SUPREME COURT COPY

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July 17, 2009

Frederick Ohlrich, Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

SUPREME COURT
FILED
JUL 20 2009
Frederick K. Ohlrich Clerk
Deputy

Attn: Mary Jameson, Deputy Clerk

Re: People v. Sandi Dawn Nieves, S092410

Direct Capital Appeal

Errata and Replacement Pages for Appellant's Opening Brief

Dear Mr. Ohlrich:

The Court filed appellant's 637 page opening brief in this direct capital appeal on December 22, 2008. Since the filing, appellant's counsel has discovered several errors that should be corrected. Appellant respectfully requests that the following errata with corrected pages be included with Appellant's Opening Brief. We have not included typographic errors where the meaning and context should be clear to the reader. We have corrected several editing errors, where we believe a statement may be incorrect or misleading. None of the corrections changes the arguments presented or adds to the substance of the arguments.

Replacement pages are enclosed. Each replacement page bears the notation in the lower right corner that it is a "corrected" page.

The errata are as follows:

Page	Current Text	Corrected Text
p. 8[1]	Top ¶: Although the evidence at trial was mixed, it appears that prior to the fire Sandi was in turmoil. The prosecution argued that Sandi intended revenge against the men in her life by killing her children. The defense contended that Sandi's life collapsed around her and that she had been in a dissociative state when the fire occurred. The defense contended that Sandi did not act with the mens rea required for conviction. It also argued that Sandi, intent on committing suicide, also set the fire for the sake of the children, believing they would be better off in heaven with her than living with either of their fathers.	Top ¶: Although the evidence at trial was mixed, it appears that prior to the fire Sandi was in turmoil. The prosecution argued that Sandi intended revenge against the men in her life by killing her children. It also argued that Sandi, intent on committing suicide, also set the fire for the sake of the children, believing they would be better off in heaven with her than living with either of their fathers." The defense contended that Sandi's life collapsed around her and that she had been in a dissociative state when the fire occurred. The defense contended that Sandi did not act with the mens rea required for conviction.

[1] One sentence on page 8 was out of order and an argument was attributed to the defense when it should have been attributed to the prosecution. The Attorney General was made aware of this particular error by letter from Amitai Schwartz to Deputy Attorney General Mary Sanchez, dated January 5, 2009.

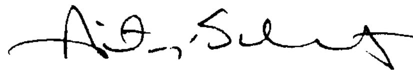
p.29	Last sentence: Humphrey testified she had called a Dr. Paul Satz, a developer of the newest normative data on the MMPI-II. 5299:11.	Last sentence: Humphrey testified she spoke to a Dr. Paul Satz, a developer of the newest normative data on the color trails test. 5299:11 -5300:12.
p.167	First ¶: The court denied defense counsel's challenge for cause, and because the defense had exhausted all peremptory challenges, she was sworn in as Alternate Juror 1. 13 RT 1224:6.	First ¶: The court denied defense counsel's challenge for cause, and because the defense had exhausted all peremptory challenges to alternates, she was sworn in as Alternate Juror 1. 13 RT 1224:6.
p.531	Part 2, second ¶: "Before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for the individual in light of his personal history and characteristics and <u>the circumstances of the offense</u>." <u>Abdul-Kabir v. Quarterman</u> (2007) 550 U.S, 233, 127 S.Ct. 1654, 1674 (citing <u>Lockett,</u> 438 U.S. at 605).	Part 2, second ¶: "[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for the individual in light of his personal history and characteristics and <u>the circumstances of the offense</u>." <u>Abdul-Kabir v. Quarterman</u> (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674 (citing <u>Lockett,</u> 438 U.S. at 605)(emphasis added). [2]

[2] Correction of the error on page 531, carried over to page 532. Therefore replacement pages 531-532 are enclosed.

p.590	Last ¶: There was also some evidence to show that Sandi Nieves was a controlling mother who was overly protective of her children. There was evidence of guilt from the abortion. Once she decided to commit suicide herself, she could not leave her children to anyone else because no one could care for them as she had.	Last ¶: There was also some evidence to show that Sandi Nieves was a controlling mother who was overly protective of her children. There was evidence of guilt from the abortion. Once she decided to commit suicide herself, she could not leave her children to anyone else because no one could care for them as she had. See 54 RT 8416:10-13, 8458:25-8459:17.

Thank you for your cooperation and assistance.

Respectfully submitted,



Amitai Schwartz
Attorney for Defendant-Appellant,
Sandi Dawn Nieves

AS/

cc: Mary Sanchez,
Deputy Attorney General

California Appellate Project

PROOF OF SERVICE BY U.S. MAIL

Re: The People of the State of California vs. Sandi Dawn Nieves, California Supreme Court Case No. S092410

Los Angeles County Superior Court, Case No. PA030589-01

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the attached

Letter to Frederick Ohlrich, Clerk Re: Opening Brief Errata

on the following by placing a copy in an envelope addressed to the parties listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid, at Emeryville, California, on July 17, 2009.

Edmund G. Brown, Jr., Attorney General
Mary Sanchez, Deputy Attorney General
300 South Spring Street, Suite 5000
Los Angeles, CA 90013

Docket Clerk
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 17, 2009 at Emeryville, California.

Amitai Schwartz

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

B. Guilt Phase

1. The Prosecution Case

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

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

Cross-examination attacked Humphrey's methodology and the basis for the opinions she had expressed. 37 RT 5211:3-5231:13, 38 RT 5279:18. Dr. Humphrey admitted that she had made some methodological mistakes in reporting some of the test results in her written report. Id. at 5221:26-5229:27, 5303:24-5305:10. The prosecutors vigorously developed the theme that Humphrey's findings were not accurate and that she had misinterpreted information from third parties. Humphrey testified she spoke to a Dr. Paul Satz, a developer of the newest normative data on the color trails test. 5299:11 -5300:12.[8]

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

(continued...)

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

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

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

But the court prevented the jury from considering and giving meaningful effect to all the chaplain had to offer. Counsel asked, "Do you feel Sandi has more to give others?" 63 RT 9891:23-26. This was a relevant consideration for the jury. A jail chaplain with her experience could have offered reliable opinions about whether "Sandi ha[d] the character to be of help to people even within the prison system" (63 RT 9892:17-18), and whether "Sandi [was] the type of person that ha[d] the capacity to help fill other people's lives" (63 RT 9892:22-24). But the court would not allow these questions.

The trial court's exclusion of character testimony violated Sandi Nieves's constitutional right to put on mitigating evidence during the penalty phase of her capital case. <u>Skipper</u>, 476 U.S. at 4; <u>Eddings</u>, 455 U.S. at 114; <u>Lockett</u>, 438 U.S. at 604.

2. <u>The Trial Court Improperly Excluded Mitigating Evidence Relevant to the Defendant's State of Mind At the Time of the Offense</u>

The court improperly excluded testimony relevant to the defendant's state of mind the night of the fire. Such evidence about the circumstances surrounding the offense is also admissible under <u>Lockett v. Ohio</u>. <u>See</u> 438 U.S. at 604; <u>Zant v. Stephens</u>, 462 U.S. at 879.

"[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for the individual in light of his personal history and characteristics and <u>the circumstances of the offense</u>." <u>Abdul-Kabir v. Quarterman</u> (2007) 550 U.S. 233, 127 S.Ct. 1654, 1674 (citing <u>Lockett</u>, 438 U.S. at 605)(emphasis added). Likewise, Penal Code § 190.3(a) allows the trier of fact to take into account the circumstances of the crime when determining whether to sentence the

defendant to death. People v. Gay (2008) 42 Cal.4th 1195, 1218-1219; People v. Guerra (2006) 37 Cal.4th 1067, 1154.

"Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime." Guerra, 37 Cal.4th at 1154. Subsection (k) also allows the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Penal Code § 190.3(k). A lay witness may "testify about objective behavior and describe behavior as being consistent with a state of mind." People v. Chatman (2006) 38 Cal.4th 344, 397.

The trial court sustained hearsay objections every time defense counsel attempted to ask witnesses such as Driskell and Thompson about their knowledge of how Sandi Nieves was reacting to her pregnancy and the subsequent abortion. 61 RT 9488:1-9489:2, 9556:4-17. This testimony was offered to show the defendant's state of mind during the days that led up to the death of the children.

Out of court statements relevant to the declarant's state of mind are admissible as an exception to the hearsay rule. Evid. Code. § 1250.[169] Statements about the declarant's state of mind at the time of the statement are admissible when the then existing state of mind is a relevant issue in the case. Adkins v. Brett (1920) 184 Cal. 252, 255. See also People v. Geier (2007) 41 Cal.4th 555, 586; People v. Hernandez (2003) 30 Cal.4th 835,

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[169] Evidence Code § 1250 states that evidence of statements of the declarant's then existing state of mind or emotion are not made inadmissible by the hearsay rule when: ". . . (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶](2) The evidence is offered to prove or explain acts or conduct of the declarant. . . ."

final blow to the defense – it told the jury to disregard multiple mitigating factors and it specially informed the jury that defense counsel had tried to mislead them with his characterization of mitigating factors.

The mitigating evidence could have tipped the balance toward life if the court had properly allowed the jury to give it full and meaningful consideration and not forced the jurors to cram it all together into one statutory factor to be weighed against aggravating factors. As the court recognized in its ruling on the mandatory Penal Code § 190.4 motion, defendant did introduce several mitigating considerations. First, she had been physically abused as a child by her mother. Second, the abuse may have caused seizures. Third, she felt a sense of hopelessness, stress, and depression over her marriages, boyfriend, lack of a job and weight. Fourth, a number of friends and loved ones believed she was a caring and loving mother. Fifth, the court inferred from the evidence that defendant "will more than likely be a model prisoner." 65 RT 10373:3-19. Additionally, the jury could have considered defendant's financial devastation when David Folden served her with legal papers shortly before the fire seeking to terminate his child support obligations.

There was also some evidence to show that Sandi Nieves was a controlling mother who was overly protective of her children. There was evidence of guilt from the abortion. Once she decided to commit suicide herself, she could not leave her children to anyone else because no one could care for them as she had. See 54 RT 8416:10-13, 8458:25-8459:17. Finally, and most importantly, there was absolutely no evidence to show that Sandi Nieves had otherwise ever engaged in any criminal acts or that she was any sort of killer who was likely to present a continuing threat to society.