IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. **SUSAN DIANE EUBANKS,** Appellant.	**CAPITAL CASE** S082915

San Diego County Superior Court No. SCN069937
The Honorable Joan P. Weber, Judge

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STATEMENT OF THE CASE

Appellant Susan Eubanks ("Eubanks") shot and killed her four young sons on October 26, 1997. The District Attorney of San Diego County filed an information on April 28, 1998, charging Eubanks with four counts of first degree murder, in violation of Penal Code section 187, subdivision (a), and further alleging that Eubanks personally used a firearm in connection with each count, within the meaning of Penal Code section 12022.5, subdivision (a)(1), and alleging the special circumstance that Eubanks had committed multiple murders, within the meaning of Penal Code section 190.2, subdivision (a)(3). (2 CT 74-75.)

A jury returned a verdict finding Eubanks guilty as charged on all counts, and found true the allegations of personal use of a firearm and the special circumstance of multiple murders, on August 18, 1999. (29 RT 3397-3399; 6 CT 1222-1227.) The jury returned a verdict of death on September 9, 1999. (37 RT 4804; 6 CT 1083, 1249.) The trial court heard and denied a motion for modification of sentence. (38 RT 4812-4815; 6 CT 1151-1153, 1251-1252.) The trial court sentenced Eubanks to death, and to a term of four

years on each of the four enhancements for personal use of a firearm. Judgment of death was entered on October 13, 1999. (38 RT 4848; 6 CT 1154-1156.)

STATEMENT OF FACTS

Susan Eubanks married Eric Eubanks ("Eric") in 1990 and they had three children, Austin, Brigham and Matthew Eubanks. (23 RT 2316.) Two other children lived with them, Brandon Armstrong, Eubanks's son from her first marriage, and Aaron S., Eubanks's nephew.[1] (23 RT 2316.) Aaron came to live with Eubanks and Eric in 1994 or 1995. (23 RT 2317.) On October 26, 1997, Austin was seven, Brigham was six, Aaron was five, Matthew was four, and Brandon was fourteen. (23 RT 2318.) Brandon was in his freshman year of high school. (23 RT 2318.) The family lived at 226 South Twin Oaks Valley Road, San Marcos, in San Diego County.

In October 1997, Eubanks and Eric were going through a divorce. Eric had moved out of the house about one month before the murders. (23 RT 2319.) Rene Dodson ("Dodson") moved into the house after Eric moved out. (23 RT 2320.) Dodson and Eubanks had an intimate relationship on and off since they met in a bar in 1994. (23 RT 2261, 2284.) Reflecting the chaotic nature of their lives, from October 13 to October 19, 1997, Dodson was out of the house and Eric was back in. This was only temporary, and as of the 19th,

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1. Aaron was the child of Eubanks's brother John, who was deceased. (23 RT 2317.) At first, when Aaron was two or three years old and had just arrived to live with Eubanks, Eubanks got along well with him. But this changed. Aaron was like a stepchild, "the last in the pecking order." Aaron had behavioral or discipline problems that bothered Eubanks. (23 RT 2352.) In late 1996 or early 1997, Eubanks's sister Michelle Smith became concerned about Aaron living with Eubanks. At one point, Eubanks planned to "ship Aaron off to some relatives in Texas" because Eubanks was very angry at Aaron about his behavior. Eric refused this plan, because he felt like a father to Aaron. At the time of trial, Aaron lived with Eric, and Eric was like a father to him. (23 RT 2353.)

Eric moved out and Dodson moved back in. (23 RT 2361-2362, 2367; 24 RT 2662.)

October 26, 1997: Eubanks Fought With Her Boyfriend, Dodson, Then Murdered Her Four Children

Early in the afternoon of Sunday, October 26, 1997, Eubanks and Dodson went to a bar they frequented, the North Bar in Escondido, to watch football, leaving Brandon home to watch the younger boys. (23 RT 2261-2262, 2284, 2286.) Dodson did not see Eubanks drink any alcohol before they went to the bar, and he saw her drink less than two glasses of beer at the bar.[2/] (2 RT 2262.)

Ron and Kathleen Adams, who were friends of Dodson's, came into the bar and sat at the table with Eubanks and Dodson. Eubanks was upset that Kathleen Adams sat with them, because about a week earlier, at the North Bar, Kathleen Adams had chided Eubanks for talking about Dodson when he was not present. (2 RT 2263.)

Kathleen Adams did not see Eubanks drinking alcohol that day. (24 RT 2646, 2650.) Eubanks's demeanor suggested she was not drinking, as she was usually gregarious and boisterous when she was drinking. (24 RT 2646, 2648.) On this day, Eubanks was very much subdued. (24 RT 2646-2647.) The bartender found Eubanks agitated and rude that day, but not intoxicated. (24 RT 2655.)

Eubanks told Dodson she did not want Kathleen Adams to sit at the table with them. (23 RT 2264.) Eubanks was upset. Dodson suggested they go to the Hoops bar in San Marcos to finish watching the game there. As Eubanks

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2. Eubanks and Dodson were served one pitcher of beer at the bar, which holds four or five glasses; the bartender estimated there were about two glasses of beer remaining in the pitcher when Eubanks and Dodson left the bar. (24 RT 2654-2656.)

and Dodson were driving along Highway 78 toward San Marcos, Eubanks confronted Dodson about why he was supporting Kathleen Adams's point of view. Eubanks slapped Dodson a few times while he was driving. Dodson decided to go home instead of to another bar. (23 RT 2265.) When Eubanks realized they were not going to the next bar, she grabbed the car key out of the ignition and threw the minivan into park, while they were traveling at about 30 miles per hour on the exit ramp. (23 RT 2265-2266, 2294-2295.) Dodson was angry. (23 RT 2296.) Dodson retrieved the keys and drove home. (23 RT 2266.) He parked the minivan by the side door. (23 RT 2279.)

All of the boys were at home. (23 RT 2266.) Eubanks ripped the phones out so Dodson could not call anyone. (23 RT 2268.) In the bedroom, Dodson told Eubanks he wanted to leave her and move to Hawaii, although he intended to return the next day after Eubanks had calmed down, as he had done after other arguments. (23 RT 2266, 2297.) Eubanks slapped Dodson again. (23 RT 2267-2268, 2298.) Eubanks closed the bedroom door and stood in front of it so that Dodson could not leave. (23 RT 2266, 2298.) Dodson tried to gather his clothes. Eubanks took his car keys. (23 RT 2267.) Eubanks said they had been together for three years, that Dodson was going to stay and work this out. (23 RT 2267, 2299.) Eubanks and Dodson had sex, then Eubanks calmed down. (23 RT 2268, 2300.)

While Eubanks and Dodson were fighting, fourteen-year-old Brandon went out to a pay phone and called Kathy Goohs, the mother of his best friend, and asked Goohs to come and pick up Brandon and his brothers because Eubanks and Dodson were fighting.[3/] (24 RT 2660; 25 RT 2698.) Brandon said his little brothers were scared and he did not want them exposed to that

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3. Goohs estimated this call came at 5:00 p.m. (24 RT 2659), but it probably occurred before 4:30 p.m., when Deputy Deese received the call from Dodson discussed below.

fighting. (25 RT 2698.) Goohs told Brandon to check and make sure that she really needed to pick them up. Goohs told him to go back to the house, assess the situation, and call again if he still needed her to pick them up. (24 RT 2660.)

When the fight concluded, Dodson asked Eubanks if he could go into the living room to watch football with the boys. While Eubanks was busy trying to fix the phones, Dodson left the house and ran away. (23 RT 2268, 2300.) Dodson went to a gas station on Twin Oaks Road and called the San Diego County Sheriff's Department. (23 RT 2269.) Dodson called 911 at 4:22 p.m., and reported that he had been in an argument with his girlfriend and that she was in a blue minivan. (27 RT 3065.)

Eubanks called Kathy Goohs and asked her to come and get the children. Goohs estimated this phone call was about ten minutes after the call from Brandon. (24 RT 2660.) Eubanks said that Dodson was going to call the police, and if the police came they would take the children away and separate them, and Eubanks needed Goohs to come get the children before that happened. (24 RT 2661.) Eubanks was "very upset, very agitated," and she pleaded with Goohs to take the children away. (24 RT 2660.) Eubanks also asked Goohs to bring her some vodka and orange juice because Dodson had emptied all of hers. Eubanks was close to hysterical, but articulate. Goohs could not say that Eubanks was intoxicated. (24 RT 2661.) Eubanks's speech was not slurred and she did not sound like she was intoxicated. (25 RT 2712-2713.) Eubanks sounded upset, demanding, anxious, agitated and loud. (25 RT 2713.) Eubanks was crying, yelling, pleading and begging. (24 RT 2678-2679.) Goohs had known Eubanks for six or seven years, and this was the most upset Goohs had ever heard her. (24 RT 2659, 2678.)

Goohs suggested that Eubanks and Dodson leave and let Brandon watch the boys, but Eubanks said they could not because Dodson had "messed up" the

van and it would not run. Goohs suggested Eubanks page Eric, but Eubanks said she could not because Eric was in jail for another DUI and had been in jail for three days. (24 RT 2661.) Goohs knew this was not true because Eric had been staying with Goohs and her husband since he left his house the week before. (24 RT 2662.)

Goohs told Eubanks she would come and get the children, but she did not. Goohs had permitted Eric to stay at her house after he left Eubanks, and Goohs said she was afraid if Eubanks came over to retrieve the children later that night, and saw Eric staying there, that Eubanks would not let Brandon visit her son Christian any more. Goohs did not want Eubanks to think Goohs was taking sides. (24 RT 2664.)

Goohs paged Eric and told him that Brandon and Eubanks had both called, there was a fight between Eubanks and Dodson, the police were going to arrive, and Eubanks wanted Goohs to take the children. (24 RT 2664.) Goohs said she needed to start cooking dinner for her family and asked Eric to help her out, as Goohs had told Eubanks that Goohs was on the way to pick up the children. (24 RT 2664-2665.) Eric said he would go over to the house to see what was going on. (24 RT 2665.)

At about this time, that is, between the time Dodson left the house and the time he returned with a sheriff's deputy, Eubanks called her older sister, Michelle Smith, in Texas. (25 RT 2720-2722.) Smith estimated this phone call lasted for fifteen to thirty minutes, then the call came to an abrupt end when Eubanks said that Dodson, Eric and the police were all at the house. (25 RT 2722.)

San Diego County Sheriff's Deputy Daniel Deese was dispatched to investigate the disturbance at about 4:30 p.m. Deputy Deese went to a gas station at the corner of Carmel and South Twin Oaks in the city of San Marcos and contacted Dodson. (27 RT 3015.) Dodson said he had just had a fight with

Susan Eubanks and Eubanks had taken his car keys, and he needed to get his work equipment out of his car. (23 RT 2269; 27 RT 3015.) Deputy Deese drove Dodson up to the house at 226 South Twin Oaks Valley Road. (23 RT 2269, 2300; 27 RT 3016.)

Dodson's blue Hyundai was parked by the side door. (23 RT 2269.) The car now had two flat tires, although the tires were not flat earlier in the day, and the car doors were open, the lights were on, and the headlights were broken out. (23 RT 2270-2271.) Eubanks was carrying away a handful of Dodson's drywall tools. (23 RT 2270; 27 RT 3016.)

The deputy asked Eubanks to set down the tools, and she complied. (23 RT 2272, 2301.) Eubanks denied having Dodson's keys. (23 RT 2272.) Eubanks was extremely upset. (23 RT 2273.) Eubanks told Deputy Deese that Dodson had just raped her and that she was pregnant with Dodson's baby. (23 RT 2272, 2302.) Eubanks told Deputy Deese that Dodson owed her $500 in rent and she was going to keep his property until he paid her. (23 RT 2303; 27 RT 3017.) Deputy Deese explained that by law she could not force him to make the rent payment by holding onto his property. (27 RT 3017.) Dodson said he would get his Hyundai car later, he was only concerned with his tools, so Deputy Deese told him to take his tools and put them in the patrol car. (23 RT 2273-2274, 2304; 27 RT 3017.)

Eubanks ran to the car and tried to lock it. (27 RT 3017.) Deputy Deese opened the hatchback; Eubanks tried to stop him. (27 RT 3018.) Deputy Deese warned her he would arrest her if she obstructed him. (27 RT 3019.) Eubanks was angry. Eubanks went inside the house and locked the door. While Dodson was collecting his tools, Eubanks came out several times to yell at Dodson and the deputy. The deputy told her to calm down, but Eubanks continued to yell that Dodson owed her money, and she refused to talk to Deputy Deese, saying she did not talk to men because: "I've been screwed by men my whole life. I've

been beaten. I've been raped." (27 RT 3018.) Deputy Deese and Dodson left with Dodson's tools. (27 RT 3019.)

As Deputy Deese was driving Dodson down the hill, Dodson saw Eric Eubanks at the bottom of the hill. (23 RT 2274; 27 RT 3021.) Eric had received a call from Kathy Goohs telling him that both Eubanks and Brandon had called her and asked her to pick up the children. (23 RT 2328-2329.) Eric drove to Eubanks's home to check on the children. From the bottom of the hill, Eric could see the police car up at the home. (23 RT 2329.) Susan Eubanks had a restraining order against Eric, so Eric waited for the police car to drive away. (23 RT 2305, 2329.)

Deputy Deese left the residence at 5:01 p.m. (27 RT 3029.) Deputy Deese stopped by Eric's truck at the bottom of the hill and Dodson told Eric that Eubanks was throwing Dodson out. (23 RT 2329.) Eric agreed to give Dodson a ride into Escondido. (23 RT 2274, 2306, 2330; 27 RT 3021-3022.) At the gas station, Dodson got into Eric's truck with his work tools. (23 RT 2330.) Eric drove Dodson to the North Bar. (23 RT 2275, 2330.) Eric then drove to the Goohs' house, which was about five miles from Eubanks's house. (23 RT 2331.)

Dodson told Eric that Eubanks had threatened to kill the children and herself. (23 RT 2332-2333.) Dodson testified that he told Eric: "[Eubanks's] really going off today, she's a little bit whacked, and I just wanted you to know that she had mentioned killing her kids and herself before." (23 RT 2275.) At trial, Dodson said Eubanks had not made this threat on this day, but she had made comments like that two or three times before when she was upset. (23 RT 2275, 2306.) Especially with respect to Brandon, Eubanks had said, "I brought you into this world, I can take you out of it," during arguments with Brandon. (23 RT 2275-2276, 2307.) Dodson characterized these arguments as the typical

arguments a mother might have with a teenager, and Dodson did not take the threat seriously. (23 RT 2307.)

Kathy Goohs had her son Christian call Susan Eubanks to tell her that Goohs was delayed in coming over because her neighbor had borrowed her car. (24 RT 2665-2666.) Nobody answered so Christian left a message. (24 RT 2666.) Brandon called back 20 or 30 minutes later and said everything was calm; the police had come, Dodson was gone, Eric was down the hill and Eubanks was alright and all was quiet. (24 RT 2666; 25 RT 2699.)

Eubanks's sister, Michelle Smith, called Eubanks back later that day to see if she was alright. (25 RT 2723.) Smith estimated this was between 5:00 and 6:00 p.m. "California time."[4/] (25 RT 2726.) Eubanks sounded sad, angry and "pissed off at the world in general," or more specifically angry at men of a dateable age. (25 RT 2727-2728.) Eubanks was definitely angry at Dodson and Eric, more at Dodson than at Eric. (25 RT 2728, 2730-2731.) It sounded to Smith that Eubanks might have been drinking but was not intoxicated and not "pilled up." (25 RT 2728-2729.) Eubanks said something like it was better that Dodson was gone because he was not the person she thought he was. Smith recalls the phone call as long, 45 to 90 minutes. Eubanks said Smith had cheered her up. (25 RT 2731.) Eubanks told Smith to call her again on Tuesday. (25 RT 2732.)

Eubanks tried to call Brandon's father, John Armstrong, at 6:09 and 6:10 p.m. (27 RT 3067.) Armstrong moved back to Texas after they were divorced. (26 RT 2963.) On October 26, 1997, Armstrong was working in Corpus Christi, not his hometown, and staying at a motel there. (26 RT 2964.) Whenever he worked away from his hometown, he always gave Brandon the phone number and address where Brandon could reach him. (26 RT 2964.)

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4. Smith lived in Texas; she had never visited Eubanks in California. (25 RT 2718.) They spoke on the phone once or twice a week. (25 RT 2720.)

When Eubanks made these calls, Armstrong was in the shower so Eubanks left a message with Armstrong's cousin that she would call back. (26 RT 2968.)

Eubanks called Brandon's grandfather, Curtis Armstrong, at 6:16 p.m. (27 RT 3067.) Curtis was afraid she was calling to borrow money again. Eubanks sounded slightly intoxicated because she was speaking very fast and slurring her words. Eubanks said that Eric and Dodson had been giving her problems; she said that one or both of them had raped her. Eubanks said she was wearing a tampon and the perpetrator pushed it in so far that she had to have surgery. (27 RT 3009.) Eubanks said they better not come back, that she had .38 special bullets, the very best hollow points, and "they better not fuck with me." (27 RT 3010.) Eubanks did not mention the children at all during the conversation. Eubanks sounded angry, not depressed. (27 RT 3010.) This call lasted 22 minutes, until 6:38 p.m. (27 RT 3067.)

The last conversation Curtis Armstrong had with Eubanks before this night was two weeks or one month prior. That conversation, also, was about Eubanks's troubles, money troubles, and trouble with her husband Eric. Eubanks did not talk about the children on that occasion either. Eubanks rarely talked about her children. (27 RT 3010.)

Eubanks called John Armstrong again at 6:38 p.m. (27 RT 3067.) Eubanks sounded very upset and angry, very insistent that Armstrong have Brandon support her story. (26 RT 2964, 2967.) Eubanks told Armstrong that he "had to tell Brandon to stick by her on this one," "even if it means lying," that she had slashed the tires, broken the windshield and put sugar in the gas tank of her boyfriend's car, and the police had just left, and if Armstrong did not tell Brandon to "stick by" Eubanks, the police would return and take Brandon and the boys to Child Protective Services and there would be nothing Armstrong could do about it. (26 RT 2964-2965.) Her tone was "high-keyed, keyed-up," nervous. (26 RT 2966.)

Armstrong asked to speak to Brandon. (26 RT 2965.) Armstrong told Brandon that his mother told Armstrong that Brandon had to stick by Eubanks even if it meant lying. (26 RT 2965.) Armstrong spoke to Brandon for about 20 minutes, moving the topic to Brandon's football game. While Armstrong was on the phone he heard Eubanks in the background telling Brandon, three times, to get off the phone. (26 RT 2965-2966.) Brandon said he had to get off the phone, and that Eubanks said she would call back in 15 minutes. Armstrong never heard back from either one. (26 RT 2966.) This call lasted 34 minutes, until 7:12 p.m. (27 RT 3067.)

Eubanks methodically murdered her children after telling Brandon to get off the phone. Brandon was sitting in the living room, with a bowl of cereal, watching television. Eubanks put the gun up to his left temple and shot him, then shot him again on the back right side of his neck, from a few inches away.[5/] (24 RT 2573; 25 RT 2804-2805.)

The little boys were watching television in their bedroom. Eubanks shot Austin, who was on the top bunk, just to the right of his left eye. (25 RT 2813.) Eubanks held the gun no more than one foot from Austin's head when she fired it. (25 RT 2814.)

Brigham was on the lower bunk when Eubanks shot him twice. (25 RT 2859.) She held the gun up to the back left side of his head and shot him just above the ear. (25 RT 2859-2861, 2863.) She also shot the right side of his face, close to his right ear. (25 RT 2859.) The muzzle of the gun was not in contact with the skin, but within a few inches. (25 RT 2860.)

Matthew was on the lower bunk with Brigham. Eubanks shot Matthew in the top of his head. (25 RT 2821.) She also fired the gun close enough to

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5. There is no direct evidence of the order of the shots. The shots are described here in the order suggested by the crime scene reconstructist during the penalty phase. (31 RT 3655-3696.)

the right side of his head to leave stippling marks on the right side of his face. (25 RT 2821-2823, 2826-2827.)

At the time of their deaths, Austin had .02 micrograms of Xanax in his blood; Brigham had .02 micrograms of Xanax in his blood; Brandon and Matthew had no Xanax in their blood. (27 RT 3072.)

Underneath the bottom bunk bed there was a baby blanket with bullet holes and gunshot residue, consistent with a single gunshot at contact or near contact range through the blanket. (24 RT 2569; 27 RT 3065.) Blood on the baby blanket could have come from Matthew or Brigham. (27 RT 3071-3072.)

Eubanks fired other bullets into the boys' bedroom that hit the wall and the window behind the bunk bed. (24 RT 2500-2502, 2557-2559, 2561-2562, 2564-2565.) Eubanks used a five-shot .38 caliber revolver. (24 RT 2511-2512.) In the middle of this deadly carnage in the little boys' bedroom, Eubanks took the time to open the cylinder of the revolver, remove the five expended shell casings, place them in the trash can, and reload the revolver. (24 RT 2566-2567.)

At some point while Eric was driving Dodson to Escondido and then driving back to San Marcos, Eubanks called Eric's pager and left a voice message. (23 RT 2332.) Eric checked the page when he returned to the Goohs' house after dropping off Dodson. (23 RT 2332; 24 RT 2667.) Eubanks's message was, "Say good-bye." (23 RT 2332; 24 RT 2685.) Mindful of the earlier threats, Eric called 911 at 6:26 p.m. on October 26, 1997, and asked for Deputy Deese, saying that he received a strange phone call from his wife. (23 RT 2332-2333; 27 RT 3065.) Eric was told that if he asked for a child welfare check, deputies could go into the house. (23 RT 2333.) Eric called 911 at 7:15 p.m. on October 26, 1997, requesting a welfare check because his wife left a message on his phone, "Say good-bye," after a break-up with her boyfriend. (23 RT 2333; 27 RT 3065-3066.)

Deputy Deese, followed by Deputy Brian Perry, arrived at Eubanks's home at 7:34 p.m. (23 RT 2415-2416; 27 RT 3024-3025.) Dispatch advised the deputies that there was a handgun in the house. (23 RT 2417; 27 RT 3025.) Deputies Deese and Perry knocked on the side door many times, but there was no answer. (23 RT 2417; 27 RT 3026.) They circled around the house looking in the windows and stopping to knock on the front door. (27 RT 3026.) The televisions were on in the living room and in a back room; Deputy Deese knocked on the windows but there was no response. (27 RT 3027.)

On his first time at the house, the minivan was parked by the side door, facing the front of the property, near Dodson's blue Hyundai. (27 RT 3029.) When Deputy Deese returned, the minivan was in the front of the house, not on a road or driveway. (27 RT 3030.) The minivan had been driven through ice plant and grass and over a fence. (27 RT 3030-3031.)

As the deputies walked back toward the side door, Deputy Deese heard a moaning noise like an animal. (27 RT 3027.) Deputy Deese knocked on the side door again, calling to Eubanks. (27 RT 3028.) Deputy Deese used his public announcement system, which is very loud, to call for Eubanks or anyone to come to the door. (23 RT 2417; 27 RT 3032.) No one responded. (27 RT 3032.) Finally the deputies heard someone say "Help," and "I've been shot." (23 RT 2418; 27 RT 3032.) Deputy Deese relayed this to his dispatcher, said he was going to force entry, and asked his supervisor to come to the scene. (27 RT 3032.)

Deputy Perry kicked down the side door. (23 RT 2418-2419; 27 RT 3032.) Deputy Deese went in first. (27 RT 3033.) He went through the laundry room, down a hallway to the right, and saw, inside a bedroom, Eubanks lying on a bed with a handgun next to her hand. (23 RT 2419; 27 RT 3033.) Eubanks was on her back with her arms and legs stretched out, "spread eagled." (27 RT 3033.) The handgun, a five-shot .38 caliber Smith & Wesson revolver,

was just an inch from her fingertips. (24 RT 2510-2512; 27 RT 3034-3035.) Expended and unexpended rounds were all over the bed and the cartridge box. (27 RT 3036.) When close enough, Deputy Deese grabbed the gun and opened the cylinder so that it could not accidentally discharge. (27 RT 3034.) There were four unexpended rounds and one expended shell casing inside the revolver. (24 RT 2512.)

Deputy Deese noticed a bloody towel over Eubanks's stomach. (27 RT 3034.) Deputy Perry lifted the towel and saw a gunshot wound to her stomach, bleeding heavily. (23 RT 2419; 27 RT 3034.) It appeared to be a self-inflicted wound. (27 RT 3035.) Eubanks was conscious, but Eubanks's face was turning blue and her breaths were very shallow. (23 RT 2420; 27 RT 3035-3036.) Deputy Deese asked dispatch to send paramedics. (27 RT 3035.)

Deputy Deese went out to secure the handgun in the trunk of his patrol car and to retrieve CPR masks. As Deputy Deese left the room, he went to check another bedroom just to the left and saw a small child, Aaron, lying on the bottom bunk of the bed. (27 RT 3035.) The lights were off in this room. (27 RT 3036.) He called to Deputy Perry to check on the child. Deputy Perry went into the southwest bedroom and saw Aaron lying in bed with the covers pulled up to his chin. (23 RT 2421.) Deputy Perry pulled the covers down, saw that Aaron was not injured, pulled the covers back up and told Aaron to stay in the room. Aaron answered, "Okay." (23 RT 2422.)

Deputy Deese put the gun in the trunk of the car and pulled out the CPR masks, went back in the house and gave the CPR masks to Deputy Perry, then went to check the rest of the house. (27 RT 3036.) In another bedroom, there was a small child, Austin, on the top of a bunk bed, leaning against the wall, with a gunshot wound to his face. Two little boys, Brigham and Matthew, were on the bottom bunk, both with gunshot wounds to the head. The light and television were both on. (27 RT 3037.) Deputy Deese notified dispatch and

Deputy Perry, then went to check the living room. (27 RT 3037-3038.) Deputy Deese saw Brandon sprawled on the floor on his stomach between the couch and the coffee table. Deputy Deese saw a gunshot wound in Brandon's neck and blood coming from the back of Brandon's head. (27 RT 3038.)

Deputy Perry went into the northwest bedroom and saw the three children on the bunk bed. Austin, on the top bunk, had swelling and bruising to his eyes, and blood. (23 RT 2423.) He was in a half-seated position. (23 RT 2426.) Two children were on the bottom bunk. Brigham was on his left side with blood on his right ear and bruising on his face. (23 RT 2423.) Austin and Brigham appeared dead. (23 RT 2431.) Matthew was on the lower bunk to the left of Brigham, at the foot of the bed; his eyes were open and he was making gurgling noises. (23 RT 2423.) Deputy Perry scooped up Matthew and ran out of the house. (23 RT 2426.) Matthew was alive, but the rear portion of his head was missing and blood flowed out as Deputy Perry carried Matthew outside. (23 RT 2427; 27 RT 3040.) The deputies wrapped Matthew in Deputy Deese's jacket and tried to give him CPR. (23 RT 2428; 27 RT 3040.) Matthew was breathing on his own and had a pulse. (23 RT 2428.)

Paramedics in a fire truck had trouble finding the house. (27 RT 3040.) Deputy Deese saw the fire truck going up the wrong driveway, so he told dispatch he would take the child to the firefighters. (27 RT 3040-3041.) As the deputies were running down the driveway with Matthew in their arms, they came upon another deputy, who assisted Deputy Perry in carrying the child to the paramedics, and Deputy Deese went back to the residence. (23 RT 2429, 23 RT 2448; 27 RT 3042.) The firefighters tended to Matthew, putting an oxygen mask on him to assist his breathing. (23 RT 2438; 24 RT 2490.) The ambulance arrived two minutes later. (23 RT 2449.)

Matthew had a gunshot wound on the top of his head. His hair was saturated with blood, and there was blood around the base of his head. (24 RT

2489.) The hole in the top of Matthew's head was about an inch in diameter, with some brain matter spilling out. (24 RT 2490.) Paramedic Theodore Chialtas put a bandage on the wound. (24 RT 2489.) Chialtas also tried to put an endotracheal tube into Matthew's airway, but Matthew had a strong gag reflex and was biting down on the instrument, so Chialtas was not able to insert the endotracheal tube. Chialtas attempted to put Matthew on a heart monitor and to start an intravenous line on him. (24 RT 2490.)

Matthew was transported to Children's Hospital by Mercy Air Helicopter, with extraordinary measures used to keep him breathing. (24 RT 2491.) Matthew was pronounced dead at 6:30 a.m. the next morning. (24 RT 2819.)

When Deputy Deese returned to the master bedroom after getting Matthew down to the paramedics, Eubanks was still conscious, and had vomited. Deputy Deese told her to roll onto her side, and Eubanks rolled over by herself without help. (27 RT 3042.) Deputy Deese did not detect a strong odor of alcohol. (27 RT 3056.) Other deputies arrived. (23 RT 2449; 27 RT 3041.) Deputy Deese wrapped Aaron in a blanket, handed him to another deputy and told him to take Aaron out of there. (27 RT 3041.) Goohs picked up Aaron from the Sheriff's station about 11:00 p.m. that night. (24 RT 2668.)

The paramedics arrived at the house. (27 RT 3042.) A paramedic pronounced Brigham dead right away. (23 RT 2441; 27 RT 3042.) He moved Austin from a seated position on the top bunk to a lying down position to check for a pulse, then pronounced him dead. (23 RT 2440; 27 RT 3042.) A firefighter went to the living room and saw Brandon lying on the floor between a sofa and a coffee table, with the television on. (23 RT 2450.) Brandon had no pulse and was not breathing. (23 RT 2450; 27 RT 3042-3043.) Brandon had gunshot wounds to the head with brain matter spilled out. (23 RT 2450.)

Paramedic Jeffrey Miller went to the master bedroom to tend to Eubanks, who was lying on the bed, cringing and moaning. (23 RT 2442, 2452; 27 RT 3043.) Eubanks had a single gunshot wound just above her belly button. Eubanks had a pulse and was breathing (23 RT 2442.) It is not clear whether she was conscious or not, but she did not respond to the paramedics. (23 RT 2442, 2452.) Eubanks tried to flail her arms to fight off the paramedics a few times. (23 RT 2452.) Miller carried Eubanks out the front door and put her in the ambulance. (23 RT 2442; 27 RT 3043.) In the ambulance the paramedics started treatment on Eubanks and transported her to Palomar Hospital. (23 RT 2442.)

Eubanks never lost her pulse completely, although while the ambulance was rolling, at 8:35 p.m., Miller could not find a pulse. (23 RT 2444.) Miller started an infusion of saline solution and infused as much as 3000 cubic centimeters of saline into Eubanks. (23 RT 2444-2445.)

At the hospital, Eubanks's blood was drawn at 8:50 p.m. (26 RT 2906; 27 RT 3064.) Her blood was later tested for ethanol (alcohol), fluoxetine (Prozac), diazepam (Valium), alprazolam (Xanax), methamphetamine and amphetamine. (26 RT 2918-2920.) Her blood was not tested for PCP, cocaine, THC, morphine, Hismanal or doxycycline. (26 RT 2919-2920.) There was no alprazolam, methamphetamine or amphetamine in her blood. (26 RT 2918-2919, 2924.)

Eubanks's blood contained ethanol (alcohol), fluoxetine (Prozac), and diazepam (Valium). (26 RT 2911.) Her alcohol level was .07.[6] (26 RT 2910.) The level of Prozac was 118 nanograms of fluoxetine per milliliter of blood, and 258 nanograms per milliliter of its metabolite, norfluoxetine, for a total

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6. Under California law, the level of intoxication for driving under the influence is .08. (26 RT 2911.)

active amount of 376 nanograms. (26 RT 2912.) The therapeutic range for fluoxetine is 250 to 1200 nanograms. (26 RT 2914.)

There were 0.6 micrograms of diazepam (Valium) and 0.3 micrograms of its metabolite, nordiazepam, in her blood. (26 RT 2914.) The therapeutic range for diazepam is 0.1 to 1.5 micrograms; the therapeutic range for nordiazepam is 0.1 to 2.0 micrograms; and the toxic range of diazepam is above 3.0 micrograms. Eubanks had a therapeutic range of diazepam and nordiazepam in her blood. (26 RT 2915.) The Valium had been in her blood for several hours because its metabolite was also present, but diazepam metabolizes differently in each person so it could not be determined when she took the medication. (26 RT 2921.)

Eubanks's hands were swabbed at the hospital for gunshot residue. (26 RT 2933-2934.) There were gunshot residue particles on both of Eubanks's hands. (27 RT 3064.)

There were five letters found in the master bedroom next to the bed, all written by Eubanks. (24 RT 2520-2521, 2605-2608, 2611.) The first letter, to Eubanks's niece, was on the floor by the foot of the bed. (24 RT 2523.)

> My Dearest Brandi Michelle Smith,[7/]
>
> I know what I'm doing is going to hurt you tremendously, but I can't and have no desire to go on. All my belongings of Elvis, jewelry, private matters and clothes are to go to you. I love you and hope you have a happy life.
>
> Love, Aunt Susie Denise Eubanks.

(24 RT 2522.)

The other four letters all appeared to come from the same notepad. (24 RT 2523-2524.)

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7. Brandi, the daughter of Eubanks's sister Michelle Smith, lived with the Eubanks from August through October, 1995, when Brandi was sixteen years old. Her mother characterized Brandi as "rebellious." (25 RT 2740.)

Oct. 26, 1997.

Dear Michelle:

I'm sorry. I'm tired of being strong. Tell Mike I love him and Greg and Rod. But things are way out of hand. Please make sure Matthew Dillon John Eubanks and I are in the same casket no matter how cheap. Just as long as it's next to my Mom off Lawndale. Matt was born June 26, 1993. Me, June 26, 1964. If possible, do what you can for my other kids. I'm sorry.

Love, Susie.

(24 RT 2524.)

Oct. 26, 1997.

Dear Rene,

I will never ask for your love, friendship nor forgiveness. Like you say, I'm a psycho bitch. Don't shed one tear over me or my or your son. You are the biggest liar to date that I know. Stay on crystal meth and let your 37-year-old ass move back with Mom and Dad. Get back with Pam and / or Sherri. They're your class. Don't worry, cry or even mourn me. See ya. . . . Ha Ha.

Susan.

(24 RT 2524.)

Dear Eric,

Everything is yours including the death and funerals of your children. You betrayed me. You kept a diary, and you and Rene Dodson conspired against me.[8/] I will not ever go through the hurt, pain or bullshit again. I've lost everyone I've ever loved. Now it's time for you to do the same. You'll hate me forever, I know, but it's not worth it anymore. I did w/ all my ♡ fall in love with Rene, but he's 37 and knows nothing but running home to Dad and his whore slut Mom. Hopefully he'll feel his obligation to his / child Amber Sue, since Brittany is Darrell Bellshee's and Shelly is only God knows, any

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8. Pages from a diary kept by Eric in connection with an expected custody dispute were found in Eubanks's bedroom and are described more specifically *post*.

settlement I receive from work comp go to you to bury the kids and find your rainbow. Anna May, I'm sure. The van is yours. I know you'll never forgive me.

Susan.

(24 RT 2525.)

Oct. 26, 1997.

Dear John,

I know you'll hate me forever, but I can't let B.C. live without his brothers, so I did what I did. Tell Sally and Curtis I'm sorry. I have been strong for 25 years, and I'm tired of all the fight and hurt. My SS number [. . .] should help. If not, I'm sorry. Rene Gene Dodson, 691 Roosevelt Street, Escondido, California, 92027, fucked me all up.

Love, Susan.

(24 RT 2525-2526.)

There were more than 50 prescription pill bottles in the master bedroom. There were prescription medicine bottles in other areas of the house, including about a dozen in the master bathroom. (24 RT 2633.) In the trash can in the master bedroom were two prescription medicine bottles, a Prozac medicine bottle, and crumpled papers that were incomplete drafts of the letters left by Eubanks. (24 RT 2534-2536.) Pages from a diary were found in a miniature trunk in the master bedroom. (24 RT 2554, 2627.) A package of Hismanal medication was on the bed in the master bedroom. (24 RT 2550.) There were expended and unexpended cartridges on the bed. (23 RT 2442; 24 RT 2550-2551.)

On the day after the murders, Dodson told Detectives Collier and Heilig that Eubanks had said in the past that she had a .38, and she bought bullets for it, and she was going to shoot all of her kids and then shoot herself. (23 RT 2277.) Dodson once saw the gun, a snub-nosed Smith & Wesson .38 caliber weapon. (23 RT 2277.)

Eric explained that Eubanks had the gun throughout her marriage with Eric, but she never had bullets before. (23 RT 2322-2323.) At earlier times, when Eubanks was upset, Eubanks had threatened to get bullets for the gun. Eubanks made these threats to get bullets for the gun three or four years earlier, when another boyfriend had dumped her. There were other boyfriends besides Dodson throughout her marriage to Eric. (23 RT 2323.)

Events Before The Murders

Eric first moved out of the home about one month before the murders, and Dodson moved in. (23 RT 2319-2320.) Eric kept a diary of Eubanks's inappropriate parenting after Eubanks "threw him out" of the house. (23 RT 2350.) Eric wanted custody of the children because he had concerns about the way Eubanks was taking care of the children, such as staying out all night or not feeding dinner to the children. (23 RT 2350-2351.) Eric kept this diary in his truck. Portions of the diary were found in Eubanks's residence, because more than once Eubanks went into Eric's truck and took things such as his diary and checkbook. (23 RT 2351.)

On Sunday, October 12, 1997, Eubanks called Eric and told him that Dodson was going out to watch football; eventually Dodson and Eubanks both went out. Brandon called Eric later that night, and Eubanks grabbed the phone and told Eric that Dodson had just left, asking Eric to come over quickly. When Eric arrived at the house, Dodson followed him up the driveway. Eubanks and Dodson were yelling back and forth. Eubanks went to call the police, and Dodson left. (23 RT 2360.) Eubanks told Eric that Dodson tried to rape her, saying he tore her underwear and nightgown.[9/] (23 RT 2357, 2360.)

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9. Dodson testified that previously Eubanks had told Dodson's mother that she had filed charges against Dodson for raping her. Dodson went to the

Eric did not take Eubanks's comments seriously because he had seen Eubanks rip her own clothing and then threaten to accuse Eric of rape. (23 RT 2357, 2364.)

Eric moved back into the house the next day, for about a week. (23 RT 2361-2362.) Eubanks changed the locks on the doors. (23 RT 2321.) She also purchased ammunition for her gun, on October 14, 1997. (24 RT 2531.) At the store where she went with her little boys to buy new locks for her house, Eubanks saw Debbie McNeil, a long-time friend of Dodson. (25 RT 2770, 2776.) Eubanks was angry. Eubanks told McNeil that Dodson had broken the lock on her door and she was buying new locks so Dodson could not get into the house and could not get his things. Eubanks told McNeil to warn Dodson that Eubanks had just bought bullets and one of the bullets had Dodson's name on it. (25 RT 2777.) Eubanks turned to one of her little boys and asked, "Mommy did buy the bullets, didn't she?" (25 RT 2778.) Eubanks also told Eric that she bought bullets for her gun, saying: "I also bought bullets for my gun and I'm not gonna take anybody's threats." (23 RT 2322.)

Eubanks stayed out late on October 15, 1997, and had a car accident, one in a number she had been having. Eric was concerned she would hurt herself or someone else. (23 RT 2362.) On October 16, 1997, Eric believed Eubanks was having problems with her boyfriend again. He recorded in his diary that Eubanks's sister called Eric and said Eubanks was threatening suicide. (23 RT 2363.)

Eubanks's sister, Michelle Smith, testified about Eubanks threatening to harm herself. She could not remember the exact date, placing the call in late September or early October 1997. (25 RT 2738.) Eubanks called Smith in the morning or early afternoon, which was unusual. Eubanks said she needed to

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sheriff's station to check, but there were no charges filed against him. Dodson did not remember when this occurred. (23 RT 2313.)

get in touch with Dodson, who was at the North Bar, but he would not take her calls. (25 RT 2739.) Eubanks said she was pregnant with Dodson's child and the only reason Eubanks stayed with Eric was because she needed money for the children.[10/] Eubanks wanted Smith to tell Dodson that she loved Dodson and was only using Eric for his money. (25 RT 2741.) Eubanks was "very distraught," although not hysterical. Eubanks had been drinking or taking pills. Eubanks said if Smith did not call Dodson that Eubanks would kill herself. (25 RT 2742.) Eubanks told Smith to tell Dodson that Eubanks was "losing" the baby. (25 RT 2743, 2745.) Eubanks said she had a gun and that only she and Dodson knew the location of the gun. (25 RT 2743.) Eubanks said if Dodson did not call then Eubanks would shoot herself, and Smith should tell that to Dodson. (25 RT 2744-2745.) Eubanks became hysterical at this point. Eubanks went outside her house and Smith heard a "bang." (25 RT 2745.) Smith got Eric's phone number from Eubanks and called Eric. (25 RT 2747.) Smith told Eric that Eubanks was very upset and had a gun, and Eric agreed to go check on her. (25 RT 2747-2748.) Eric called Eubanks at home; Eubanks said she was fine and she sounded fine. At trial Eric said, "That was just one of those days where she was having trouble functioning," and that Eubanks's behavior was worse, toward the end. (23 RT 2363.)

On October 16, Eric and Eubanks were to go to divorce mediation the next day. Eubanks told Eric she would drop the divorce but she wanted to petition the court to take the children to Texas. Eric would not agree to that. More than once, Eubanks threatened to take the boys to Texas so Eric would never see them again. (23 RT 2363.)

On Sunday, October 19, 1997, Brandon went to the Goohs' house for a birthday dinner for his friend Christian. (23 RT 2366; 24 RT 2662.) Eubanks

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10. Eric Eubanks testified that Dodson thought Eubanks was pregnant, but she was not. (23 RT 2349.)

had gone out with Dodson that day, while Eric was still at the Eubanks's home. (23 RT 2365.) Eubanks and Dodson returned to the home, and there was an argument that resulted in Eric leaving the house again. (23 RT 2364-2367.) Eric went to the Goohs' to tell Brandon that Eric was leaving again and would not be home when Brandon returned. (23 RT 2367; 24 RT 2662.) The next day, the Goohs offered to let Eric stay at their home until he found another place to stay. (24 RT 2663.)

On the Friday before the murders, October 24, 1997, Eric's tools were missing from the front of his truck when he emerged from the Long Shot Bar. Eric suspected Eubanks had taken them because the truck was not broken into and Eubanks had the only other key. Eric's checkbook and camera were also missing from the glove box. Eric went to Eubanks's home at 226 South Twin Oaks Valley Road to retrieve his tools. All the children were there along with Eubanks and Dodson. (23 RT 2326.) Eric stood at the front door and demanded his tools back. Eubanks was angry and denied taking the tools. Eubanks threatened to get her gun and shoot Eric, then she called the police. (23 RT 2327.) The police showed up; Eric retrieved his property and left. (23 RT 2328.)

Defense: Eubanks Used Prescription Medications

Eubanks's counsel elicited from the witnesses in the case-in-chief that Eubanks may have abused prescription drugs, and put on one of Eubanks's treating doctors and an expert witness to discuss her level of intoxication when she murdered the boys.

In 1989 - 1990, Eubanks worked at the Palomar Medical Center. (23 RT 2371.) She had a back injury at work, a herniated disk. Eubanks had to take time off from work and eventually had back surgery. (23 RT 2372.) Due to the injuries, Eubanks started taking prescription medication and gradually developed a problem with these medications. (23 RT 2374.) After the initial

back surgery, Eubanks went to her family doctor, Dr. Grebs, and was successful in breaking her addiction from pain medications. (23 RT 238 1.) When she returned to work, however, Eubanks injured herself again, in the neck. She had surgery on her neck, started using prescription pain medications again, and never went back to work at Palomar. (23 RT 2373.)

Eric agreed that Eubanks's personality changed at some point, possibly around the time of the first surgery. (23 RT 2376, 2382-2383, 2404, 2411-2412.) That was about two years before the murders. (23 RT 2404.) Eubanks was not a big drinker when Eric married her, but she developed a problem with alcohol when she started going out again. (23 RT 2375.) Eric was aware of two boyfriends Eubanks had during the course of their marriage. (23 RT 2405.) She had problems with her first boyfriend about the time of the surgeries. (23 RT 2373, 2406.)

Eubanks had about five accidents with the minivan. Eric believes these accidents were due to drinking and prescription medications. (23 RT 2376.)

Eric disapproved of Eubanks taking so many medications. Eubanks said she could not bring it out in the open because she worked in the medical field. (23 RT 2380.)

Dodson also "kinda had a feeling that she was having problems with the prescription drugs," that started with her back injury. Eubanks had surgery about eight months before the murders. (23 RT 2288.) Eubanks told Dodson that a doctor had gotten her addicted to some kind of pain medication. Eubanks had lots of prescription bottles around the house. (23 RT 2289.) Dodson told Eubanks she should not take so much pain medication; Eubanks tried to explain what they were for. Dodson did not see Eubanks take any pills on October 26, 1997. (23 RT 2291.)

Kathy Goohs also saw changes in Eubanks in the year and a half before the murders. Eubanks was upset and frustrated that she could not return to

work due to her back injury, and she was in a lot of pain. (25 RT 2702.) Goohs became aware that Eubanks had a problem with prescription drugs. (24 RT 2680.) Eubanks's personality changed: she was often agitated, her eyes were glassy, and she did not listen in a conversation. (24 RT 2680-2681.) Towards the end, Goohs' son Christian did not feel comfortable over at the Eubanks's house. (24 RT 2681.)

Dr. David Grebs was Eubanks's family physician since late 1988. (25 RT 2831, 2833.) On August 18, 1993, Dr. Grebs saw Eubanks for very severe back pain and a pinched nerve. (25 RT 2634.) Dr. Mark Stern, a neurologist, performed surgery on August 19, 1993, for a herniated disk in Eubanks's lower back. (25 RT 2836.) Dr. Grebs assisted in the surgery. (25 RT 2837.)

In March 1994, Eubanks went to Dr. Grebs for numbness in both of her arms, related to a problem in the neck. (25 RT 2837.) Physical therapy did not cure the problem, so Dr. Grebs sent her back to Dr. Stern on May 26, 1994. (25 RT 2838.) This neck problem was treated through the workers' compensation system, so Dr. Grebs did not assist any further. (25 RT 2838.)

On October 11, 1995, Eubanks came to Dr. Grebs and complained that Dr. Stern had "cut her off all her medications." Eubanks was taking Prozac, Inderal, Valium, Fiorinal, Restoril, Zantac, Midrin, Tylenol Number Four (with codeine, a narcotic) and Imitrex. (25 RT 2839.) Eubanks was having anxiety attacks and pain. Dr. Grebs formed the opinion that Eubanks had become habituated to the use of these medications. Dr. Grebs tried to find some immediate relief for her anxiety. Dr. Grebs decreased her Prozac to "a more reasonable dose" and discontinued the two longer acting benzodiazepines, Valium and Restoril, replacing them with Ativan, a shorter acting anti-anxiety medication from which it is easier to wean people. He used ibuprofen or Motrin for pain control and replaced Tylenol Number Four, which has 60 milligrams of codeine, with Tylenol Number Three, which has 30 milligrams

of codeine. (25 RT 2840.) Dr. Grebs planned to wean her off the drugs over six months. Eubanks did not specifically ask for help treating an addiction, she just wanted help. (25 RT 2841.) Tapering off medicines is difficult for a patient and time-consuming for the doctor, so he does not do this unless he is convinced the patient wants to do it. (25 RT 2851-2852.)

Eubanks came in on October 23, 1995, November 10, 1995, and December 14, 1995, and it appeared that she was successfully tapering down her medications. (25 RT 2841, 2843.) The last time Dr. Grebs provided prescriptions to Eubanks was December 14, 1995. Dr. Grebs did not know if any other doctor was also prescribing drugs for Eubanks. (25 RT 2851.)

Eubanks was having trouble with her neck and not getting relief from her workers' compensation doctors, so she was referred to another surgeon. Dr. Grebs assisted in anterior cervical diskectomy surgery for Eubanks in May 1996. (25 RT 2844.) This was major surgery with general anaesthesia. (25 RT 2845.) Most patients are pain-free or nearly pain-free a few months after surgery. (25 RT 2847.)

Experts Offer Conflicting Opinions On Level Of Intoxication At Time Of Murders

As noted above, samples of Eubanks's blood were taken at the hospital at 8:50 p.m. and analyzed, resulting in a measurement of blood alcohol of .07; 376 nanograms of fluoxetine and norfluoxetine (Prozac); and 0.9 micrograms of diazepam and nordiazepam (Valium). (26 RT 2910, 2912, 2914.)

The defense presented Dr. Clark Smith, a psychiatrist and the medical director of a drug and alcohol treatment hospital who was board-certified in psychiatry, addiction psychiatry and forensic psychiatry. (27 RT 3076, 3080.) Dr. Smith testified that the prosecution's toxicology report, prepared by Dr. Vina Spiehler, a toxicologist with a Ph.D., did not account for the dilution

effect caused by the infusion of saline solution into Eubanks by the paramedics before and during her transport to the hospital. (27 RT 3083, 3108.)

The total volume of blood in an average human body is five liters. (27 RT 3084.) Paramedic records showed that Eubanks was given about three liters (3000 cc's) of saline solution, or about three quarts, due to her massive blood loss. (27 RT 3083.)

To counter this dilution, Dr. Smith measured the hematocrit, or the percentage of red blood cells in the blood. (27 RT 3084.) Previous medical records of Eubanks showed her blood had 43.3 per cent red blood cells. (27 RT 3085-3086.) The blood sample taken from Eubanks at 8:50 p.m. on October 26, 1997, had a hematocrit value of 20.7 percent. There were about twice as many red blood cells in Eubanks's previous lab sample as in the diluted sample from the day of the murder, or more exactly 2.1 (43.3 divided by 20.7). (27 RT 3087.) Dr. Smith opined that when the blood was lost and saltwater substituted for about half of the blood, the amount of alcohol or Valium in the blood was also diluted by about half. (27 RT 3088.)

Dr. Spiehler had calculated an alcohol level of .09 for Eubanks at the time of the murders. The average rate of alcohol burn-off for a woman is .015 per hour. About one and one-half hours passed between 7:15 p.m. and the time the blood was drawn at the hospital at 8:50 p.m. About .02 of the alcohol burned off in that hour and one-half, so the assumed blood alcohol level at 7:15 p.m. was .09. (27 RT 3089.)

Dr. Smith calculated that Eubanks's blood alcohol level at 7:15 p.m. was .09 times 2.1, or .19, which was twice the legal limit for intoxication. (27 RT 3090.) Dr. Smith calculated the amount of diazepam as .06 times 2.1, or 1.36, and the amount of nordiazepam as .03 times 2.1, equal to .63. (27 RT 3091.) These levels would be equivalent to taking about 60 milligrams of Valium, which is a high dose of Valium. (27 RT 3109.)

Dr. Smith explained that alcohol is a sedative that tends to calm nerves or to reduce anxiety. Enough alcohol can act like a hypnotic or a sleeping pill and cause deep sleep, even unconsciousness or coma. Alcohol operates on the central nervous system. A level of .19 blood alcohol would have a very significant effect on the brain. (27 RT 3092.) The alcohol could have two paradoxical effects: most people would be deeply asleep at that level, unable to stay awake, but others would be stimulated and excited, agitated, have unpredictable behavior, especially soon after ingestion of the alcohol, as the alcohol levels are rising. Emotions and judgment would be impacted at this high a level of alcohol. (27 RT 3093.) At a level of .19 blood alcohol, one would expect to see impairment, excitability, emotional instability, loss of critical judgment, impairment of perception, memory and comprehension, decreased sensory response, changes in visual acuity and coordination. At higher levels, one can see profound changes such as frank disorientation, extreme mental confusion, and exaggerated emotional states such as exaggerated fear or sorrow, perception of threat. (27 RT 3095.) There would be severe impairment of higher brain function with a blood alcohol level of .19. (27 RT 3109.) At this level, one could perform a complicated set of physical activities but not remember it the next day. (27 RT 3110.)

Valium, like alcohol, is a sedative or tranquilizer. It causes generalized sedation and acts on the central nervous system to control anxiety, to induce calmness, to promote sleep. Alcohol and Valium are in the same general classification of medications, both called sedatives or hypnotics. (27 RT 3095.) Typically with Valium a person is quieter, sleepy, but there is a paradoxical effect in some people that get agitated and unpredictable, especially right after they take Valium. (27 RT 3096.) Valium can cause sedation, a clouding of consciousness, it can induce sleep and in higher doses can cause a loss of consciousness or even coma or death. Valium intoxication is similar to alcohol

intoxication. For most patients, Valium tends to concentrate its action on the brain itself rather than on other bodily functions. (27 RT 3105.) It is possible to have blackouts from Valium. (27 RT 3111.) Valium is a benzodiazepine; benzodiazepine is notorious for causing loss of memory. (27 RT 3096, 3111.)

Either Valium or alcohol can impair higher brain functions and impair choices. (27 RT 3105-3106.) To make choices, one needs to be able to consider different options, different situations, and predict possible outcomes, a complex level of brain functions. (27 RT 3106.) This higher level of brain function is often quite impaired when someone is under the influence of either alcohol or Valium. (27 RT 3106-3107.)

The effects of alcohol can be doubled or redoubled by adding the additional tranquilizing effect of Valium. They have a synergistic effect on each other. This is dangerous and unpredictable and can result in accidental death. (27 RT 3109-3110.)

Dr. Smith also acknowledged that people who are tolerant of alcohol due to regular use can function at higher levels of blood alcohol than those without tolerance. Similarly, people can develop a tolerance to Valium. (27 RT 3118.) A person with tolerance would not be as impacted as Dr. Smith described at these levels, but there would still be significant impact with significant symptoms. (27 RT 3119-3120.)

Rebuttal

The People called Dr. Vina Spiehler to rebut Dr. Smith's opinions. Dr. Spiehler is a pharmacologist who is board-certified in forensic toxicology. Pharmacology is the study of how drugs act in the body, and forensic toxicology is the science and practice of drugs, drug testing and drug interpretation when drugs are involved in a legal case. (28 RT 3199.)

Dr. Spiehler did not agree with Dr. Smith's conclusions about the dilution of Eubanks's blood sample. Dr. Smith's calculations would be

accurate if the dilute were added to a test tube, but not when added to a living body. (28 RT 3203.)

When a person drinks alcohol, the alcohol starts moving out into the blood as soon as it hits the stomach. Once in the blood, alcohol travels quickly into all the organs of the body including the brain. Anything circulating in the blood reaches equilibrium in the different organs in just a few minutes. (28 RT 3206.) Alcohol goes to the water in the body, and the body is about two-thirds water. Alcohol goes most rapidly to those parts of the body that have a good blood supply, i.e., the kidneys, liver, lungs and brain. (28 RT 3207.)

An infusion of saline solution could lower the blood alcohol level. (28 RT 3207.) Eubanks weighed about 125 pounds. About half her body weight was water. Eubanks had about 68 pounds of water into which the alcohol was distributed. Three liters of saline solution equals about six pints or six pounds. Here, the alcohol could be diluted by the amount of the six pounds of saline solution into the total water amount of about 68 pounds, or about ten per cent. By the time the saline was infused into her body, most of the alcohol was already absorbed into Eubanks's tissues; the alcohol was not just in the blood supply. Within a few minutes of blood circulation after the saline was infused, the alcohol levels would reach equilibrium again. It would not be possible to sober up a person by giving him a whole new alcohol-free blood supply, although such a total transfusion could lower the alcohol content. (28 RT 3208.)

If the substance measured was serum with a level of .07, then a whole blood sample was probably .06. (28 RT 3208.) If this was diluted by the fluids Eubanks received, then it was probably a level of .07. (28 RT 3208-3209.) Ordinarily, serum has 18 percent more alcohol than whole blood. If the sample measured was whole blood, then it was a little diluted. Doing the calculation

back, it would round out to about .06. Assuming that was diluted by 10 per cent, that would take it back to about .07. (28 RT 3209.)

Dr. Spiehler disputed that diazepam and nordiazepam would be affected by dilution the same way as alcohol because diazepam, fluoxetine and their metabolites go to the fatty parts of the body, not the watery parts. (28 RT 3210.) Valium in the blood is carried around on the proteins or the fatty part of a blood cell. (28 RT 3226.) Diluting the water does not have the same effect on these medicines as on alcohol. (28 RT 3210.) There is no reason to correct the levels due to a change in the water dilution level. (28 RT 3210-3211.)

Dr. Spiehler stated her calculations were based on principles taken from a textbook by Goodman and Gillman, Pharmacological Basis of Therapeutics, which is used to teach pharmacology to medical students. (28 RT 3213.) Her conclusions and calculation of measurements after dilution by intravenous fluids is based on an example in Garriott's Medical / Legal Aspects of Alcohol Determination and Biological Specimens from 1988. (28 RT 3213-3214.) Personal experience in the field confirmed what Dr. Spiehler read in the literature; she has looked at before and after samples from people who had transfusions in the hospital. In her personal experience, after transfusions, alcohol values sometimes go up, sometimes go down, and sometimes they stay the same. (28 RT 3214.)

On cross-examination, Dr. Spiehler stated that a gunshot wound with massive blood loss, with shock and vascular collapse, could impair blood circulation and thus alcohol absorption and redistribution, but it would not entirely curtail circulation and absorption. (28 RT 3220-3221.)

Dr. Spiehler agreed that sixty milligrams of Valium would be a substantial dose. Sixty milligrams of Valium would be a paralyzing dose for a

person not used to taking Valium, but people who take Valium every day build up a great deal of tolerance to it. (28 RT 3222.)

Surrebuttal

Dr. Smith heard Dr. Spiehler's opinion and it did not change his opinion. (28 RT 3229.) In an emergency gunshot situation, the body can go into shock and vascular collapse, so the emergency personnel try to infuse liquids as quickly as possible to restore circulation by replacing the lost fluid volume. (28 RT 3230.) In a condition of massive blood loss, the body shuts down circulation to try to protect itself. (28 RT 3230-3231.) The extremities become cold and turn blue. (28 RT 3230-3231.) The heart circulates blood to the brain as its first priority, through the lungs, and everything else is sacrificed. Vascular collapse is when the veins and arteries in the hands and feet and extremities collapse to preserve the vital organs. During vascular collapse there is no pulse or blood pressure. (28 RT 3231.) Dr. Smith testified that the medical records showed a time during which Eubanks had no pulse or blood pressure, signifying vascular collapse and shock. (28 RT 3231-3232.) Circulation was limited to the lungs and the brain. (28 RT 3232.)

Dr. Smith agreed in general with Dr. Spiehler's explanation that alcohol circulates in the water parts of the body and there are free exchanges until equilibrium is reached, but Dr. Smith opined that in Eubanks's case the alcohol stayed in her organs and tissues because there was no circulating fluid to pick it up. This opinion was based on his experience, training, and education as a medical doctor and in the literature. (28 RT 3233.)

On an empty stomach, alcohol can be absorbed within half an hour to an hour; on a full meal, absorption can be delayed over several hours. (28 RT 3233.) Alcohol is most rapidly absorbed into the brain first of all and then into the other organs. (28 RT 3234.)

Dr. Smith reviewed and found helpful the discussion of dilution in Medical / Legal Aspects of Alcohol at page 152, "Dilution Effect." (28 RT 3236-3237.) If one used that method, however, Dr. Smith found a dilution effect of about 13 percent, not the ten percent testified to by Dr. Spiehler. (28 RT 3238-3239.) Dr. Smith obtained the dilution factor of 13 percent as follows. Eubanks weighed about 125 pounds, equal to about 55 kilograms, so one-half of that would be 22 ½ liters of water. (28 RT 3235.) If Eubanks lost three liters of blood, and if the paramedics then added three liters of salt water to her circulatory system, the dilution would compute out to 13.3 percent (3 divided by 22.5). (28 RT 3235-3238.)

Dr. Smith testified, however, he thought the dilution factor of 50 percent (or more; he was rounding down to 50 percent), based on the reduction of red blood cells, was more accurate. Dr. Smith opined this was more accurate because Eubanks went into shock, vascular collapse and a shutdown of circulation that prevented the reabsorption of alcohol back into her diluted blood, so the blood alcohol level remained quite low until doctors at Palomar Hospital performed emergency surgery to stop the bleeding, transfuse huge amounts of blood into her and restore a circulating blood volume. At that point, her blood alcohol level probably rose dramatically while she was in the intensive care unit because the alcohol would come back out of the tissues into the blood. (28 RT 3239.)

Dr. Smith testified that Dr. Garriott's textbook, Medical / Legal Aspects of Alcohol Determination and Biological Specimens, supported his theory, rather than Dr. Spiehler's, because it contained descriptions of a series of patients with massive blood loss who had false low blood alcohol levels that later rose after the alcohol had a chance to seep from the tissues back into the diluted blood. (28 RT 3240.)

Dr. Smith relied on the paramedic records that showed the paramedics arrived at 226 South Twin Oaks Valley Road at 8:11 p.m., evaluated Eubanks as being in shock and vascular collapse, and started intravenous lines at 8:35 p.m. At 8:35 p.m. Eubanks had no pulse and no blood pressure. (28 RT 3240.) At 8:36 p.m. Eubanks had a very fast pulse as her heart struggled to circulate what fluid was available. (28 RT 3240-3241.) They arrived at the hospital at 8:42 p.m. and Eubanks's blood sample was drawn at 8:50 p.m. Dr. Smith opined this was a short amount of time of blood circulation, with very impaired circulation, so that the alcohol levels from the tissues could not have seeped back into the diluted blood. (28 RT 3241.)

Sixty milligrams of Valium can be a paralyzing dose of Valium. Dilution is an important factor in evaluating Valium levels as well as blood alcohol levels. (28 RT 3242.) Although Valium is in the fat of the body, it is the blood that is measured, so a dilution of the blood by 50 percent does affect the amount of Valium. (28 RT 3242-3243.) The fatty parts of the blood are diluted when blood is replaced by saline solution. (28 RT 3243.)

PENALTY PHASE

A. Prosecution Evidence

1. Circumstances Of The Crime: Eubanks Shot Her Four Boys In A Methodical, Deliberate Manner

The prosecution called Rod Englert, a crime scene reconstructionist, with 36 years of experience in law enforcement and extensive experience and training in crime scene reconstruction, anatomy and pathology, ballistics, blood stain analysis, and other forensics. (31 RT 3660.) Englert reviewed about 47 reports, and about 400 photographs including autopsy photographs and scene photographs. (31 RT 3668.) He also went to the crime scene and inspected the physical evidence. (31 RT 3668-3670.)

Based on his review and analysis, Englert opined that Brandon was shot first, when he was seated on the floor of the living room, between the couch and the coffee table. (31 RT 3670-3672.) The first shot was a loose contact shot to Brandon's left temple. (31 RT 3672.) His blood blew back, creating a velocity mist of fine droplets on his left leg and shorts. (31 RT 3675-3676.) He was shot again, through the back of his neck from the right side. (31 RT 3672.)

Next, Eubanks shot Austin on the top of the bunk bed. (31 RT 3676.) Austin had his right knee pulled up very close to his face. (31 RT 3676.) She also shot two other bullets at Austin, one to the right of him and one to the left of him, both at the level of his head. One bullet went into the wall to his right and one went into the window to Austin's left. After these five shots, Eubanks had to stop and re-load her gun. (31 RT 3677.)

After re-loading, Eubanks turned to the littlest boys on the bottom bunk. She put the muzzle of the gun up against the left side of Brigham's head, leaving an imprint on his head. (31 RT 3679-3680.) There was no blow back or blood spatter from this shot because the gun was pressed so firmly into his head. (31 RT 3679.) Matthew was in front of Brigham and very close to him when this shot was fired. After shooting Brigham on the left side of his head, Eubanks rolled him back onto his other side. She shot the right side of Brigham's face; this bullet exited his head and lodged in the pillow. (31 RT 3680.) Brigham had stippling on the right side of his face, neck and shoulder, and also a void on the upper part of his face, demonstrating there was either a blanket, pillow, or body (Matthew) that covered that top part of his face when Eubanks fired into the right side of his face. (31 RT 3686-3687.) Another shot went into the bed between Matthew and Brigham, hit the floor, and ricocheted back into the wall three inches above the floor. (31 RT 3680.) One of these latter two shots caused stippling to Matthew's face, showing that Matthew's

face was very close to the muzzle of the gun when the shot was fired. (31 RT 3679-3681.)

Matthew moved to the bottom of the bed, up against the wall, and his mother shot him in the top of his head, from an intermediate range. (31 RT 3680-3681.) This shot did not cause the stippling on Matthew's face. (31 RT 3679-3681.) Matthew's blood was tracked through the house as the deputy sheriff carried him out of the house to the paramedics. (31 RT 3681.)

2. Prior Violent Act: Eubanks Held A Gun To Larry Shoebridge's Head And Threatened Him

Larry Shoebridge had a romantic relationship with Eubanks in 1988 or 1989. (31 RT 3698.) They lived together for six to eight months. (31 RT 3699-3700.) The relationship deteriorated after about three or four months. At some point, an ex-girlfriend called Shoebridge while he was living with Eubanks. Eubanks threatened Shoebridge that if his ex-girlfriend ever contacted him, Shoebridge would not like the outcome. Eubanks said she could do whatever she wanted. (31 RT 3700.)

When Shoebridge was watching television, Eubanks came up to him and put a gun to his head and said she could have killed him. This frightened Shoebridge. Shoebridge grabbed the gun, opened it and took the single bullet out of it, then gave it back to Eubanks. (31 RT 3701.)

Shoebridge ended the relationship with Eubanks by moving all of his belongings out of the house and leaving, while Eubanks was out at work, without telling her. Shoebridge thought this was the only way to get out without a lot of turmoil. (31 RT 3702.)

Eubanks was a single parent with a young son, Brandon, when she was living with Shoebridge. (31 RT 3703.) Eubanks became pregnant while living with Shoebridge. Shoebridge did not want any children. (31 RT 3704.)

In August 1989, about one month after he had left Eubanks, Shoebridge obtained a restraining order against Eubanks, but he did not mention in his application that she had put a gun to his head earlier. (31 RT 3712.) Shoebridge did state in his declaration that Eubanks had a gun, that she wished Shoebridge were dead and that she said she would shoot him. (31 RT 3716-3717.) He obtained the restraining order after Eubanks drove up to his house, speeding and skidding her car, screaming and yelling, trying to attack a woman at Shoebridge's house. (31 RT 3714.)

After Shoebridge was excused, the court instructed the jury that of Shoebridge's testimony, the only evidence it was permitted, but not required, to consider as an aggravating factor was the incident in which Eubanks held a gun to his head. (31 RT 3718; see also 37 RT 4689.)

3. Victim Impact Testimony

Mary Groff, a teacher at an elementary school in San Marcos, knew both Brigham and Austin. She described their special personalities, and the impact on her life of their loss.[11] (31 RT 3720-3728, 3740-3744.)

Leonard Gann, a teacher and freshman football coach at San Marcos High School, described Brandon as well-liked and respected by all, "the ultimate team player." Gann testified to the devastating impact on him when he learned that Brandon had been murdered. (31 RT 3746-3750.) Jane Hull, Brandon's math teacher, said Brandon was selfless, witty and charming, and explained the devastating impact on her of his loss. (31 RT 3753-3761.) Brandon's fifth grade teacher, Paul Linkowski, called Brandon an "all around wonderful kid," and said that every morning, as he was dropped off at school, Brandon would open the back door of his car and kiss his little brothers good-

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11. During Groff's testimony, the court noted for the record that the defendant was sobbing loudly and crying, and recessed the court early for lunch. (31 RT 3728.)

bye. Linkowski was devastated when he learned that Brandon had been murdered. (31 RT 3763-3768.) Brandon was very proud of his mother and his grandmother because they both worked in the medical field. (31 RT 3764, 3768.)

Brandon's best friend, 16-year-old Christian Hand, shared his remembrances of Brandon. Brandon always put his little brothers first. Hand was devastated when Brandon was murdered. (31 RT 3799.)

Brandon's grandmother, Sally Armstrong, spoke of her great love for Brandon, his personality and special characteristics, and her total devastation when he was murdered. Brandon was her son John's only child, and Sally was afraid she would lose her son, also, because Brandon was John Armstrong's whole life. Sally said Brandon's murder was "the worst nightmare that you could ever face in your whole life," and that she had a hole in her life that would never heal; she had difficulty getting up every morning now that Brandon was gone. Whatever was special to Brandon was special to Sally, and because his little brothers were so important to Brandon, Sally became attached to them, too. They were precious little boys. (31 RT 3811-3828.)

John Armstrong, Brandon's father, described Brandon as "an extremely special person, he was – he was someone that always thought about others." John never stops thinking of him, and never will. John was hysterical when he heard that Brandon had been murdered by his own mother. (32 RT 3847-3863.)

B. Defense Case

1. Eubanks Was A Good Mother To Her Children Before She Killed Them

On cross-examination of the prosecution's witnesses, defense counsel elicited that the children were well-groomed. (31 RT 3740, 3743, 3767.)

Christian Hand said Eubanks was interested in her children, acted lovingly towards them, and was protective of them. (31 RT 3803-3805.)

Mary Martinez knew Eubanks for about 12 years and considered Eubanks her best friend. (31 RT 3771-3775.) They went to church and Bible study together. (31 RT 3775.) Eubanks provided emotional help when Martinez's daughter had an eating disorder. (31 RT 3775-3776.) Eubanks was very helpful to Martinez on a daily basis, would tell her things were going to get better. (31 RT 3778-3779.) Eubanks's home appeared to be happy and her children appeared happy with Eubanks. (31 RT 3779.) Eubanks bought lots of gifts at Christmas and provided festive birthday parties for her children, except for Aaron. (31 RT 3776-3778.) Eubanks used to hug and kiss the children. (31 RT 3781-3782.) The children were always clean and well-fed. (31 RT 3780-3781.) Eubanks appeared to be a good mother, and the boys were her priority. (31 RT 3783.)

In their last phone conversation, in September 1997, Eubanks told Martinez that Aaron was a troubled little boy and that Eubanks was trying to find someone else to take him. About two weeks after Martinez's brother died, Eubanks became angry with Martinez and wrote her a letter telling her off, because Martinez had not told Eubanks that her brother had passed. (31 RT 3785.) Eubanks was angry that the obituary for Martinez's brother appeared in the paper on Eubanks's birthday. (31 RT 3786.)

Leslie McCormick was the pediatrician for Eubanks's five children. (34 RT 4280-4281.) Eubanks brought the children in for many well visits and acute visits for illnesses and problems. (34 RT 4281.) Immunizations were complete and up to date for all five children. (34 RT 4283.) She appeared to be interested in the children's medical well-being. (34 RT 4284.) There were about 170 visits for five children over nine or ten years. (34 RT 4285.)

2. Eubanks Was A Good Worker And Proud Of Her Children

Co-workers testified that Eubanks was reliable and a very good worker. (32 RT 3877-3878, 3925, 3937-3938, 3955-3956.) Jade Starling said that Eubanks was very proud of Brandon and talked about him incessantly. (32 RT 3880.) Her children were Eubanks's top priority in her life. (32 RT 3890.) Dorothy Adams said Eubanks was proud of her boys and spoke highly of them. (32 RT 3939.) Adams also said Eubanks was, at times, very angry, volatile and hostile. (32 RT 3944.) A lot of co-workers had a hard time dealing with her. (32 RT 3945-3946.) Barbara Bateman testified that Eubanks seemed to be a good mother, and that the children were clean and polite. (32 RT 3958-3959.) Bateman added that Eubanks seemed to be frustrated, angry and unhappy, and had problems getting along with other employees. (32 RT 3961.)

Eric confirmed that Eubanks was dismissed from Palomar Medical Center when she could no longer work due to the need for neck surgery. (35 RT 4402.) Before that, she had back surgery. (35 RT 4403.)

Dr. Theodore Obenchain, a neurosurgeon, performed back surgery on Eubanks. (34 RT 4275-4276.) Eubanks had a herniated disk in the mid-portion of her neck, between the fifth and sixth neck vertebra. He performed an anterior cervical diskectomy with fusion. (34 RT 4276.) This condition can cause a lot of pain, but after surgery most patients have little pain. Based on her chart, Eubanks had quite severe pain. (34 RT 4278.)

In May 1995, a vocational rehabilitation counselor for Eubanks determined that she could not return to her position as a surgical assistant. (34 RT 4294-4296.) In 1996, Eubanks started to train for a position as medical office insurance biller at Maric College. (34 RT 4298.)

Deborah Burdette-Wilson provided career counseling to Eubanks in the fall of 1995, at Maric College. (35 RT 4388-4389.) Eubanks seemed highly motivated and compassionate, and good for the medical field. (35 RT 4390.)

Eubanks gave Wilson the impression that she was a single parent and the sole provider for her children. (35 RT4390-4391.) Eubanks did well and completed her program. (35 RT 4395.)

Lisa Beaird-Rucker, an instructor at Maric College in 1996, said Eubanks did well in her classes. (35 RT 4326-4329.) She also said that Eubanks was the sort of person that would not let anyone get away with anything with her. (35 RT 4334.)

3. Eubanks Was "Crushed" When Shoebridge Moved Out On Her

The defense presented evidence showing that Eubanks was "crushed" when Larry Shoebridge moved out on her, without notice, when she had a young son (Brandon) and was pregnant. (32 RT 3885-3889, 3914.)

Darrell Belshee, the friend who introduced Eubanks to Shoebridge, described Eubanks as a kind person and a good mother, who always kept her home clean. (32 RT 3916.) Belshee also said that Eubanks had a temper and that when she drank beer, she sometimes became loud and obnoxious, using obscene language. (32 RT 3913-3914, 3920.)

4. Family History

Eubanks's family history was presented by her relatives, primarily by her great uncle Elvin Elrod, his wife Dove Elrod, and her uncle Don Smith.

Eubanks's maternal grandparents were Mary Lou Smith and Cone Smith. (33 RT 3978.) Both were heavy drinkers, and the family had money problems because Cone Smith did not work much. (33 RT 3981, 3986, 3989, 4016, 4033, 4036-4037, 4187.) They had four children; Eubanks's mother, Linda Smith, was the youngest child of Cone and Mary Lou Smith. (33 RT 3986.) Cone Smith had a bad temper, but he was not physically abusive to the children. (33 RT 4037.)

Following in her parents' shadow, Linda Smith started drinking heavily at a young age, and was married young. (33 RT 3991.) Linda was about 14 when she was married for the first time. (33 RT 3992, 4039.) That marriage ended without children, and Linda married Bill Stanley, while she was still a teenager. (33 RT 3992, 4041-4043.) Bill Stanley already had a daughter named Brenda. (33 RT 4043.) Linda had a problem with alcohol. (33 RT 4044.) Bill Stanley was an alcoholic; he was drunk most of the time and worked irregularly. (33 RT 3993-3994, 4017, 4045-4046, 4187.) Linda and Bill Stanley drank and fought frequently in front of the children, and had financial problems. (33 RT 3997, 4017, 4048, 4051.) Bill and Linda Stanley had four children: Michele, Michael, Johnny, and Susan [Eubanks]. Eubanks was the youngest. (33 RT 4001, 4049.) Michael had a terrible substance abuse problem with alcohol when he grew up, and John died of a methadone overdose.[12/] (33 RT 4049-4050.)

Brenda Stanley Idol, Eubanks's half-sister, went to live with Bill Stanley permanently when she was about 13 years old. (34 RT 4205.) She described Bill Stanley's parents as depressive and oppressive. (34 RT 4203-4205.) Eubanks was born when Idol was about 14 ½ years old. (34 RT 4201.) By the time Eubanks was born, Bill Stanley tried to stay away from the home as much as possible, and he was drinking heavily. (34 RT 4210.) Although Eubanks did not get much attention from adults, she was loved and adored and cared for by Brenda, Michele, Michael and Johnny. (34 RT 4212.) Brenda Idol said that Eubanks's mother was loud, with a violent temper, frequently cursing at the children. (34 RT 4225.) Eubanks's mother once slapped Eubanks on the face when Eubanks was a baby. (34 RT 4234.) The house was always scrubbed fastidiously clean, however. (34 RT 4230.) Brenda Idol got married and

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12. John was Aaron's father. (23 RT 2317.)

moved out of the home when Eubanks was about one and one-half years old, and had no contact with Eubanks for about ten years. (34 RT 4250.)

A cousin, Leslie Ardis, said that Eubanks's mother "tortured" Eubanks by dragging her around the house by the hair and forcing her to do chores; Linda Smith Stanley did not allow Eubanks to play. (33 RT 4086.) Eubanks's parents were constantly drunk, fighting, yelling at each other or at others around them. (33 RT 4086-4087.) Eubanks's great-uncle, Elvin Elrod, said that Eubanks and her siblings were brought up with no morals or values, surrounded by drinking and profanity. (33 RT 4002.)

Bill Stanley was not around the house much; Linda Smith Stanley had several different boyfriends over to the small house. (33 RT 3997-4000, 4021.) Years later, Eubanks told her friend Leona Coen that there were men going in and out of her mother's room all the time, and Eubanks described her mother as a "whore." (33 RT 4162-4163.) When Eubanks was four or five years old, her parents divorced. (33 RT 4052-4053.) Linda Stanley struggled to support her children and herself after Bill Stanley left. (33 RT 4054.) The mother and children moved to the east end of Houston in 1971 or 1972, a tough, industrial area with a lot of bars, drugs and shootings. (33 RT 4055.) Linda Stanley continued to drink heavily and to have multiple men over to their house. (34 RT 4216.) The house burned when Eubanks was eight years old; Linda died in the fire. (33 RT 4009, 4057.)

Bill Stanley was drunk at Linda's funeral. (33 RT 4058; 34 RT 4238.) After the funeral, when Brenda Idol was high and Stanley was drunk, Idol (22 years old) had sex with her father, Bill Stanley. (34 RT 4246-4247.)

The children initially went to live with their maternal grandparents, but Bill Stanley took the children, without notice, from the grandparents' home to live with his sister Melva. (33 RT 4059-4060, 4087.) At some point, Michele

went back to live with her maternal grandparents Mary Lou and Cone Smith, and graduated from high school while living with them. (33 RT 4062.)

Bill Stanley's sister, Melva, already had three children, so when Bill Stanley dropped his four children off at his sister's house, there were seven children in a small two-bedroom house. (33 RT 4087.) Melva treated all the children the same way Eubanks's mother did: Eubanks and her siblings were frequently spanked and hollered at, and when not in school the children had to cook and clean all the time. (33 RT 4088.) Melva had mental problems, hit the children with a belt, with the buckle to the face, and told them they were not smart or pretty enough and did nothing right. (33 RT 4089.) Melva abused alcohol and drugs. (33 RT 4090.)

The Stanley children were sent to live with Bill Stanley's mother and "Aunt Dote." When not in school, they all did chores, cooked and cleaned. (33 RT 4090.)

At some point, Eubanks and her brothers lived with their father, Bill Stanley, in a dilapidated trailer in Florida. Eubanks's nephew, Shane Hayes, lived with them for a while. (33 RT 4130.) Hayes was the son of Eubanks's older half-sister, Brenda Stanley Idol. (33 RT 4128.) Hayes reported that Bill Stanley was "nasty." He was always drunk, smelled, urinated in bed, cussed and screamed, especially at Johnny. (33 RT 4131.) Eubanks, who was about five years older than Hayes, helped take care of Hayes, like a big sister. (33 RT 4132.) Later, Eubanks also took care of Bill Stanley when he was dying of cancer. (33 RT 4091.)

While Eubanks was about 11 or 12 and living in the trailer, she became friendly with Leona Coen. (33 RT 4144.) Coen said Eubanks helped her. Eubanks was funny and not afraid of anything. (33 RT 4149.) It seemed to Coen that Eubanks could come and go as she pleased; Bill Stanley was rarely

there and there was little or no supervision. (33 RT 4149, 4152.) Coen also admitted that Eubanks stole a necklace from her. (33 RT 4163.)

Eubanks called Coen in early 1998, and told Coen about the death of Eubanks's children. (33 RT 4164.) Eubanks told Coen that "they" killed the children, she did not know who. (33 RT 4166.) Coen told a defense investigator that Eubanks said she thought Eric killed the children or got someone to kill them. (33 RT 4166-4167; 36 RT 4570.)

When Eubanks was 15 or 16, she lived for a while with her Aunt Rose, Don Smith's ex-wife. (33 RT 4072.) Rose had a drug (sleeping pill) and alcohol problem when Eubanks lived with her. (33 RT 4072.) Don Smith had no contact with Eubanks during her adolescent years. (33 RT 4075.) Most of Don Smith's contact with Eubanks was before Eubanks's mother died. (33 RT 4079.)

5. Eubanks's Self-Inflicted Wound To Her Abdomen Was Life-Threatening

A registered nurse working in the trauma unit of the Palomar Medical Center when Eubanks was brought after the murders testified that Eubanks's gunshot wound to her abdomen was a life-threatening injury. There were several wounds to her small intestines. A major artery, the mesenteric artery, was injured. (34 RT 4286-4291.)

6. Eubanks Offered To Plead Guilty

The parties stipulated that on or about March 27, 1999, Eubanks and her attorney conveyed a written offer to plead guilty to all four counts of murder and the special circumstances in exchange for a sentence of life without the possibility of parole. This offer was rejected by the District Attorney. (36 RT 4570-4571.)

7. Future Dangerousness

James Esten, a correctional expert, reviewed jail records on Eubanks from Las Colinas Detention Center, where she was housed, and met with Eubanks, to evaluate her future dangerousness if she were committed to a California State Prison. (35 RT 4336-4341.) Future dangerousness is a predictor of future behavior, regarding the safety of inmates, based on past behavior. (35 RT 4342, 4349.)

Eubanks was involved in a fight at Las Colinas, from which the other inmate was taken to an outside hospital. (35 RT 4342-4343.) Esten described the confrontation as follows: Eubanks was confronted by another inmate; words were exchanged; the other inmate spit on Eubanks; Eubanks retaliated with blows. According to state guidelines, Eubanks should have reported the insult and spit to a guard. (35 RT 4343.) According to Esten, Eubanks would then be labeled a snitch. Esten thought Eubanks retaliated appropriately by beating up the other inmate. Esten said that if Eubanks had reported the incident to a guard, then she would become the target of every other inmate and might have to be locked up. If one is labeled a snitch, one is shunned by the entire inmate population, including many of the staff. Esten admitted that due to the notoriety of this case, Eubanks would face similar insults in the future. (35 RT 4344.) Esten could not predict if Eubanks would respond the same way in the future, but gave his opinion that Eubanks would not be a danger to others in the future if she were sentenced to prison. (35 RT 4344-4345.) Her murder of her children was a unique event and would not be duplicated in prison. But she might have "minor altercations" like she had at Las Colinas. In women's prisons, fighting usually involves scratching, hair pulling and rolling on the floor. (35 RT 4345.)

According to the report, however, it appeared that Eubanks was the initial aggressor in this fight. In the report, the victim was talking to another

person, ignoring Eubanks, and Eubanks said to the victim, "If you have something to say, why don't you say it to my face?" The victim said she was not talking about Eubanks, then Eubanks stood up and walked over to her, cursing, and grabbed the victim's hair, then the victim spat in Eubanks's face. (35 RT 4356.) The victim was seriously injured. Eubanks scratched and dug her fingernails into the victim's eyes, and was jabbing her fingernails into the victim's eyes throughout the fight. The victim had scratches to her face, around her eyes, and neck. Her eyes were red and bleeding. She had a two-inch scratch on her neck, and had to go to an outside hospital to be treated. (35 RT 4359.) Eubanks had only superficial scratches on her face and did not need treatment. (35 RT 4358-4359.)

In forming his opinion that Eubanks would not be a danger in the future, Esten did not review a comment from March 26, 1998, that said Eubanks was "vindictive, cursing generously in all directions, full of loathing," and "antisocial." (35 RT 4367.) Esten's opinion did not change when he read a note from March 1, 1998, about Eubanks becoming very angry and threatening staff during a game. (35 RT 4369-4371.) There was also a note on December 15, 1997, referring to a newspaper article with a picture of Eric at the children's funeral. Eubanks said to a nurse, "Eric with this bitch and her cunt sister at the kids' funeral with her hand on his leg." (35 RT 4362) Eubanks mentioned that her preliminary hearing was coming up and Eric better not bring the female in the picture because Eubanks would "go off." Eubanks said she never thought about killing before, but she would kill both Eric and his female companion. (35 RT 4373.) This did not change Esten's view that Eubanks would not be a danger in the future.

8. Pleas For Mercy

Eubanks's great-uncle Elvin Elrod still loved Eubanks, although he did not condone what she did. (33 RT 4003.) He believed that Eubanks did not

have "a snowball's chance in hell" to learn moral values. (33 RT 4003-4004.) Elvin Elrod asked the jury to spare Eubanks's life and give her more time to repent. (33 RT 4004.) Dovie Elrod loved Eubanks when Eubanks was a child. (33 RT 4022-4023.) Dovie Elrod had not known Eubanks for a long time, but she still had loving feelings for Eubanks and asked the jury to spare Eubanks's life. (33 RT 4025.) Eubanks's uncle, Don Smith, asked the jury for mercy for Eubanks. (33 RT 4077.) Wyman Elrod, Eubanks's second cousin, knew Eubanks as a child, not as an adult. Wyman Elrod loved Eubanks and asks the jury to consider sparing her life because of her rough childhood. (34 RT 4192-4193.) Eubanks's cousin, Leslie Ardis, asked the jury for mercy for Eubanks. (33 RT 4095.) Eubanks's nephew, Shane Hayes, still had love for Eubanks. (33 RT 4140.)

Eubanks's older half-sister, Brenda Idol, still loved her sister. Idol thought Eubanks had a horrible life and was bruised and scarred from what she went through. (34 RT 4247.) Idol asked the jury to spare Eubanks's life. Eubanks never knew anybody loved her; Eubanks was always abandoned. The people who loved her were sick. Eubanks was raised on her own. Eubanks never saw goodness or love other than her boys. (34 RT 4248.)

The last time Idol talked to Eubanks, in June or July of 1997, Eubanks hung up on Idol when Idol recommended that Eubanks stay married to Eric rather than leave him. (34 RT 4251-4252.) Earlier in the year, Eubanks had told Idol that she wanted to give up Aaron. (34 RT 4255.) Eubanks had a really bad temper. (34 RT 4258-4259.) Idol told an investigator that Eubanks "had a really bad temper and if she got mad at you she'd threaten you and this is something she would have done a long time before, in [Idol's] experience." (34 RT 4260.)

Eubanks's childhood friend Leona Coen asked the jury to spare Eubanks's life. (33 RT 4156.)

Jean McGuire took care of Brandon when he was a baby, for about four years, until 1987. (33 RT 4101, 4107.) Eubanks seemed very protective, and kept Brandon very clean. (33 RT 4103-4104, 4116.) McGuire, and all her family, loved Brandon very deeply, but she asked the jury not to condemn Eubanks to death because Eubanks should have years to think about what she did. (33 RT 4119-4120.)

Eubanks's last witness was Eric. He said Eubanks planned and decorated for birthday parties, and decorated for Christmas, and bought lots of presents. (35 RT 4405-4406.) Eric still had some loving feelings towards Eubanks. (35 RT 4431-4432.)

C. Prosecution Rebuttal

Virginia Ogren worked with Eubanks at Palomar Medical Center. (35 RT 4441.) Usually, Eubanks was hostile, angry, manipulative, and vindictive. However, she could be happy and in a good mood. (35 RT 4443.) Her work product was very good. (35 RT 4443.) When angry, "fucking bitch" was a favorite phrase of Eubanks's. (35 RT 4443.) Eubanks could change quickly from a good mood to hostile. (35 RT 4446.)

Eubanks's niece, Brandi Spencer, spent the summer of 1995 with Eubanks and her family, when Spencer was 16.[13/] (36 RT 4474.) Eubanks sometimes, but not often, cussed at her children, calling them a "son of a bitch" or "mother fucker." (36 RT 4475-4476.) Spencer had to miss school a few days to stay home with the children because there was no one else to watch them. Sometimes, Eubanks would leave in the early evening, stay out all night, and not be home the next morning. (36 RT 4478.)

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13. Spencer's mother was Eubanks's older sister, Michele Smith. (36 RT 4473.)

One night, both Eubanks and Eric were out at separate bars. Eric came home, very angry at Spencer, threw the telephone at her, busted through her locked door and threw something else at her. Spencer left and called the police. They checked two bars, could not find Eubanks, then took Spencer home 30 minutes later. Eubanks was there, in someone else's car, and said she would take care of Spencer. Eric was passed out on his bed. After the police left, Eubanks left again and did not return all night, and was not there in the morning. (36 RT 4481-4485.) Spencer left the Eubanks's home as a result. (36 RT 4485.)

Eubanks introduced Spencer to the two other men she was seeing, Wyndel and Dodson. (36 RT 4496.)

Sally Armstrong, Brandon's grandmother, described three acts of physical abuse of Brandon by Eubanks. When Brandon was young, and they were at a fair, he asked for a treat, twice. Eubanks pinched his skin in a tender area on the inside of his elbow and twisted it in a circle until Brandon fell to the ground, whimpering and crying. (36 RT 4501, 4518.) When his grandmother, Sally Armstrong, picked him up and comforted him, Eubanks said, "Put him down. He's my kid. I can do anything I want with him." (36 RT 4501.)

On another occasion, at a religious group for young children, when Brandon could not remember his Bible verse, Eubanks twisted his arm and said, "You say that verse, or I will take you out in the car, and you know what will happen." (36 RT 4501-4502.)

Eubanks hit Brandon when he was 3 ½ or 4 and gave him a black eye, and never showed remorse. (36 RT 4502.)

When Brandon was nine, he injured his eye and was in the hospital for a week. (36 RT 4507.) Eubanks went on her trip to Texas anyway. (36 RT 4508.) Eubanks called Brandon four days later. (36 RT 4510.)

Eubanks used profanity around her children every day. (36 RT 4510.) If the little boys came into the room while Eubanks was talking on the phone to Sally Armstrong, Sally overheard Eubanks say, "Get out of here, you little son-of-a-bitch'n bastard." (36 RT 4511.)

Because Sally Armstrong baby-sat Brandon when he was little while Eubanks worked, Eubanks was jealous that Brandon was so attached to Sally Armstrong. (36 RT 4522.) Eubanks told Armstrong that Armstrong could not see Brandon as much any more, because Brandon was too attached to her. (36 RT 4522-4523.) Eubanks told Sally Armstrong not to tell John Armstrong, because it would cause friction in the marriage, they might get a divorce, Eubanks would take Brandon away and they would never see him again, and Sally Armstrong would break John Armstrong's heart because he would lose Eubanks and Brandon. Sally Armstrong had friction with Eubanks up to the last two years of Brandon's life. (36 RT 4523.) Eubanks threatened not to let Brandon come and visit. (36 RT 4524.)

Sally Armstrong overheard Eubanks warn Brandon, "Not one word. . . . I mean it, Brandon, not one word about what goes on in this house, or you know what will happen." (36 RT 4527.)

Eubanks's sister, Michele Smith, related a phone conversation she had with Eubanks. At the time, Aaron was in "Pull-Up" training pants. Eubanks said one day she smelled something in the house, from the boys' room. Eubanks was an immaculate housekeeper. Between the bed that Aaron slept in and the wall Eubanks found training pants dirtied with feces that he had stuffed down there so she would not find them. (36 RT 4533-4534.) Eubanks was very angry at Aaron, so she held up the soiled pants, told Aaron to smell it, and then rubbed the pants in his face. (36 RT 4534.) Michele Smith got angry, so Eubanks said, "I didn't rub it in his face, I just meant I made him smell it." (36 RT 4535.)

Michele Smith testified that she spoke with Eubanks by telephone twice on the day of the murders. (36 RT 4535.) Eubanks cut off the first conversation by saying something to the effect of, Dodson's here with the police, and Eric's here. Michele Smith called her back later because Michele Smith was concerned. (36 RT 4537.) During that later conversation, Eubanks was complaining about men. (36 RT 4537-4538.) Michele Smith recalled that these conversations were on the day of the murders because she had talked to Eubanks the night before, when Eubanks had to pick up Brandon from the homecoming dance. (36 RT 4541-4542.) Michele Smith was not surprised that her phone bills do not reflect two calls on Sunday, October 26, except the call right after midnight Saturday night. (36 RT 4542-4543.) Her phone bills were often inaccurate. Also, Michele Smith had three phone lines at that time. (36 RT 4543.)

ARGUMENT

I.

EUBANKS JURY WAS DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND THEREFORE, CONSTITUTIONAL

A. Introduction

Eubanks's first four arguments are intertwined, all challenging the jury selection process. (AOB 25-97.) The parties estimated the entire trial would take about ten weeks. Therefore, the trial judge had the jury commissioner send out 7,000 summonses and conduct preliminary screening of the people who appeared in response to the summons by excusing people in accordance with the criteria set forth in Code of Civil Procedure 203. Historically, about five per cent of the people summoned responded to the summons. Eubanks was advised of these procedures and did not object.

Now, Eubanks argues that the jury commissioner exceeded his authority in excusing people, and that the jury commissioner's preliminary screening violated her right to a jury drawn from a representative cross-section of the community, to counsel, to be present at critical stages of the trial, to a public trial, and to "heightened reliability." (Arg. I, AOB 25-61.) Eubanks argues that because the summons provided an excuse for lacking sufficient knowledge of the English language, her right to a jury drawn from a representative cross-section of the community was violated because, allegedly, Hispanics tended to excuse themselves from the process. (Arg. II, AOB 62-84.) She further argues that the summons provision permitting excusal of prospective jurors with insufficient English language skills violated her rights to due process and equal protection. (Arg. III, AOB 84-97.) Finally, Eubanks argues that her due process and jury trial rights, and state statutory procedures, were violated because of the jury commissioner's preliminary screening and some communications between the trial court and the jury commissioner were not recorded. (Arg. IV, AOB 98-107.)

Respondent has a unified defense to these four contentions. Eubanks was aware that the jury commissioner would conduct the preliminary screening of people who responded to the summons pursuant to the criteria in Code of Civil Procedure section 203, and never objected or requested that a record be maintained of these preliminary procedures. Similarly, Eubanks was aware of the historically low response rate to summonses, and did not object. Thus, she has forfeited her objections to these procedures on appeal. This defense applies to all four arguments, and is developed in detail in Argument I.A., *post.*

Eubanks had a jury drawn from a representative cross-section of the community. In San Diego County, the jury commissioner uses the list of registered voters in the County of San Diego and the Department of Motor Vehicles ("DMV") list of licensed drivers and identification cardholders in the

County of San Diego as its source list for the selection of prospective jurors. (*Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1121–1123.) These lists are merged and the duplicates are purged. (*Ibid.*) This Court has held that such a list "'"shall be considered inclusive of a representative cross-section of the population" where it is properly nonduplicative.' [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 857.) The San Diego County jury-selection process produces a pool of prospective jurors that represent a cross-section of the population. As long as the further selections from this pool are fair and not discriminatory, there is no error in the juror-selection process.

The jury summons mailed in this case, set forth the criteria for being eligible or qualified for jury service pursuant to Code of Civil Procedure section 203, subdivision (a). The jury commissioner excused from the pool of potential jurors those people who were not eligible or qualified pursuant to Code of Civil Procedure section 203, subdivision (a). The selection process for obtaining the jury venire for this case was based on criteria that were neutral with respect to race, ethnicity, sex, and religion.

Where the selection process is based on neutral criteria, the defendant must identify some aspect of the manner in which those criteria were applied that was the probable cause of the disparity and constitutionally impermissible. Eubanks has not done so.

Eubanks perceives disparity because the jury panel that was ultimately selected was primarily Caucasian. Throughout her arguments, she sets forth numbers and percentages of Hispanics in the community who participated in the jury selection procedure to bolster her claims that her jury was not drawn from a representative cross-section of the community. Respondent has not responded to this aspect of Eubanks's arguments because the record does not contain any information about the racial makeup of the communities, due to Eubanks's

failure to object in the trial court.[14] Eubanks fails to meet her burden of demonstrating that some aspect of the manner in which the selection criteria was applied was constitutionally impermissible. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 858; *People v. Jackson* (1996) 13 Cal.4th 1164, 1194.)

The rest of this section responds to Eubanks's first argument, in which Eubanks contends that her Sixth Amendment rights to a jury drawn from a representative cross-section of the community, to counsel, to be present at critical stages of a trial, to a public trial, and her Eighth and Fourteenth Amendment rights were violated because the jury commissioner was permitted to time-qualify the prospective jurors before they were examined by counsel. Eubanks also alleges these Constitutional errors occurred because the County of San Diego did not force compliance with the summonses that were mailed out. (AOB 25-61.) Eubanks did not object to the jury selection procedures used in this case, and therefore, she forfeited the issues. In any event, the jury selection system used in this case was a fair and neutral system conforming with Constitutional and statutory requirements.

B. Although Eubanks Was Advised A Small Proportion Of The People Summoned Were Expected To Actually Appear And That The Jury Commissioner Would Initially Time-Qualify Those People Without Eubanks, The Court, And Counsel Present, Eubanks Did Not Object To These Procedures

Eubanks was well aware that the jury commissioner would conduct the initial pre-qualifying of the pool of potential jurors, and never objected to that procedure. The first set of pre-trial motions were argued on December 14, 1998. Eubanks made a motion for a "fair and impartial trial," asking the trial

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14. The summonses that were sent out did not request any ethnicity or race identification. Prospective jurors who responded to the summons did identify their ethnic or race background on the questionnaires they filled out, and those are contained in Volumes 7 through 50 of the Clerk's Transcript.

court to confer with and guide the jury commissioner not to assign any individual to the panel who expressed a preference to serve on this case, or to excuse any potential juror who expressed a reluctance to serve on the case; not to assign to the panel any potential jurors who had been excused from another criminal jury panel or who had finished service on another criminal jury panel; not to engage in discussions with potential jurors about the nature, facts or circumstances of the case and not to inquire of potential jurors whether or not they would like to serve on this case. (6 RT 641-642; 2 CT 87-94.) Eubanks's counsel submitted a declaration stating he was familiar with the system used by the North San Diego County jury commissioner in summoning prospective jurors for a death penalty trial, and requesting the trial court to provide guidance to the jury commissioner. (2 CT 94.) Thus, Eubanks was fully aware that the jury commissioner would have first contact with the individuals who would comprise the jury pool, and rather than objecting to this procedure, she sought to use it for her own benefit. The trial court indicated to the parties that it would rely on the limited exclusions authorized by Code of Civil Procedure section 203.[15/] (6 RT 642.)

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15. Code of Civil Procedure section 203:

(a) All persons are eligible and qualified to be prospective trial jurors, except the following:

(1) Persons who are not citizens of the United States.

(2) Persons who are less than 18 years of age.

(3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

(4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

While ruling on the motion regarding jury selection, the trial court described the limited role of the jury commissioner:

> When we have the commissioner talk about the length of the trial, et cetera, with the panel, the panel is not even going to be told if it's a civil or criminal case. There will be nothing, no information provided to the panel with regard to what case the jury is going to be sitting on, so you shouldn't have any concerns whatsoever about that. [¶] I do not allow the jury commissioner to discuss the case in any way. The only information the jury will be receiving with regard to what the case is about is from me and the attorneys, so I think we shouldn't need to concern ourselves with that issue.

(6 RT 650-651.)

The parties continued to discuss the scope and mechanics of voir dire of the prospective jurors. (6 RT 651-659.) Eubanks never raised any objection to the role of the jury commissioner. (6 RT 650-659.)

Two months later, during a defense motion to continue that was heard on March 1, 1999, the trial court noted that 7,000 summonses would be sent out for the jury panel. (8 RT 669-671.) Later in that day, while discussing the mechanics of jury selection, the court said it hoped to have at least 500 prospective jurors fill out the questionnaires. No party questioned the difference from 7,000 summonses to 500 prospective jurors actually filling out

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> (5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.
>
> (6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.
>
> (7) Persons who are serving as grand or trial jurors in any court of this state.
>
> (8) Persons who are the subject of conservatorship.
>
> (b) No person shall be excluded from eligibility for jury service in the State of California, for any reason other than those reasons provided by this section.

questionnaires. (8 RT 739.) There was no mention of the jury commissioner questioning the prospective jurors for hardships. (8 RT 737-739.)

On March 11, 1999, the court stated 7,000 summonses would be sent out six weeks before the trial date. (10 RT 835-836.) At that time, jury selection was scheduled to start on June 9, 1999. (10 RT 830.)

On May 6, 1999, the court informed the parties that the summonses had been sent, and noted that about 500 questionnaires would be used. (11 RT 869.) Again on May 26, 1999, the court said that 7,000 summonses were mailed, and the court had no idea how many people would actually show up on June 9, as directed, but that it could be more than 500. (12 RT 887.)

The most detailed discussion of the jury selection process occurred on May 26, 1999. Counsel for Eubanks wanted to voir dire fewer than 16 prospective jurors in the morning and 16 in the afternoon. (12 RT 886-887.) The court mentioned that it had been meeting with the jury commissioner. Eubanks did not object or request to be present. (12 RT 892.) The court agreed to voir dire 12 prospective jurors each half day. (12 RT 894.)

The court reiterated that the jury commissioner would see the pool of prospective jurors first and screen them for their ability to serve on a lengthy trial [16/] The jury commissioner would tell the pool of prospective jurors only the estimated time of the trial, without stating whether it was a criminal or civil trial or any other information. The jury commissioner would question the initial pool about financial hardship, not being paid by their employers or prepaid vacations, medical appointments that could not be changed, and full-time

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16. The term "pool" refers to the prospective jurors who were summoned for service. The term "venire" refers to the group of prospective jurors who appeared at court and were made available, after excuses and deferrals were granted by the jury commissioner, for assignment to a "panel." A "panel" is the group of jurors from that venire and sent to the courtroom for voir dire. (See *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3.)

school enrollment. (12 RT 896.) The court estimated it would take about one and one-half to two hours for the jury commissioner to time-qualify the pool. (12 RT 897.) Eubanks did not object during this description of the jury commissioner's actions. (12 RT 896-897.) The court explained after these hardship questions were handled by the jury commissioner, the commissioner would call the judge, defendant and attorneys to come to the jury assembly room for introductory remarks. (12 RT 897.) Eubanks had already stated her desire to be present for the introductory remarks, when the court would introduce counsel and the defendant to the prospective jurors and read the information to them. (12 RT 895-896.) After the introductory remarks were concluded, counsel, the defendant and the court would leave, and the clerk would hand out the questionnaires. After completing and turning in the questionnaires, each prospective juror would be given a date certain to return for voir dire, in groups of 12 for each half-day. (12 RT 895.) Aside from insisting on being present when the court introduced counsel to the prospective jurors and read the information to them, Eubanks did not request to be present at any other time, did not object to the jury commissioner time-qualifying the prospective jurors, and did not ask for more detailed information on the commissioner's actions, although the court offered it "if you're interested at all." (12 RT 896.)

On May 26, 1999, Eubanks came to court in a wheelchair and her counsel informed the court that Eubanks had injured her vertebra, was in constant pain and was not sleeping well. (12 RT 931-932.) The court ordered that Eubanks receive medical services as soon as possible. (12 RT 933-934.) Eubanks had lumbar disk surgery on May 29, 1999, and was not present at the next court hearing, on June 2, 1999. (14 RT 936.) The court continued the trial to permit sufficient time for Eubanks to recuperate. (14 RT 937.) The trial court said it had met with the jury commissioner and planned to have the

prospective jurors informed that the trial would be a ten-week trial starting on a date certain in July. Fearing a number of people would not be available in July, the court said it could pick up additional prospective jurors from regular jury pools on Mondays and Tuesdays, and have them time-qualified for the July trial date. The court was reluctant to send out a new set of summonses due to the cost, about $3500. (14 RT 939.)

The trial court explained, the plan was that if the pool of prospective jurors who showed up on June 9 in response to the summons were time-qualified on that day, the court would know how many additional prospective jurors would have to be added to have a venire of 300 available to fill out questionnaires in July. (14 RT 940.) Defense counsel stated, "The ugly of it is that [Eubanks] won't be present. That's a problem in a capital case." Defense counsel acknowledged that Eubanks would not be present for the time-qualifying of the jury, but specified that Eubanks and counsel planned to be present in the jury assembly room for introductions. The court explained that the introduction and subsequent questionnaires would not be done until July, with Eubanks present, as had been discussed on May 26, 1999. On June 9, the potential jurors who responded to the summonses would be time-qualified by the jury commissioner, then told to return in July, without knowing the name of the defendant or anything else about the case, other than its estimated length. (14 RT 941.) Defense counsel stated, "Okay. So I understand the step of introduction is not going to take place, the questionnaires will not be distributed at that point?" (14 RT 941-942.) The court confirmed that was correct. Defense counsel made no objection to this procedure as clarified. (14 RT 942.) After consultation with counsel, the court ordered that potential jurors would be told to return on July 21, 1999, to fill out the questionnaires, and the voir dire would start on July 27, 1999. (14 RT 944-945.)

On July 21, 1999, Eubanks was present in court with counsel. Three hundred and thirty time-qualified prospective jurors were scheduled to show up. (16 RT 965.) When the jury commissioner said the prospective jurors were ready, the court, counsel and Eubanks went to the jury assembly room. (16 RT 965, 970.)

The clerk swore the venire. (16 RT 971.) The court introduced Eubanks and counsel, read the information, and explained the process of filling out the questionnaire. (16 RT 971-973.) The court instructed the venire that if Eubanks were found guilty of murder with a special circumstance, the only options at the penalty phase would be death or life without parole, and that both punishments meant exactly what it said. The court instructed that Eubanks could not be convicted unless all 12 jurors found her guilty beyond a reasonable doubt. (16 RT 975.) The prospective jurors were told to fill out the questionnaires on their own, without any help. (16 RT 978.) The trial court, counsel and Eubanks left the jury room, leaving clerks to supervise while the prospective jurors filled out their questionnaires. (16 RT 977-978.)

A full reading of the record makes clear that Eubanks did not object to the time-qualifying of the prospective jurors by the jury commissioners. Eubanks's objection was only to being absent when the court introduced the parties, read the information and provided preliminary instructions to the venire. Time-qualifying of the prospective jurors by the commissioner was mentioned several times with no objection by Eubanks.[17] (6 RT 650-659; 12 RT 892, 896-897; 14 RT 939-942.)

Eubanks did insist on being present when the court read the information and made introductory remarks to the prospective jurors. (12 RT 895-896.)

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17. Six years later, during record correction proceedings, the trial court's "very distinct recollection" was that defense counsel agreed with this procedure. (45 RT 5053.) The court's recollection corroborates the contemporaneous record.

When discussing the changed circumstances due to Eubanks's medical condition, defense counsel noted "the ugly" of Eubanks not being present. (14 RT 941.) When defense counsel understood that the introductions and distribution of questionnaires would not occur until July, when Eubanks would be present, defense counsel was satisfied and made no objection. (14 RT 941-942.) The court confirmed that was correct. (14 RT 942.) Defense counsel did not object to this procedure as clarified. (14 RT 941-942.)

Similarly, Eubanks was advised several times of the small percentage of prospective jurors who typically showed up in response to a jury summons. The court stated several times that it was having 7,000 summonses mailed out in the hopes of having about 300 people show up for jury service. (8 RT 669-671, 739; 10 RT 835-836; 11 RT 869; 12 RT 887; 14 RT 940.) Eubanks never objected to or questioned the disparity between the number of summonses sent and the number of prospective jurors expected to show up. (*Ibid.*) Eubanks did not object when the trial court informed her that additional venire members would be added from the pools of prospective jury members who appeared every Monday and Tuesday at the courthouse. (14 RT 939-941.)

Eubanks has forfeited all of her arguments about the selection of jurors (Args. I, II, III and IV) by her failure to object to the jury selection procedures in the trial court. (See *People v. Ervin* (2000) 22 Cal.4th 48, 73; *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) Eubanks had many opportunities to make a clear, coherent objection that would have produced a clear record in the trial court. She failed to do so. In *People v. Basuta* (2001) 94 Cal.App.4th 370, the defendant objected before voir dire when the trial court said the prospective jurors would be time-qualified by the jury commissioner before being questioned by the court and counsel. (*Id.* at p. 393.) The defendant asked that the court have the jury commissioner maintain a record of the number of jurors in the pool, the number excused and the reason a prospective juror was excused.

(*People v. Basuta, supra*, 94 Cal.App.4th at pp. 393-394.) Here, Eubanks never objected to the jury commissioner pre-qualifying the venire and did not make a request for any information on the summonses that were sent out or the prospective jurors who were excused by the jury commissioner until six years after the trial.

In *Basuta*, moreover, the defense made a motion to strike the panel after voir dire commenced and before the jury was sworn, based on its claim that screening by the jury commissioner was improper. (*People v. Basuta, supra*, 94 Cal.App.4th at p. 394.) There was no information, however, regarding the screening by the jury commissioner. (*Id.* at p. 394.) The court of appeal found error because the jury commissioner failed to maintain a record of the hardship screening procedure, despite the defendant's request. (*Id.* at p. 395.) Here, Eubanks never made a contemporaneous request for the jury commissioner to keep records of the screening process.[18/]

The record in *Basuta* provides examples of the clear objections and requests that can be made by defendants who consider a jury selection procedure improper. No such objections or requests were made here. The single statement on which Eubanks relies does not support her claim. Defense counsel's statement about "the ugly of it" addressed only having the trial judge meet the prospective jurors without Eubanks. (14 RT 391-392.) It was not an objection to the screening of the prospective jurors by the jury commissioner, it was not an objection to any discretion being exercised by the jury commissioner, it was not a request for records of what the jury commissioner said, and it was not an objection to the procedure of sending out 7,000 summonses to obtain a venire of 300 persons. In short, Eubanks has forfeited all of her complaints in Arguments I, II, III and IV of her Opening Brief, because she failed to object in the trial court on the bases now argued on appeal.

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18. Nonetheless, some records do exist. (CT Vols. 55-59.)

(*People v. Ervin*, *supra*, 22 Cal.4th at p. 73; *People v. Holt*, *supra*, 15 Cal.4th at pp. 656-657.)

Forfeiture is not a mere technical error. Eubanks has forfeited these claims because there is no information in the record that supports her claims. Had Eubanks raised these arguments in the trial court, a record could have been made to either support or disprove her complaints. (*People v. Holt*, *supra*, 15 Cal.4th at p. 656, fn. 9; *People v. Mickey* (1991) 54 Cal.3d 612, 664 (trial court has no opportunity to weigh and consider challenge that is not stated at trial).) "The requirement of a contemporaneous and specific objection promotes the fair and correct resolution of a claim of error both at trial and on appeal, and thereby furthers the interests of reliability and finality." (*People v. Holt, supra*, at p. 657, quoting *Mickey* at p. 664.) Here, at trial, Eubanks agreed to the procedures to summon prospective jurors and did not object to the preliminary screening by the jury commissioner. Therefore, the record contains no factual basis to support her arguments.

C. Eubanks Cannot Challenge The Manner Of The Hardship Excusals Because The Jury Pool Was Chosen In An Impartial Manner And Represented A Fair Cross-Section Of The Community

Eubanks contends the jury commissioner's excusal of prospective jurors for discretionary reasons violated her Sixth Amendment right to a jury drawn from a representative cross-section of the community. This claim lacks merit because San Diego County draws its jury pools from a representative cross-section of the community. (*People v. Burgener, supra*, 29 Cal.4th at p. 857; *Roddy v. Superior Court, supra*, 151 Cal.App.4th 1115.) The excusals by the jury commissioner were based on neutral factors set by law. (Code Civ. Proc., § 203; Cal. Rules of Court., rule 860(d); *People v. Ramos* (1997) 15 Cal.4th 1133, 1156.) The jury pool was selected in a constitutionally permissible manner. Assuming arguendo there was any disparity in representation in the

jury pool or venire, any such disparity was not caused by a constitutionally impermissible selection procedure. Statistical under-representation of a cognizable group that results from neutral practices does not amount to "systematic exclusion" necessary to support a claim of an unrepresentative cross-section. There was no violation of the right to a jury drawn from a representative cross-representation of the community in this case.

The Sixth Amendment to the United States Constitution and article I, section 16 of the California Constitution both guarantee an accused the right to trial by a jury drawn from a representative cross-section of the community. (*People v. Bell, supra*, 49 Cal.3d at p. 525, fn. 10.) "That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. [Citation.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088.) In challenging a jury venire, the defendant must first establish a prima facie violation of the fair cross-section right. (*People v. Bell, supra,* at p. 525; *People v. Horton, supra,* at p. 1088.)

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

(*Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 58 L.Ed.2d 579]; *People v. Bell, supra,* 49 Cal.3d at p. 525.)

Eubanks fails to make a prima facie showing of a fair cross section violation. The record does not support her claim. Moreover, it has already been judicially determined that the jury-selection process in San Diego County meets constitutional requirements. In San Diego County, the jury commissioner uses the list of registered voters in the County of San Diego and the Department of Motor Vehicles ("DMV") list of licensed drivers and identification

cardholders in the County of San Diego as its source list for the selection of prospective jurors. (*Roddy v. Superior Court*, *supra*, 151 Cal.App.4th at pp. 1121-1123.) These lists are merged and the duplicates are purged. (*Roddy v. Superior Court*, *supra*, 151 Cal.App.4th at pp. 1121-1123..) This Court has held that such a list "'"shall be considered inclusive of a representative cross-section of the population' 'where it is properly nonduplicative.' [Citation.]" (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) The San Diego County jury-selection process includes a representative cross-section of the population.

A defendant must show that an under-representation of a cognizable group in the venire is the result of an improper feature of the jury selection process. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) Statistical disparity alone will not establish under-representation due to systematic exclusion. (*People v. Anderson* (2001) 25 Cal.4th 543, 566; *People v. Horton*, *supra*, 11 Cal.4th 1068, 1088; *People v. Howard* (1992) 1 Cal.4th 1132, 1160.) If statistical disparity alone were sufficient, the Supreme Court would not have required the third prong of the constitutional inquiry: the requirement of systematic exclusion. (*Duren v. Missouri, supra*, 439 U.S. at p. 364.)

When the selection criteria are neutral with respect to race, ethnicity, sex, and religion, the defendant must identify some aspect of the manner in which those criteria are being applied that is the probable cause of the disparity and constitutionally impermissible. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 858; *People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) Speculation is not sufficient. (*People v. Burgener, supra*, at p. 858.) Evidence that the disparity of representation is a product of chance or has endured for some time is not sufficient. (*Ibid.*)

Here, the jury commissioner did not excuse potential jurors in a constitutionally impermissible manner. The commissioner's excusals were all based on neutral factors. The excusals were based on the laws of this State.

D. The Jury Commissioner Had The Discretion To Excuse People Who Were Not Qualified To Be Jurors

California statutory law and Rules of Court permit jury commissioners to excuse from the prospective jury pool those who are not eligible to serve on a jury and those for whom jury service would be an undue hardship. Section 218 of the Code of Civil Procedure requires the jury commissioner to hear excuses in accordance with standards prescribed by the Judicial Council. It is within the discretion of the commissioner to accept a hardship excuse without a prospective juror appearing before him or her. Code of Civil Procedure section 196 authorizes the jury commissioner or the court to inquire as to the qualifications of the persons on the master list or source list who are summoned for jury service. Code of Civil Procedure section 194, subdivision (d), defines an "excused juror" as one "excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and policies." Code of Civil Procedure section 203, subdivision (a), specifies who is not eligible or qualified to sit as a juror.[19/]

In *People v. Ramos*, the defendant claimed under-representation by Hispanics in Orange County in 1985 through 1986. An extensive evidentiary hearing was held on the jury selection process. In Orange County, a master list was created from registered voters and Department of Motor Vehicles licensees. The jury commissioner sent the people on the master list both a summons and a packet of material to qualify the potential jurors. (*People v. Ramos, supra*, 15 Cal.4th at p. 1152.) The jury commissioner and his staff reviewed the

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19. See footnote 15, *ante*.

responses to determine qualifications as well as to evaluate requests for exemptions, excusals, and deferrals. This Court found the criteria for qualifications, exemptions, excusals and deferrals, based on Code of Civil Procedure sections 203 and 204, and on the California Standards for Judicial Administration, were neutral with respect to race, ethnicity and national origin. (*People v. Ramos*, *supra*, 15 Cal.4th at pp. 1152, 1156.) Thus, this Court found the application of the Code of Civil Procedure qualifications, exemptions, and excusals by the jury commissioner and his staff to be proper.

As Eubanks acknowledges, the court of appeal has found no error in a jury commissioner conducting the hardship screening. (*People v. Basuta*, *supra*, 94 Cal.App.4th at pp. 393-396.) That court relied on the language of the statutes and Rules of Court, which contemplate some screening by the jury commissioner, as well as this Court's holding in *People v. Ervin*, *supra*, 22 Cal.4th at pages 72, 74, that hardship screening of the jury pool is not a crucial stage of the trial and a defendant therefore has no absolute right to be present. (*People v. Basuta, supra,* at p. 395.)

Further, this Court has found no error when a trial court releases all those prospective jurors who claim a hardship, instead of questioning the prospective jurors and exercising discretion in permitting excusals. In *Burgener*, the trial court told the prospective jurors that the case potentially involved the death penalty and could last six months. The court asked the prospective jurors whether the time involved would create a hardship and, if the prospective juror said it would, the court excused him without further inquiry. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 861.) The defendant objected to these summary excusals, but the trial court overruled his objections. On appeal, this Court found it had "repeatedly rejected any claim that a trial court's policy of freely excusing prospective jurors for financial hardship deprives a defendant of his right to a fair and impartial jury." (*Id.* at p. 862, citing *People v. Medina*

(1995) 11 Cal.4th 694, 747; *People v. Howard*, *supra*, 1 Cal.4th at p. 1160 ["defendant cannot demonstrate systematic exclusion based upon the even-handed application of a neutral criterion, such as hardship"].) This Court further noted that "'once the preliminary screening process had concluded, the court and counsel then conducted the usual voir dire examination of the remaining prospective jurors in selecting the actual jurors who would serve on defendant's jury.'" (*People v. Burgener*, *supra*, 29 Cal.4th at p. 862, quoting *People v. Ervin*, *supra*, 22 Cal.4th at p. 73.) Eubanks complains about prospective jurors engaging in "self-excusing," the jury commissioner improperly exercising his discretion, purportedly, by excusing prospective jurors for reasons that are permitted by the law, rules, and policies, but were not in the four categories of financial hardship identified by the trial court: time not paid by employer; medical appointment; prepaid vacation; or full-time student. (AOB 30-31.) Although this may not be the best practice, this court has found no error in excusing prospective jurors simply on the jurors' own say-so. (*Id.* at p. 862.) Prospective jurors understood they were to be truthful in providing information regarding excuses. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1177.) With the number of prospective jurors a trial court has to screen, it can be time-consuming to require extensive questioning of every prospective juror who asserts a ground for excusal. When the jury pool is selected in a manner to ensure a fair representation of the community, and when the excusal system is neutral and impartial, there is no error. Due process is satisfied when a defendant has a jury fairly chosen from a cross-section of the community, even though the court or the commissioner may have granted excusals to all who requested them. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 862.)

Eubanks asserts that of the 481 prospective jurors who were excused by the jury commissioner on June 9, 1999, ten neglected to sign their affidavits, and 38 failed to check a box on the form signifying the reason they could not

serve, but did write an excuse on the face of the summons. (AOB 29-30.) Here, there is an extensive, though not perfect, record of the jurors who were screened by the jury commissioner. (See CT Vols. 55-59.) All of the summonses had the name of the person printed on the front page. Of those who did not sign their affidavits, four wrote their name on the front page of the summons. (55 CT 12162-12163, 12198-12199, 12231-12232, 12304-12305.) The summons at 56 CT 12304-12305 does have a mark beneath the certification that may be a scrawled signature. (56 CT 12305.) Of those that had "no box checked" on the affidavit on the back, most had a valid excuse written on the front of the affidavit. Eubanks acknowledges this and claims that only five affidavits had no information at all: 55 CT 12170, 12190, 12198; 56 CT 12304, 12335. (AOB 31.) But the summons at 55 CT 12189-12190 has the financial box checked and is signed. The summons at 55 CT 12304-12305 has the date "July 24, 1999," with initials written on it, suggesting that the juror deferred her jury service to another date or was told to return for this case. This is also the summons with a scrawled mark under the certification. (55 CT 12305.) Thus, it appears there may be three summons for which the reason for an excusal cannot be determined. Section 218 of the Code of Civil Procedure requires all excuses be in writing and signed by the prospective juror, so the jury commissioner may have erred in failing to ensure strict compliance with this statutory requirement. These are technical violations of the state statute, minimal in number and in nature.

Eubanks has not shown any prejudice as a result of this error of state law to which the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, applies. That is, Eubanks would have to show that there is a reasonable likelihood she would have received a different result if these prospective jurors would have signed their names or checked a box on the forms signifying the reason for their

excusal. This she cannot do. As this Court stated in *People v. Ervin, supra,* 22 Cal.4th at page 73,

> "While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that *criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced.*"

(*People v. Ervin, supra,* 22 Cal.4th at page 7, emphasis added.)

For the other prospective jurors whom Eubanks claims the jury commissioner improperly exercised her discretion to excuse (AOB 30-31), each was eligible to be excused by the jury commissioner under the applicable "statute, state or local court rules, and policies." (See Code Civ. Proc., § 194, subd. (d).) Persons who have difficulty with the English language are not eligible to be jurors. (Code Civ. Proc., § 203, subd. (a)(6); see 55 CT 12261; 56 CT 12284.) If a person must care for a child – has day care problems – the person is eligible for a hardship excusal under California Rules of Court, rule 860(d). (See 55 CT 12202, 12222, 12245; 56 CT 12299.) Further, the person whose summons is at 55 CT 12202-12203 had financial hardship problems in addition to her child care need. A person with impairments that would make service potentially harmful, such as heart problems, chronic fatigue, or memory problems, may be excused under California Rules of Court, rule 860(d). (See 55 CT 12165; 56 CT 12288; 57 CT 12690.) Eubanks complains, in addition, that the jury commissioner excused a person who had been called for jury service within the two years before trial. (See 55 CT 12197.) That was the policy of San Diego County, and thus falls within the policies for which a jury commissioner could excuse a prospective juror for hardship. (*People v. Roddy, supra*, 151 Cal.App.4th at p. 1129.)

Eubanks complains that of the jurors who told the jury commissioner that jury service on a ten-week trial would be a financial hardship to them, most

of the jurors provided insufficient "proof" of their hardship. (AOB 50-51.) Each person's statement to the jury commissioner provided evidence of this hardship. The law requires no other proof. (See Code Civ. Proc., § 194; Cal. Rules of Court, rule 860.) Further, the law permits deferral; it could well be that many of these jurors were sent to other courtrooms with shorter trials.

Contrary to Eubanks's contention, California law does not require that prospective jurors sign an affidavit or check a box on the affidavit that identifies a particular grounds for excusal. (See AOB 51-53.) Code of Civil Procedure section 196, subdivision (a), provides:

> "The jury commissioner or the court shall inquire as to the qualifications of persons . . . . The commissioner or the court may require any person to answer, under oath, orally or in written form, all questions as may be addressed to that person, regarding that person's qualifications and ability to serve as a prospective trial juror."

Code of Civil Procedure section 218 requires that excuses be in writing and signed by the summoned person, but it does not contain a requirement that the writing be under penalty of perjury. The written summons / affidavit is an administrative convenience provided by San Diego County. To accept affidavits without a box checked is not a constitutionally impermissible factor in jury selection, and there is no evidence that these failures were a selection factor used by the County that caused the under-representation in the venire of a cognizable group.

Thus, as to the three or four persons with no written record of the reason for their excusals, there is no way to determine if there was a state law error because Eubanks failed to request a record be made of the pre-qualification by the jury commissioner. (*People v. Basuta*, *supra*, 94 Cal.App.4th at p. 396.) The lack of a record is not evidence that the excusal was based on a constitutionally impermissible factor that caused a significant under-representation by a cognizable class. There is no evidence or suggestion

that the five jurors who did not leave a written record belonged to a cognizable class that was under-represented in the venire.[20/]

Finally, Eubanks asserts Constitutional error because about ten percent of the prospective jurors who were pre-qualified failed to return on July 21, 1999. (AOB 53-56.) But once the court has set up a fair and impartial procedure to select jurors from a representative cross-section of the community, the court has no duty to adopt other measures to increase the representation by any particular group. (*People v. Ochoa* (2001) 26 Cal.4th 398, 427-428.) Indeed, for the court to affirmatively seek to boost the attendance of a particular group at one trial could have an adverse effect on that group's representation at another trial. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 861 [prohibiting courts from making race-conscious assignments].) Again, Eubanks has not demonstrated any portion of the *Duren* test, that is, she has not shown that the court used a systematic selection system that deliberately caused the under-representation of a distinctive group in the venire at her trial. (See *Duren v. Missouri*, *supra*, 439 U.S. at p. 364.) Eubanks has not shown constitutionally impermissible jury selection.

E. There Is No Other Constitutional Infirmity

Eubanks has made other claims of constitutional set out the claims of constitutional error in the jury selection process without citation either to the record or to relevant legal authority. Assuming arguendo these claims were not forfeited, no constitutional error occurred. This Court has already held that hardship screening of the jury pool is not a crucial stage of the trial and a

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20. If Eubanks's method of characterizing people based on their names was used, and even looking at all five alledged errors, then the people without a written record of their excuse would be classified as non-Hispanic: B. Harris (55 CT 12170); J. Jones (55 CT 12190); S. Kaufman (55 CT 12198); T. Randall (56 CT 12304); M. Skiano (56 CT 12335).

defendant therefore has no absolute right to be present. (*People v. Ervin, supra*, 22 Cal.4th at pp. 72, 74; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526 [105 S.Ct. 1482, 84 L.Ed.2d 486] (no constitutional right to be present at every interaction between a judge and a juror, and no constitutional right to have a court reporter transcribe every such communication).) Contrary to Eubanks's claim, there is no evidence that the hardship screening was held in private and that the public were excluded in any way. There was no violation of Eubanks's right to due process by a procedure that ensured a fair cross-section of the population be summoned, that used neutral factors set by law as the basis of excusals, and that Eubanks never questioned or objected to at the time it occurred. There was no Constitutional error in the selection of Eubanks's jury.

F. There Was No Prejudicial Error

Assuming arguendo error occurred and it was not forfeited, any such error was harmless. An error in excusing a prospective juror for reasons unrelated to the jurors' views on imposition of the death penalty does not require reversal. "[T]he general rule [is] that an erroneous exclusion of a juror for cause provides no basis for overturning a judgment." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 148.) Eubanks has a right to jurors who are qualified and competent, not to any particular juror. (*Ibid.*; *People v. Holt, supra*, Cal.4th at p. 656.) Eubanks does not, and cannot, assert that, as a result of the screening by the jury commissioner, any incompetent, unqualified or biased juror was seated or that, as a result of the jury commissioner's excusals, she was tried before a jury that was not fair and impartial. There was no prejudice to Eubanks. (*Peopole v. Holt, supra*, at p. 656.)

Eubanks argues throughout her four arguments about the jury selection process that the errors were structural, requiring reversal per se, relying on *People v. Stewart* (2004) 33 Cal.4th 425, 454; *People v. Heard* (2003) 31

Cal.4th 946; *People v. Cash* (2002) 28 Cal.4th 703; and *People v. Harris* (1992) 10 Cal.App.4th 672, 688. (AOB 59-60.) In *Harris*, the defendant's right to a public trial was violated because counsel exercised their peremptory challenges in chambers, with the public excluded. There is no evidence in this case that the public was ever excluded from the jury selection process. Therefore, the *Harris* case provides no support for Eubanks.

Stewart, *Heard*, and *Cash* were all capital cases in which the penalty phase, only, was reversed for error in excusing jurors who would find it very difficult - but not impossible – to impose the death penalty. This Court was obliged to reverse the penalty phase judgments under *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]. As this Court explained, because the California death penalty sentencing process contemplates that jurors will take into account their own values in evaluating the aggravating and mitigating factors, those jurors with conscientious opinions or beliefs generally against the death penalty are different from those jurors whose beliefs substantially impair their ability to follow the law at all. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) Being predisposed to assign greater than average weight to mitigating factors is not the same as not being able to engage in the deliberation process at all. (*Id.* at pp. 446-447.)

The *Steward*, *Heard*, and *Case* holdings are not applicable to this case. Here potential jurors were excused not for their opinions but for having a native language other than English, heart problems, chronic fatigue, or memory problems. A wrongful excusal of a prospective juror who was reluctant but willing to impose death could have an actual impact on the outcome of a penalty phase determination, whereas a wrongful excusal of someone who might have insufficient memory to remember the facts through deliberation could only improve the likelihood of a just outcome. The *Witt* basis for wrongful excusals is qualitatively different from the excusals at issue here,

which are not based on beliefs about the death penalty. The reasons for excusal here were all authorized by statute. (Code Civ. Proc., § 203.) Further, the excusals that Eubanks now complains of all occurred before the prospective jurors were told this was a capital case or were given questionnaires. The estimated length of the trial was the only information given to the preliminary jury pool by the jury commissioner. (60 CT 13070.) Those who did not respond to the summons did not even have that basic information. Eubanks's suggestion that those who were excused by the jury commissioner or by self-selection may have been more opposed to the death penalty is purely speculation and without basis in fact.

Moreover, although the facts here are substantially distinguishable from the facts in *Stewart*, *Heard*, and *Cash*, it should also be noted that the *Witt* rule of reversal per se was decided before the High Court's decision in *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302]. In *Fulminante*, the United States Supreme Court refined its jurisprudence on harmful error and per se reversals by ruling that only "structural" error, and not trial error, requires per se reversal. The structural errors identified in *Fulminante* are: (i) "total deprivation of the right to counsel at trial"; (ii) trial by a "judge who was not impartial"; (iii) "unlawful exclusion of members of the defendant's race from the grand jury"; (iv) denial of the right to self-representation at trial; and (v) denial of the right to a public trial. (*Id.* at pp. 309-310.) The Supreme Court has not identified any additional structural errors since 1991. The United States Supreme Court has not revisited the standard for reversals for *Witt* error since deciding *Fulminante*.

Additionally, as this Court found in *Stewart*, even in the case of a wrongful excusal of a prospective juror based on that person's deeply held beliefs about the death penalty, only the penalty phase will be reversed. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 455.) In short, assuming arguendo error

occurred, and assuming arguendo that it was preserved, there is no basis for reversal of the judgment in this case.

II.

NOTHING IN THE SUMMONS OR THE SELECTION OF THE VENIRE VIOLATED EUBANKS'S SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

Eubanks contends that the summons mailed to prospective jurors violated her Sixth Amendment right to a jury drawn from a representative cross-section of the community because the summons informed the recipients that persons who did not possess knowledge of the English language could be excused from jury service, and also asked for their native language. (AOB 62-84.) Eubanks forfeited this claim by failing to raise it in the trial court. In any event, this contention lacks merit. The ability to speak English is a necessary and neutral factor that does not create a forbidden, systematic exclusion of any cognizable group. (*People v. Ochoa, supra*, 26 Cal.4th at pp. 427-428, disapproved on another ground by *Ring v. Arizona* (2002) 536 U.S. 584, 603 [122 S.Ct. 2428, 153 L.Ed.2d 556]; see also Code of Civ. Proc., § 203, subd. (a)(6).) Asking for the prospective juror's native language does not transform this neutral factor into a systematic exclusion of any cognizable group. The claims should therefore be denied.

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 of the United States Constitution and by article I, section 16 of the California Constitution. (*People v. Burgener, supra*, 29 Cal.4th 833; *People v. Ramos, supra*, 15 Cal.4th at p. 1154; *People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) The right to a jury drawn from a fair cross-section of the community

does not include the right to a jury that reflects the racial composition of the community. (*People v. Crittenden* (1994) 9 Cal.4th 83, 119-120.)

To establish a *prima facie* violation of the fair cross-section requirement, a defendant must show: (1) that the group excluded was "distinctive"; (2) representation of the group in the venires is not fair and reasonable in relation to community; and (3) under-representation is due to systematic exclusion. (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364; *People v. Anderson, supra*, 25 Cal.4th at p. 566; *People v. Ramos*, *supra*, 15 Cal.4th at p. 1154.)

Additionally, defendant must show that the disparity is the result of an improper feature of the jury selection process. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) Statistical disparity alone will not establish under-representation due to systematic exclusion. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 566; *People v. Horton* (1995) 11 Cal.4th 1068, 1088; *People v. Howard* (1992) 1 Cal.4th 1132, 1160.) If statistical disparity alone were sufficient, the Supreme Court would not have required the third prong of the constitutional inquiry: the requirement of systematic exclusion. (*Duren v. Missouri, supra*, 439 U.S. at p. 364.)

When the selection criteria are neutral with respect to race, ethnicity, sex, and religion, the defendant must identify some aspect of the manner in which those criteria are being applied that is the probable cause of the disparity, and constitutionally impermissible. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 858; *People v. Jackson supra*, 13 Cal.4th 1164, 1194.) Speculation is not sufficient. (*Id.* at p. 858.) Evidence that the disparity of representation is a product of chance or has endured for some time is not sufficient. (*Ibid.*)

As long as the county's jury selection process is neutral, the county is not obligated to change its process to attract a more even representation of groups. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) In *People v. Ochoa*, *supra*, 26 Cal.4th at pages 427-428, it was argued that Hispanics failed to register to

vote in proportion to their share of the population, and thus a master list of prospective jurors based in part on voter registration lists resulted in a statistical under-representation of Hispanics on jury venires. This Court held, however, that this self-exclusion was not caused by the state. As long as the government uses criteria that are neutral with respect to the under-represented group, the government is not required to adopt other measures to improve further the group's representation. (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 427-428.)

Indeed, changing the criteria or taking additional steps to ensure more diversity on jury panels can cause more mischief than it prevents. The government would be treating groups disparately if it changed a neutral process for the purpose of attracting more members of cognizable groups to the jury venire. In *Burgener,* for example, testimony at an evidentiary hearing on the jury selection process in Riverside County revealed that on some days, the jury services office received requests from courtrooms to send up Hispanic or African-American prospective jurors who were present in the jury room to supplement nondiverse panels assigned to those courtrooms. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 858.) Accommodating that request would reduce the number of Hispanic or African-American prospective jurors available for other courtrooms. This Court found that practice of race-based courtroom assignments to be objectionable, and exercised its supervisory power to prohibit that practice in the future. (*Id.* at p. 861.) Seeking out additional prospective jurors of cognizable classes is disparate treatment of members of those groups, and it destroys the random nature of the selection process. (*Ibid.*)

In this case, the summons mailed to prospective jurors included a statement that people who lacked sufficient knowledge of the English language would be excused from jury service. California law forbids those who lack sufficient knowledge of the English language from being a juror. (Code of Civ. Proc., § 203, subd. (a)(6).) Eubanks contends that because the summons also

asked the recipients to state their native language, this form as a whole acted to exclude Hispanics. The problems with Eubanks's argument are many. First and foremost is the fact that Eubanks forfeited this claim because she never objected at trial that the jury venire did not reflect a representative cross-section of the community, and she never asked that records be maintained of the summonses that were sent out and the responses thereto. (*People v. Ervin, supra,* 22 Cal.4th at p. 73; *People v. Holt*, *supra*, 15 Cal.4th at pp. 656-657; see Arg. I.A., above.) Due to Eubanks's failure to object in the trial court, records of the summons and responses to those summons were not maintained. Based on the absence of an objection at trial, Eubanks's claim has been forfeited.

In support of this appeal, Eubanks has requested that the Court take judicial notice of census figures for the North County Judicial District for San Diego County. (See AOB 73-74.) Respondent objects to this request for judicial notice. Because this material was not presented to the trial court, this Court should not consider it for the first time in this appeal. (*People v. Ramos*, *supra*, 15 Cal.4th at 1155, fn. 2 (rejecting request for judicial notice of census data because the data were not presented at trial and are unclear).) Moreover, without the fact-finding that would have occurred in response to a properly noticed motion, it is not possible to evaluate the numbers presented in this appeal by Eubanks: Had Eubanks presented this information to the trial court, it could have been adequately addressed and verified for accuracy.

Despite Eubanks's failure to create an adequate record, the facts are sufficient to show that there was no systematic exclusion of any cognizable group. The contested selection criterion – being possessed of sufficient knowledge of the English language – is completely neutral with respect to ethnicity, race, sex or religion: it is the basic ability to understand English, the language in which the trial is conducted. (See Code Civ. Proc., § 203, subd. (a)(6) [persons who are not possessed of sufficient knowledge of the English

language are not eligible and qualified to be jurors].) The available facts, while minimal, show that this exclusion operated neutrally. Among the people who responded to the summons on June 9, 1999, the jury commissioner excused two prospective jurors due to language difficulties. One was Hispanic and one was Asian. (55 CT 12262; 56 CT 12284; see AOB 66 & fn. 6.) The language requirement did not exclude only Spanish speakers, but operated as a neutral factor without regard to ethnicity.

If citizens of any ethnic decent choose not to master the English language sufficiently to comprehend a trial, then the State is not responsible for this self-exclusion. (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 427-428.) Every citizen has the opportunity to learn to speak and comprehend English, and the government is not required to adopt other measures to improve further non-English language speakers representation. (*Id.* at pp. 427-428.)

The state law requirement for sufficient possession of the English language is a neutral criterion for excusals within the pool that was fairly chosen. (*People v. Ramos*, *supra*, 15 Cal.4th at pp. 1152, 1156.) The choice to learn English is open to all citizens, regardless of race, ethnicity, or gender. With respect to jury service, the San Diego County does not have any obligation to prod more citizens to learn English. The jury selection system here was fair and neutral.

Eubanks complains that the jury commissioner was improperly vested with the discretion to screen out jurors on this ground because the term "sufficient English" is too vague to apply with precision. Eubanks further suggests this "vague" requirement of "sufficient English," combined with the lack of enforcement of summonses in general, gave Hispanics, in particular, "the easiest of excuses" to avoid jury service. (AOB 81.) Assuming arguendo there was a disparity caused by the vagueness of the "sufficient English" requirement, speculation on the cause of a disparity can never substitute for

evidence of a causal relationship and therefore can never provide a basis for reversal. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1157 ("errant speculation of improper manipulation" in merging of voter registration list and DMV list does not meet the defendant's burden).)

Moreover, the requirement to possess sufficient English is necessarily self-enforcing. If a person, of whatever background, believed she or he did not understand English sufficiently well enough to understand a trial, then that is not the person who would be an adequate juror for a case of this length. Further, the courts and the commissioners are not in a position to cross-examine all the prospective jurors who do not speak English well. Jurors are requested to sign their affidavits seeking excusal under penalty of perjury. The courts accept the given word of the citizens. And the County does not have an obligation to adopt additional measures to improve the representation on jury venires of those who do not speak English well. (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 427-428.)

Assuming arguendo error occurred, and assuming arguendo that Eubanks did not forfeit this claim, there was no prejudice. The jury panel was chosen by fair and impartial methods. The requirement that each prospective juror know sufficient English to understand the trial proceedings is necessary. Eubanks does not, and cannot, assert that, as a result of screening out prospective jurors who did not know English that any incompetent, unqualified or biased juror was seated or that, as a result of the jury commissioner's excusals, she was tried before a jury that was not fair and impartial. There was no possible prejudice to Eubanks. (*People v. Holt*, *supra*, Cal.4th at p. 656.)

III.

CALIFORNIA'S REQUIREMENT THAT JURORS POSSESS SUFFICIENT KNOWLEDGE OF THE ENGLISH LANGUAGE IS NOT VAGUE AND DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION

Eubanks contends that the law that prohibits persons sitting on a jury unless they possess sufficient English violates her due process and equal protection rights, is unconstitutionally vague, and impermissibly discriminates against those citizens who do not speak English. (AOB 84-97.) Eubanks forfeited this claim by failing to raise it in the trial court. In any event, this claim lacks merit because knowledge of the language in which the trial is conducted is essential to being an informed and responsible juror. There is no equal protection violation, because citizens who do not speak English are not similarly situated with those who suffer from immutable disabilities. Her claim that the requirement to speak sufficient English is a systematic exclusionary factor that causes an under-representation of citizens of Hispanic background, or of any other cognizable group of citizens, is founded purely on speculation.

As set forth above, Eubanks forfeited this claim because she never objected at trial to the requirement that jurors possess sufficient English or to the jury commissioner's excusal of prospective jurors on this ground, and she never requested that records be kept of the prospective jurors who were excused because they did not possess sufficient English. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 73; *People v. Holt*, *supra*, 15 Cal.4th at pp. 656-657.) Her claim, in any event, lacks merit.

Eubanks characterizes her claim as an attack on the jury commissioner's exercise of discretion in excusing prospective jurors who did not possess sufficient English. It is California law, however, that persons are not eligible or qualified to be jurors unless they possess sufficient knowledge of the English language. (Code of Civ. Proc., § 203, subd. (a)(6).) The State has a compelling

reason to require its citizens who sit on juries to possess sufficient knowledge of the English language, for our jury trials are conducted entirely in English, with translation into English provided for those witnesses who do not speak English. (Cf. *Duren v. Missouri, supra*, 439 U.S. at p. 368 [If this showing is made, the burden then shifts to the state to show that attainment of a fair cross-section is "incompatible with a significant state interest"].) It would indeed shock the conscience, or violate due process, to permit as jurors persons who could not comprehend the facts and law that are presented to jurors in English.

Eubanks argues that "publication to potential jurors of this vague standard reasonably explains the low Hispanic turnout because it provided an excuse for Hispanic people to ignore the summons." (AOB 85.) This contention is based on speculation, and thus must be ignored. (*People v. Ramos, supra*, 15 Cal.4th at p. 1157.) The record shows that the lack of English language skills excluded one person who was a native Japanese speaker and one person who was a native Spanish speaker. The requirement excluded non-English speakers of different backgrounds, not just of Hispanic backgrounds. However, Eubanks ignores the person excluded because they were a Japanese speaker and instead focuses solely on the excluded Spanish speaker. (See AOB 66, fn.6, 97.) Further, in addition to understanding English, one must be a citizen to be a juror. (Code of Civ. Proc., § 203, subd. (a)(1).) It is more reasonable than not to assume that citizens will speak English. Eubanks's idea, that citizens of Hispanic descent are less likely to speak and comprehend English than other citizens seems to be the sort of ethnicity-based discrimination that the Constitution abjures. Certainly, there is no evidence to support this speculation.

The requirement of knowing the English language is a neutral factor. Contrary, to Eubanks's discriminatory implications, the ability to know and

learn English is equally open to all citizens of this country without regard to race, ethnicity, gender, or other immutable characteristic. And this is the answer to Eubanks's claim of violation of equal protection, which she bases on the law's proviso that "no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability to communicate . . . ." (Code of Civ. Proc., § 203, subd. (a)(6).) The disability of loss of sight or hearing is generally immutable. If the loss of hearing is ameliorated so that a person can hear again, he is no longer considered to be deaf. But the lack of ability to speak English can always be changed. Citizens who wish to participate in the jury system and who do not understand English have the ability to learn the language. Speaking or not speaking English is a mutable characteristic, and thus those who do not speak English are not similarly situated with those without the ability to see or to hear. The touchstone of equal protection analysis is to compare those who are similarly situated. Those with the mutable characteristic of not speaking English are not similarly situated with those with the immutable characteristic of blindness or deafness. It is rational for the State to differentiate between the two groups, and to provide enabling assistance to those who are deaf or blind, but not to provide enabling assistance to those citizens who do not posses sufficient knowledge of English.

The provision in Code of Civil Procedure section 203 requiring "sufficient knowledge of English" is not unconstitutionally void. Relying on *Kolender v. Lawson* (1983) 461 U.S. 352, 357 [103 S.Ct. 1855, 75 L.Ed.2d 903) and *People v. Heitzman* (1994) 9 Cal.4th 189, 199, Eubanks claims the statute is unconstitutionally vague on its face and as applied. (AOB 96.) These cases address whether a criminal statute is sufficiently definite to provide a standard of conduct for those who activities are proscribed. (*People v. Heitzman, supra*, 9 Cal.4th at p. 199.) They have no applicability to the statute addressing the requirements to be a juror. Moreover, the statute was

sufficiently definite. Certainly, the people summoned to jury service were ordinary people. It was these ordinary people, not the jury commissioner, who determined if they had a level of English proficiency sufficient to sit as a juror. Self-selection renders the statute sufficiently definite. Self-selection avoids arbitrary or discriminatory exclusion by court personnel. Self-selection must occur among prospective jurors unless the Legislature were to establish an objective, measurable standard for the English language abilities of jurors. Such a system seems unworkable. For example, if the Legislature required that a juror have the proficiency of a fifth-grade student, the jury commissioner could administer an English language test to each prospective juror who responded to a summons. That would be cumbersome and would further discourage prospective jurors from participating in the process.

Similarly, if trial courts uniformly required written excuses from employers before excusing a prospective juror for hardship, this extra burden would further slow down the judicial process, would cause extra time, travel and burden for prospective jurors and their employers and would further reduce the pool of jurors. The state has a significant interest in keeping jury selection procedures adequately stream-lined to encourage maximum participation in the jury system that is so reliant on the willing participation of its citizens. The state must, and should, presume the good faith of persons summoned to jury service.

Finally, even assuming arguendo that Eubanks could show a disparate effect in the venire based on the questions regarding native language on the summonses, and assuming arguendo that she has not forfeited her claim by failing to object and to make a record in the trial court, if the jury commissioner did indiscriminately grant excuses based on the self-selecting evaluation of English language skills, Eubanks's claim of a error would still fail because that manner of granting excuses was neutral. A neutral procedure, even if it has

some incidental disproportionate effect, will not support a claim that a venire is improperly constituted. (*People v. Bell, supra,* 49 Cal.3d at p. 530; *People v. Howard, supra*, 1 Cal.4th at p. 1160.) There is absolutely no showing that Eubanks's jury was improperly constituted. There is no basis for reversal on this ground. (*People v. Holt, supra*, Cal.4th at p. 656.)

IV.

COMMUNICATIONS BETWEEN THE TRIAL COURT AND THE JURY COMMISSIONER WERE NOT A CRITICAL PART OF THE TRIAL AND EUBANKS'S ABSENCE FROM THOSE COMMUNICATIONS DID NOT VIOLATE HER RIGHTS

Eubanks contends that the off-the-record communications between the trial court and the jury commissioner, and the lack of a record of the pre-screening by the jury commissioner, violated statutory requirements and her due process and jury trial rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 98-107.) Eubanks forfeited this argument by acquiescing to the jury selection procedure. Additionally, due to Eubanks's failure to request a record of these proceedings be made, a complete record of pre-qualification of potential jurors does not exist. Nevertheless, there was no error. The pre-qualification of venire members was not a critical stage of the proceedings, and Eubanks's absence from those communications did not diminish her ability to represent herself. Eubanks was afforded adequate process and she received a fair trial.

Eubanks forfeited these arguments by acquiescing in the jury selection procedures, as described above. (See Arg. I.A, *ante*.) She never requested that any record be kept of the pre-screening by the jury commissioner. Nonetheless, an extensive record remains. The available evidence shows Eubanks's jury pool was picked in a fair and impartial manner and there was no systematic exclusion of any cognizable group.

Although Eubanks was notified that the jury commissioner would pre-screen the prospective jurors who responded to the summons on June 9, 1999 (6 RT 650-659; 12 RT 892, 896-897; 14 RT 939-942), she never requested that a court reporter record the proceedings. Had she done so, a complete record would exist. Now, she has forfeited this claim.

In any event, there is no Constitutional requirement that these preliminary proceedings be recorded or that Eubanks be present. This Court has already rejected claims of constitutional and statutory error in cases of absence from jury hardship excusals in *People v. Rogers* (2006) 39 Cal.4th 826, 854-856, *People v. Ervin, supra,* 22 Cal.4th at pages 72-74, and in *People v. Hardy* (1992) 2 Cal.4th 86, 178. In *People v. Rogers*, as here, the defendant asserted constitutional and statutory error because he was excluded from preliminary hardship screening of prospective jurors. This Court repeated the applicable standard:

> The federal law governing a defendant's right to be present at trial is well established. "'A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution. . . . [Citations.] A defendant, however, "does not have a right to be present at every hearing held in the course of a trial." [Citation.] A defendant's presence is required if it "bears a reasonable and substantial relation to his full opportunity to defend against the charges." [Citations.]'" The standard under [Penal Code] sections 977 and 1043 is similar. "'[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him. . . . [Citation.]' [Citations.]"

(*People v. Rogers*, *supra*, 39 Cal.4th at p. 855.)

In *Rogers*, unlike this case, defense counsel were present but defendant was not. There, however, the hardship screening was conducted after the prospective jurors had filled out questionnaires and may have included discussion of substantive issues such as views on the death penalty. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 856.) This Court refused to engage in

speculation as to what happened at unreported conferences that were agreed to by all parties. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 856.) This Court found no state or federal error. (*Ibid.*)

Similarly, here, there was no error. At the preliminary screening by the jury commissioner, the prospective jurors were given no information other than the expected length of the trial. No information was taken from the jurors other than their ability to sit on a long trial and their ability to understand the proceedings. Eubanks has not, and cannot, show that her absence or presence at the preliminary screening was related in any way to her ability to defend herself against the charges.

Cases have found the absence of the defendant to be error only where he could have provided specific, relevant advice to his attorney. Even then, the error was not prejudicial. For example, this Court found that a defendant could have assisted his attorney in deciphering who was speaking and what was said in a tape recording that was discussed outside the presence of the defendant, in *People v. Davis* (2005) 36 Cal.4th 510, 530-531. The tape was the only evidence that corroborated the co-defendant's statement that inculpated the defendant. (*Ibid.*) Yet this Court found the error was harmless beyond a reasonable doubt because the defendant could have advised his attorney on the tape outside the court hearing and there was no evidence that the defendant's clarifications, if any, would have made the tape recording any less incriminating. (*Id.* at p. 533.)

Here, the preliminary screening of individuals who received summons did not bear a reasonable or substantial relationship to Eubanks's ability to defend herself against the capital charges. There is no evidence that any possible error, even if not forfeited, prejudiced Eubanks in any way. The venire was selected by fair and impartial means. Eubanks had a fair trial by jury, in accordance with due process.

Eubanks contends that it is not possible to tell if her venire was selected by fair and impartial means because the record is inadequate. That contention lacks merit. State and federal constitutional law entitles a defendant only to a record sufficient to permit adequate and effective appellate review. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 857, citing *Griffin v. Illinois* (1956) 351 U.S. 12, 16-20 [76 S.Ct. 585, 100 L.Ed. 891], and *Draper v. Washington* (1963) 372 U.S. 487, 495-496 [83 S.Ct. 774, 9 L.Ed.2d 899].)

> [T]he Eighth Amendment requires reversal only where the record is so deficient as to create a substantial risk the death penalty is being imposed in an arbitrary and capricious manner. . . . The defendant has the burden of showing the record is inadequate to permit meaningful appellate review.

(*Rogers*, *supra*, 39 Cal.4th at pp. 857-858, citing *Stephens v. Zant* (5th Cir.1980) 631 F.2d 397, 403, rehg. den. and opn. mod. (1981) 648 F.2d 446.)

In *Rogers*, as here, the defendant argued a more complete record would permit him to show the trial court abused its discretion by improperly granting hardship excusals. But also, as here, the defendant in *Rogers* could not show that he preserved his complaint by objecting to the selection process that was used, or that any error occurred. (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 858-859.) In *Rogers*, the appellate record contained the questionnaires of the prospective jurors, the court minutes, and the excusals that were put on the record after discussions in chambers. This Court found that defense counsel had stipulated to all but one of the excusals. (*Id.* at pp. 858-859.) Further, this Court found no prejudice to the defendant.

Here, Eubanks agreed to the preliminary screening of the jurors by the jury commissioner. Further, nothing in the record suggests it is reasonably probable that if Eubanks had been present throughout the preliminary screening process, the jury would have found she did not kill her four children or would have voted to sentence her to life imprisonment without the possibility of parole rather than death. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 861; see also

Thomas v. Borg (9th Cir. 1998) 159 F.3d 1147, 1152 [counsel's failure to raise and preserve a fair cross-section claim at trial did not prejudice defendant, because "the evidence, both testimonial and physical . . . was so overwhelming that it is hard to believe that any reasonable juror, black or white, would have voted to acquit him"]; see also *People v. Freeman* (1994) 8 Cal.4th 450, 487 [defendant failed to show prejudice from counsel's failure to employ peremptory challenges to excuse prospective jurors, because "[n]othing in the record suggests . . . it is reasonably probable a different jury would have been more favorably disposed towards defendant"].) Any possible error, even if not forfeited, was not prejudicial to Eubanks because the evidence of her guilt is overwhleming

V.

THE TRIAL COURT CORRECTLY RULED THAT THE SEARCHES PURSUANT TO WARRANT WERE REASONABLE WITHIN THE FOURTH AMENDMENT

Eubanks contends that the two searches of her house, each based on a search warrant, both violated the Fourth Amendment, alleging that the warrants were overbroad and unnecessarily permitted the search for and seizure of evidence of dominion and control over the residence, and that the affiant recklessly omitted purportedly material evidence that Sheriff's deputies already knew Eubanks lived at the residence. (AOB 107-136.) This contention lacks merit. The searches were conducted pursuant to warrants and thus were presumptively valid. Search for and seizure of evidence of who had access to, and more particularly who had dominion and control over the house in which four people had been murdered, was necessary for a complete investigation of the crime scene. The magistrate properly issued warrants based on affidavits that did not omit material evidence, and the searches were conducted in accordance with those warrants.

On the night of the murders, Deputies Deese and Perry found three dead bodies inside the home at 226 South Twin Oaks Valley Road, and two people seriously wounded. The deputies called for emergency assistance for Matthew and Eubanks. Homicide detectives were then contacted. Detective Rawlins was notified of the homicide at about 8:50 p.m. on October 27, 1997, and was briefed on the situation when he arrived there. At 11:08 p.m., Detective Rawlins and a deputy district attorney placed a telephone call to a magistrate judge to obtain a warrant to search the residence. (3 CT 341.) Detective Rawlins requested a warrant to search the property at 226 South Twin Oaks Valley Road, at night, to do an immediate search "for the possibility of collecting evidence and finding the perpetrator of the crime." (3 CT 343.) Detective Rawlins requested, and the magistrate issued, a warrant to search the premises for firearms, ammunition, crime scene measurements, photographs, blood stains and other evidence, and evidence to show dominion and control over the premises.[21/] (3 CT 339-347.) During that search, Detective Rawlins and his team seized cartridges, ammunition, lead projectiles, blood stains and blood-stained items, medications, letters from around the bed where Eubanks

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21. Specifically, the first warrant authorized a search for

> firearms, magazines, holsters, ammunition, cartridge casings, bullets, cleaning equipment, crime scene measurements, photographs, clothing or other objects bearing blood or blood stains, human hairs, tissues, secretions and parts thereof, handwritings, fingerprints, documents and effects which tend to show possession, dominion and control over said premises, including keys, photographs, taped voice or video images, computer equipment, disks or tapes, pagers, anything bearing a persons name, social security number or other form of identification, and the interception of calls . . . .

(3 CT 339-340.)

shot herself, along with a pen, Rolodex, phone list, telephone and answering machine, miscellaneous papers and other items. (3 CT 348-351.)

On October 30, 1997, Detective Rawlins sought a second search warrant, to search for weapons, phone bills and records, medical records, medications and prescriptions, a computer and its hard drives, crime scene photographs and measurements, and additional items tending to show dominion and control. (3 CT 361-371.) In support of this warrant Detective Rawlins stated that he had accounted for nine projectiles and only six empty casings. He also stated that Eubanks's sister had told another detective that Eubanks had said she was pregnant and had threatened suicide, discharging a firearm to show her seriousness; and that John Armstrong spoke by telephone with both Eubanks and his son, Brandon, on the night of the murders, about Eubanks's fear that Child Protective Services would come to interview the children. (3 CT 363.) A magistrate issued the warrant, permitting the search for and seizure of the items requested.[22/] (3 CT 368-369.) From this search, the detectives seized additional bullets and blood-stained items, photos and photo albums,

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22. This second warrant authorized a search for and seizure of

> .38 caliber weapons, pistols, pistol magazines, holsters, manufacturer's shipping boxes, ammunition, cartridge casings, bullets, blood stained clothing, phone bills and records, medical records, medications and prescriptions, computers or word processors and all computer disks, drives and related documentation and hardware, crime scene photographs and measurements, items which tend to show dominion and control, including handwritings, fingerprints, keys, photographs, undeveloped film, answering machines, audiotapes, pagers, or any means of identification bearing a persons name, number or photograph. . . .

(3 CT 369.)

videotapes, books, calendars, a notebook, prescription bottles, a word processor, and other papers. (3 CT 370-371.)

Eubanks filed a motion to quash and traverse the two search warrants, and to suppress the evidence seized pursuant to those warrants. (3 CT 297-378.) The motion was based on three related grounds: the language seeking evidence of "dominion and control" of the residence was overly broad and not sufficiently particular; the affidavits in support of the warrants omitted the purportedly material fact that members of the Sheriff's Department already knew that Eubanks lived at the residence; and the affidavits purportedly failed to establish probable cause for the seizure of dominion and control evidence, as the deputies already knew that Eubanks lived there. (3 CT 302-337.) Eubanks sought to suppress all evidence taken from her home. (3 CT 297-300.)

The trial court heard extensive argument on the motion to quash, traverse and suppress but did not hold an evidentiary hearing. (8 RT 672-720.) After conferring with Detective Rawlins, the prosecutor reported that, before obtaining the first search warrant, Detective Rawlins did not have any information about prior contacts between the Sheriff's Department and Eubanks. (8 RT 697.) Detective Rawlins provided the affidavit in support of the second search warrant, also, and he had information about the prior contacts between Eubanks and the Sheriff's Department before swearing out the second affidavit on October 30, 1997. (8 RT 697-699.) Eubanks did not accept this offer of proof as a stipulation, so it was left in the record as "a proposed stipulation." The People did not dispute the fact that Eubanks lived at the residence at 226 South Twin Oaks Valley Road. (8 RT 674, 677-678.)

The trial court first ruled that the affiant did not omit material information from the affidavit. The court ruled that information that members of the Sheriff's Department had had prior contacts with Eubanks and thus knew that she resided at 226 South Twin Oaks Valley Road was not material, and the

magistrate would have issued the first and second search warrants for evidence of dominion and control of the residence even if the affidavit had included information that Eubanks resided at the home. (8 RT 698-699.) A serious crime had occurred in the house. The officers had to establish who had access to the house to determine the perpetrator. Even if the circumstances pointed to Eubanks as the perpetrator, the police would have been remiss in not investigating who else had access to the house, if only to exclude them as suspects. (8 RT 690, 706.) There was probable cause to search for evidence of anyone who had access to the home. (8 RT 711.)

The court also found no error of overbreadth in the language of the warrant seeking dominion and control evidence. The police had to determine who had access to the home at the time of the murders. (8 RT 706, 711, 713-714, 716.) The court reasoned that even if the clause seeking dominion and control evidence were overbroad, and was therefore redacted, the remaining proper portions of the search warrant, such as the search for ammunition, would authorize a search of the entire residence. (8 RT 700-701.)

Although the warrant could have been "more carefully tailored," there was probable cause to search for evidence throughout the entire house to determine who had access at the time of the murders, and a full search for evidence of dominion and control was properly authorized by the magistrate. (8 RT 713-714, 716.) In the event the clause seeking evidence of dominion and control were found to be invalid, the trial court found that the officers had probable cause to search the entire house. (8 RT 713-714, 716.) The court also found, in the event the warrants were declared defective, the officers acted in good faith in executing the warrant. (8 RT 714, 720.)

When reviewing a trial court's ruling on a motion to suppress, the reviewing court defers to the trial court's express or implied factual findings if supported by substantial evidence, but independently applies constitutional

principles to the trial court's factual findings in determining the legality of the search. Where the facts are undisputed, the reviewing court independently determines the legality of the search under the Fourth Amendment. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119; *People v. Glaser* (1995) 1 1 Cal.4th 354, 362; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

The United States Supreme Court has expressed a strong preference that searches and seizures be made pursuant to a search warrant, such that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." (*United States v. Ventresca* (1965) 380 U.S. 102 [85 S.Ct.741, 13 L.Ed.2d 684]; 2 LaFave, Search and Seizure (4th ed. 2004) § 4.1, p. 441.) When a search is pursuant to a search warrant, there is a presumption that the search is lawful. The burden is on the defendant to overcome this presumption. (*People v. Kurland* (1980) 28 Cal.3d 376.) Eubanks does not meet her burden and fails to present evidence to overcome the presumption the searches were lawful.

Eubanks does not contest the officers' initial forced entry after they heard Eubanks moaning and saying she had been shot. (AOB 118.) That entry was appropriate under the "imminent danger-to-person" exigent circumstance exception. (*People v. Hill* (1974) 12 Cal.3d 731, 753-757.) After Matthew and Eubanks were taken to hospitals, a homicide detective was called and he obtained a warrant to search the home late that night, as described above. A second search warrant was obtained two days later. Eubanks challenges the two searches conducted pursuant to warrants.

Eubanks first complains that the portion of the warrant authorizing a search for and seizure of items related to "dominion and control" was so overly broad that it rendered that portion of the warrant invalid. Eubanks claims without elaboration that the letters found on and near her bed were "devastating to the defense . . . ." (AOB 118-119.)

The United States Constitution, as well as the Constitution and statutory law of California, require that a search warrant describe the place to be searched and the items to be seized with particularity. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13; Pen. Code, § 1525. The warrant must be sufficiently definite so that an officer can identify the items sought with reasonable certainty. (*People v. Rogers* (1986) 187 Cal.App.3d 1001, 1007.) However, whether a warrant is sufficiently particular cannot be decided in a vacuum. The court should look to such factors as "the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case." (*People v. Rogers,* 187 Cal.App.3d at p. 1008.)

Both state and federal courts have recognized a warrant must sometimes be more generalized than in other cases, and that search warrants must be read in context and with common sense. (*Andresen v. Maryland* (1976) 427 U.S. 463, 480-481 [96 S.Ct. 2737, 49 L.Ed.2d 627]; *United States v. Ventresca*, *supra*, 380 U.S. 102; *People v. Bradford* (1997) 15 Cal.4th 1229, 1291, 1296.) For example, in *Andresen*, the warrant described documents related to a fraudulent real estate transaction and added the phrase "together with other fruits, instrumentalities and evidence of crime at this (time) unknown." (*Andresen v. Maryland, supra*, 427 U.S. at p. 479.) The defendant argued this phrase permitted a general rummaging amongst his effects for evidence of any crime. (*Ibid.*) The Supreme Court found the search warrant, including that broad phrase, to be lawful, because it was clear in context that the phrase referred to the crime of false pretenses that the police were investigating. (*Id.* at pp. 480-481.) The warrant did not authorize the search for evidence of any other possible crime, but for evidence related to the fraudulent transaction, including evidence related to similar sales of real estate other than the specific lot identified in the warrant. That is, the language did permit the seizure of evidence of other real estate sales made with false pretenses that was relevant

to the defendant's motives and methods in the charged offense. (*Andresen v. Maryland, supra*, 427 U.S. at pp. 483-484.)

The Supreme Court indicated a broad and deep search for evidence could be lawful when there was a recent murder. In *Mincey v. Arizona* (1978) 437 U.S. 385 [98 S.Ct. 2408, 57 L.Ed.2d 290], the defendant killed a person in the defendant's home. The officers then conducted a very broad and generalized search of the home for four continuous days after the murder. The Supreme Court found this broad search unconstitutional because the officers did not obtain a warrant to conduct the search. (*Mincey v. Arizona*, *supra*, 437 U.S. at p. 395.) The Court noted that a search of such substantial scope would be necessary and proper, as long as this decision was made by a neutral magistrate, that is, as long as the officers first obtained a warrant for the search. (*Id.* at p. 395.) The flaw in *Mincey* was not the breadth of the four-day search but the failure to obtain a warrant from a magistrate before commencing the search. Here, the officers did obtain a search warrant from a magistrate before searching the premises. The trial court properly denied the motion to quash.

Under the circumstances here, it is unrealistic to believe the sheriff detective affiant could describe the personal property to be seized with any more particularly in light of the information available to him at the time the warrant was sought. (See *United States v. Spilotro* (9th Cir. 1986) 800 F.2d 959, 964.) As to the first search warrant, four murders had just occurred inside the house, and the officers had no information as to the cause, method or motive of the murders. It appeared that Eubanks had committed the crimes, but even that had to be ascertained with more certainty. Detective Rawlins could not be expected to divine in advance of the entry the precise nature of the relevant evidence. This Court has upheld warrant clauses that command the search and seizure of personal property that tends to establish the identity of persons in control of the premises, against claims that the clause is not

sufficiently particular under the Fourth Amendment. (See *People v. Alcala* (1992) 4 Cal.4th 742, 799; *People v. Nicolaus* (1991) 54 Cal.3d 551, 574-575; see also *People v. Balint* (2006) 138 Cal.App.4th 200, 206; *People v. Rogers, supra*, 187 Cal.App.3d at pp. 1003-1004.) "To require such prescience from the officers would be patently unreasonable." (*People v. Rogers, supra*, at p. 1009.) Federal courts have also upheld the search and seizure of items that establish the identity of persons occupying the premises when justified by the nature of the crime. (*United States v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1008-1009; *United States v. Honore* (9th Cir. 1971) 450 F.2d 31, 33.) Here, it was necessary for the police to establish who had access to the home when the four children were murdered. Although Eubanks appeared to be in control of the residence at the time, it was reasonable to search for independent evidence of that and to rule out the possibility of any others having access to the home at the time of the murders.

In *People v. Nicolaus*, *supra*, 54 Cal.3d at pages 574-575, the dying victim told police that the defendant had shot her and told the police where he lived. The defendant's address was confirmed through DMV records. The police obtained a search warrant to search the defendant's apartment for evidence including evidence that tended to show the occupants of the apartment. (*Id.* at p. 574.) While searching for these documents, an officer opened a manila folder on the defendant's desk and found numerous documents in the defendant's handwriting, describing his plans to harm the victim and illuminating his motives and state of mind before the murder. (See *id.* at p. 565.) This Court found that the search for dominion-and-control evidence was sufficiently particularized. (*Id.* at pp. 574-575.) This Court found good faith in the request for this search because there was some evidence that the defendant had other addresses; there was no evidence that the defendant lived alone; and a deputy district attorney had reviewed the request before submitting

it to a magistrate. (*People v. Nicolaus*, *supra*, 54 Cal.3d at p. 575.) This Court further noted,

> In any event, the officers acted entirely properly in seeking independent evidence to establish defendant's occupancy of the apartment, and defendant's control over any evidence seized therefrom, for presentation in court.

(*People v. Nicolaus*, *supra*, 54 Cal.3d at page 575.)

Similarly, in *People v. Alcala*, *supra*, 4 Cal.4th at page 799, the defendant attacked as "boilerplate" a search warrant for dominion and control evidence that permitted an overly broad search of the defendant's documents, including, as in *Nicolaus*, the reading of documents to determine if they provided evidence of residency. (*Id.* at pp. 799-800.) This Court found the search for "[a]ny articles of personal property tending to establish the identity of persons in control of the premises. . ." to be sufficiently "particularized," and the observation of documents in plain view within the scope of the authorized search was proper. (*Ibid.*)

Eubanks contends that these cases actually support her position because in each case the nature of the documents or items that could be considered for evidence of dominion and control was spelled out more narrowly than in the instant case.[23/] (AOB 124-126.) But it is the qualifier "which tend to show

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23. Eubanks submits, without authority, that *People v. Nicolaus*, *supra*, 54 Cal.3d 551, "was wrongly decided and conflicts with United States Supreme Court precedent." (AOB 124-125.) Respondent contends *Nicolaus* was correctly decided, and is in accord with United Supreme Court precedent.

Respondent suggests that it is Eubanks's citations that must be reviewed with caution, as she relies on many cases decided before 1985. While a search that is unreasonable under article I, section 13, of the California Constitution is unlawful, after the passage of Proposition 8 in 1982 the exclusion of evidence obtained from such a search is a remedy that is no longer available unless the search also violates the federal Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 886-887.) Thus, "questions about exclusion of evidence must be resolved under federal, and not state law." (*In re James D.* (1987) 43 Cal.3d 903, 911.) Cases decided under state law before *Lance W.* may state a broader rule of

possession, dominion and control" that sufficiently narrows the search warrant. (See *United States v. Whitten*, *supra*, 706 F.2d at p. 1009.)

Each search must be considered on its own circumstances. The breadth of a warrant should be commensurate with the needs of the investigation. (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.) The scope of a search for a rifle will necessarily be different from the scope of a search for evidence of all persons who could have had access to a murder scene. Small slips of paper could provide valuable evidence of persons who had access to a murder scene. Here, the search for evidence of all persons who had access to the residence was sufficiently particular under these circumstances, especially because Detective Rawlins could not identify in advance what evidence would be available. The searches here were not overbroad.

A. Reading The Content Of The Letters And Seizure Of The Letters Relevant To The Crime Were Lawful Because The Letters Were In Plain View Within The Scope Of The Warrant

Eubanks contends that even if the officers were authorized to search for evidence of dominion and control, they had no authorization to read or to seize the letters lying about Eubanks's bed, once they determined that the letters were not evidence of dominion and control. (AOB 126-129.) This contention fails because the incriminating letters were in plain view.. Under *Horton v. California* (1990) 496 U.S. 128, 136 [110 S.Ct. 2301, 2307, 110 L.Ed.2d 112], items in plain view, but not described in the warrant, may be seized when their incriminating or relevant character is immediately apparent. (*People v. Lenart, supra*, 32 Cal.4th at p. 1119; *People v. Kraft, supra*, 23 Cal.4th at p. 1043; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1293-1295.)

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exclusion than the Constitutional rule applicable now and at the time of trial. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1291.)

Horton v. California held that an officer can seize incriminating items that are in plain view but that are not included in the scope of a search warrant, even if the discovery is not inadvertent, that is, even if the officer subjectively thought such items would be found. If the officer has a lawful right of access to the location where the item was found, and the item's incriminating character is immediately apparent, the item can be seized. (*People v. Horton*, *supra*, 496 U.S. at pp. 136-137.) The Court explained that a search compromises an individual's right to privacy and a seizure invades the individual's right to dominion over an object. A search warrant permits an officer to lawfully infringe on the individual's right to privacy. If, during that lawful infringement, an incriminating item is in plain view, then neither its observation nor its seizure would unlawfully invade the owner's privacy. (*Id.* at p. 133.) Once the Fourth Amendment requirement has been met and the officer has a lawful right of access, no additional Fourth Amendment interest prevents the seizure of an incriminating item. (*Id.* at p. 141.) The officer who, with lawful access to an item, immediately recognizes its incriminating character, has probable cause to seize the item. (*Id.* at p. 142.) As long as officers look only where they can properly look under the terms of a particularized and proper search warrant, any incriminating item can be seized as the subject's privacy is no more impaired than it otherwise is under the warrant. (*United States v. Ewain* (1996) 88 F.3d 689, 694; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1295.)

Here, the officers had lawful access to the house and to the papers in the house. The scope of the search warrant permitted the officers to look at the letters around Eubanks's bed. It was immediately apparent that the letters related directly to the homicides. The officers did not violate Eubanks's rights by looking at and seizing the letters around her bed that described her thoughts and actions at the time she shot her four sons. (*Horton v. California*, *supra*, 496 U.S. at p. 136; *People v. Lenart*, *supra*, 32 Cal.4th at p. 1119; *People v. Kraft*,

supra, 23 Cal.4th at p. 1043; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1293-1295.)

Contrary to Eubanks's contention, *Arizona v. Hicks* (1987) 480 U.S. 321 [107 S.Ct. 1149, 94 L.Ed.2d 347] does not require a different result. In that case, the officers entered an apartment after a bullet had been fired from that apartment to search for the weapons, shooter, or other evidence of the shooting crime. While in the apartment, the officers noticed expensive stereo equipment, and moved the equipment to obtain its serial numbers. The Supreme Court held that an item in plain view may be seized only when the officers have probable cause to believe that the item in question is evidence of a crime or is contraband. (*Id.* at p. 326.) The Court found that moving the stereo equipment constituted a search separate and apart from the search for the shooter and weapons that was the lawful objective of the entry into the apartment. Merely inspecting those parts of the stereo equipment that came into view during the exigent-circumstances search would not have constituted an independent search, because it would have produced no additional invasion of the defendant's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, produced a new invasion of the defendant's privacy that was not justified by the exigent circumstance that validated the entry. (*Arizona v. Hicks, supra*, 480 U.S. at pp. 324-325.)

Here, the officers had a warrant to search for documents of dominion and control, in addition to ammunition and bullet casings. Papers and trash cans were well within the scope of the search warrant. It was lawful for the officers to look at the papers around Eubanks's bed and, upon looking at them, it was immediately apparent that the papers were evidence related to her killing of the children. Reading Eubanks's letters was within the scope of the search

warrant. (See *People v. Alcala*, *supra*, 4 Cal.4th at pp. 799-800; *People v. Nicolaus*, *supra*, 54 Cal.3d at pp. 574-575.)

B. There Was No Reason To Traverse The Warrants

Finally, Eubanks contends that the warrants should have been traversed because there were material omissions in the affidavits. (AOB 129-135.) The purported omissions, that sheriff's deputies knew that Eubanks lived at the house, were not material because even if true, the officers still needed evidence to establish who had access to the home at the time of the murders.

Under *Franks v. Delaware* (1978) 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667], a defendant can challenge a search warrant by showing the affiant deliberately or recklessly made material factual omissions, provided that the omitted facts negate probable cause when added to the affidavit. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 381-382; *People v. Sousa* (1993) 18 Cal.App.4th 549, 562-563.) A defendant who challenges a search warrant based on omissions has the burden of showing that those omissions would have been material to the magistrate's determination of probable cause. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1297.)

Here, as the trial court found, even if the affidavits were tested by adding in the omitted information that officers knew that Eubanks lived at the house, the magistrate still would have issued a warrant to search for items showing dominion and control, if only to rule out other suspects. (8 RT 698-699; see *People v. Huston* (1988) 210 Cal.App.3d 192, 210.)

Detective Rawlins sought the second search warrant because he had discovered more about Eubanks's statements and actions before the murders, including her phone call to Brandon's father just prior to the murders. He had also found nine projectiles but only six empty casings. (3 CT 363.) He requested a warrant to search for weapons, phone bills and records, medical records, medications and prescriptions, a computer and its hard drives, crime

scene photographs and measurements, and additional items tending to show dominion and control. (3 CT 361-371.) Detective Rawlins did not explain in the second affidavit why he needed additional items showing dominion and control, and what items were discovered in this regard in the first search. Further, the affidavit contains a misstatement because Detective Rawlins stated that he did "not contemplate making an arrest under the facts as they presently exist" (3 CT 366), yet Eubanks had already been arrested and had been arraigned the day before at Palomar Hospital (1 RT 6). The search warrant certainly would have been issued even if this incorrect statement had been left out or if the magistrate had been informed that Eubanks had already been arrested.

Eubanks has not demonstrated any possible harm to her caused by any error in the second search warrant. The only items she claims harmed her were her handwritten letters. (AOB 118-119, 135.) Those letters were seized during the first search: "#1) envelope w/ misc. medication and papers - on bed; . . . #4) blue plastic container w/ misc. papers / paperwork; #5) letter - on floor at foot of bed; . . . #7) (4) letters - on floor at right side of bed; #10) trash can and contents - on floor s/e corner of bed;" all from the master bedroom. (3 CT 348-351.) On and around Eubanks's bed there were four letters appearing to be written from the same notepad and a letter from the foot of the bed. (24 RT 2520-2523, 2605-2608, 2611.) These were undoubtedly item numbers (5) and (7) seized during the first search. (3 CT 348.) Eubanks complains about the "photographs, photo albums, backpacks, videotapes, books, calendars, clipboards, notebooks, file cabinet contents, prescription medication bottles, bags, a suitcase, and a hat box," but there is no indication that those items contained or comprised the "devastating letters" of which Eubanks complains. (See AOB 134.) Even assuming arguendo there was any material error in the

second affidavit, nothing seized during the second search caused undue harm to Eubanks.

There was no constitutional error in the issuance and execution of the two search warrants. Assuming arguendo any error occurred, 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].) The letters were used by the prosecution to show premeditation and to support a theory that Eubanks killed her children in revenge against Dodson and Eric. But the letters also show that Eubanks was despondent, suicidal, and intended to kill herself. They could have been used to show that Eubanks was acting in an emotional state that negated premeditation and deliberation to some degree. Further, the evidence was conclusive that Eubanks killed her four children. These letters did not provide any undue emotional prejudice against Eubanks greater than her own admitted act of killing four children. The physical evidence was conclusive that Eubanks premeditated the murders. Brandon was shot twice. Eubanks then walked from the living room to the boys' bedroom. After shooting at her boys three more times, Eubanks had to stop, open her pistol, throw away the expended cartridges, then add five more live rounds before taking aim again at her little boys. She shot at Austin three times and she shot at Brigham twice. All of the shots were aimed at the boys' heads and fired at close range. Beyond a reasonable doubt, the jury would have convicted Eubanks of four counts of first-degree murder even if those letters had not been admitted.

VI.

THE PROSECUTION REBUTTAL EXPERT'S BRIEF TESTIMONY ABOUT HER PROFESSIONAL EXPERIENCE WITH THE EFFECTS OF INFUSION OF FLUIDS INTO THE BLOODSTREAM DID NOT DEPRIVE EUBANKS OF A FAIR TRIAL AND DID NOT VIOLATE STATE LAW REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY

Eubanks contends that the trial court denied her a fair trial by permitting the prosecution's forensic toxicologist to testify about her professional experience with the effect of transfusions into the blood on the level of blood alcohol content in the body. (AOB 137-150.) Eubanks's argument discusses potential violations of state law and does not present any argument in support of a claim of federal constitutional violation. Eubanks's contention is based on an inaccurate portrayal of the record and also lacks merit.

In the case-in-chief, the People called Javier Velasco, a clinical and forensic toxicologist at Poison Lab, who reported the actual levels of alcohol, Valium and Prozac found in Eubanks's blood sample. (26 RT 2907.) Dr. Vina Spiehler, a toxicology expert, prepared a report that calculated the probable level of alcohol at the time of the crime, which occurred at about 7:15 p.m., about one and one-half hours before Eubanks's blood was drawn at 8:50 p.m. (27 RT 3107-3108.) The People did not introduce the contents of Dr. Spiehler's report in their case-in chief. However, the defense expert, Dr. Clark Smith, described Dr. Spiehler's report and used it as a basis for his opinion that Dr. Spiehler did not account for the diluting effect of the saline solution that was infused into Eubanks by the paramedics before her blood was drawn at the hospital. (27 RT 3082-3088, 3107-3108.)

The People called Dr. Spiehler to rebut Dr. Smith's theory of dilution. Eubanks objected on the basis asserted here, that personal studies conducted by Dr. Spiehler were not sufficiently reliable on which to base an expert opinion.

(27 RT 3148-3154; 28 RT 3161-3164.) The court held a hearing under section 402 of the Evidence Code to examine the admissibility of Dr. Spiehler's testimony and at the conclusion of the hearing ruled the testimony admissible. (28 RT 3164-3192.) The trial court concluded that Dr. Spiehler was applying her practical or work experience to the academic training she received, no differently from any other expert. (28 RT 3192.)

Dr. Spiehler testified on rebuttal, explaining her theory that dilution of the alcohol level would be minimal because alcohol diffuses into all of the water throughout the body, and even after the addition of three liters of saline, the blood alcohol level returns to equilibrium fairly quickly due to the constant circulation of the blood. (28 RT 3199-3227.) Dr. Smith reiterated his contrary opinion during surrebuttal testimony. (28 RT 3229-3243.)

During Dr. Spiehler's rebuttal testimony, she stated her basic calculations were based on principles taken from a textbook by Goodman and Gillman, Pharmacological Basis of Therapeutics, and her conclusions and calculation of measurements after dilution by intravenous fluids were based on an example in the 1988 edition of Garriott's Medical / Legal Aspects of Alcohol Determination and Biological Specimens. (28 RT 3213-3214.) The prosecutor asked Dr. Spiehler if her personal experience in the field confirmed what she had read in the literature, and Dr. Spiehler responded,

> Yes, I actually have looked at samples from people who had transfusions in the hospital, and I was able to look at samples taken before they got the transfusion and afterward, and my experience has been sometimes the values go up, sometimes they go down and sometimes they stay the same, the alcohol values.

(28 RT 3214.)

On cross-examination, Dr. Spiehler explained that while she was working at the Orange County Sheriff / Coroner's office, she had worked on about ten to fifteen cases in which she was able to get blood samples from the hospital both before and after transfusions. (28 RT 3222-3223.) In these ten

to fifteen cases, the subjects eventually died. (28 RT 3223-3225.) All the results were recorded in the Coroner's Office, and Dr. Spiehler did not have any results present in court. (28 RT 3225.)

Dr. Smith, on surrebuttal, said he read the discussion of dilution in the reference book by Dr. Garriott on which Dr. Spiehler relied, and found it "very helpful." (28 RT 3236-3237.) Dr. Smith agreed that Dr. Spiehler's theory was generally correct, that alcohol circulates in the watery parts of the body and exchanges freely until equilibrium is reached, but Dr. Smith opined that did not happen in Eubanks's case because Eubanks had no blood circulation to pick up and recirculate the alcohol from the organs and tissues. (28 RT 3233.)

A. The Trial Court Properly Exercised Its Discretion In Permitting Dr. Spiehler To Testify About Her Professional Experience With The Effect Of Transfusions On The Level Of Blood Alcohol Content

A trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222; *People v. Robinson* (2005) 37 Cal.4th 592, 630; *People v. Bolin* (1998) 18 Cal.4th 297, 321.) Where a witness has disclosed sufficient knowledge of a subject to entitle his or her opinion to go to the jury, the question of the degree of the witness' knowledge goes more to the weight of the evidence than its admissibility. (*People v. Bolin, supra*, at p. 321.) The trial court properly determined the challenged evidence was admissible and Eubanks's complaints went to the weight, not the admissibility, of the evidence. (See *People v. Smithey* (1999) 20 Cal.4th 936, 966; see also *People v. Catlin* (2001) 26 Cal.4th 81, 139.)

Eubanks's only objection at trial, and thus the only argument available on appeal, was that the information obtained from the ten to fifteen cases known to Dr. Spiehler due to her experience in the Coroner's Office was unreliable and thus any opinion based on that experience was improper. (27 RT

3148-3154; 28 RT 3161-3164.) Any other basis for objection has been forfeited. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434; Evid. Code, § 353.) Eubanks's objection, lacks merit.

There was no error in permitting Dr. Spiehler to testify about her professional experience with the effect of transfusions on the level of blood alcohol content in the body. Dr. Spiehler was a pharmacologist who was Board-certified in forensic toxicology. (28 RT 3199.) Dr. Spiehler had a Bachelor's degree in chemistry, a Master's degree in analytical chemistry, and a Ph.D. from the medical school at the University of California at Irvine, and additional post-doctoral education in Sweden and on a Fulbright scholarship. (28 RT 3200.) At the time of trial she had over 20 years of experience in the field, including about six years with the Orange County Sheriff's / Coroner's office. (28 RT 3169-3171, 3200-3202.) She had published over 75 papers and articles and served as an editor for forensic and toxicological journals. (28 RT 3201-3202.) She had testified as an expert more than 100 times, for both the prosecution and the defense and also in civil cases. (28 RT 3212-3213.)

Dr. Spiehler stated that her conclusions and calculation of measurements after dilution by intravenous fluids were based on information in an example in Garriott's Medical / Legal Aspects of Alcohol Determination and Biological Specimens from 1988. (28 RT 3213-3214.) On cross-examination, defense counsel elicited the fact that this was not the most recent edition of this textbook. (28 RT 3218-3219.) Eubanks's expert, Dr. Smith, reviewed this same edition of the textbook, however, and found it "very helpful.[24]" (28 RT 3236-3237.) Dr. Smith also agreed that Dr. Spiehler's theory of dilution was

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24. Eubanks incorrectly states that the section on dilution was removed from the later edition of the textbook "because it had been discredited." (AOB 144.) However, Dr. Spiehler explained during the 402 hearing that when compiling the third edition, Dr. Garriott could not locate the doctor who wrote that chapter in the earlier edition. (28 RT 3179-3180.)

generally correct where circulation was intact, and provided his own calculation of dilution based on the same principle described by Dr. Spiehler, that is, the diluting fluid must be compared to the entire volume of fluid within the body, not just the volume of blood, because the alcohol diffused throughout all the water in the body, and would eventually return to equilibrium if there were normal circulation. (28 RT 3233, 3235-3240)

Dr. Spiehler stated that she learned the principles relating to dilution from the literature she read, and her personal experience in the field confirmed what she read in the literature. (28 RT 3214.) This is the basis of Eubanks's objection to Dr. Spiehler's testimony. Eubanks focuses her claim on the fact Dr. Spiehler did not keep records of the ten to fifteen cases she examined that involved transfusions and did not write up her observations for publication. But those purported deficiencies went to the weight that the jury could give to Dr. Spiehler's testimony, not to its admissibility. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.) Dr. Spiehler looked at before and after samples from people who had transfusions, in the hospital. She observed that, after receiving a transfusion some individual's alcohol values went up, some went down, and some stayed the same. (28 RT 3214.)

Evidence Code section 801, subdivision (b), provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . .
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The trial court did not abuse its discretion in permitting Dr. Spiehler to testify about her own professional experience that supported the information

she read in toxicological literature about dilution of alcohol by intravenous fluids. Personal professional experience has long been a reliable basis for expert testimony. This is obvious with gang experts, who typically provide testimony on the culture of criminal gangs based on personal conversations with gang members, investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies, whether or not this information is compiled into written reports and submitted to academic journals for peer review. (See e.g., *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 620; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384-1385.) Similarly, in *People v. Prince*, an expert was permitted to testify about crime scene analysis and "signature crimes," based on his training and experience. The expert's experience included conducting and reviewing crime scene investigations; there was no evidence that such information had been compiled into written studies, but rather he was qualified on the basis of his professional experience over the years. (*People v. Prince*, at pp. 1220-1221.) In *People v. Combs* (2004) 34 Cal.4th 821, 849, an expert was found to have sufficient qualifications and foundation to testify about blood-spatter patterns based on his educational background and work experience.

Contrary to Eubanks's contention, Dr. Spiehler's testimony was not subject to the test of admissibility set forth in *People v. Kelly* (1976) 17 Cal.3d 24, and reiterated in *People v. Leahy* (1994) 8 Cal.4th 587, because Dr. Spiehler did not use a novel technique or new method.

Kelly held that the admissibility of expert testimony based on a new scientific technique requires proof of its reliability. (*People v. Kelly, supra,* 17 Cal.3d at p. 30; accord, *People v. Leahy, supra,* 8 Cal.4th at pp. 594, 604.) The proponent of the testimony must show: (1) the technique has gained general

acceptance in the particular field to which it belongs; (2) any witness testifying on general acceptance is properly qualified as an expert on the subject; and (3) correct scientific procedures were used in the particular case. (*People v. Kelly, supra*, 17 Cal.3d at p. 30.) However, this Court has found the *Kelly* test of reliability does not apply in cases where the methods employed are not new to science or the law, and where they carry no misleading aura of scientific infallibility. (See *People v. Combs*, *supra*, 34 Cal.4th at p. 848; *People v. Clark* (1993) 5 Cal.4th 950, 1018; see also *People v. Willis* (2004) 115 Cal.App.4th 379, 385 [*Kelly* test applies to new scientific techniques, especially in cases involving novel devices or processes].)

Dr. Spiehler did not use any new technique, but simply observed and relied upon comparative alcohol values in a series of cases where samples were available both before and after blood transfusions. She made no new calculations or measurements and did not use any new scientific technique.

Eubanks contends a "heightened reliability" requirement must be met in capital cases. (AOB 148.) The cases relied upon by Eubanks do not address the admissibility of expert testimony or evidence. Further, while juries, attorneys and the courts are all particularly attuned to the gravity of capital cases, there is no requirement for the courts to modify their long-standing state-law-based rules governing the admissibility of evidence at the guilt phase of a capital case. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1229; *People v. Weaver* (2001) 26 Cal.4th 876, 930.) "'Application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights.'" (*People v. Prince, supra*, at p. 1229, quoting *People v. Kraft, supra*, 23 Cal.4th at p. 1035.)

Here, the trial court properly decided, after holding a foundational hearing and considering the arguments of counsel, that there was sufficient foundation for the expert to present her opinion to the jury. It was then up to

the jury to determine whether to follow Dr. Spiehler's theory of dilution or Dr. Smith's theory, or neither. """Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility."'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.) The trial court instructed the jury that they were the exclusive judges of credibility (CALJIC No. 2.20), and that they were not bound by an expert's opinion, being free to accord the opinion the weight it deserves after considering the basis for the opinion (CALJIC No. 2.80). (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1227; 5 CT 954, 963.)

The jury deliberated for about two hours before rendering its verdict in the guilt phase. (6 CT 1221-1222.) All the available evidence showed that Eubanks was not intoxicated when she murdered her children. She was talking coherently on the telephone until about 7:00 p.m., and she was heard speaking coherently in the background after that. (26 RT 2965-2967, 27 RT 3067.) She stopped in the middle of shooting her little boys to reload the revolver and she placed the expended casings in the trash can in their bedroom. (24 RT 2566-2567.) She was coherent enough to call for help from within the locked house when the deputies arrived, despite the life-threatening wound to her abdomen. (23 RT 2418; 27 RT 3032.) The evidence demonstrated Eubanks's cold and premeditated actions. The evidence could not support a theory that she was incapacitated by the alcohol and prescription medications she took, regardless of any possible dilution, tolerance, or other theories about her intoxication. Assuming arguendo any error occurred, it was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Admission of Dr. Spiehler's expert testimony was proper and Eubanks's trial was fundamentally fair.

VII.

EUBANKS'S ADMISSION ABOUT HER TREATMENT OF AARON ADMITTED IN THE PENALTY PHASE WAS NOT ERROR OR PREJUDICAL

Eubanks contends that admission during the penalty phase of a statement she made about her own mistreatment of Aaron was more prejudicial than probative, under Evidence Code section 352, and violated her rights to fundamental fairness and due process, as well as the constitutional requirement of reliability in a capital case under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution. (AOB 151-159.) This contention lacks merit because the trial court carefully considered the evidence and properly admitted it as impeachment of Eubanks's evidence that she was a good mother before she shot her children. The trial court did not abuse its discretion and no constitutional error occurred.

During the guilt phase, the prosecutor asked Michelle Smith, Eubanks's sister, if she had any concerns about Aaron living with Eubanks, and then asked if Eubanks had made any statements to Michelle Smith about feces. (25 RT 2732.) Eubanks objected, citing relevance and Evidence Code sections 352 and 1101, subdivision (b). (25 RT 2732.) The trial court sustained the objection, finding the testimony collateral and redundant, as there was other evidence already admitted showing that Eubanks did not like Aaron. (25 RT 2736-2737.) Later, the trial court warned defense counsel that during opening statement, defense counsel said five times that Eubanks was a good mother, and if he offered evidence that she was a good mother, the court would likely change many of its rulings, including the ruling on the feces incident with Aaron. (25 RT 2872.) The court explained that it was not relevant whether Eubanks was a good mother before October 1997, but if the defense introduced evidence of her "good mothering," that would open the door to many issues,

including the evidence of Eubanks pushing feces into Aaron's face. (25 RT 2872.)

During the penalty phase, defense counsel elicited statements from prosecution and defense witnesses tending to show that Eubanks was a good mother, attended to her children, held birthday parties for them, was proud of them and spoke of them often. Some of the defense witnesses volunteered that the children were Eubanks's first priority. The prosecutor informed the court and defense counsel that she wanted to ask Michele Smith on rebuttal about Eubanks pushing the dirty diaper into Aaron's face, because Eubanks had introduced evidence regarding her being a good mother. (36 RT 4529.) Eubanks objected. (36 RT 4530-4531.) The trial court ruled that Eubanks's statements to Michele Smith were admissions under Evidence Code section 1220, that the testimony tended to rebut Eubanks's evidence about how the children were treated in the home, and therefore, admissible. (36 RT 4531.)

Michelle Smith testified about a telephone conversation she had with Eubanks. Aaron was being trained to use the bathroom, and wore disposable training pants at the time. Eubanks found a pair of training pants soiled with feces that Aaron had stuffed down between the wall and the bed that Aaron slept in. (36 RT 4533-4534.) Eubanks was very angry at Aaron, so she held up the soiled pants, told Aaron to smell it, and then rubbed the feces soiled pants in his face. (36 RT 4534.) When Michelle Smith became angry at Eubanks over this act, Eubanks said, "'I didn't rub it in his face, I just meant I made him smell it.'" (36 RT 4535.)

The evidence was relevant and admissible. During her penalty phase presentation, Eubanks made a point of introducing evidence tending to show that she was a good mother to her sons. She was lavish in celebrating their birthdays, hugged and kissed the children, kept them well-groomed and fed, and frequently took them to the doctor. (31 RT 3740, 3743, 3767, 3776-3782; 34

RT 4281-4285.) Brandon's friend said Eubanks was interested in her children, acted lovingly towards them, and was protective of them. (31 RT 3803-3805.) Several witnesses testified that Eubanks gave the impression her children were her highest priority and that she was proud of them. (31 RT 3783, 3880, 3890; 32 RT 3939, 3958-3959.) Because Eubanks presented evidence of her good mothering, the prosecution was entitled to impeach that evidence with a more rounded and accurate view of Eubanks's treatment of the children. "If the defense chooses to raise the subject, it cannot expect immunity from cross-examination on it." (*People v. Gates* (1987) 43 Cal.3d 1168, 1211; see also *People v. Ramos*, *supra*, 15 Cal.4th at p. 1173.) Evidence of Eubanks's use of the soiled pants was relevant to the issues introduced by Eubanks, and probative. It was not overly prejudicial. It did not cause the jury to decide this case on an emotional basis unrelated to the evidence. There is no reasonable possibility that the jury would have sentenced Eubanks to life imprisonment without the possibility of parole rather than death if evidence of this incident with Aaron had been excluded.

Whether the admission of Eubanks's statements to Michelle Smith violated state law or federal law, the standard for reversal is the same for evidence erroneously admitted at the penalty phase. (*People v. Page* (2008) 44 Cal.4th 1, 52-53.) State law error at the penalty phase, including the admission of evidence, is reviewed to determine whether there is a "reasonable possibility" that the error affected the penalty phase determination. This is the same as the federal "harmless-beyond-a-reasonable-doubt" standard required by *Chapman v. California, supra*, 386 U. S. at page 24. (*People v. Page, supra*, at pp. 52-53; *People v. Abilez* (2007) 41 Cal.4th 472, 526; *People v. Brown* (1988) 46 Cal.3d 432, 447.) Under this standard it must be evaluated whether there is any reasonable possibility the jury would have sentenced Eubanks to life imprisonment without the possibility of parole rather than death if the "dirty

diaper" incident had been excluded. If there was no reasonable possibility of a different outcome, absent this evidence, any error in admitting the evidence was harmless beyond a reasonable doubt.

Here, evidence of Eubanks pushing a dirty diaper into Aaron's face paled in comparison to the evidence that Eubanks deliberately shot each of the four boys in the head, shooting Brandon first, without warning, so that he could not interfere in her shooting the others, then hunting down the three little boys as they cowered on their beds. Eubanks stopped in the middle of shooting the little boys to re-load her five-shot revolver. She shot each boy in the head at close range, but when it came to herself she did not want to damage her face and fired a non-fatal shot into her abdomen instead. Her writings demonstrate she was in command of her faculties, and that she chose to kill the boys in a warped act of revenge against her husband and boyfriend.

The deliberate, intentional and premeditated murder of four children would merit the death penalty in most instances. Here, the four victims were particularly innocent and vulnerable, Eubanks's own children who were eating cereal and watching television. Although Eubanks presented evidence of her own difficult childhood, nothing in that evidence mitigated the horror of Eubanks destroying these children for her own perceived satisfaction and revenge. Evidence of this one incident was harmless beyond a reasonable doubt.

When Eubanks presented evidence at the penalty phase that she was a good mother to her boys, she opened the door to evidence rebutting that characterization of her. Her admission that she pushed a dirty diaper into young Aaron's face was relevant and probative to rebut the picture Eubanks tried to draw of her caring motherly nature. It is not reasonably possible that the jury would have spared her life had this evidence not been presented to the jury,

when compared to her acts of deliberately and intentionally shooting her four young boys. (See *People v. Page, supra*, 44 Cal.4th at pp. 53-54.)

VIII.

EXPERT TESTIMONY RECONSTRUCTING THE CIRCUMSTANCES OF THE CRIME WAS PROPERLY ADMITTED AT THE PENALTY PHASE

Eubanks contends that the admission of testimony by an expert crime scene reconstructionist about the circumstances of the crime violated Evidence Code section 352 and the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 160-173.) This contention lacks merit because the evidence was properly admitted.

Eubanks objected to the testimony of crime scene reconstructionist Rod Englert at the penalty phase, arguing his testimony was not relevant because the jury had already decided that Eubanks had the specific intent to kill. (30 RT 3466.) After hearing Englert's testimony at an Evidence Code section 402 hearing, Eubanks further argued that Englert would be acting like a juror in drawing conclusions from the evidence; the evidence was cumulative with the medical examiner's testimony; Englert would improperly provide the thought processes of some of the decedents (that Austin reacted to the gun shots by pulling up his leg and Matthew crawled to the end of the bunk bed); and that Englert's testimony was speculative. (30 RT 3519-3520.) Eubanks argued the jury would be double-counting the circumstances of the crime and the number of murders as factors in aggravation. Eubanks objected to the photos created by Englert and his assistants as they were not to scale, incomplete and inaccurate, and speculative. Finally, Eubanks objected that the evidence was unconstitutional, overly broad and vague under the Fifth, Eighth and Fourteenth Amendments, it did nothing to assist the trier of fact, and it invaded the province of the jury. (30 RT 3520.)

The trial court found that Englert was "extremely well qualified to render this type of testimony on crime scene reconstruction given his extensive experience in this area and credentials." (30 RT 3521.) The court found Englert's testimony could be helpful, if the jury chose to accept it, regarding errant bullets that were fired. The testimony was cumulative in some respects to the testimony of the medical examiner at the guilt phase, but the crime scene reconstruction expert provided additional helpful evidence that did not repeat the medical examiner's the testimony. The circumstances of the crime were relevant to the penalty phase, under Penal Code section 190.3, subdivision (a). The trial court found the pictures prepared by the expert were not unduly prejudicial, and the mannequins were "very nonprejudicial from 352 standpoint." (30 RT 3522.) At the conclusion of the 402 hearing and after argument by defense counsel, the trial court ruled the evidence was probative on the issue of the circumstances of the crime, and it was not overly prejudicial under Evidence Code section 352. (30 RT 3521-3522.)

The trial court's decision was correct. Evidence of the circumstances of the crime is clearly admissible at the penalty phase. (*People v. Loker* (2008) 44 Cal.4th 691, 705; *People v. Robinson, supra,* 37 Cal.4th at pp. 643-644; *People v. Box* (2000) 23 Cal.4th 1153, 1200.) Indeed, the discretion of the trial court to exclude evidence of the circumstances of the crime as unduly prejudicial is more circumscribed at the penalty phase. (*People v. Box, supra*, at p. 1201.)

The evidence here was not speculative. Englert provided information about bullet trajectories, stippling, and other information that related to a subject, multiple shootings, "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801.) The crime scene reconstruction was properly the subject of expert opinion evidence. Englert, a qualified expert, expressed his opinion on the sequence in which Eubanks murdered her children between 7:12 p.m. and 7:33 p.m. (See *People*

v. Robinson, *supra*, 37 Cal.4th at pp. 643-644 [deputy medical examiner's testimony about relative positions of the shooter and the victims admissible at penalty phase].) The trial court found the expert was well-qualified and that his opinion might be helpful to the jury. The jury was instructed on the standards for evaluating expert testimony and told that it could, but did not have to, accept the testimony of the expert. This was not speculation but an expert opinion rendered by a person with extensive experience and training in the field, after a thorough review of the police reports, medical reports, and examination of the premises.

The evidence was relevant, probative, and not unduly prejudicial. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 644.) To the extent Englert's testimony repeated the medical examiner's testimony it was very limited and the testimony at the guilt phase lacked a clear explanation of where all the bullets were aimed and how they lodged in the wall or broke the window. (24 RT 2500-2502, 2557-2559, 2561-2562, 2564-2565.) Englert gave clear descriptions of the trajectories of the bullets. (31 RT 3677, 3680-3681.) Englert explained that Eubanks shot at Austin three times as Austin cowered back on the top bunk: one shot went to the right of Austin, one went to the left of Austin, and one struck Austin in the face. All were fired at the height of Austin's head. (31 RT 3677-3678.) This fact explains that Eubanks was determined to shoot Austin in the head and persisted in multiple shots to end his life with a bullet to his brain. It provides some insight into Eubanks's character as she gunned down her helpless children, which in turn provides a basis for a moral and normative judgment.

As with the incident with the dirty diaper, Englert's testimony was not prejudicial in the legal sense of tending to evoke an emotional bias based on irrelevant factors. "[E]vidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him or her in

a bad light or merely because the defendant contests that evidence and points to allegedly contrary evidence." (*People v. Robinson*, *supra*, 37 Cal.4th at p. 644.) Englert's testimony and the evidence of Eubanks pushing soiled underpants into Aaron's face both are relevant and damaging to Eubanks because they reveal her moral character, and they do not introduce factors that are irrelevant to the moral question before the jury.

As in Argument VII, any possible error is harmless beyond a reasonable doubt. The depravity of Eubanks's actions ensured that there is no reasonable possibility that Eubanks would have been sentenced to life without parole, absent the testimony of the crime scene reconstructionist. (*People v. Page*, *supra*, 44 Cal.4th at pp. 52-53.)

IX.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF LIVING CONDITIONS FOR AN INMATE SENTENCED TO LIFE WITHOUT PAROLE BECAUSE THE EVIDENCE WAS IRRELEVANT AND SPECULATIVE

Eubanks contends that the exclusion of evidence of the living conditions for an inmate sentenced to life without parole violated her rights under Penal Code section 190.3 and under the Eighth and Fourteenth Amendments. (AOB 173-194.) This contention lacks merit. As Eubanks acknowledges, this Court has previously rejected this claim. (*People v. Jones* (2003) 29 Cal.4th 1229, 1261-1262; *People v. Fudge* (1994) 7 Cal.4th 1075; *People v. Quartermain* (1997) 16 Cal.4th 600, 632.)

Defense expert James Esten came to court with a photoboard of the Valley State Prison housing for condemned and administratively segregated female inmates. Esten believed that if she were sentenced to life without parole, Eubanks would be placed into administrative segregation for the first six months to one or two years, because she had murdered children. (35 RT 4311-

4312.) The trial court sustained an objection to use of the photographs and testimony about future living conditions. (35 RT 4314.) Esten also had a chart showing the levels of security and prison placements for life-without-parole inmates. (35 RT 4318-4321.) The court ruled this chart was not admissible, and limited Esten to testimony about Eubanks's predicted future dangerousness. (35 RT 4322.) The trial court's rulings conformed to law. Eubanks has not presented any valid reasons for overturning this Court's decisions in *Fudge*, *Quartermain*, and subsequent decision in *Jones*, that such evidence is inadmissible.

> "[E]vidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense. [Citations.] Its admission is not required either by the federal Constitution or by Penal Code section 190.3. [Citations.]" [Citation.] "Moreover, '[d]escribing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do. [Citation.]' [Citation.]"

(*People v. Jones*, *supra*, 29 Cal.4th at p. 1261.)

The decision for death or life without parole is a moral and normative decision that depends on two categories of information: (1) the circumstances of the crime and (2) the defendant's individual background and character. (*Boyde v. California* (1990) 494 U.S. 370, 382 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973].) The specific conditions of future confinement, either for life without parole or on death row, shed no light on the circumstances of the crime or on the individual background and character of the defendant. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1261.) The possible future assignment and living conditions of an inmate are irrelevant to the moral and normative choice before the jury

and are speculative. The trial court, therefore, properly ruled this information inadmissible.

X.

THE COURT'S EVIDENTIARY RULINGS AT THE PENALTY PHASE WERE CORRECT

In Argument X, Eubanks combines three evidentiary rulings at the penalty phase that she contends were in error and violated her rights to "a fair penalty phase trial and the heightened requirement of the Eighth and Fourteenth Amendments." (AOB 195-215.) These contentions lack merit. The trial court made its evidentiary rulings carefully, conscientiously and correctly. Eubanks received a fair trial.

Three of the challenged rulings involved evidence that Eubanks wanted to present in mitigation, but that was excluded by the trial court, i.e., information about Eubanks's purported assistance of another inmate; sexual relations with her cousin Greg Smith; and molestation by her father Bill Stanley. The trial court properly excluded this evidence because there was insufficient foundation and it was unreliable. Additionally, the trial court properly admitted evidence from Eubanks's jail records that expert Esten reviewed, to impeach Esten.

During the penalty phase, outside the presence of the jury, Eubanks's attorney gave the court an investigative report on Dr. Bart Jarvis, noting that he expected an objection from the prosecutor on the grounds of hearsay.[25/] (32 RT 3903.) In the report, Dr. Jarvis told a defense investigator about an incident that happened at the prison infirmary when Dr. Jarvis was not present. He heard about it after the fact. He did not remember all the details at the time he talked to the investigator. (32 RT 3904.) Eubanks did not make a clear proffer of

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25. The report was made Court's Exhibit 27. (32 RT 3908.)

evidence in the Reporter's Transcript, but apparently it involved a nurse who did not respond to an inmate's request. (32 RT 3905-3906.) The inmate had mental problems and did not remember anything at the time of trial. (32 RT 3906.) Eubanks asserts, in her brief, that she intervened when a nurse refused treatment for an inmate, and Eubanks was able to obtain the necessary treatment for the inmate. (AOB 196.)

As the trial court found, there simply was no foundation for this evidence. There was no eyewitness available to describe what happened. (32 RT 3906.) Dr. Jarvis did not remember the details of the event he merely heard about. (32 RT 3904.) Only second or third level hearsay was available, and it did not meet any criterion for reliability. The testimony did not fall within any recognized exception to the hearsay rule. The testimony of Dr. Jarvis was not admissible.

Similarly, no admissible evidence of Eubanks's relationship with her cousin or alleged molestation by her father was offered. Eubanks called her uncle, Don Smith, to testify during the penalty phase. Don Smith was born in 1938, and married Rose Smith when he was 19 years old, in 1957. (33 RT 3982-3983, 4070.) They had a son, Greg, four years later, in 1961, three years before Eubanks was born. (33 RT 4070.) The Smiths divorced. (33 RT 4071.) Eubanks lived with Rose for a time when Eubanks was 15 or 16 years old. Don Smith was not involved with his ex-wife at that time, had not seen much of Eubanks since Eubanks was about eight years old, and did not pay much attention to Eubanks or Rose when they were living together. (33 RT 4072.) Nonetheless, defense counsel asked Don Smith if Eubanks had an inappropriate relationship with her cousin Greg when she was living with her Aunt Rose. (33 RT 4073.) The court sustained an objection for lack of foundation, as Don Smith had just testified that he was not involved with Eubanks and did not pay any attention to her at that time. (33 RT 4073-4075.)

Defense counsel proffered that Don Smith had heard about this purported affair from Eubanks, Rose, and Greg. (33 RT 4074.) At the time of trial, Rose was undergoing surgery for cancer and Greg was dead. (33 RT 4072, 4074.) The court excluded Don Smith's testimony about the purported affair as hearsay; the court found the testimony not reliable, due to the levels of hearsay and Don Smith's own statements that he was not involved with Eubanks, Rose or Greg at the time and paid no attention to what they did. (33 RT 4072, 4075.)

Eubanks also called Deborah Burdette-Wilson, who provided career counseling to Eubanks when Eubanks started at Maric College. (35 RT 4389-4390.) The prosecutor moved to exclude hearsay testimony that Eubanks had told Burdette-Wilson, in response to a leading question from Burdette-Wilson, that Eubanks was molested by her father, Bill Stanley. (35 RT 4393-4394.) That was completely contrary to what Eubanks had told her psychiatrist, psychologist, and numerous other people to whom she had confided that she had been molested, but not by her father. (35 RT 4393.) Defense counsel affirmed that Eubanks had never told any mental health professional who interviewed her that she had been molested by her father. The trial court excluded the statement as unreliable and inadmissible hearsay. (35 RT 4394.)

Defense correctional consultant, Esten, testified that he reviewed jail records related to Eubanks, including arrest reports, her medical records and incident reports from the detention center where she was held. (35 RT 4341-4342, 4345.) He further stated his opinion, that Eubanks would not be a future danger to anyone, was based on her conduct in jail. (35 RT 4349.) His opinion was based on his review of her jail records and interview with Eubanks. According to Esten, Eubanks's crimes were relevant only if there were unique circumstances that would affect prison housing or future dangerousness. (35 RT 4345, 4349, 4351.) On cross-examination, the prosecutor questioned Esten

about information contained in the records he had reviewed. (35 RT 4347, 4360-4361, 4363.) Eubanks objected on hearsay and foundation grounds, arguing that the prosecutor needed to have the declarant available as a witness to perfect any impeachment of Esten. (35 RT 4361.) The court overruled the objection, finding the information to be admissible impeachment. (35 RT 4363.) The court noted that defense counsel could not avoid impeachment by providing a sanitized record to its expert as the basis for his opinion. (35 RT 4363-4364.) Some of the records were from the time Eubanks was in a psychiatric ward, either at a hospital or within the detention center. She was under the custody of the Sheriff's Department at both locations, so these incidents reflected her behavior while incarcerated, which Esten asserted he relied on in forming an opinion about Eubanks's future dangerousness while incarcerated. (35 RT 4363-4366.) Defense counsel could clarify on re-direct examination that Eubanks was at a psychiatric ward and on medication when these incidents occurred. (35 RT 4365-4366.)

The prosecutor sought to impeach Esten's opinion that Eubanks would not be dangerous in the future with information from her jail medical records. The prosecutor asked Esten if he had considered a progress note dated March 26, 1998, describing Eubanks as "vindictive, cursing generously in all directions, full of loathing," and "antisocial." (35 RT 4367.) The prosecutor asked about a March 1, 1998 progress note that stated that during a game, Eubanks became very angry, demanded to be taken out of the room, and threatened to hit a staff member who Eubanks referred to as a "bitch." (35 RT 4369-4371.) Esten was asked about an incident on December 1, 1997, when Eubanks awoke from a coma and responded to a picture of her children's funeral by commenting that Eric was with a "bitch and her cunt sister," and threatened to kill them at the preliminary hearing if Eric brought the woman with him. (35 RT 4373.) As to all of these, Esten responded that the described

incidents did not change his opinion of Eubanks's future dangerousness in prison, because such angry statements were typical of a person undergoing the stresses of pretrial county jail incarceration, and because only actions that resulted in disciplinary actions would result in a prisoner being classified as a danger by the prison administration. (35 RT 4368, 4371.)

Eubanks relies largely on *Green v. Georgia* for her assertion that the rumors about Eubanks's assistance to another inmate, affair with her cousin, and molestation by her father should be admitted. (*Green v. Georgia* (1979) 442 U.S. 95, 96-97 [99 S.Ct. 2150, 60 L.Ed.2d 738] (per curiam); see also *People v. Weaver, supra*, 26 Cal.4th at pp. 980-981; *People v. Phillips* (2000) 22 Cal.4th 226, 238.) Her proffered evidence, however, does not meet the standard of *Green v. Georgia*. In that capital case, the high court permitted the admission of a declaration against penal interest – another man's statement that he alone shot the victim after ordering Green to leave – that was not otherwise admissible under state law, both because it was "highly relevant to a critical issue in the punishment phase of the trial," and also because "substantial reasons existed to assume its reliability." (*Green v. Georgia, supra*, 442 U.S. at p. 97.) Notably, in that case the state had considered the statement to be sufficiently reliable to use it against the declarant in the declarant's capital penalty determination. The Court called these "unique circumstances." (*Id.*)

In California, the rules of evidence do not impermissibly infringe on a defendant's right to present mitigating evidence ordinarily, and the *Green* holding applies to the rare cases where "the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable." (*People v. Phillips*, *supra*, 22 Cal.4th at p. 238; *People v. Weaver*, *supra*, 26 Cal.4th at pp. 980-981.) In particular, this Court warned against permitting a defendant to give self-serving testimony free

from cross-examination as to its validity. (*People v. Weaver, supra*, 26 Cal.4th at p. 981, citing *People v. Stanley* (1995) 10 Cal.4th 764, 839.)

And the United States Supreme Court has limited *Green v. Georgia.* In *Oregon v. Guzek* (2006) 546 U.S. 517 [126 S.Ct. 1226, 163 L.Ed.2d 1112], the Court reiterated that:

> The Eighth Amendment insists upon "'reliability in the determination that death is the appropriate punishment in a specific case.'" [Citations.] The Eighth Amendment also insists that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." [Citation.]

(*Oregon v. Guzek*, 546 U.S. at pp. 525-526, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 327-328 [109 S.Ct. 2934, 106 L.Ed.2d 256].)

The states are free to set limits on the evidence admissible at a penalty phase, as long as the basic requirement of reliability is met, and all reliable mitigating evidence about the circumstances of the offense and about defendant's character or record are admissible. (*Oregon v. Guzek, supra*, 546 U.S. at pp. 525-526.)

The basic requirement of reliability has not been met for any of the evidence proposed by Eubanks. There were no witnesses to the purported kind act by Eubanks for a fellow inmate, the alleged affair with her cousin and alleged molestation by her father. The proposed hearsay did not fall into any traditionally recognized exception and bore no other indicia of reliability. Rather, Eubanks sought to introduce self-serving hearsay statements without any showing as to its validity. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 981.) The trial court properly excluded this evidence.

Further, there is no reasonable possibility that the evidence would have had an effect on the jury's determination even if it had been admitted. A small act of kindness toward another inmate pales in comparison to Eubanks's gouging the eyes of another inmate. If evidence of Eubanks's statement to Burdette-Wilson had been admitted, there would have been a torrent of

evidence from all the other people with whom Eubanks discussed her tragic life who would have testified that Eubanks never made this claim before. (See 35 RT 4393-4394.) Even assuming arguendo that this statement were admitted, along with evidence of Eubanks's affair with her cousin, there is no reasonable possibility that such evidence would have tipped the scale in favor of life in prison without the possibility of parole. Eubanks's premeditated and deliberate murder of her four children was particularly brutal and heinous. The evidence convincingly showed that Eubanks deliberately murdered her children out of vengeance and hatred toward Eric and Dodson. Any error was harmless beyond a reasonable doubt.

Similarly, the trial court was correct in permitting the prosecutor to impeach Esten. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1173; *People v. Gates*, *supra*, 43 Cal.3d at p. 1211.) Assuming argendo error in impeaching Esten with parts of Eubanks's jail records, any possible error was harmless beyond a reasonable doubt.

XI.

EUBANKS RECEIVED A FUNDAMENTALLY FAIR TRIAL

Eubanks contends numerous errors considered cumulatively denied her from receiving a fair trial (AOB 216-217.) No individual errors occurred during Eubanks's trial. Moreover, even if errors are assumed, as discussed herein, they do not require reversal of Eubanks's conviction or sentence, either individually or cumulatively. (*People v. Slaugher* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094; *People v. Cooper* (1991) 53 Cal.3d 771, 830.) Eubanks received the fair trial to which she was entitled, even if it may not have been a perfect trial. (See *People v. Stewart, supra*, 33 Cal.4th at 522.) Eubanks's claim of cumulative error should be denied.

XII.

EUBANKS'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE HAVE ALL BEEN REPEATEDLY REJECTED BY THIS COURT AND ARE OTHERWISE LACKING IN MERIT

Eubanks alleges numerous aspects of California's 1978 death penalty sentencing scheme violate the United States Constitution. (AOB 217-258.) As Eubanks herself concedes (AOB 217), many of these claims have been presented to, and rejected by, this Court in prior capital appeals. Further, the 1978 death penalty law has been repeatedly upheld as constitutional by the United States Supreme Court. (*Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 892, 894, 163 L.Ed.2d 723]; *Brown v. Payton* (2005) 544 U.S. 133 [125 S.Ct. 1432, 161 L.Ed.2d 234]; *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *Boyde v. California, supra*, 494 U.S. 370; *California v. Brown* (1987) 479 U.S. 538 [107 S.Ct. 1250, 93 L.Ed.2d 934]; *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) As long as the state narrows the class of defendants eligible for the death penalty, and the state provides a means for the individualized penalty determination that permits the sentencer to consider all mitigating evidence relevant to the defendant's record, personal characteristics, and circumstances of his crime, there are few restrictions on the state's statutory scheme for carrying out this punishment. (*Kansas v. Marsh* (2006) 548 U.S. 163, 174 [126 S.Ct. 2516, 165 L.Ed.2d 429]; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275 [118 S.Ct. 757, 139 L.Ed.2d 702]; *Tuilaepav. California, supra*, 512 U.S. at pp. 971-979; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306 [107 S.Ct. 1756, 95 L.Ed.2d 262].)

Because Eubanks fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, her claims should all be rejected. Moreover, as this Court has observed in the past, it is entirely proper

to reject Eubanks's complaints by case citation, without additional legal analysis. (*People v. Harris* (2008) 43 Cal.4th 1269, 1322-1323; *People v. Page*, *supra*, 44 Cal.4th at pp. 60-61; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1058-1059.)

A. California's Death Penalty Adequately Narrows The Class Of Offenders That Are Death Eligible

Eubanks contends that California's death penalty statute is unconstitutional because Penal Code section 190.2 is impermissibly broad and fails to adequately narrow the class of offenders that are eligible for the death penalty. (AOB 220-222.) This Court has repeatedly rejected this contention. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *People v. Barnwell*, *supra*, 41 Cal.4th at p. 1058; *People v. Bonilla* (2007) 41 Cal.4th 313, 358.) Eubanks provides no basis for this Court revisiting its decisions rejecting this claim, especially in this case, where Eubanks committed multiple murders by ambushing four helpless, innocent children.

B. Penal Code Section 190.3 Is Constitutional

Eubanks contends that Penal Code section 190.3 is unconstitutional because factor (a) does not sufficiently narrow those circumstances under which the death penalty is imposed. (AOB 222-225.) The United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-980; *People v. Harris, supra*, 43 Cal.4th at p. 1322; *People v. Brasure* (2008) 42 Cal.4th 1037, 1066; *People v. Alfaro* (2007) 41 Cal.4th 1277.) Eubanks does not provide any basis for this Court to revisit its prior decisions rejecting this contention.

C. California's Capital Punishment Laws Provide Sufficient Safeguards To Protect Eubanks's Constitutional Rights

Eubanks contends that California's death penalty law violates the Sixth, Eighth and Fourteenth Amendments by not guarding against the arbitrary imposition of death. (AOB 225-252.) This argument has been repeatedly rejected. The decision to impose death is a moral and normative decision, therefore, no written findings or unanimity as to aggravating factors are required. There is no requirement that the sentencer find beyond a reasonable doubt that aggravating factors exist, that aggravating factors outweigh mitigating factors, or that death is the appropriate penalty. (See *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 173-176, 181 [Kansas death penalty statute, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise or that mitigators do not outweigh aggravators, is constitutional]; *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511], overruled on other grounds, *Ring v. Arizona, supra*, 536 U.S. 584 [Arizona statute, that requires the death penalty be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances, is constitutional]; *Brown v. Sanders*, *supra*, 546 U.S. 212; *Boyde v. California*, *supra*, 494 U.S. 370.)

1. There Is No Requirement For Findings Beyond A Reasonable Doubt At The Penalty Phase

Eubanks argues that she had a Sixth Amendment constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty based on *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147

L.Ed.2d 435]. (AOB 226-239.) This Court has rejected the contentions that juror unanimity or written findings regarding aggravating factors are constitutionally required at the penalty phase, and that the high court's Sixth Amendment jurisprudence compels a different answer. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1030; *People v. Page*, *supra*, 44 Cal.4th at p. 61; *People v. Mendoza* (2007) 42 Cal.4th 686, 707; see also *People v. Stevens* (2007) 41 Cal.4th 182, 212; *People v. Lewis* (2008) 43 Cal.4th 415, 421.)

Under the California death penalty statute, sufficient factual support for a death sentence consists of the factual elements of first-degree murder plus the factual elements of a statutory special circumstance found beyond a reasonable doubt. (Pen. Code, § 190.2; see *Brown v. Sanders*, *supra*, 546 U.S. at p. 217; *Tuilaepa v. California*, *supra*, 512 U.S. at p. 975; *People v. Griffin* (2004) 33 Cal. 4th 536, 595; *People v. Ochoa, supra*, 26 Cal 4th at 454.) In Eubanks's case, these murder and special-circumstance findings were made by a unanimous jury under the beyond a reasonable doubt standard of proof in the guilt phase. (Pen. Code, § 190.4; CT 589; 40 RT 5568-5569.) Because Eubanks's death sentence is fully supported by those jury findings, it comports with the constitutional requirements of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Eubanks incorrectly contends that California state law requires an additional factual finding of an aggravating circumstance, or an additional factual finding of the comparative import of aggravation and mitigation, before a death sentence may be imposed at the penalty phase. The "special circumstances" found by the jury in its guilt-phase verdict establish by definition an aggravating factor. (Pen. Code, § 190.3, subd. (a).) No new fact-finding is required. This is especially true here, where Eubanks brutally killed four young children. If one or more of the special circumstances are found true beyond a reasonable doubt, the Legislature has authorized only two

punishments: death or life without the possibility of parole. (Pen. Code, § 190.2, subd. (a).) No other facts must be found to impose death. The sentencer then "takes into account" that jury-adjudicated aggravator, along with any further aggravating or mitigating evidence presented in the penalty phase, to make a discretionary choice between the two available sentences, *i.e,* death or life imprisonment without parole. (Pen. Code, § 190.3; see *Brown v. Sanders*, *supra*, 546 U.S. at p. 217; *Tuilaepa v. California*, *supra*, 512 U.S. at p. 948 (California sentence-selection aggravators are non-"propositional").) The sentencer's determination of the comparative import of the aggravating and mitigating evidence is a "moral and normative" assessment – not a finding of historic "fact" as that term is used in the *Apprendi-Ring-Blakely-Cunningham* line of opinions. (See *People v. Carpenter* (1997) 15 Cal. 4th 312, 417-418.)

Nor does the Constitution require submitting such a discretionary choice within an available sentencing "range" to a jury or to a sentencer under any particular standard of proof. (See *United States v. Booker*, 543 U.S. at p. 233; *Jones v. United States* (1999) 526 U.S. 227, 249 [119 S.Ct. 1215, 143 L.Ed.2d 311]; see also *Boyde v. California*, *supra*, 494 U.S. at p. 377; *Walton v. Arizona*, *supra*, 497 U.S. at pp. 647-649.) Further, the legislative requirement of California's determinate sentencing law before *Cunningham*, that the sentencer must impose the middle of three available terms, does not apply to the two sentencing options available for a murder with special circumstances. (See former Pen. Code, § 1170, subd. (b); *Cunningham v. United States, supra*, 127 S.Ct. at p. 863.)

Nothing in *Ring* or *Booker* invalidates California's penalty-phase procedures. (*People v. Page*, *supra*, 44 Cal.4th at p. 61; *People v. Prince*, *supra*, 40 Cal.4th at pp. 1297-1298.) In *Ring*, Arizona law required the judge to make a further finding of historical fact at the sentencing proceeding before he could impose a sentence of death. (*Ring v. Arizona*, *supra*, 536 U.S. at p.

592, fn.1.) Under the *Blakely-Apprendi* cases, that fact question instead had to be submitted to a jury under the constitutional standard of proof. Similarly, in *Booker*, the error occurred because the defendant's sentence was increased, beyond the maximum otherwise available by statute, based on an additional finding of fact by the judge rather than by a jury. (*United States v. Booker*, *supra*, 543 U.S. at pp. 242-44.) In contrast, California law does not require, as a prerequisite to a death sentence, that the sentencer at the penalty phase make any further factual findings beyond the guilt and special circumstance findings made earlier by the jury under the appropriate beyond-reasonable-doubt standard of proof.

2. Neither The State Nor The Federal Constitution Require That Aggravating Factors Be Found To Exist And To Outweigh Mitigating Factors Beyond A Reasonable Doubt, Or That Death Is The Appropriate Penalty Be Found Beyond A Reasonable Doubt

Eubanks also contends that the due process and the cruel and unusual clauses of the state and federal constitutions require proof beyond a reasonable doubt that aggravating factors exist and outweigh mitigating factors and that death is the appropriate penalty. (AOB 239-243.) Neither the federal or state constitution creates such a requirement. (See *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 173-176, 181; *Walton v. Arizona*, *supra*, 497 U.S. 639.) Eubanks acknowledges that this Court has repeatedly rejected his claims, but asks this Court to reconsider its rulings on these subjects.

Eubanks argues that due process requires application of the beyond-a-reasonable-doubt standard to the penalty determination, relying on the analysis in *Santosky v. Kramer* (1982) 455 U.S. 745 [102 S.Ct. 1388, 71 L.Ed.2d 599]. *Santosky* is not on point; in that case, the high court held that the standard of proof for termination of parental rights must be at least by clear and convincing evidence. (*Id.* at p. 769.) This Court has already rejected the contention that

the due process or the cruel and unusual clauses require that any factors relied on to impose death must be proven beyond a reasonable doubt. (*People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1029-1030, citing *Tuilaepa v. California*, *supra*, 512 U.S. at p. 979 [referring to California law and holding a capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing]; *People v. Page*, *supra*, 44 Cal.4th at p. 60.) Eubanks fails to present any reason why this Court's previous pronouncements on this subject should be revisited.

3. Written Findings Of The Factors In Aggravation Are Not Required

Eubanks contends that she was denied her due process and Eighth Amendment rights to meaningful appellate review from an absence of written findings by the jury showing the aggravating factors relied on to impose death. (AOB 243-246.) This Court has repeatedly rejected this contention. (*People v. Page*, *supra*, 44 Cal.4th at p. 60; *People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *People v. Abilez*, *supra*, 41 Cal.4th at p. 533.) Eubanks provides no basis for this Court to revisit its decisions rejecting this claim.

4. Eubanks Is Not Entitled To Inter-case Proportionality Review

Eubanks contends inter-case proportionality is necessary to ensure constitutional implementation of California's death penalty. (AOB 246-248.) This Court and the United States Supreme Court have rejected the contention that inter-case proportionality review is constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Page*, *supra*, 44 Cal.4th at p. 60; *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1030; *People v. Harris*, *supra*, at pp. 1322-1323.)

While Eubanks does not expressly request that this Court undertake an inter-case proportionality review, even assuming such a request, it is clear that

Eubanks's death sentence is not disproportionate to her culpability. Eubanks murdered four people. That alone makes this case more deserving of death than most other capital cases in California. In addition, the four people murdered were little children, completely innocent of any aggravating circumstances. In comparison to other murders with special circumstances, Eubanks especially deserves death. She does not try to argue to the contrary except in the broadest, most abstract terms that do not take into account her actions. In fact, the trial court already compared this case to other crimes, and found that, given the number of victims and their complete vulnerability, Eubanks's murders were "the single most horrific criminal episode in the history of this county." (38 RT 4813; 6 CT 1152.)

5. Adjectives Such As "Extreme" And "Substantial" Did Not Confuse The Jury And Did Not Render A Conviction Unconstitutional

Eubanks complains that her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendment were violated because of the inclusion in the list of potential mitigating factors of the adjectives "extreme" (Pen. Code, § 190.3, factors (d) and (g)) and "substantial" (factor (g)). (AOB 248-249.) Eubanks's contention has been repeatedly rejected by this Court and Eubanks provides no basis for this Court reconsidering its prior decisions. (*People v. Page*, *supra*, 44 Cal.4th at p. 60; *People v. Prince, supra,* 40 Cal.4th at p. 1298.)

6. There Is No Requirement For A Trial Court To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigation And That The Absence Of Such Mitigation Was Not Aggravating

Eubanks contends that the factors introduced by "whether or not" – factors Penal Code section 190.3, factors (d), (e), (f), (g), (h) and (j) – were relevant solely as possible mitigators, and that the jury should have been so instructed. (AOB 249-252.) This Court has repeatedly rejected the contention

that a jury must be instructed that factors (d) through (h) and factor (j) can only be considered as evidence in mitigation. (*People v. Page*, *supra*, 44 Cal.4th at p. 61.) This Court has also repeatedly rejected the argument that the jury must be instructed that the absence of evidence of a mitigating factor cannot be considered aggravating. (*Id.* at p. 61.) Eubanks has not provided any reason for this Court to revisit its prior decisions rejecting her contention.

As with many of her other arguments, this contention is presented in a completely abstract way. It is not applicable in this case, where Eubanks murdered four young children out of vengeance toward two men, Eric and Dodson. There is no likelihood that the jury was misled by the jury instructions or failed to understand the instructions in this case, or that the verdict of death was due to non-statutory aggravating factors. Eubanks's death sentence is appropriate given her premeditated brutal murder of four innocent children.

D. Differences In Sentencing Procedures For Non-capital Defendants Do Not Create A Denial Of Equal Protection For Capital Defendants

Eubanks complains that she is being denied equal protection because as a capital defendant she was not afforded the same procedural safeguards as non-capital defendants, *i.e.* a unanimous jury finding on a sentencing enhancement and proof of the aggravating factors beyond a reasonable doubt. (AOB 252-255.) This Court has repeatedly rejected Eubanks's contention that the death penalty law denies capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1030; *People v. Page*, *supra*, 44 Cal.4th at pp. 60-61.) Eubanks cites no basis for this Court to revisit its prior decisions rejecting this claim.

E. Eubanks's Death Sentence Does Not Violate International Norms Of Decency, Due Process, Or The Eighth Amendment

Eubanks complains that her death sentence violates international norms of decency, due process and the Eighth Amendment. (AOB 256-258.) These contentions have already been rejected by this Court. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1029; *People v. Page*, *supra*, 44 Cal.4th at p. 61; *People v. Moon* (2005) 37 Cal.4th 1, 47-48.) Eubanks argues that these considerations apply particularly to felony-murders and single-victim murders. (AOB 258.) However, these are not the circumstances of Eubanks's case, where she committed four premeditated and deliberate murders of innocent children. Eubanks presents no reason for this Court to revisit its decisions rejecting the claim that the death penalty violates international norms of decency, due process and the Eighth Amendment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to affirm the judgment below.

Dated: October 9, 2008

Respectfully submitted,

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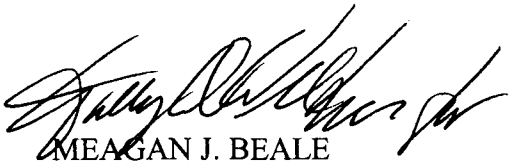

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 45,061 words.

Dated: October 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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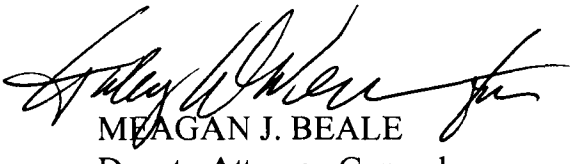

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DECLARATION OF SERVICE BY U.S. MAIL - CAPITAL CASE

Case Name: **People v. Eubanks** Case No.: **S082915**

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 October 10, 2008, 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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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 October 10, 2008, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature