that this Court has decided these issues adversely to her position and she raises them for the purpose of federal review. Buenrostro provides no compelling reason for this Court to depart from its previous rulings.[33]

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[33] As a threshold matter, respondent notes that where there is no objection below on federal constitutional grounds, constitutional claims cannot be presented on appeal. (*People v. Earp* (1999) 20 Cal.4th 826, 893; *People v. Carpenter* (1997) 15 Cal.4th 312, 385.) However, this Court has consistently considered "as applied" constitutional challenges to the death penalty law without discussing whether they were raised in the trial court. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863.) To the extent

(continued...)

Buenrostro argues Penal Code section 190.2 is impermissibly broad by making almost all first degree murders eligible for the death penalty. (AOB 376.) This Court has decided the death penalty law adequately narrows the class of death-eligible offenders. (*People v. Burgener, supra*, 29 Cal.4th at p. 884.) Her claim must be rejected.

Buenrostro contends the broad application of Penal code section 190.3, factor (a), violated her constitutional rights. (AOB 376-378.) Factor (a) of section 190.3 is not impermissibly broad nor is it vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Proctor* (1992) 4 Cal.4th 499, 550-551.) Her claim must be rejected.

Buenrostro contends her death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 379-381.) The trial court need not instruct the jury that in order to recommend a sentence of death, it must find, "beyond a reasonable doubt," that the aggravating factors outweigh the mitigating factors. (*People v. Prieto* (2003) 30 Cal.4th 226, 275.) Buenrostro's claim must be rejected.

Buenrostro argues that some burden of proof is required in the penalty phase or the jury should have been instructed that there was no burden of proof. (AOB 381-382.) There is no burden of proof in the penalty phase of the trial. (*People v. Hayes* (1990) 52 Cal.3d 577, 642-643.) The lack of a burden of proof does not deprive the defendant of any constitutional right. (*People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127.) There is no requirement that the trial court instruct the jury that it has to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and

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(...continued)
Buenrostro failed to object below to a particular claim now raised herein, respondent asserts the claim is forfeited.

death was the appropriate remedy. (*People v. Medina* (1995) 11 Cal.4th 694, 782.) Buenrostro's argument must be rejected.

Buenrostro contends that her death verdict was not premised on unanimous jury findings. (AOB 382-384.) The jury need not unanimously agree on particular aggravating factors or that those factors outweigh the factors in mitigation, and lack of the requirement of such an agreement does not violate any constitutional right. (*People v. Jones, supra*, 30 Cal.4th at pp. 1125-1127.) Buenrostro's contention must be rejected.

Buenrostro argues that the instructional language "so substantial" of CALJIC No. 8.88 caused the penalty determination to turn on an impermissibly vague and ambiguous standard. (AOB 384.) The requirement that the jury find aggravating circumstances "so substantial" in comparison with mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Arias* (1996) 13 Cal.4th 92, 170.) Her argument must be rejected.

Buenrostro argues the penalty phase instructions failed to inform the jury that the central determination is whether death is the appropriate punishment. (AOB 384-385.) Penalty phase instruction CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that death must be the appropriate penalty not just the warranted penalty." (*People v. Moon, supra,* 37 Cal.4th at p. 43 citing *People v. Boyette* (2002) 29 Cal.4th 381, 465.) Buenrostro's argument must be rejected.

Buenrostro argues that the instructions failed to inform the jury that if they determined that mitigation outweighed aggravation they were required to return a sentence of life without the possibility of parole. (AOB 385-386.) CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole." (*People v. Moon, supra,* 37 Cal.4th at p. 42 citing *People v.*

Dennis (1998) 17 Cal.4th 468, 552.) Buenrostro's argument must be rejected.

Buenrostro contends the instructions failed to inform the jury regarding the standard of proof and the lack of need for unanimity as to mitigating circumstances. (AOB 386-388.) Although it is permissible under the federal Constitution to require a defendant to prove mitigating factors by a preponderance of the evidence, the California statute does not specify any burden of proof and, except for other crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt* (1997) 15 Cal.4th 619, 682-684; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Further, there is no requirement that the jury must unanimously agree on mitigating circumstances. Conversely, there is no requirement that the court instruct the jury that its consideration of mitigating evidence need not be unanimous. (*People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) The phrasing of the standard penalty phase instructions does not support the conclusion that the jury would misconstrue those instructions to require unanimity before finding a mitigating circumstance. (*People v. Philips* (2000) 22 Cal.4th 226, 239.) Buenrostro's contention must be rejected.

Buenrostro argues that the jury should be instructed on the presumption of life. (AOB 388-389.) CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon, supra,* 37 Cal.4th at p. 43 *citing People v. Maury* (2003) 30 Cal.4th 342, 440.) Buenrostro's argument must be rejected.

Buenrostro contends that when the trial court failed to require that the jury make written findings, it violated her right to meaningful appellate review. (AOB 389.) California's death penalty law is not unconstitutional for failure to require the jury to provide written findings. (*People v.*

Michaels (2002) 28 Cal.4th 486, 531.) Buenrostro's contention must be rejected.

Buenrostro argues that the instructions to the jury on aggravating and mitigating factors violated her constitutional rights because they used restrictive adjectives in the list of potential mitigating factors. (AOB 389-390.) CALJIC No. 8.85 is not unconstitutional for using "restrictive adjectives" such as "extreme" and "substantial." Such adjectives do not limit the mitigating factors the jury can consider. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon, supra,* 37 Cal.4th at p. 42 citing *People v. Weaver* (2001) 26 Cal.4th 876, 993.) Buenrostro's argument must be rejected.

Buenrostro argues that the instructions to the jury on aggravating and mitigating factors violated her constitutional rights because the instructions failed to delete inapplicable sentencing factors. (AOB 390.) The trial judge is not required to edit CALJIC No. 8.85 by deleting the aggravating and mitigating factors which are clearly inapplicable under the facts of the present case. (*People v. Cook* (2007) 40 Cal.4th 1334, 1366; *People v. Schmeck* (2005) 37 Cal.4th 240, 305; *People v. Anderson* (2001) 25 Cal.4th 543, 600.) Buenrostro's argument must be rejected.

Buenrostro argues that the instructions to the jury on aggravating and mitigating factors violated her constitutional rights because the instructions failed to instruct the jurors that statutory mitigating factors were relevant solely as potential mitigators. (AOB 391-392.) The trial court is not required to instruct the jury that mitigating factors can only be mitigating. (*People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Farnam, supra,* 28 Cal.4th at p. 191.) Buenrostro's argument must be rejected.

Buenrostro argues that the instructions to the jury on aggravating and mitigating factors violated her constitutional rights because the instructions failed to inform the jury that lingering doubt could be considered a

mitigating factor. (AOB 392.) There is no federal or state constitutional right to an instruction at the penalty phase to reconsider the issue of guilt as a basis for mitigation. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-176 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.) Buenrostro's argument must be rejected.

Buenrostro argues that the instructions to the jury on aggravating and mitigating factors violated her constitutional rights because the instructions failed to inform the jury not to consider the deterrent effect or the cost of the death penalty. (AOB 393.) The trial court is not required to instruct the jury to refrain from considering either the deterrent effects of capital punishment or the costs of either the death penalty or life in prison without the possibility of parole. (*People v. Wharton* (1991) 53 Cal.3d 522, 599; *People v. Thompson* (1988) 45 Cal.3d 86, 131-132.) Buenrostro's argument must be rejected.

Buenrostro contends the prohibition against intercase proportionality review guarantees arbitrary and disproportionate impositions of the death penalty. (AOB 393-394.) California's death penalty law is not arbitrary and capricious because it forbids intercase proportionality review. (*People v. Lewis* (2001) 25 Cal.4th 610, 677.) Buenrostro's contention must be rejected.

Buenrostro contends that California's capital sentencing scheme violates the equal protection clause because it provides fewer protections to those facing a death sentence than to those individuals charged with non-capital crimes. (AOB 394.) California's death penalty law does not deny equal protection because of a different method of determining penalty than is used in non-capital cases. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Buenrostro's contention must be rejected.

Buenrostro contends that California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 395.) California's death penalty law does not violate international law. (*People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Bolden* (2002) 29 Cal.4th 515, 567, cert. denied (2003) 538 U.S. 1016 [123 S.Ct. 1935, 155 L.Ed.2d 854].) Buenrostro's contention must be rejected.

In sum, Buenrostro has not provided the Court with any compelling reasons to revisit any of the penalty issues raised herein. The jury's penalty of death should be upheld.

XVIII. THERE WAS NO CUMULATIVE ERROR

Buenrostro argues that the cumulative effect of the alleged errors at the criminal trial undermines the reliability of the judgment. She asserts that a per se reversal of all of the verdicts, special circumstance and sentence enhancement true findings is required separately based upon the denial of a second competency hearing; the exclusion of the three prospective jurors, Bobbie R., Frances P., and Richard J., because of their views on capital punishment; and, the denial of Buenrostro's motion to represent herself. She additionally asserts that even if the alleged *Faretta* error does not compel reversal, the prejudice flowing from such alleged error combined with the alleged instructional errors unfairly hindered her chances of obtaining a non –capital second degree murder conviction. Buenrostro further contends the cumulative prejudice stemming from the alleged errors that occurred during the penalty trial requires reversal. (AOB 396-397.)

Per se reversal is entirely unwarranted. As discussed in the Respondent's Brief, Buenrostro was not entitled to a second competency hearing because she failed to establish a change in circumstances. (See

Arg. VIII, *supra.*) The potential jurors, Bobbie R., Frances P., and Richard J. were properly excused based upon their inability to set aside their views on the death penalty, follow the law and the trial court's instructions. (See Arg. IX, *supra.*) The trial court properly denied Buenrostro's request to represent herself at trial. (See Arg. XI, *supra.*)

Further, the jury was properly instructed on the degrees of murder and on motive; the prosecution's burden of proving murder in the first degree beyond a reasonable doubt was clearly established. (See Arg. XII, *supra.*)

During the penalty phase, the trial court properly admitted victim impact evidence and the evidence of Buenrostro's criminal activity while incarcerated awaiting trial. (See Args. XIV, XV, *supra.*) Buenrostro was not entitled to a penalty phase instruction that death is a more severe penalty than life without the possibility of parole. (See Arg. XVI, *supra.*) Buenrostro's death sentence is constitutional. (See Arg. XVII, *supra.*) "If none of the claimed errors [are] individual errors, they cannot constitute cumulative errors that somehow effected the . . . verdict." (*People v. Beeler, supra,* 9 Cal.4th at p. 994.)

Assuming for the sake of argument that those claims of error Buenrostro ascribes to the guilt and penalty phases of her trial were in fact error, each would be harmless under the applicable standard of review. (*People v. Slaughter, supra,* 27 Cal.4th at p. 1223 [taken individually or cumulatively, errors harmless].) Errors, therefore, had little if any significance. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [appellant's] detriment." (*People v. Sanders, supra,* 11 Cal.4th at p. 565; *People v. Kipp* (2001) 26 Cal.4th 1100, 1141; *see also People v. Bunyard,* 45 Cal.3d at p. 1236 [given strong prosecution case, cumulative effect of errors did not prejudice defendant].)

Buenrostro has not shown that she was denied her right to due process or to a fair trial. (See *People v. Kronemyer, supra,* 189 Cal.App.3d at p. 349 ["the litmus test is whether defendant received due process and a fair trial"].) Indeed, even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214; *People v. Mincey, supra,* 2 Cal.4th at p. 454.)

Accordingly, assuming arguendo any error occurred, viewed cumulatively such errors would not have significantly affected the jury's determination of the appropriate penalty. (*People v. Avila* (2006) 38 Cal.4th 491, 615.) Therefore the entire judgment must be affirmed. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.)

CONCLUSION

Based on the foregoing, respondent respectfully requests that this Court affirm the judgment in its entirety.

Dated: September 11, 2009 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 59,778words.

Dated: September 11, 2009

EDMUND G. BROWN JR.
Attorney General of California

FELICITY SENOSKI
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Dora Buenrostro** Case No.: **S073823**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 11, 2009, I served the attached **Respondent's Brief**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Hon. Patrick F. Magers, Judge
c/o Inga E. McElyea
Executive Officer
Riverside County Superior Court
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Riverside, CA 92501

The Honorable Rod Pacheco
District Attorney
Riverside County
District Attorney's Office
Western Division, Main Office
4075 Main Street
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11, 2009, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature

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