No. S073823

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DORA BUENROSTRO,

Defendant and Appellant.

(Riverside County
Sup. Ct. No. CR59617)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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DEATH PENALTY

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Dora Buenrostro was sentenced to death for the first degree premeditated murder of her three children – Susanna, age 9, Vicente, age 8, and Deidra, age 4. Throughout the case Buenrostro insisted that she did not kill her children and was being framed for the murders. She maintained her innocence during a long police interview the day the children were found with their throats slit. Against the advice of counsel, she testified at both the guilt phase and the penalty phase that she did not kill her children, despite strong circumstantial evidence to the contrary. According to Buenrostro, her estranged husband, Alejandro ("Alex") Buenrostro, was the killer. But at trial no evidence supported her claim; the prosecution presented his unimpeached alibi, and defense counsel told the jury that Alex

did not kill his children.

On appeal, the State contends that Buenrostro killed her children to seek revenge on her estranged husband. (RB 1.) In his opening statement, the prosecutor suggested that the crimes resulted from Buenrostro's anger at her estranged husband over his infidelities, an anger which turned from resentment into a desire for revenge. (6 RT 585-586, 597.) But the prosecutor did not focus his case on motive. Indeed, from the very beginning, the prosecutor told the jury there would not be much evidence regarding Buenrostro's motivation (6 RT 584), and repeatedly emphasized that motive was not an element of the crime (10 RT 1085) and that Buenrostro's motives and reasons for her actions "have nothing to do with whether she committed first-degree murder" (10 RT 1120). True to his word, the prosecutor produced almost no evidence to support his revenge theory other than Alex's testimony that on Tuesday night when Buenrostro showed up at his apartment and after they had sex, she threatened him with a knife, ambiguously stating that she would hit him where it hurts the most (AOB 33, citing 8 RT 850, 855). In his closing argument at the guilt phase, the prosecutor did not even mention this evidence. (See 10 RT 1095-1096, 1119.) Rather, the prosecutor admitted that he could only speculate as to why the children were killed. (10 RT 1120.)

Neither the prosecution nor the defense presented a coherent explanation of this tragedy. Many pieces of the puzzle are missing. Nevertheless, there were indications that, in the weeks or months preceding the murders, something ominous was happening to Buenrostro. Her behavior was erratic. To her family, she described having bizarre visual hallucinations and made weird statements that did not make sense. (AOB 11-13, 52-53.) Worried about Buenrostro, her mother and a sister went to

talk to her, but Buenrostro was uncharacteristically hostile and slammed her apartment door on them. Her sister thought they would try again the following week, but by then the children were dead. (AOB 53.) After her arrest, Buenrostro's bizarre behavior continued as she described experiencing additional visual, aural, and olfactory hallucinations. (AOB 8-10, 12-13.) In county jail, she was evaluated, diagnosed with a psychotic disorder and prescribed anti-psychotic medication, which she refused. (AOB 7-11.)

The trial court declared a doubt about Buenrostro's competence to stand trial. (AOB 2.) Three defense experts found that she suffered from a psychotic disorder and was unable to assist counsel in a rational manner. (AOB 14-17, 25-28). The court appointed experts disagreed. (AOB 17-20, 29-30.) At a competency trial, tainted by several prejudicial errors, the jury found Buenrostro competent. She was convicted of first degree murder with multiple-murder special circumstance findings, and sentenced to death in a criminal trial that also was tainted by prejudicial error.

Much is unclear about this case – especially what was happening to Buenrostro around the time of the murders. This question, which is critical to her deathworthiness, was not answered at either the guilt phase or the penalty phase of her trial, which took place in 1998. Any answer to that question, and other unanswered questions about these tragic murders, will have to wait. Despite her request more than 13 years ago, this Court has not yet appointed habeas counsel. Seventeen years after their deaths, why Susanna, Vicente and Deidra Buenrostro were killed remains unknown, and whether their mother deserves to be executed for their murders remains open to serious debate. Meanwhile, as this appeal shows, errors at the competency trial and the criminal trial require reversal of the entire judgment.

In this brief, Buenrostro replies to contentions by the State that necessitate an answer in order to present the issues fully to this Court. However, she does not reply to arguments that are adequately addressed in her opening brief. In particular, Buenrostro does not present a reply on Arguments V, VII, XIII, XVII or XVIII, but notes that, with regard to Argument XIII, the State concedes two of the three special circumstances findings must be stricken. (RB 147, 151.) The failure to address any particular argument, sub-argument or allegation made by the State, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Buenrostro (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects her view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. As in the opening brief, citations to the record are abbreviated as follows: "CT" is the clerk's transcript on appeal, and "SCT" is the supplemental clerk's transcript on appeal. The reporter's transcript consists of three sets of transcripts, and each set is separately paginated. The reporter's transcript for the competency trial is abbreviated "C-RT"; the reporter's transcript for the pretrial proceedings is abbreviated "P-RT", and the reporter's transcript for the trial is abbreviated "RT". For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1 CT 1-3, is the first volume to the clerk's transcript at pages 1-3.

On July 29, 2009, this Court ordered the clerk to unseal the following transcripts: Fifth Supplemental Clerk's Transcript with the exception of pages 6-8; Volume 7A and Volume 7B, with the exception of page 695, line 18 through page 696, line 17 of Volume 7B, of the reporter's transcript of the trial; the Marsden Hearing, page 50 of the January 3, 1996, of the reporter's transcript of the pretrial proceedings; Volume 2A of the May 4, 1998 proceedings, pages 304-312, of the reporter's transcript of the

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I. THE DEFINITIONS OF COMPETENCE AND INCOMPETENCE TO STAND TRIAL IN PENAL CODE SECTION 1367, WHICH WERE APPLIED AT BUENROSTRO'S COMPETENCY TRIAL, ARE UNCONSTITUTIONAL

Buenrostro's appeal presents a question of first impression: does the mental-disorder requirement in section 1367 for proving incompetence to stand trial violate the due process clause of the Fourteenth Amendment? The issue is important because under California's competency statute, defendants who, in fact, are unable to understand the proceedings against them or are unable to assist their attorneys in a rational manner nonetheless may be tried, convicted, and sentenced to prison or even to death. Buenrostro may be one of those defendants. The State avoids responding to much of Buenrostro's argument, and, at bottom, defends section 1367's mental-disorder requirement solely on the grounds that it is logical and useful. (See RB 40-41.) As shown below, that justification is not persuasive and does not rebut Buenrostro's showing that the mental-disorder element in section 1367 unconstitutionally narrows the definition of incompetence.

A. The State Fails To Refute Buenrostro's Showing That The Mental-Disorder Requirement In Section 1367 Unconstitutionally Narrows The Definition Of Incompetence To Stand Trial

As this Court has acknowledged, under the federal Constitution, "[a] defendant is incompetent to stand trial if he or she lacks a '"sufficient present ability to consult with his lawyer with a reasonable degree of

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trial; and Volume 6A of the July 16, 1998 proceedings, pages 662-665, of the reporter's transcript of the trial. These unsealed transcripts are cited with the same abbreviation format as the rest of the record.

rational understanding—[or lacks] ... a rational as well as a factual understanding of the proceedings against him.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 524, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402; accord, *People v. Taylor* (2009) 47 Cal.4th 850, 861 and *People v. Rogers* (2006) 39 Cal.4th 826, 846-847 [quoting *Dusky* standard].) That definition should have governed Buenrostro's competency trial, but it did not. Instead, the instruction given pursuant to Penal Code section 1367 imposed an additional requirement: Buenrostro had to prove that her inability to understand or assist resulted from a mental disorder. The insertion of this extraneous criteria unconstitutionally narrowed the definition of incompetence as set forth by longstanding United States Supreme Court law and risked that Buenrostro was convicted of, and sentenced to death for, the murders of her children even though she established that she was unable to assist her attorney with a reasonable degree of rational understanding. (See AOB 55-78.)[2]

Simply stated, the State's response does not meet Buenrostro's challenge to section 1367's definition of incompetence to stand trial. First, the State offers no answer to, and thus implicitly agrees with, Buenrostro's discussion of the development of California's definition of incompetence, including that until 1974, the prohibition against trying defendants who were incompetent was defined solely in terms of the functional abilities needed to participate meaningfully in the trial and did not require the defendant to

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[2] As in the opening brief, Buenrostro refers to the "*Dusky*" test as a shorthand for the United States Supreme Court's standard as announced in *Dusky v. United States* (1960) 362 U.S.402, and elaborated in *Drope v. Missouri* (1975) 420 U.S. 162, 171. (See AOB 63, fn. 27.) As the State notes, the jury instruction given in Buenrostro's competency trial did not refer to the "developmental disability" part of section 1367 (RB 38, fn. 11), so that particular language is not directly at issue here.

identify a mental disorder as the cause for her incapacity. (See AOB 57-70.) Second, the State fails to acknowledge the various problems posed by section 1367's mental-disorder requirement, including the lack of a statutory definition of "mental disorder" for purposes of section 1367 (AOB 72), the difficulty of looking to the Diagnostic and Statistical Manual of Mental Disorders for a definition of "mental disorder" (AOB 73-76), and rulings of this Court that certain conditions do not qualify as a "mental disorder" for purposes of section 1367 (AOB 76-77).

The State's defense of section 1367 boils down to three points: (1) "[i]ncompetence to stand trial logically stems from a mental disorder" (RB 37-38; see *id.* at 42); (2) "[t]he determination of whether a mental disorder exists provides a basis for an opinion and a finding of incompetence" (RB 40); and (3) "the jury's consideration of whether a mental disorder exists provides a context for the defendant's purposed irrationality and qualifies a defendant's conduct as more than simply bizarre behavior." (RB 40-41, citing *People v. Lewis*, *supra*, 43 Cal.4th at p. 524; see RB 42.) Buenrostro has no quarrel with the proposition that incompetence logically may result – even more often than not – from a mental disorder and thus that a diagnosis of a mental disorder may help explain or place in context a defendant's inability to understand the nature of the proceedings or inability to assist counsel rationally. In her opening brief, she acknowledges the relevance of medical evidence in competency determinations. (See AOB 65.) But, as Buenrostro explains, under the due process clause of the Fourteenth Amendment, a diagnosis of a mental disorder is not, and should not be, a requirement for proving incompetence (*ibid.*) because a defendant may not be competent under the *Dusky* standard and yet may not be able to establish an identifiable mental disorder as the cause of her inability to understand

the proceedings or assist her attorney (AOB 70).

The risk that a defendant may be functionally incompetent, yet be forced to stand trial because she is not diagnosed with a mental disorder should not be underestimated. In her opening brief, Buenrostro discusses the lack of a definition of "mental disorder" in section 1367 and consequently the problems arising from reliance on the ever-changing nature of the classification and diagnosis of mental disorders under the most widely-used diagnostic tool, the Diagnostic and Statistical Manual of Mental Disorders (DSM). (AOB 73-77.) The effect of the mental-disorder requirement of section 1367 is as plain as it is untenable: it sets a threshold for incompetence that may have little to do with whether a defendant understands the proceedings against her or is able to assist her attorney, and has much to do with the definitional line-drawing of the American Psychiatric Association in the DSM.

Under the current DSM-IV, which was published in 1994 and is still in effect, there are people who could be found incompetent today, but would not have been found incompetent before 1994, because the DSM-IV added mental disorders not recognized in the DSM-III.[3] Conversely, there

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[3] The following mental disorders were added to the DSM-IV, and several have symptoms that reasonably might be expected to interfere with a defendant's ability to understand and assist in his trial: Rett's Disorder (characterized by severe impairment in expressive and receptive language development and psychomotor retardation); Asperger's Disorder (characterized by severe and sustained impairment in social interaction, causing clinically significant impairment in social, occupational or other important areas of functioning); Delirium Due to Multiple Etiologies (characterized by disturbance of consciousness or change in cognition such as a memory, disorientation, or language disturbance); Dementia Due to Multiple Etiologies (characterized by memory impairment and cognitive disturbances such as aphasia (language disturbance), agnosia (failure to

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are people who could not be found incompetent today, but could have been found incompetent before 1994, because the DSM-IV deleted mental disorders that were recognized in the DSM-III.[4] Not only does the classification of mental disorders come and go, but the criteria used to define mental disorders also change.[5] Thus, defendants undergoing evaluation for some mental disorders under the DSM-III and DSM-IV would have been assessed under different criteria, although their symptoms affecting their ability to understand and assist counsel may have been the same.

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[3](...continued)
recognize or identify objects), and disturbances in executive functioning (affecting ability to plan and make decisions); Bipolar II Disorder (characterized by major depressive episodes accompanied by hypo-manic episodes); Acute Stress Disorder (characterized by anxiety, dissociative and other symptoms (such as difficulty concentrating, feeling of being detached from the body and experiencing the world as "unreal," interference with normal functioning, and dissociative amnesia); and Narcolepsy (irresistible attacks of sleep often accompanied by intense dreamlike imagery and hallucinations). (DSM-IV, p. 789.)

[4] Mental disorders that were recognized in the DSM-III, but are not recognized in the DSM-IV, include: Identity Disorder, Undifferentiated ADD, Transsexualism, and Passive-Aggressive Personality Disorder.

[5] The DSM-IV contains 14 pages of annotated changes to the criteria of disorders that took place across the full spectrum of mental disorders between the publication of the DSM-III and the DSM-IV. The disorders with changes in criteria include those that reasonably could be expected to affect a defendant's ability to understand the proceedings and assist counsel including Mental Retardation, Learning Disorders, Autistic Disorder, Conduct Disorder, Selective Mutism, Delirium, Dementia, Amnestic Disorders, Personality Change Due to a General Medical Condition, Schizophrenia, Schizoaffective Disorder, Brief Psychotic Disorder, Psychotic Disorder Due to a General Medical Condition, Substance-Induced Psychotic Disorder, Mood, Anxiety, and Personality Disorders. (DSM IV, pp. 773-787.)

The evolution in the understanding and classification of mental disorders is ongoing. The DSM-IV sets out proposals for numerous "proposed disorders."[6] Currently, they would not meet section 1367's threshold for proof of a mental disorder. In addition, proposed changes for the DSM-V, expected to be published in 2013, include further additions and deletions to the list of recognized mental disorders, including deletions to

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[6] These proposed disorders include some that reasonably could be expected to provide the basis for a finding of incompetence under section 1367. The full list includes: Postconcussional Disorder (characterized by deficits in attention/memory, anxiety, depression, apathy); Mild Neurocognitive Disorder (characterized by memory, language and attention disturbance); Alternative Dimensional Descriptors for Schizophrenia; Post Psychotic Depressive Disorder of Schizophrenia (major depressive episode characterized by persistent negative symptoms, e.g. odd beliefs, unusual perceptual experiences and depressed mood and possible suicide attempts); Simple Deteriorative Disorder (characterized by psychotic symptoms, blunted emotional responses, impoverished speech, apathy, absent-mindedness); Premenstrual Dysphoric Disorder (marked depression and anxiety); Alternative Criteria for Dysthymic Disorder (characterized by pessimism, fatigue, excessive anger, difficulty with memory, thinking and concentration); Minor Depressive Disorder (causing clinically significant distress or impairment in social, occupational or other important areas of functioning); Recurrent Brief Depressive Disorder (brief episodes of depressive symptoms that are identical to major depressive episodes in number and severity of symptoms); Mixed Anxiety-Depressive Disorder (persistent dysphoric mood lasting at least one month and characterized by concentration and memory difficulties, fatigue, hyper-vigilance and which may cause clinically significant distress or impairment in social, occupational or other important areas of functioning); Dissociative Trance Disorder (involuntary state of trance that causes clinically significant distress or functional impairment); Depressive Personality Disorder and Passive-Aggressive Personality Disorder; and Neuroleptic Disorders (in the most acute form of which the individual may not be able to maintain any position for more than a few seconds and will be in distress if asked to.) (DSM-IV, pp. 703-704.)

some types of Schizophrenia (see http://www.dsm5.org/ProposedRevision/Pages/SchizophreniaSpectrumandOtherPsychoticDisorders.aspx), and possible inclusion of Attenuated Psychosis Syndrome, which has characteristics of delusions, hallucinations and disorganized speech that indisputably are relevant to competence to stand trial (http://www.dsm5.org/proposedrevision/pages/proposedrevision.aspx?rid=412). In short, there are people who would have a mental disorder now that would satisfy section 1367 but, even though nothing about their mental functioning changes, may not have a mental disorder in 2013, under the next edition of the DSM, and thus could not be found incompetent, and there are people who do not have a mental disorder now that would satisfy section 1367 but, even though nothing about their mental functioning changes, may have a mental disorder in 2013, under the next edition of DSM, and thus could be found incompetent.

Plainly put, the grave constitutional question as to whether a defendant is competent to be prosecuted for a crime should not rest on the fluctuating views of the American Psychiatric Association as to what should be classified as a mental disorder. Section 1367's mental-disorder requirement does exactly that. It focuses the fact finder on the diagnosis of a mental disorder under changing classifications and criteria, rather than on the effect of symptoms the defendant may exhibit on the cognitive abilities she needs to be competent for trial. For this reason, the mental-disorder requirement is contrary to the United States Supreme Court's decisions on competence to stand trial, which define competence solely in the functional terms of a defendant's ability to understand the nature of the proceedings against her and assist her attorney in preparing her defense in a rational

manner. (*Dusky v. United States*, *supra*, 362 U.S. at p. 402, and *Drope v. Missouri*, *supra*, 420 U.S. at p. 171.) If a defendant lacks one of these abilities, she is incompetent to stand trial under the due process clause of the Fourteenth Amendment. Imposing an additional, arbitrary element, section 1367's mental-disorder requirement unconstitutionally narrows the definition of incompetence.

The State's response begs the question posed by Buenrostro's claim. The issue is not whether a mental disorder is logically related to incompetence or provides an explanation for an expert's opinion about incompetence. (RB 40-41.) The issue is whether requiring proof of a mental disorder as the predicate for a finding of incompetence unconstitutionally risks trial of a defendant who, in fact, is unable to understand the nature of the proceedings or who, as the defense contended at Buenrostro's competency trial, is unable to assist counsel in a rational manner in presenting a defense. None of the State's arguments refutes that essential point. As a preliminary matter, the State itself acknowledges that "[t]he focus of the *Dusky* test is cognitive," (RB at 39; see RB 40) and that psychiatric diagnosis is uncertain and subjective (RB 41), but shrinks from the implications of its own understanding for the constitutionality of section 1367.

The State also appears to suggest that because the California courts repeatedly have applied section 1367's requirement that incompetence must result from a mental disorder, that element must be constitutional. (See RB 39-40.) But the fact that the mental-disorder requirement has existed for over 35 years is no answer to Buenrostro's claim. The longevity of a law does not establish its constitutionality under either the federal or the state Constitution. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 564, 567-570

[holding unconstitutional Texas statute, enacted in 1973 and having "'ancient roots,'" which criminalized same-sex sexual conduct]; *Furman v. Georgia* (1972) 408 U.S. 238, 239-240 [holding unconstitutional Georgia and Texas death penalty statutes]; *Robinson v. California* (1962) 370 U.S. 660, 667 [holding unconstitutional California's 1939 statute criminalizing the state of being a narcotic addict]; *In re Marriage Cases* (2008) 43 Cal.4th 757, 855-856 [holding unconstitutional California statutes limiting marriage to opposite-sex couples], superceded by constitutional amendment, *Strauss v. Horton* (2009) 46 Cal.4th 364; *People v. Belous* (1969) 71 Cal.2d 954, 959 [holding unconstitutional Penal Code section 274, which criminalized performing an abortion unless necessary to preserve the pregnant woman's life, even though the statute had been in effect "substantially unchanged since it was originally enacted in 1850"].)

Moreover, the State asserts that the "rationality finding" required under *Dusky* "necessarily requires a determination of the defendant's present mental condition and inextricably links legal incompetence with the existence of a mental disorder." (RB 40.) This contention makes a large and unexplained leap. Undoubtedly, assessment of a defendant's ability to consult with and assist counsel in a rational manner, like her ability to understand the nature of the proceedings, involves consideration of her present mental status. However, that fact does not, as the State contends, "inextricably" predicate incompetence upon the diagnosis of a mental disorder. (See *ibid.*) It is entirely possible for a judge or a jury to determine whether a defendant possesses or lacks the rationality required under the *Dusky* standard without determining whether she suffers from a mental disorder. In fact, triers of fact in many states in the nation do so. At least 17 states do *not* require proof of a mental disease, defect or disorder or

other medical condition as part of a showing of incompetence to stand trial.[7]

As these other states recognize, a diagnosis of a mental disorder is not essential to establish a defendant's incompetence. A defendant can prove that she lacks the functional abilities required under the *Dusky* standard – e.g., she can establish with credible testimony from her attorney, family members, and/or mental health experts that she is unable to cooperate with defense counsel in a rational manner because she genuinely, but erroneously, believes her attorney is colluding with the prosecutor to convict her – without establishing that her lack of ability to assist results from paranoid schizophrenia, delusional disorder, or any other recognized mental disorder. Indeed, the ABA standards for determinations of competence to stand trial use the *Dusky* test and do not require proof of a mental disorder as the cause of incompetence. (ABA Standard 7-4.1.)[8] As

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[7] These states include Alabama (Ala. Code 1975 § 22-52-30); Connecticut (C.G.S.A. §54-56d; *State v. Mordasky* (Conn.App. 2004) 853 A.2d 626, 632); Florida (F.S.A. § 916.12); Georgia (Ga. Code Ann., § 17-7-130; *Velazquez v. State* (Ga. 2008) 655 S.E.2d 806, 809-810); Indiana (IC 35-36-3-1); Maryland (Md. Crim. Pro. §3-104); Massachusetts (M.G.L.A. 123 § 15; *Com. v. Goodreau* (Mass. 2004) 813 N.E.2d 465, 472); Mississippi (URCCC Rule 9.06; *Hearn v. State* (Miss. 2008) 3 So.3d 722, 728-732); Nevada (N.R.S. § 178.400); New Jersey (N.J.S.A. 2C:4-4); Oklahoma (22 Okl. St. Ann. §§ 1175.1, 1175.3); Pennsylvania (50 P.S. §7402(a)); Rhode Island (R.I. Gen. Laws 1956, § 40.1-5.3-3(a)(5)); South Carolina (S.C. Code § 44-23-410); Texas (Tex. Code. Crim. Proc. Ann. art. 46B.003(a)); Virginia (Va. Code Ann. §19.2-169.1); Wisconsin (Wis. Stat. 971.13(1)).

[8] Standard 7-4.1(b) states: "The test for determining mental competence to stand trial should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings." The ABA Standards do look to "the condition causing

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one leading treatise states, "the competency assessment is *functional* and *present-oriented.*" (Melton, Petrila, Poythress and Slobogin, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers (3rd ed. 2007) p. 144 (original italics); see *id.* at pp. 127-129.) There are several psychological instruments available for helping to assess competence to stand trial. They are functional evaluations of the defendant's abilities matched to the demands of his case and do not require proof of a mental disorder for a finding of incompetence. (*Ibid.*)[9] Moreover, these competency assessment tools are reported to have high levels of reliability with agreement between evaluators in determining competency in perhaps 97-100 percent of cases. (Roesch, Zapf, Golding, and Skeem, *Defining and Assessing Competency to Stand Trial*, in The Handbook of Forensic Psychology (2nd ed.) (Hess & Weiner, edits., 1999) pp. 338-339.) As these sources shows, proving that a defendant lacks the functional abilities required for competence is not dependent – logically or constitutionally – on proving a mental disorder as the cause of such inability. The State has not shown otherwise.

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[8](...continued)
incompetence" once a defendant has been found incompetent to stand trial in order to provide for "treatment or habilitation [that] is necessary for the defendant to attain or maintain competence." (ABA Standards 7-4.5(b) and 7-4.5(b)(1) [report of evaluator].) The California court rule governing juvenile competency proceedings contains a similar provision. (Cal. Rules of Court, rule 5.645.)

[9] These competence tools, which generally employ a structured interview, include the Competency Assessment Instrument (CAT), the Interdisciplinary Fitness Interview (IFI), the Georgia Court Competency Test (GCCT), and the MacArthur Competence Assessment Tool - Criminal Adjudication (MacCAT-CA). (Melton, et al., Psychological Evaluations for the Courts, *supra*, pp. 145-155.)

The State's citation to *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 859 does little to shore up the constitutionality of section 1367, and actually lends support to Buenrostro's claim. (See RB 39-40.) *Timothy J.* addresses a minor's competence to stand trial in a juvenile court proceeding. Unlike section 1367, former California Rule of Court 1498(d), which governed juvenile competency determinations, did *not* require that the defendant show his inability to meet the *Dusky* criteria resulted from a mental disorder or developmental disability. (*Timothy J. v. Superior Court*, *supra*, 150 Cal.App.4th at p. 856.) Nonetheless, the trial judge found the minors competent for failing to prove such a disorder. (*Id.* at pp. 854, 855.) Reversing, the Court of Appeal held that rule 1498(d) "does not require that a minor have a mental disorder or development [sic] disability before the juvenile court may hold a hearing to determine whether, or find after holding a hearing that, the minor is incompetent to stand trial." (*Id.* at p. 852; see *id.* at p. 861.) The language of rule 1498(d) was clear and unambiguous on this point. (*Id.* at p. 858.)

The court in *Timothy J.* was cognizant of its duty to construe rule 1498(d) to avoid doubts as to its constitutionality. (*Timothy J. v. Superior Court*, *supra*, 150 Cal.App.4th at p. 858.) To that end, the court noted that the test stated in rule 1498(d) was an abbreviated version of the *Dusky* test which, like the rule, does not mention "a mental disorder or developmental disability." (*Ibid.*) The court further explained that the *Dusky* test "does not define incompetency in terms of mental illness or disability." (*Id.* at p. 860.)

The court then offered the passing observation about section 1367, which is quoted by the State: "As a matter of law and logic, an adult's incompetence to stand trial must arise from a mental disorder or

developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel." (*Timothy J. v. Superior Court*, *supra*, 150 Cal.App.4th at p. 860; RB 40.) As a matter of law, the court simply states the requirement of section 1367, which Buenrostro challenges. As a matter of logic, its observation is incorrect, for the reasons Buenrostro already has explained. In any event, this single sentence in *Timothy J.* is the sole authority the State cites to support its contention that the logical or useful relationship between a mental disorder and assessing competence suffices to make the mental-disorder requirement constitutional. And it is dicta. *Timothy J.* decided nothing about the definition of incompetence in section 1367. As this Court has admonished, "[a]n appellate decision is authority only for the points actually involved and decided." (*People v. Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7.)

Finally, contrary to the State's intimation, the mental-disorder element is not constitutionally justified because it "can potentially resolve issues of malingering or other intentional conduct." (RB 42.) The State does not elaborate its summary assertion. Although proof of a mental disorder may tend to prove that a defendant is not malingering, the converse is not necessarily true. The fact that a defendant does not have a diagnosed mental disorder may not mean that the she is feigning mental illness. Rather, her symptoms simply may not fall within the diagnostic criteria of classified mental disorders. To the extent the State suggests that without the mental-disorder requirement, judges and juries will be unable to ferret out defendants who feign incompetence, it is simply wrong. Although the specter of malingering may be a favorite prosecution hobby horse, the likelihood of a defendant trying to fake incompetence to stand trial is low. (Perlin, et al., Competence in the Law From Legal Theory to Clinical

Application (2008) p. 54 ["such feigning is *attempted* in less than 8 percent of all such cases" (original italics)].) Moreover, malingering can be assessed even if there is no requirement that a defendant prove a mental disorder as part of her showing of incompetence. There are psychometric assessment instruments as well as other clinical methods, which are separate from competency tests, for detecting deception. (See Rogers, edit., Clinical Assessment of Malingering and Deception (2nd ed. 1997) pp. 169-370.) In short, malingering still could be assessed even if there were no mental-disorder requirement in section 1367. It is done in other states and can be done in California. (See, e.g., *Hernandez-Alberto v. State* (Fla. 2004) 889 So.2d 721, 726-728; *Lewis v. State* (Ala. Crim. App. 2003) 889 So.2d 623, 644-648; *Ferry v. State* (Ind. 1983) 453 N.E.2d 207, 212 [evidence that defendants were malingering presented at competency proceedings in jurisdictions that do not predicate a finding of incompetence on proof of a mental disorder].)[10]

The testimony of prosecution witness, Craig Rath, Ph.D., illustrates this point. Dr. Rath did not conduct an examination of Buenrostro after the trial court appointed him to assess her competence to stand trial. (See AOB 19-20, 97-98; 4 C-RT 949-951.) Instead, he based his opinion that Buenrostro was competent to stand trial on an investigative interview he conducted for the prosecution a full year before the competency trial. (4 C-RT 951-954, 987-988.) He testified that during his interview the night of

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[10] The State's cryptic reference to "malingering or other intentional conduct" might be read to suggest that feigning incompetence and suffering from a mental disorder are mutually exclusive phenomena, but this is not the case. One of the explanatory models of malingering is pathogenic, i.e. that it occurs *because* the defendant is mentally disordered. (Rogers, *supra*, Clinical Assessment of Malingering and Deception, pp. 5-7.)

her arrest, Buenrostro did not malinger (4 C-RT 979, 981, 983), but he concluded that she purposefully feigned mental illness on the MMPI examination he administered that same night, even though he did not note this finding in his report to the trial court (4 C-RT 983, 985; 5 SCT 17-19 [Psychological Evaluation by Craig C. Rath, Ph.D.]).[11] The fact that the State's own witness based his opinion about whether Buenrostro was malingering on an evaluation that was not undertaken specifically for the purpose of determining competency shows that a malingering assessment does not depend on any of the particular elements, let alone the mental-disorder requirement, of California's definition of incompetence.

In conclusion, the State does not dispute that in 1974, California's insertion of the "mental disorder" element into section 1367 redefined incompetence to stand trial in part by medical, rather than by strictly legal, terms and for the first time required the defendant to prove that her incapacity arose "as a result of a mental disorder." (§ 1367; CALJIC No. 4.10.) Nor does the State address the definitional problems, identified by Buenrostro, that result from this change in the law. Rather, the State defends the constitutionality of the mental-disorder requirement on the grounds that it is logically related and useful to assessing competence, but does not prove that the element's utility renders it necessary and indispensable to determining whether a defendant is able to understand the nature of the proceedings or able to assist counsel in a rational manner in presenting a defense. Most important, the State simply offers no answer to the crux of Buenrostro's claim that the extraneous mental-disorder criterion

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[11] As explained previously, this Court unsealed the Fifth Supplemental Clerk's Transcript on Appeal (" 5 SCT") with the exception of pages 6-8. (See *ante* pp. 4-5, fn. 1.)

unconstitutionally risks trial and punishment, even by death, of a defendant who, in fact, is unable to understand the nature of the proceedings or who, as the defense urged in this case, is unable to assist counsel in a rational manner in presenting a defense. For the reasons stated above and in the opening brief, the mental-disorder element of section 1367 is unconstitutional under *Dusky*, *supra*, 362 U.S. at p. 402 and *Drope*, *supra*, 420 U.S. at p. 171, and the due process clause of the Fourteenth Amendment.

B. The State Fails To Refute Buenrostro's Showing That The Definition of Competence In Section 1367 Omits Key Elements That Are Clearly Established And Required Under *Dusky/Drope*

In her opening brief, Buenrostro challenges the constitutionality of the definition of competence in section 1367 and CALJIC No. 4.10 on two grounds: California's definition (1) does not require "a rational as well as factual" understanding of the proceedings and (2) does not specify that the requirement is a sufficient "present" ability to understand the proceedings and consult with and assist counsel as required by *Dusky*, *supra*, 362 U.S. at p. 402. (AOB 78-79.) Buenrostro fully acknowledges that this Court has treated the California standard and the *Dusky* test as substantially the same (AOB 79), but argues that the omission of these two substantive elements of *Dusky* cannot be brushed aside as de minimis (AOB 80).

In its response, the State appears to agree with Buenrostro that the two parts of the requirement that a defendant understand the proceedings – both "rational" and "factual" – serve distinct purposes. (AOB 80; see RB 42-43.) The State argues that California's definition of competence comports with *Dusky*'s constitutional requirements because its requirement that a defendant be able to understand the nature of the criminal

proceedings "necessarily encompasses" both a rational and factual understanding and that CALJIC No. 4.10 "clearly implicates" both meanings. (RB 43.) That, however, is not the test. With regard to an ambiguous instruction, "the question is whether there is a 'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Huggins* (2006) 38 Cal.4th 175, 192, quoting *Middleton v. McNeil* (2004) 541 U.S. 433, 437, internal quotation marks omitted.)

Here the instruction on the first prong of the *Dusky* standard contained no description at all of the nature of the defendant's understanding of the proceedings. The instruction made no mention of either "rational" or "factual," but simply referred to the defendant's "understanding." (5 C-RT 1219.) It is unreasonable to assume that jurors, unschooled in the intricacies of constitutional law, knew to read *Dusky's* two-part qualifier into this single word. Nor is it reasonable to assume, as the State does, that either the introductory reference to the possibility that the defendant's mind on some subjects "may be deranged or unsound" or the later reference to the defendant comprehending "her own status and condition in reference to such proceedings" (5 C-RT 1219) informed the jurors that the defendant may be found competent to stand trial only if they find she has both a "rational" and "factual" understanding of the proceedings against her. (See RB 43-44.) The State expects too much from the jury. Nothing in these sections of the instruction gave the jury even an inkling that the defendant's understanding must be two-fold, both based on the facts of her case and reflecting a rationally-functioning mind. Accordingly, there is a reasonable likelihood that the jury did not understand the "ability to understand the proceedings"element in

conformity with the dictates of the due process clause of the Fourteenth Amendment.

Finally, the State's defense of the omission of the requirement that the defendant have a "present" ability to consult with and assist her lawyer also is unpersuasive. Buenrostro agrees with the State that "California law requires that the defendant be able to 'assist counsel in the conduct of a defense'" in a rational manner and also agrees that the ability to consult with one's lawyer and the ability to assist counsel in one's defense "are entirely consistent" and require "a current ability to rationally interact with one's lawyer." (See RB 44.) The problem is that neither section 1367 nor CALJIC No. 4.10 indicates that this ability must exist in the present – not at some time before or perhaps at sometime after the competency trial. (AOB 80-81; see *In re Ricky S.* (2008) 166 Cal.App.4th 232, 236 [trial court's finding in juvenile competency case that "'working with [the minor] over time . . . will lead him to be able to at least understand on a basic level what he's been accused of and whether he should admit to it or not'" flies directly in the face of the requirement that the minor "'presently' has a reasonable, factual understanding of the proceedings"].)

The State's insistence that section 1367, which clearly does *not* require a "present" ability to assist, is consistent with *Dusky*, which clearly requires a "sufficient 'present ability'" to assist is puzzling. (See RB 44.) As Buenrostro has explained, the lack of this temporal qualification in the jury instruction was particularly significant under the facts of her case where the evidence focused on whether she had a mental illness, which can be episodic rather than constant (AOB 81), and where one of the prosecution's expert witnesses, Jose Moral, opined that Buenrostro would be able to cooperate rationally with her attorney at some point in the future

(AOB 90) and the other, Craig Rath, simply assumed Buenrostro already was cooperating with counsel (*ibid.*). Under these circumstances, there is a reasonable likelihood that, in violation of the federal Due Process clause as set forth in *Dusky*, the jury understood the instruction that "she is able to assist her attorney in conducting her defense in a rational manner" (5 C-RT 1219) as not limited to a present, already-existing ability, but rather as encompassing a future, potential capacity.[12]

C. The State Fails To Prove That The Unconstitutional Definitions Of Incompetence And Competence Do Not Require Reversal

In her opening brief, Buenrostro argues that the instructional errors required per se reversal on two separate grounds – that the multiple defects in the instruction rendered the competency trial an unfair and unreliable vehicle for determining her competence to stand trial (AOB 83) and that the erroneous mental-disorder requirement provided the jury with an

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[12] The State mistakenly asserts that Buenrostro "attempts to piggyback her argument that an incompetency determination cannot be properly based upon incompetence resulting from a mental disorder or developmental disability in an attempt to demonstrate a constitutional defense in the absence of the 'present ability' language." (RB 44.) That is not her argument. Rather she contends that "[t]he competency determination must turn only on the defendant's present ability to function at her trial" (AOB 80-81) and that the jury instruction under CALJIC No. 4.10 did not state this requirement. Buenrostro simply points out that the failure to make clear the "present ability" requirement was compounded by the erroneous mental-disorder element, which might imply a permanent or static condition when mental illness may be episodic. In this way, in the absence of an express instruction on the defendant's "present ability," the unconstitutional mental-disorder requirement made it less likely that the jury would intuit that its task was to determine whether Buenrostro at the time of the competency trial – not a year before or three months later – possessed adequate functioning abilities to participate effectively in her trial. (AOB 81.)

unconstitutional theory for finding Buenrostro competent (AOB 83-88). The State disputes the first theory (see RB 44-45), but says nothing about the second theory.[13] It argues that "[p]rejudice, if any, resulting from the use of one form of a jury instruction correctly stating the law, as opposed to another instruction also correctly stating the same legal principles, does not affect the framework within which the trial proceeds, but is simply an error in the trial process itself." (RB 45-46.) This argument appears to make little sense. Certainly, legal principles can be stated correctly in more than one way. If an instruction correctly states the law, then there is no error and no question of prejudice arises. But Buenrostro's claim is *not* that the trial court gave one correct instruction rather than another. Her challenge is that the trial court incorrectly and unconstitutionally instructed the jury on the fundamental principles governing its competency decision and that these errors prejudiced its verdict.[14]

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[13] The State attacks Buenrostro's arguments as "largely based on semantics." (RB 45.) This is a curious criticism of a claim of instructional error, since the law is largely slave to language. The task of correctly defining incompetence or incompetence, like the challenge of defining substantive crimes, is dependent on semantics, i.e., "meaning in language." (Webster's Third New International Dictionary of the English Language Unabridged (2002), p. 2062.) Lawyers and judges inescapably are dependent on words to explain the law to lay jurors. Getting the words right is what jury instructions are all about. The challenges here do not revolve around tangential or insignificant words, but go to the fundamental, substantive elements for determining whether a defendant is competent to stand trial.

[14] The only case the State cites for its proposition is inapposite. In *People v. Thomas* (2007) 150 Cal.App.4th 461, the appellant argued that the trial court erred in giving the CALJIC rather than the CALCRIM instruction on self defense. The Court of Appeal found that (1) although the CALCRIM instruction may have been superior to the CALJIC instructions,

(continued...)

As Buenrostro argues in her opening brief, the unconstitutional instruction on incompetence given under section 1367 was structural error and requires reversal per se of the entire judgment. Trying a defendant after making an insufficiently-supported finding that she is competent requires reversal without any prejudice analysis. (*Dusky v. United States*, *supra*, 362 U.S. at p. 402.) So does trying a defendant without first making a competency determination despite evidence raising sufficient doubt as to her competence (*Drope v. Missouri*, *supra*, 410 U.S. at pp. 181-182) unless, as some jurisdictions permit, a retrospective competency hearing is feasible (see *People v. Ary* (2011) 51 Cal.4th 510, 516-517). In this case, where the jury was instructed on one theory – an unconstitutional theory – for determining whether Buenrostro was competent to stand trial, the error is structural. Like delivering a constitutionally deficient definition of reasonable doubt, giving a constitutionally deficient definition of incompetence permeates the jury's entire consideration of the case and cannot be salvaged through harmless error review. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The unconstitutional instruction not only vitiates the entire verdict, but may have rendered it unnecessary for the jury to make the factual findings – that Buenrostro was able to understand the nature of the proceedings and to assist counsel in a rational way – that *Dusky* requires for competence to stand trial. To borrow from the high court in *Sullivan*, in this situation, "[a] reviewing court can only engage in

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[14](...continued)
"appellant's jury was indisputably informed of the principle for which appellant argues" and (2) "[b]ecause the instructions given were correct statements of the relevant legal principles, the purported error was necessarily harmless." (*Id.* at p. 467.) That is not the case here, where Buenrostro's point is that the jury was instructed erroneously on the elements of incompetence when instructed under CALJIC No. 4.10.

pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant" competent. (*Id.* at p. 280; see § 1369 [providing for jury trial].) This Court cannot conclude that the verdict of competence "*would surely not have been different* absent the constitutional error." (*Ibid.*, original italics.) Reversal is required without further inquiry.[15]

In the alternative, Buenrostro also argues that use of the unconstitutional definition of incompetence and competence was not harmless beyond a reasonable doubt under *Chapman v. California* (1964) 386 U.S. 18, 24. (See AOB 88-91.) As Buenrostro explains in her opening brief, the mental-disorder issue dominated the competency trial. Both the prosecutor and defense counsel focused their evidence and their argument on the question of whether Buenrostro suffered from a mental disorder. (See AOB 85-87.) The prosecutor told the jury that under the instructions, if the evidence was "evenly balanced," it must find Buenrostro competent. (5 C-RT 1189; see AOB 87.) Under the instructions, as amplified by the prosecutor's argument, if the jury concluded that the evidence about the mental-disorder element was in equipoise, it had to return a verdict of competence and could do so without ever determining the other elements in

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[15] After Buenrostro filed her opening brief, the United States Supreme Court decided *Hedgpeth v. Pulido* (2008) 555 U.S. 57, which holds that instructing a jury on multiple theories of guilt, one of which is invalid, is not a structural error, but is subject to harmless error review. (*Id.* at pp. 60-61.) This Court has cited *Pulido* in reviewing murder verdicts where the jury was instructed on both invalid and valid theories of guilt. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1116, fn. 22; *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) Unlike the instructional issues in *Pulido*, *Farley* and *Chun*, Buenrostro's claim asserts that the jury was instructed in a single, unconstitutional theory of incompetence, and therefore the harmless error standard announced in *Pulido* does not govern this case.

section 1367. In this way, the mental-disorder requirement provided the jury with a short-cut to finding Buenrostro competent that rendered the *Dusky* criteria irrelevant. The State disputes none of this. (See RB 44-47.)

The State does not prove beyond a reasonable doubt, that without the mental-disorder requirement, the jury would have found that Buenrostro was presently able to assist counsel in a rational manner, which was the other sharply disputed element at the competency trial. The State sidesteps the strength of the defense case, especially given the preponderance standard of proof that governed the jury's decision, and the weakness of the prosecution's evidence on this question. As set forth in the opening brief, Buenrostro's sister and the defense paralegal testified about Buenrostro's irrational refusal to authorize the release of information about herself to her attorney, her unfounded belief that her family and her attorney were working against her, and her unexplained refusal to give her attorney information relating to her case. (AOB 89.) The defense experts provided similar observations. They testified about Buenrostro's delusion that her attorney was plotting against her and her inability to confront information about her case if it diverged from her own delusional beliefs, which rendered her unable to work with, and listen to advice from, her attorney. (AOB 89-90.)

Without acknowledging this evidence, the State simply points to a few pages of Dr. Jose Moral's 120 pages of testimony. (See RB 47, citing 4 C-RT 853-856; 4 C-RT 823-944.) In the passage cited by the State, Dr. Moral testified that in his first interview Buenrostro was angry and wanted to fire her attorney, Frank Scott. (4 C-RT 852-853.) Buenrostro's main complaints were that Scott was too bossy, was not allowing her to

participate in decision-making, and was moving her case too slowly. (4 C-RT 854.) At Dr. Moral's second interview, Buenrostro had changed her opinion about Scott, whom she knew cared for her and who had been visiting her more. (4 C-RT 852.) However, Buenrostro remained "very ambivalent" about Scott, although she did not intend to fire him. (4 C-RT 852.) She also said it was better to take time to prepare for trial. (4 C-RT 853.) Notably, Dr. Moral did not verify any of this information with Scott. (See AOB 90; 4 C-RT 930-931.) Nor did Dr. Moral testify that Buenrostro, in fact, was cooperating with and assisting counsel in a rational manner, which would have been evidence tending to show her ability to do so. At most, Dr. Moral's testimony shows that Buenrostro's position on firing Scott and going to trial quickly had changed, but it does not establish that she was presently able to consult with and assist Scott in a rational manner.

The only other testimony the State cites that might even tangentially relate to the ability-to-assist element is Dr. Moral's impression that Buenrostro's reaction was similar to the distrust and ambivalence seen in other defendants he had evaluated. (4 C-RT 855-856.) But this general observation about other people has little bearing on Buenrostro's competency.[16] Evidence that Dr. Moral had encountered other defendants who were distrustful of and ambivalent about their attorneys falls far short of countering the defense evidence about Buenrostro's inability to assist counsel rationally in preparing a defense. In the context of a first degree murder and potentially capital case, Buenrostro's behavior, including her accusations that defense counsel was conspiring against her, her refusal to

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[16] Nothing in Dr. Moral's testimony establishes whether these other defendants were competent or incompetent to stand trial or whether he even interviewed them for the purpose of determining their competence. (See 4 C-RT 855-856.)

divulge information to her attorney, and her inability to listen to views that were inconsistent with her own beliefs, presented substantial evidence that at the time of the competency hearing she was unable to assist counsel.

The State's characterization of the evidence as showing that Buenrostro had a "satisfactory relationship" with her attorney (RB 47) is the State's overstated spin, not Dr. Moral's description. He testified that "[o]nce she would become reasonably comfortable" with her attorney, then "she would be able to rationally cooperate . . .." (4 C-RT 857.) At this point, deputy public defender Scott already had been Buenrostro's attorney for close to a year. (1 CT 7 [Scott appears as defense counsel at felony in-custody arraignment on December 14, 1994].) Notably, Dr. Moral did not testify that Buenrostro was *presently* able to do so.[17] Nor did Dr. Moral acknowledge that when he rendered this opinion, Frank Scott already had been Buenrostro's attorney for a year. Rather, Dr. Moral simply speculated about Buenrostro's competence at some unspecified time in the future which, of course, does not satisfy the *Dusky* standard of a current ability to assist counsel in a rational manner at the criminal proceedings already underway.

In addition, Dr. Moral's opinion about Buenrostro's ability to assist counsel in a rational manner was contingent upon circumstances not then extant, i.e. becoming comfortable with her attorney. Certainly, defense counsel did not think there was a satisfactory attorney-client relationship. Buenrostro was suspicious of Scott's handling of her case and irrationally thought he was plotting with the district attorney and the judge against her.

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[17] The State does not dispute Buenrostro's reading of the record with regard to Dr. Moral's opinion on this competency element. (See RB 14-15 [describing Dr. Moral's testimony].)

(2 C-RT 276, 295, 340.) She was unable to listen to views that differed from her own (2 C-RT 308-309) and grew more distrustful, suspicious, and hostile when confronted with information that did not fit her set beliefs, which rendered her unable to cooperate with Scott (2 C-RT 493-495). As a result, Scott had difficulty even establishing a dialogue with Buenrostro (4 C-RT 812) and was unable to get information from her (4 C-RT 778, 1084; 5 C-RT 1085, 1089). The State's unsupported contention that Buenrostro had a satisfactory relationship with her attorney does not overcome the ample defense evidence that she was unable to assist counsel with any degree of rationality. (See AOB 25-29.)

In addressing the ability-to-assist evidence, the State does not cite the prosecution's other expert, Craig Rath, Ph.D. Its omission is conspicuous, but understandable. Dr. Rath was plagued with credibility problems arising from his failure to interview Buenrostro for purposes of a competency evaluation after his appointment as a court expert and his reliance instead on a year-old investigative interview conducted on behalf of the prosecution the day of the crimes. (See AOB [Argument II] 96-118; *post* at pp. 40-51.) In Dr. Rath's view, this was no obstacle to his competency evaluation because if, as in Buenrostro's case, the defendant does not demonstrate mental illness and all of her behavior appears volitional, he does not necessarily ask questions to determine whether the defendant understands the proceedings and is able to assist counsel. (4 C-RT 987.) Indeed, Dr. Rath's testimony exemplifies the constitutional problem with section 1367's definition of incompetence. Because he concluded from his interview long before the trial court declared a doubt about Buenrostro's competence that she did not suffer from a mental disease or disorder, he did not need to even consider the functional abilities that define competence under the due

process clause of the Fourteenth Amendment. Nevertheless, despite his failure to assess Buenrostro's capabilities on the crucial ability-to-assist question, Dr. Rath testified to his belief, which he did not confirm by interviews with either Buenrostro or her attorney, that Buenrostro was cooperating with her attorney. (4 C-RT 952.) Dr. Rath based his conclusion solely on his opinion that all Buenrostro's behavior was volitional (4 C-RT 953) and on records which, in his opinion, indicated that Buenrostro had followed her attorney's advice not to talk to certain people (*ibid.*), although defense evidence established that Scott had not so advised her (see AOB 30, fn. 14, citing 5 C-RT 1084). In short, like Dr. Moral's testimony, Dr. Rath's testimony offers no aid to the State's position that any instructional error was harmless on the theory that the record demonstrated Buenrostro was able to assist counsel in a rational manner.

Given the pivotal importance of the ability-to-assist element in this case, the substantial defense evidence that Buenrostro was unable to do so, and the very weak prosecution evidence that she could, there is at least a reasonable possibility that a correctly-instructed jury – one that was not required to find that her inability to assist resulted from a mental disorder – would not have found Buenrostro competent. Thus, the State cannot carry its burden of proving the unconstitutional instruction harmless beyond a reasonable doubt. Indeed, without the erroneous mental-disorder element, the evidence of Buenrostro's ability to assist was so paltry that a verdict of competence would not have been supported by sufficient evidence and would have resulted in Buenrostro's trial while incompetent in violation of the due process clause of the Fourteenth Amendment. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 885, 890-891 [acknowledging but rejecting claim where, despite conflict in the expert opinions, testimony of a

prosecution expert who had observed and evaluated defendant for much longer time than other experts. together with lay witnesses' testimony about defendant's behavior in jail, provided substantial evidence to support the jury's verdict of competence; *People v. Samuel* (1981) 29 Cal.3d 489, 497-506 [although jury may reject the unanimous opinions of experts, a verdict of competence to stand trial in a murder case was not supported by substantial evidence where undisputed facts upon which the experts relied as well as their reasoning provided overwhelming evidence that defendant was incompetent].)

The remainder of the State's attempt to show the error harmless under *Chapman* also is flawed. First, the State mistakenly argues that concessions by the defense experts, e.g. that she understood the nature of the proceedings, and prosecution evidence that she was malingering weakened their opinions that Buenrostro suffered from mental disorders that rendered her incompetent. (See RB 46.) This argument is a proverbial "red herring." A prejudice analysis is predicated on a finding, or at least an assumption, of error. If, as Buenrostro contends, the instruction pursuant to section 1367 unconstitutionally required proof of a mental disorder, then the defense evidence about Buenrostro's mental disorders, as well as the prosecution evidence that she had no mental disorder, is of diminished importance.

But even reading the State's argument as a general attack on the credibility of the defense experts, its critique fails to tarnish them. Dr. Perrotti's testimony on cross-examination that Buenrostro, like any defendant, could suffer from a mental disorder and still be competent (RB 46) simply acknowledged what any competent forensic psychologist or psychiatrist knows: a competency determination looks to the functional

abilities of a defendant, and suffering from a mental disorder does not per se render a person incompetent to stand trial. (See 2 C-RT 360-361, 437 [Dr. Perrotti's testimony on this point]; 4 C-RT 804 [Dr. Mills agrees with the prosecutor that "[e]ven crazy people can be competent"].)[18] The United States Supreme Court, the courts of this state, and experts on competence all have acknowledged this same point. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 174 [defendant with severe mental illness was competent to stand trial, but was not competent to represent himself]; *People v. Halvorsen* (2007) 42 Cal.4th 379, 403 [defendant who suffered from a psychotic mental illness was not entitled to competency determination where there was no substantial evidence that his illness rendered him unable to understand the nature of the criminal proceedings or to assist his counsel in a rational manner]; *People v. Smith* (2003) 110 Cal.App.4th 492, 502 ["the mere presence of a mental illness does not mean appellant was unable

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[18] The cross-examination was as follows:

> Q. So, the fact, assuming you are right just for the moment, that she, in fact, suffers from paranoid schizophrenia, that fact in and of itself does not make her incompetent, correct?
> A. In and of itself, without talking about anything else, no.

(2 C-RT 360-361.) A similar exchange occurred later in Dr. Perrotti's testimony:

> Q. And finally, Doctor, if Dora Buenrostro is, in fact, schizophrenic, that mental condition in and of itself does not equate to being incompetent, does it?
> A. In and of itself, it does not equate to being incompetent.

(2 C-RT 437.) The State erroneously cites another passages of the reporter's transcript (RB 46, citing C-RT 353) for the same point, but there Dr. Perrotti is questioned about whether he talked to jail personnel about Buenrostro or had information about her medical and mental health history.

to understand the proceedings or assist in his own defense"]; Perlin, et al., Competence and the Law: From Legal Theory to Clinical Application (2008) p. 31 [noting the significant body of law "holding that an 'insane' person may nevertheless be competent to stand trial."].) Faulting an expert witness for candidly agreeing to an uncontroversial fact that is widely accepted in his field indicates a weak legal argument, not damaging impeachment. Moreover, the State makes no mention of Dr. Perrotti's subsequent testimony on the very same page it cites. Dr. Perrotti explained that although mental illness may not render a person incompetent, in Buenrostro's case, her paranoid schizophrenia interfered with her abilities to cooperate with counsel. (2 C-RT 361.)

Likewise, Dr. Mills's testimony that Buenrostro was able to understand the nature of the proceedings does not prove the instructional error harmless. (See RB 46.) As Buenrostro's opening brief makes clear, the case for incompetence before trial, like the claims pressed on appeal, rested primarily on the ability-to-assist, not the ability-to-understand, prong of the competence test. (See AOB 24-25, and 89, citing 5 C-RT 1026 [defense closing argument].) Dr. Mills's finding on this point, which was consistent with the opinions of every other expert save one, is hardly a concession that weakens his credibility. Indeed, Dr. Mills's testimony on the crucial ability-to-assist prong was consistent with that of Dr. Perrotti. He explained that although many people who have mental illness are able to cooperate with their attorneys, some are not, and Buenrostro fit into the latter category. (4 C-RT 795- 796.) Thus, Dr. Mills's testimony supports a finding that the instructional error was prejudicial, and does not tend to prove, as the State contends, that the erroneous mental-disorder requirement was harmless beyond a reasonable doubt.

Although the State selectively attacks isolated pieces of defense expert testimony in its effort to argue that the instructional error was harmless, the State does not even attempt to challenge the credibility of defense expert, Michael Kania, Ph.D., who spent far more time with Buenrostro than any other expert (see 2 C-RT 472-476; 3 C-RT 568-569) and found that Buenrostro was incompetent (2 C-RT 494, 502, 508) because she was unable to assist her counsel in rational manner (2 C-RT 494, 502, 3 C-RT 616), suffered from a psychotic delusional disorder (2 C-RT 491-492, 546), and was not faking mental illness or incompetence (3 C-RT 507, 515-516, 542).

Second, attempting to stitch together a harmless error showing, the State points to evidence that Buenrostro purportedly feigned mental illness on the MMPI that Dr. Rath administered soon after her arrest on the day of the crimes. (RB 46-47.) The malingering issue must be viewed in light of the totality of the evidence at the competency trial. Dr. Rath, who, as noted previously, based his conclusions about Buenrostro's competence on a single year-old investigative interview conducted the night of her arrest as an agent of the prosecution, was the only expert of the five mental health experts who testified about Buenrostro's competence to venture the opinion that Buenrostro was malingering. The three defense experts, Drs. Perrotti, Mills and Kania, interviewed Buenrostro specifically for the purpose of assessing her competence, assessed her much closer in time to the competency hearing than did Dr. Rath, and all concluded she was not feigning a mental disorder or incompetence. (See AOB 20-23.) The other court-appointed expert called by the prosecution, Dr. Moral, did not offer an opinion on the subject of malingering. (See 4 C-RT 823-942.) Although Dr. Rath testified that the results of Buenrostro's MMPI test indicated that

she feigned mental illness (4 C-RT 954-957), the State overlooks that Dr. Rath apparently did not think this finding sufficiently important to note in his report (see AOB 23, citing 4 C-RT 983, 985); that Dr. Rath detected no signs that Buenrostro was malingering during his interview of her (see AOB 23, citing 4C-RT 981, 983, 979); and that for purposes determining her competence, the question was whether Buenrostro was malingering at the time of the competency trial, not whether she had been malingering a year earlier when arrested.

Furthermore, the State overstates the significance of the MMPI results regarding malingering. The State contends that "analysis of Buenrostro's MMPI by an independent company indicated a likelihood that Buenrostro was malingering." (RB 46, citing C-RT 593-595, 617 [Dr. Kania's testimony].) The independent company, Caldwell, provided a computer scoring of Buenrostro's responses to the 400 questions of the 566 questions she answered for Dr. Rath and also scored the MMPI Dr. Kania administered. (3 C-RT 645-647; 4 C-RT 954.) This scoring showed that Buenrostro had a somewhat elevated score on the "fake bad" or dissimulation scale. (3 C-RT 594 [Dr. Kania's opinion]; see 4 C-RT 955 [Dr. Rath's opinion].) As Dr. Kania acknowledged, Buenrostro's scores indicated a "possibility of malingering." (3 C-RT 617.) However, both Dr. Rath and Dr. Kania placed caveats on the conclusions that could be drawn from the MMPI results. The MMPI scores give a forensic expert information, but not conclusions. As Dr. Rath explained, "the problem with the computer generated analysis" is that it "spits out . . . every possible hypotheses" [sic], which the expert must integrate with his clinical findings and the person's history to determine the conclusion that "fits best." (4 C-RT 956-957.) And as Dr. Kania explained, Buenrostro's MMPI answers do

not reveal what caused her to respond in a "fake bad" pattern, which could have resulted from dishonesty or being "in a lot of distress, a lot of anxiety" (3 C-RT 594-595), as Buenrostro likely must have been the day her children were killed and she was arrested for their murder. In addition, as the Caldwell report warned, Buenrostro's MMPI profile was "of borderline validity," which meant that the test may have been rendered invalid by the number of unanswered questions. (3 C-RT 618-619.) Cutting to the chase, defense rebuttal witness Sherry Skidmore, Ph.D., explained that a psychologist simply could not determine whether Buenrsotro was malingering from the results of the MMPI test Dr. Rath gave her. (See AOB 24; 5 C-RT 1115-1116.) In its response, the State ignores the evidence that undercuts its malingering motif.

Finally, in support of its harmless error argument, the State notes that Buenrostro consistently denied having hallucinations or delusional thoughts. (RB 47.) Of course, this evidence was offered to prove the unconstitutional mental-disorder element of section 1367, which should not have been part of the jury's competency decision. But even if this evidence were pertinent to the harmless error analysis, the State's argument disregards medical knowledge about mental illness. Buenrostro's denials are wholly consistent with suffering from mental illness. It is well-established that many patients with psychosis are unaware of or deny their disorders and symptoms. (Singh and Arun, Insight and Psychosis (2008) Journal of Mental Health & Human Behavior, vol. 13, no. 1, p. 25; Amador, I Am Not Sick! I Don't Need Help! (2000) p. 13.) As her experts explained, if Buenrostro were faking mental illness, she would have been more likely to report than to deny experiencing hallucinations and delusions when asked by the examining experts. (See 4 C-RT 753-754; 5 C-RT 1030.)

But she did just the opposite: she denied and minimized her problems when questioned by experts (2 C-RT 413-414; 4 C-RT 754; see 3 C-RT 542-543) and only revealed her delusional thoughts when she let her guard down with family and jail personnel (4 C-RT 754, 761-762). Similarly, her own insistence on her competence to both expert and lay witnesses undermines the State's trumped-up malingering argument. (See 2 C-RT 486-487 [Buenrostro told Dr. Kania she was competent]; 3 C-RT 703 [Buenrostro told her sister she was competent and what she said and did was normal].)

The decisive question for the jury should have been whether Buenrostro was able to assist her attorney with her defense in a rational manner. As explained above and in the opening brief, on this question, the defense evidence was strong, and the prosecution evidence was weak. Dr. Moral did not give the State what it needs to sustain the competency verdict – evidence of Buenrostro's then-present ability to assist counsel in a rational manner. Instead, he testified only that he assumed that at some point in the future she would be able to do so, which, of course, does not establish her then-present competence. Meanwhile, Dr. Rath erroneously assumed Buenrostro was cooperating with her attorney. The State's other assertions about the credibility of the defense case for incompetence – whether taking pot shots at the expert witnesses or reciting its malingering mantra about Buenrostro – do not suffice. The burden is on the State to prove that the profound instructional error did not contribute to the competency verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The State has failed to prove that there is no reasonable possibility that had the jury had been constitutionally instructed on the definition of incompetence – without section 1367's mental-disorder requirement – that the competency verdict would have been different. (*Neder v. United States* (1999) 527 U.S. 1, 18.)

D. Buenrostro Did Not Forfeit This Claim By Failing To Object To The Court's Instruction Under CALJIC No. 4.10

In her opening brief, Buenrostro asserts that, even in the absence of an objection at trial, her claim that the jury was erroneously instructed on the requirements of incompetence and competence to stand trial is cognizable on appeal under section 1259 and this Court's discretion to review legal claims, especially those involving a pure question of law. (AOB 92-95.) The State also acknowledges that this Court may review a challenge to an instruction without an objection at trial if the instruction affected the defendant's substantial rights. (RB 38-39.) Nonetheless, the State asserts that Buenrostro's substantial rights are not affected by the instruction, so her claim is forfeited. (RB 39.) The State's argument presupposes a ruling in its favor that the instruction was constitutional. If, as Buenrostro contends, the instruction was unconstitutional, it undoubtedly affected her substantial and fundamental right not to tried while incompetent. The State's forfeiture assertion cannot be resolved without a full merits review of the claim.

For all the reasons stated here and in the opening brief, the entire judgment entered against Buenrostro must be reversed.

II. THE TRIAL COURT ERRONEOUSLY PRECLUDED REBUTTAL TESTIMONY BY PSYCHOLOGIST SHERRY SKIDMORE CHALLENGING THE VALIDITY OF THE OPINION OF COURT-APPOINTED EXPERT, CRAIG RATH, THAT BUENROSTRO WAS COMPETENT TO STAND TRIAL

As set out in the opening brief, the trial court prejudicially abused its discretion and violated Buenrostro's federal constitutional rights by excluding rebuttal testimony from Sherry Skidmore, Ph.D., who would have refuted Dr. Craig Rath's testimony that his evaluation of Buenrostro and resulting opinion that she was competent to stand trial complied with professional, ethical standards for forensic psychologists. (AOB 96-118.) The controversy over Dr. Rath's role in the competency trial centered on two facts: (1) that he based his opinion as to Buenrostro's competence on a year-old custodial interview and MMPI testing he conducted of Buenrostro at the request of the prosecution and for investigative purposes and (2) that after he was appointed by the trial court to assess Buenrostro's competence, he did not conduct another interview for the purpose of determining whether she was competent to stand trial. (AOB 97-98.)

Dr. Rath insisted that his opinion on the ultimate issue at the trial – Buenrostro's competence – resulted from an assessment that comported with the ethical standards governing forensic evaluations. (AOB 98-101.) Through Dr. Skidmore's excluded testimony, the defense sought to establish that it did not. (AOB 101-102.) Dr. Skidmore would have testified that Dr. Rath's conclusion that Buenrostro was competent was invalid under professional standards because he did not conduct an evaluation for the purpose of determining competence and that Dr. Rath had a conflict of interest, which should have prevented him from serving as a court-appointed expert. (AOB 102.) Contrary to the trial court's ruling,

Dr. Skidmore's testimony, discrediting Dr. Rath's opinion as inconsistent with governing ethical standards for forensic psychologists, was not collateral. (AOB 103-109.) Finally, as Buenrostro demonstrates, because Dr. Rath's testimony, and thus his credibility, was essential to the prosecution's case, the trial court's exclusion of her testimony on these issues violated not only state law, but also Buenrostro's federal constitutional rights, and was prejudicial under both the state and federal harmless error standards. (AOB 110-118.)

In response, the State offers only a limited defense of the trial court's ruling.[19] Although acknowledging that "[a] collateral matter may be relevant to the credibility of a witness" (RB 52), the State asserts that the excluded "evidence of professional ethics was irrelevant as it had no tendency to prove the material issue of whether Buenrostro was competent to stand trial." (*Ibid*; see also RB 48.) This contention ignores both the undisputed law that subjects bearing on a witness's credibility are relevant and basic principles about expert opinion testimony.

Dr. Rath's opinion that Buenrostro was competent to stand trial addressed the ultimate issue before the jury – Buenrostro's competency – which, in large part, turned on a battle of expert witnesses. Dr. Rath based his opinion on a year-old investigative interview which he claimed was an adequate basis for a competency evaluation. His credibility on this point was critical because an expert may testify to an opinion based on any matter, whether or not admissible, that is reasonable for experts in the field

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[19] The State does not dispute that Dr. Skidmore's testimony was not excludable under Evidence Code section 352, as the prosecutor at trial alternatively argued (see AOB 109, fn. 45) or that Buenrostro's federal constitutional claims are fully cognizable on appeal (see AOB 113). Its silence suggests tacit agreement with Buenrostro's position on these points.

to rely upon. (Evid. Code, § 801, subd. (b).) "The question of what is 'reasonable' for an expert to rely upon in forming an opinion under the terms of Evidence Code section 801, subdivision (b), is a foundational issue. It affects the credibility and the authority of the expert's opinion." (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 861 [addressing expert's reliance on other expert's opinions], disapproved on other grounds, *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.) The facts and assumptions underlying an expert opinion are of paramount importance. As this Court succinctly stated, "'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, quoting *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.)

Dr. Skidmore's proffered testimony addressed the professional reasonableness of Dr. Rath's decision to base his competency opinion on a year-old interview conducted at the behest of the prosecution as part of its initial investigation of the crimes and not as an independent court expert for the purpose of assessing competency. (See AOB 104-105.) The defense did not attempt to impeach Dr. Rath with a sideshow on matters tangential to the question of Buenrostro's competence, but rather on points relating directly to the reliability of his expert opinion on the ultimate issue of the trial. (See AOB 106-109; cf., *People v. Sapp* (2003) 31 Cal.4th 240, 287 [no abuse of discretion under Evidence Code section 352 to prohibit defendant from impeaching prosecution's rebuttal psychiatrist with evidence he was charged with Medi-Cal fraud where charges had been dismissed].) Dr. Skidmore's proposed testimony was the type of impeachment envisioned by Evidence Code sections 780 and 801, subdivision (b). She would have shown that Dr. Rath's opinion was built

on a faulty foundation and therefore was unworthy of belief. After all, "where the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California*, *supra*, 133 Cal.App.3d at pp. 923-924.) In short, Dr. Skidmore's rebuttal was probative of the veracity or falsity of Dr. Rath's opinion that Buenrostro was competent to stand trial.

The State does not answer this analysis. The State does not take issue with Buenrostro's reading of any of the cases upon which she relies in her opening brief, including *People v. Rodriguez* (1999) 20 Cal.4th 1, which is the only authority the State cites on the question of using collateral matters for impeachment. And the State offers no authority, other than *Rodriguez*'s undisputed definition of "collateral matter," to support its position that the excluded portion of Dr. Skidmore's testimony was collateral and irrelevant. (See RB 52.)

Instead, the State argues that the exclusion of Dr. Skidmore's testimony did not violate Buenrostro's state law or federal constitutional rights because the defense (1) questioned Dr. Skidmore about ethics and (2) had an opportunity to impeach Dr. Rath on cross-examination and thus promote its theory that his competency determination was unreliable. (RB 53-54.) In essence, the State argues that the exclusion of evidence did not matter, so there was no error and no prejudice. The State is mistaken on both points.

The State's first contention suggests that the trial court's ruling did not, in actuality, restrict the scope of Dr. Skidmore's testimony. This is simply incorrect. Although Dr. Skidmore answered two limited questions asked in sequence relating to ethics and professional standards, her

responses did not cover the subjects of her proposed but excluded testimony. (4 C-RT 1120.) When defense counsel's very next question started to explore the subjects that the trial court had ruled inadmissible, the prosecutor objected; the trial court sustained the objection, and defense counsel ended his examination. (4 C-RT 1120-1121.) A closer look at what Dr. Skidmore did say about professional ethics shows that her actual, unelaborated testimony was no substitute for her more extensive, proffered testimony.

Defense counsel asked Dr. Skidmore for her provisional opinion whether the person who took the MMPI test in Defendant's Exhibit C was malingering.[20] Dr. Skidmore replied, "In my opinion, it would be unethical to form such an opinion based on such limited information." (5 C-RT 1119-1120.) Her answer pertained only to the question of malingering as shown by an MMPI test and did not connect her opinion about what would be "unethical" to the applicable professional standards, which Dr. Rath had insisted he obeyed. And Dr. Skidmore's answer did not explain why the MMPI information provided an inadequate basis for an opinion about malingering. (See AOB 99.)

In addition, Dr. Skidmore testified that it would be "below the standard of care" and "not appropriate" for a forensic psychologist to render an opinion about someone's competence when the interview of the subject was not a particularized competence interview. (5 C-RT 1120.) This limited testimony, however, did not explain why a valid opinion about competence requires a specific kind of interview, did not describe the

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[20] Dr. Rath earlier had identified Defendant's Exhibit C as Buenrostro's scores on the MMPI he administered on October 28, 1994. (4 C-RT 957.)

requirements for such a particularized interview, and did not explain why Dr. Rath's investigative interview did not meet the professional standards for a competency interview.

Moreover, neither Dr. Skidmore's opinion about basing a malingering conclusion solely on MMPI results nor her opinion about the requirement for particularized competency interview touched at all on the other subjects of her excluded rebuttal: (1) that, contrary to Dr. Rath's testimony, the professional standards in Division 41 of the Guidelines for Forensic Psychologists did apply to his assessment of Buenrostro and he failed to comply with them, and (2) that, also contrary to Dr. Rath's testimony, under professional standards for forensic psychologists he had a conflict of interest that should have disqualified him as court-appointed competency evaluator and which he should have disclosed. (See AOB 101-102, 104-107.)

In short, without explaining the summary opinions she offered and without addressing the other problems with Dr. Rath's competency assessment, Dr. Skidmore's admitted rebuttal testimony did not give the jury the information it needed to assess the credibility of Dr. Rath's unwavering insistence that his competency evaluation comported with professional standards and thus his resulting opinion that Buenrostro was competent to stand trial.

The State's second contention – that Buenrostro had ample opportunity to impeach Dr. Rath on cross-examination and thus promote her theory that his competency determination was unreliable – misses the point. (See RB 53.) Cross-examination is not a substitute for rebuttal testimony. Cross-examination permits a party to try to impeach a witness's testimony with his own concessions or inconsistent testimony, while rebuttal provides a party an opportunity to refute the testimony of an opponent's witness, and

thus bolster her case, with testimony from additional witnesses. On cross-examination, defense counsel tried to impugn Dr. Rath's assessment methods and adherence to professional standards. But Dr. Rath held firm to his belief in the validity of his work. (See, e.g., 5 C-RT 987-1006, 1022.) The cross-examination may have raised a question in the jury's mind about Dr. Rath's credibility. But without Dr. Skidmore's testimony, the jury was left with Dr. Rath's adamant assertion of the validity of his evaluation. Without Dr. Skidmore, there was no independent witness to give the jury the information – what the professional standards for forensic psychologists require for a valid competency evaluation – that would have confirmed the doubts that defense counsel tried to raise on cross-examination and would have provided a factual basis for disbelieving Dr. Rath. The State's argument that cross-examination adequately tested his credibility is not supported by the record.

Nor is the State's contention supported by its reliance on a single, inapposite case, *People v. Redmond* (1981) 29 Cal.3d 904, 908, which has nothing to do with admissibility of an expert's rebuttal testimony to challenge the professional reasonableness of facts and assumptions underlying the expert opinion of an opposing party. (See RB 54.) In *Redmond*, an assault case, the defendant admitted stabbing the victim, but contended his action was accidental, not intentional. This Court found no error in limiting defendant's cross-examination of the victim after questioning him extensively about his history of alcoholism and blackouts, where (1) the excluded medical records about the victim's alcoholism were protected by the psychotherapist-patient privilege and too remote, while the excluded arrest records were too remote and more prejudicial than probative, and (2) the excluded evidence about the victim's application for victim compensation went to the undisputed, and thus irrelevant, issue of

defendant's identity as the assailant. (*People v. Redmond*, *supra*, 29 Cal.3d at pp. 912-913.) In contrast, Dr. Skidmore's testimony was not privileged, remote, more prejudicial than probative, or inadmissible for any other reason and would have impeached Dr. Rath on a hotly disputed and pivotal issue – the validity of his competency evaluation – which bore directly on the credibility of his opinion that Buenrostro was competent to stand trial.

The importance of rebuttal testimony on the governing professional standards for competency evaluations should not be underestimated. As already noted, competency trials involve a unique battle of expert witnesses on the ultimate issue of the trial. (See *ante* pp. 41-42; AOB 114.) Because the professional expertise of psychologists and psychiatrists permit them to render an opinion about the defendant's competence, their adherence or disregard of the professional standards in forming those opinions is highly relevant to their credibility as an expert. Indeed, CALJIC No. 2.83, which was given to Buenrostro's jury, tells the jury that in resolving conflicts between the testimony of expert witnesses, it should consider "the reasons for each opinion, and the facts and other matters upon which it was based." (5 C-RT 1215; 5 SCT 149.) The prosecutor urged the jury to pay attention to the instructions. (5 C-RT 1177.) He also erroneously told the jury that Dr. Rath had spent the most time with Buenrostro and had recorded the interview (5 C-RT 1183), suggesting that his opinion was based on better information than that of the defense experts.[21] In a competency trial, especially where the question is whether defendant is competent to stand

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[21] The night of her arrest, Dr. Rath spent just over an hour interviewing Buenrostro and spent another two and a half hours with her while she took the MMPI test. (5 C-RT 980.) In contrast, Dr. Kania met with Buenrostro no less than 12 times over a period of five months before he reached his opinion that Buenrostro was incompetent to stand trial. (2 C-RT 474-477, 3 C-RT 568-569.)

trial for capital murder, it is important that the jury be given all proffered information relevant to their decision. Buenrostro's jury was not. Because cross-examination and rebuttal testimony are not fungible, Buenrostro's opportunity to question Dr. Rath did not compensate for the erroneous exclusion of Dr. Skidmore's rebuttal testimony.

Finally, as set forth in the opening brief, the exclusion of Dr. Skidmore's testimony was not just an abuse of discretion under state law, but violated Buenrostro's federal constitutional rights, and was prejudicial under both the state and federal harmless error standards. (AOB 110-118.) The burden is on the State to prove this error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The State does not address Buenrostro's discussion of prejudice, which is based on the importance and uniqueness of Dr. Rath's testimony as the only expert who had a tape-recorded interview that was played in full for the jury and who reached the conclusion that she was malingering. (See AOB 114-118.) In his closing argument, the prosecutor pressed both points (5 C-RT 1176, 1183, 1185-1186) as well as emphasized that, unlike the defense psychologists and psychiatrist, Dr. Rath, like Dr. Moral, was a court-appointed expert. Rather than counter the centrality of Dr. Rath's testimony, the State rests its cursory assertion that any error was harmless on a repetition of its inaccurate contention that Dr. Skidmore testified about Dr. Rath's ethical obligations. (See RB 54.) As explained above, the two limited questions about the professional standards that Dr. Skidmore was permitted to give did not compensate for the evidence defense counsel was not permitted to elicit.

In the context of the entire competency trial, the exclusion of Dr. Skidmore's rebuttal testimony cannot be considered harmless under either the state or federal prejudice standard. (See AOB 114-117.) The evidence

about Buenrostro's competence was closely balanced. There was substantial evidence that Buenrostro suffered from delusions or hallucinations, exhibited bizarre behavior in jail, and irrationally refused to cooperate with her attorneys. (See AOB 85, 115.) The expert witnesses were sharply divided about the key issues before the jury – whether Buenrostro suffered from a mental disorder and whether she could assist counsel in a rational manner. (See AOB 85-86, 114.) In his closing argument, the prosecutor emphasized the presumption of competence and Buenrostro's burden of proving she was incompetent. (See AOB 87; 5 C-RT 1179, 1188-1189.) He told the jury: "if it is a close call, if you are not sure, then you must vote for competency." (5 C-RT 1179; see also 5 C-RT 1185, 1189 [prosecutor rephrases this point].) Dr. Rath's testimony was essential to the prosecution moving the jury to this place of uncertainty. (See AOB 116-117.) He was the only expert to find that Buenrostro was malingering, and did so based solely on the MMPI test he administered 18 months earlier. As explained previously, the prosecutor highlighted Dr. Rath's opinion that Buenrostro was malingering. (AOB 86; 5 C-RT 1185-1187.) As noted with regard to Argument I, if the jury believed that Buenrostro was feigning, rather than suffering from, mental illness, its deliberations could end then and there in a verdict that she was competent without having to decide whether she had the functional abilities to understand the nature of the proceedings and to assist counsel in a rational manner that are constitutionally required for competence to stand trial. (See *ante* pp. 25, 26-27; AOB 87.)

Given the importance of Dr. Rath's testimony to the prosecution's case, the State has not demonstrated that the competency verdict was "surely unattributable" to the erroneous exclusion of Dr. Skidmore's rebuttal evidence. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Dr.

Rath gave the jury an easy route to a competence verdict. Dr. Skidmore's testimony – that Dr. Rath's competency evaluation did not comport with professional ethical standards and that, as a prosecution expert retained to help with the investigation in the case, Dr. Rath had a conflict of interest when he was appointed as a court expert to render an opinion about Buenrostro's competence – would have presented the jury with an evidentiary basis for disbelieving Dr. Rath's own adamant assertion of the professional bona fides of his conclusions about Buenrostro. Without Dr. Skidmore's testimony, defense counsel had no factual basis for his closing argument that Dr. Rath was a renegade whom the jury should distrust (5 C-RT 1198), and that professional ethics precluded Dr. Rath from doing what he did in this case, i.e. serving as both an investigator for the prosecution and a court-appointed expert (5 C-RT 1199, 1205-1206). The jury, of course, was instructed that arguments of counsel are not evidence. (5 C-RT 1210; 5 SCT 137.)

Had the jury rejected Dr. Rath's conclusions that Buenrostro was malingering and was competent, the evidentiary landscape at the competency trial would have been dramatically altered. The jury would have been faced with three opinions by Drs. Perrotti, Kania, and Mills that Buenrostro suffered from a mental disorder and was unable to assist counsel in a rational manner, and one opinion by Dr. Moral that she did not suffer from a mental disorder and that in the future, when she became comfortable with her attorney, she would be able to cooperate with him. (4 C-RT 857.) It would have had to assess all these opinions, including Dr. Moral's failure to testify that at the time of the competency trial Buenrostro was able presently to assist her attorney in conducting her defense in a rational manner. Given the substantial expert testimony that Buenrostro was incompetent, together with the lay testimony about her behavior in jail, the

State has not carried its burden under *Chapman v. California*, *supra*, 386 U.S. at p. 24, to show that the exclusion of Dr. Skidmore's testimony was harmless beyond a reasonable doubt. Moreover, under *People v. Watson* (1956) 46 Cal.2d 818, 836, there is a reasonable probability that but for this error, the jury would not have found Buenrostro incompetent or, at a minimum, would have been unable to reach a unanimous jury as to her competence to stand trial. The entire judgment must be reversed.

III. THE TRIAL COURT ERRONEOUSLY EXCLUDED DEFENSE EVIDENCE AS SANCTIONS FOR NON-EXISTENT DISCOVERY VIOLATIONS

In the opening brief, Buenrostro challenges the trial court's orders excluding the testimony of defense expert, Michael Kania, Ph.D. about Buenrostro's delusions that computers were killing people and altering dead people, which made her unsure whether people she saw were alive or were computers (AOB 120, citing 3 C-RT 641), and the testimony of defense expert Mark Mills, M.D., about the report he obtained from Caldwell testing service based on the data from the MMPI Dr. Rath gave Buenrostro (AOB 121-122, citing 4 C-RT 758-759). These portions of the experts' testimony supported their opinions that Buenrostro was not competent to stand trial. Granting the prosecutor's objection, the trial court excluded this testimony because it was not included in the experts' reports given to the prosecution before trial. (AOB 120, citing 3 C-RT 642; AOB 122, citing 4 C-RT 760.)

The central question presented by this claim is whether the trial court had authority to exclude this testimony as sanctions for these purported discovery violations. The statute governing a trial on the issue of mental competence, section 1369, contains no discovery provision. Thus, the answer turns on whether the civil or criminal discovery rules relating to pretrial disclosure of information from an expert witness apply in a competency hearing. The criminal discovery statute imposes mandatory discovery obligations on the parties, which require the prosecution and the defendant to provide statutorily-specified information about their expert witnesses without a request. (See §1054.1; § 1054.3.)[22] In contrast, the

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[22] The disclosure obligations under the criminal discovery statute are (continued...)

Civil Discovery Act of 1986 imposed no such automatic duty. Under the civil statute, disclosure of expert trial witness information is triggered only by a formal demand made in conformity with statutory procedures. (See former Code of Civ. Proc. § 2034, subd. (a); see AOB 125.) No such demand was made in this case.

The State forthrightly acknowledges that "competency proceedings are not criminal proceedings and the rules for civil trial generally apply to special proceedings of a civil nature." (RB 67; see also RB 59.) But the State evades the clear implications of its own admission as it argues that Buenrostro forfeited her claim (RB 58, 60-61), there was no error (RB 61-68), and any error was harmless (RB 68-69).[23]

As Buenrostro sets forth in her opening brief, and as she elaborates below, the trial court abused its discretion in excluding portions of Dr. Kania's and Dr. Mills's testimony as discovery sanctions: the civil discovery rule applies and because the prosecuting attorney made no discovery demand, Buenrostro committed no discovery violation for the trial court to remedy. (See AOB 119-126.) Even if, as the State suggests, the trial court logically relied on the criminal discovery statute in the competency proceeding (RB 61), the trial court still abused its discretion in imposing the discovery sanctions because Buenrostro did not violate the

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[22](...continued)
thus self-executing, although a party may not seek judicial enforcement of those obligations without first making "an informal request of opposing counsel for the desired materials and information." (§ 1054.5, subd. (b).)

[23] The State does not acknowledge or address Buenrostro's argument that the evidentiary errors raised in this claim resulted in a violation of her federal constitutional rights to due process, a fair competency hearing and to present evidence in support of her claim of incompetence. (See AOB 128.) Accordingly, there is no response to which Buenrostro can reply.

criminal discovery rules. (See AOB 126, fn. 49.) Further, the trial court's error was prejudicial (see AOB 129-131), and Buenrostro did not forfeit her claim (see AOB 126-128).

A. The Trial Court's Sanction Order Exceeded Its Authority Because The Expert Witness Provision of The Civil Discovery Act of 1986, And Not Proposition 115's Criminal Discovery Statute, Applies To A Competency Proceeding

In its brief, the State does not state a view on whether the civil discovery rules or the criminal discovery rules apply to pretrial disclosure of expert witness information. It appears to acknowledge, even if indirectly, that some civil discovery rules may apply to a competency hearing. (See RB 59 ["not all issues arising regarding a competency hearing lend themselves to application of civil rules"]; RB 67 ["it is less clear that civil discovery rules governing the exchange of expert information apply"].) In light of the decision in *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, which accepted the Attorney General's position that the civil rule governs pretrial discovery in the form of a mental examination in a competency proceeding, the State would be hard pressed to argue that the civil discovery rules do not apply at all to competency trials. Rather than address which discovery provision applies to pretrial discovery of expert witness information, the State attempts to reframe the issue as an inquiry into whether the trial court reasonably should have known which statute applied. The State contends that, at the time of Buenrostro's competency hearing, it was not clear whether the civil discovery rules would apply (see RB 59, 67) and suggests that finding the discovery sanctions were error would be unwarranted where the parties and trial court operated under the discovery rules applicable to criminal trials (RB 65-66). The State's response is misguided.

1. At the time of the competency determination in this case, established law clearly indicated that the civil discovery rules, not the criminal discovery rules, applied to a competency proceeding

As Buenrostro already has acknowledged, at the time of the competency trial, there was no decisional authority after the passage of Proposition 115 that addressed the question of pretrial discovery in the context of a competency hearing. (See AOB 124.) *Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th 478, was the first appellate decision to hold that the Civil Discovery Act of 1986 applies to a competency proceeding. At the same time, there apparently was no appellate decision holding – or even assuming – that the criminal discovery statute applied to a competency proceeding. Notably, the State has cited none. The absence of case law directly on point may provide a starting point for analyzing the issue, but does not answer Buenrostro's claim.[24]

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[24] Buenrostro is aware of one pre-Proposition 115 decision addressing discovery in competency hearings. In *Posner v. Superior Court* (1980) 107 Cal.App.3d 928, 933-934, the First District Court of Appeal vacated a pretrial discovery order compelling the disclosure of material relating to all persons defendant planned to call at the trial, scientific, psychological and psychiatric reports prepared for defendant concerning his competence as violative of the defendant's federal constitutional due process right and right against self-incrimination. The court recognized that a competency hearing was" a special proceeding of a civil nature which is collateral to the criminal proceedings" (*id.* at p. 932), but evaluated the discovery order under the pre-Proposition 115 test for discovery in criminal cases set forth in *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320. In *Baqleh*, the same court concluded that intervening decisions of this Court had proved its self-incrimination ruling to be wrong. (*Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th at p. 499, fn. 5.)

In ruling on the admission or exclusion of evidence, a trial court must select and apply the governing law. (*People v. Letner* (2010) 50 Cal.4th 99, 145 [addressing suppression motion].) At the time of the trial court's discovery-sanction order, there was ample law to guide its decision-making. (See AOB 124.) The settled nature of a competency hearing, together with the express language of both civil and criminal discovery statutes, certainly pointed to the answer Buenrostro presents and *Baqleh* reached – that the civil discovery rule applies. The State largely overlooks this law.

First, although the provisions for a competency determination are contained in the Penal Code under a title labeled "Miscellaneous Proceedings" (see RB 59), for nearly a century, this Court has characterized a competency hearing under section 1368 as "a special proceeding of a civil nature" that is collateral to the criminal proceeding. (*People v. Stanley* (1995) 10 Cal.4th 764, 806 ["'A proceeding to determine the mental competence of a criminal defendant to stand trial pursuant to ... section 1368 is a special proceeding civil in nature'"]; *People v. Fields* (1965) 62 Cal.2d 538, 540 ["a proceeding under section 1368 . . . is a special proceeding rather than a criminal action"]; *People v. Lawson* (1918) 178 Cal. 722, 728 ["the question of present sanity in order to determine whether a defendant possesses sufficient mental capacity to be tried, or having been tried and convicted, to be adjudged to punishment . . . are special proceedings of a civil nature"].) This principle was well-established when Proposition 115, which adopted the criminal discovery statute, was passed in 1990, and was well-established at the time of Buenrostro's competency hearing in 1995. The trial court could not reasonably have been unaware of the civil nature of a competency trial.

Second, at the time of Buenrostro's competency hearing, the scope of the criminal discovery statute was known. Its reach, of course, is determined by the intent of the voters as revealed by Proposition 115's "'words themselves.'" (*In re Littlefield* (1993) 5 Cal.4th 122, 130, quoting *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) The statutory language of the criminal discovery statute clearly indicates that its reciprocal discovery obligations apply only in the context of a trial in a criminal case. Section 1054, stating the statute's purpose, specifically refers to "criminal cases" (§ 1054, subd. (e)), as does section 1054.5, both of which make the statute the exclusive mechanism for discovery "in criminal cases." Section 1054.3, like other provisions in the statute, expressly limits discovery obligations to disclosing specified information about the witnesses the defendant intends to call "at trial" and specified evidence he intends to offer in evidence "at the trial." (See former § 1054.3, subd. (a)-(b) and current § 1054.3, subd. (a)(1)-(2) [also limiting discovery obligations to information to be used at "trial"].) These provisions do not mention other proceedings related to criminal prosecutions, let alone explicitly refer to competency hearings.

A "criminal trial" is generally understood to be the proceeding in which the trier of fact determines whether the defendant is guilty or not guilty of the crimes charged. (*Rose v. Clark* (1986) 478 U.S. 570, 577; accord, *People v. Flood* (1998) 18 Cal.4th 470, 507; see Pipes & Gagen, *Cal. Criminal Discovery*, 4th ed., § 2:18, p. 336 ["[t]he explicit use of the term 'trial' in the Criminal Discovery Statute is evidence that the statute is limited to a proceeding in which a trier of fact returns a verdict on the charges"].) Obviously, that is not the purpose of a competency proceeding. (See § 1368; *People v. Samuel* (1981) 29 Cal.3d 489, 496 ["the sole purpose of the section 1368 hearing is to determine defendant's

competence, not his guilt"]; *Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th at p. 495 ["a section 1368 hearing is a collateral proceeding that cannot directly result in the functional equivalent of a criminal adjudication of guilt"].) These principles were well-known at the time of Buenrostro's competency trial.

Third, when Proposition 115 was passed by the voters, the Civil Discovery Act of 1986 stated that its terms apply to "a special proceeding of a civil nature," (former Code of Civ. Proc., § 2016, subd. (b)(1)), which is precisely what a competency hearing was known to be. The Legislature when enacting statutes and the voters when passing initiatives are deemed to be aware of existing statutes and judicial decisions and to have enacted the statute or measure in light of them. (*People v. Harrison* (1989) 48 Cal.3d 321, 329 [statutes]; *People v. Weidert* (1985) 39 Cal.3d 836, 844 [initiatives].) In choosing to apply the civil discovery rules to "a special proceeding of a civil nature," the Legislature presumably was aware that a competency hearing was such a proceeding and, thus, necessarily intended that the Civil Discovery Act of 1986 apply to competency hearings. Similarly, in passing Proposition 115, the voters must be deemed to have understood the reach of the Civil Discovery Act of 1986. Had the drafters of Proposition 115 intended that its mandatory reciprocal discovery requirements for criminal trials also apply to competency hearings, the new law would have said so. But it did not. Instead, the criminal discovery statute enacted by Proposition 115 carefully and consistently refers only to "trials" in "criminal cases." (See, e.g. §§ 1054, 1054.1, 1054.3, 1054.5.)

After the passage of Proposition 115, if the Legislature had decided that the criminal, rather than the civil, discovery rules regarding expert witnesses should apply to competency proceedings, it would have amended section 1054 et seq. to effect that change. Again, the Legislature took no

such action, although it certainly knew how to create new discovery provisions for criminal-related proceedings as seen by its enactment of discovery mechanisms for post-conviction proceedings in 2002 (§ 1054.9) and juvenile proceedings in 2009 (§ 1054.3). Moreover, if, between the passage of the Civil Discovery Act of 1986 and Buenrostro's competency trial, the Legislature had decided broadly that none of the civil discovery rules should be used in competency proceedings or more narrowly that the civil pretrial discovery rules regarding expert witnesses should not be used in competency proceedings, it would have amended former Code of Civil Procedure section 2016, subdivision (b)(1) to state that the phrase "a special proceeding of a civil nature" does not include competency hearings or to state that expert witness provisions of former Code of Civil Procedure section 2034 do not apply to such hearings. But the Legislature did not do that either. In short, although, as the State notes (RB 59), there was no decision holding that the Civil Discovery Act of 1986 applied to competency trials when the trial court imposed sanctions on Buenrostro for purported discovery violations, the well-established law of this Court on the nature of competency trials together with the explicit language defining the scope of both the criminal discovery statute and the civil discovery act unquestionably pointed to the answer that the civil, not the criminal, rules applied to discovery in a competency proceeding.

If, after reviewing the foregoing law, the trial court had any question about the inapplicability of the criminal discovery statute to a competency proceeding, its doubts would have been resolved by considering analogous case law holding that statute inapplicable to other proceedings related to criminal prosecutions. As noted above, discovery tools were not available in habeas corpus cases, which are authorized in Penal Code, Title 12, "Special Proceedings of a Criminal Nature," (*People v. Gonzalez* (1990) 51

Cal.3d 1179, 1256-1261) until the Legislature enacted section 1054.9. Likewise, the reciprocal discovery provisions of the criminal discovery statute do not apply to juvenile proceedings (*Robert S. v. Superior Court* (1992) 9 Cal.App.4th 1417, 1420-1422), which involve criminal adjudications.

Later legal developments further confirm the inapplicability of the criminal discovery statute to proceedings that are not criminal trials, but nonetheless are considered part of the criminal justice process. The statute does not apply to probation revocation proceedings. (*Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 59). And the Legislature two years ago provided for limited discovery in juvenile cases by enacting §1054.3(2)(b)(1), which permits a mental examination of a minor in juvenile proceeding in specified circumstances. All these statutory and judicial authorities bring the underpinning of Buenrostro's claim into sharp relief: Proposition 115's criminal discovery statute applies as it is written – only to criminal trials. Although related to a criminal trial, a competency ring is not a criminal trial.

In the absence of legislatively-created discovery procedures for a competency trial, the relevant civil rules apply. The case law on discovery under the Sexually Violent Predator Act (hereafter "SVPA") illustrates this point. (See Welf. & Inst. Code, § 6600 et seq.) A SVPA proceeding, like a competency hearing, is "a special proceeding of a civil nature." (*Moore v. Superior Court* (2010) 50 Cal.4th 802, 815, citing *People v. Yartz* (2005) 37 Cal.4th 529, 532, 537.) It also is governed by a statute that is silent with regard to discovery. (See Welf. & Inst. Code, § 6603, subd. (a) [stating only that "[a] person subject to this article shall be entitled to . . . have access to all relevant medical and psychological records and reports"].) The courts addressing the question have held that the Civil Discovery Act of

1986, not the criminal discovery statute, applies to a SVPA proceeding. (*People v. Superior Court (Cheek)*) (2001) 94 Cal.App.4th 980, 987-988 [issuing writs of mandate that trial courts reconsider discovery rulings in accordance with Civil Discovery Act of 1986]; *Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 681 [Civil Discovery Act of 1986 applies in SVPA proceedings], disapproved on other grounds, *People v. Yartz, supra,* 37 Cal.4th 529, 537 [disapproving *Leake* to extent it suggests SVPA proceeding is "civil action" rather than "special proceeding civil in nature"].) These cases further support Buenrostro's position that the civil discovery rules regarding pretrial discovery of expert witness information applied to her competency trial.[25]

As noted above with regard to post-conviction and juvenile cases, the Legislature knows how to craft discovery rules for specific types of criminal-related proceedings when it concludes such statutes are warranted. With the Mentally Disordered Offender Act, the Legislature created a procedure for involuntarily committing an individual as a mentally disordered offender after the expiration of his criminal sentence. (§ 2960 et seq.) The statute is explicit about both the nature of the hearing and the discovery rules that apply: "The hearing shall be a civil hearing, however, in order to reduce costs the rules of criminal discovery, as well as civil discovery, shall be applicable." (§ 2972, subd. (a).) Certainly, the

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[25] In *Yartz*, this Court expressly endorsed the conclusion in *Cheek* that a SVPA proceeding is "a special proceeding of a civil nature," but disapproved *Cheek*'s alternate holding that SVPA proceeding also was a "civil action." (*People v. Yartz , supra*, 37 Cal.4th at p. 537.) The Court had no occasion to review *Cheek*'s ruling that the Civil Discovery Act of 1986 applied to a SVPA proceeding, but its ruling that the proceeding is a "special proceeding of a civil nature" goes at least part way to that conclusion.

Legislature could make a similar judgment that criminal rules, as well as civil rules, should apply to competency hearings. But it has not.

In sum, although there was no explicit judicial ruling on the issue at the time of Buenrostro's competency trial, established statutory and case law made clear that the civil discovery rules and not the criminal discovery rules would apply in a proceeding under section 1369.

2. The State fails to counter Buenrostro's showing that the Civil Discovery Act of 1986 applied to her competency trial

Aside from acknowledging that "competency proceedings are not criminal proceedings and the rules for civil trial generally apply to special proceedings of a civil nature" (RB 67), the State addresses none of the law discussed above. Instead, it tries to skirt the well-established principles that a competency trial is "a special proceeding civil in nature" and that the Civil Discovery Act of 1986 explicitly applied to such proceedings with a discussion of the federal due process requirements for competency trials (RB 59-60), a review of the purpose of the criminal discovery rules (RB 61, 62), a suggestion that many civil discovery rules have no application to a competency hearing (RB 61, fn. 16), and the observation that *Baqleh v. Superior Court*, *supra*, 100 Cal.App.4th 478, involved a different discovery tool (RB 67). All of this begs the issue presented here, which is whether the trial court had authority to exclude portions of Dr. Kania's and Dr. Mills's testimony at the competency trial as sanctions for purported discovery violations.

First, the State's reference to *Medina v. California* (1992) 505 U.S. 437, 442-443 is unhelpful. (See RB 59-60.) The high court's refusal in *Medina* to apply the balancing test used in civil cases to a challenge to the burden of proof in a competency proceeding says something about the

requirements of procedural due process under the Fourteenth Amendment, but nothing about California law on discovery in a competency trial. As the State itself admits, under California law competency trials are "special proceedings of a civil nature" to which "the rules for civil trials generally apply." (RB 67). That law, not *Medina*, pertains to the question presented here.

Second, the State's observation that the purpose of the criminal discovery statute is "'to promote the ascertainment of truth in trials by requiring timely pretrial discovery'" (RB 61, quoting § 1054, subd. (a)), does nothing to establish that section 1054 et seq. applies to the pretrial discovery of expert witness information in a competency proceeding. The civil discovery act has substantially the same purpose. (See *Thoren v. Johnson & Washer* (1972) 29 Cal.App.3d 270, 274 [principal purpose of civil discovery is to eliminate "'sporting theory of litigation'" and help parties ascertain the truth].) The criminal and civil discovery statutes may serve the same purpose, but they do so through different requirements and procedures. The question here is not the statute's purpose, but which rule applied, whether there was a violation of that rule, and whether the trial court's sanction order was an authorized and appropriate remedy for any such violation.

Third, the State's recognition that some civil discovery tools apparently are not used in competency hearings does not answer whether the civil rules regarding discovery of expert witness information apply. (See RB 61, fn. 16.) Certainly, some discovery tools, like interrogatories and depositions, are not generally used in competency proceedings, and the applicability of the civil rules regarding those procedures may not be appropriate. But that question is not raised by this case. Expert testimony often is at the heart of a competency trial, so the civil rules on pretrial

disclosure of an expert witness's findings and opinions are pertinent. The State has offered no reasoned analysis as to why the discovery rule in former Code of Civil Procedure section 2034 did not apply to Buenrostro's competency trial.

Finally, the difference between the discovery issue in *Baqleh*, an order that defendant submit to an examination by the prosecution's expert, and the discovery issue here, an order excluding expert testimony for failure to disclose certain information, is not dispositive. A mental examination of the defendant is an integral part of a competency determination and is recognized in the subdivision providing for court-appointed experts (§ 1369, subd. (a)), just as testimony by defense and prosecution experts is a fundamental part of a competency determination and is covered by the subdivisions providing for evidence about the defendant's competence (§ 1369, subds. (b)-(d)). Moreover, the import of *Baqleh* is its recognition that when a discovery provision is appropriate in a competency proceeding, the civil rule – not the criminal rule – governs. Focusing on peripheral points, the State's response to *Baqleh* does not even try to suggest that its analysis and its ruling are wrong. (See RB 66-67.)

The question presented here is not whether this Court thinks the criminal discovery statute or the civil discovery act better serves a competency hearing. That judgment belongs to the Legislature, not the Court. (See *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ["'the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language'"]; *Leake v. Superior Court*, *supra*, 87 Cal.App.4th at p. 682 [rejecting, as "policy arguments that should be addressed to the Legislature," Attorney General's contention that applying civil discovery rules to SVPA proceedings would unwisely replace informal discovery practices with long, costly discovery

battles that would take toll on resources of district attorneys' offices].)

The Court recently emphasized this point in the context of the criminal discovery statute. In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, the Court rejected the State's argument that the purpose of Proposition 115 justifies the judicial creation of a rule granting permission to the prosecution to obtain a mental examination of a criminal defendant who places his mental state in issue. (*Id.* at p. 1107.) The Court was very clear about its limited role:

> Although we must interpret the statutes governing discovery in criminal cases, we are not at liberty to create new rules, untethered to any statute or constitutional mandate. Instead, the framers of Proposition 115, by including the exclusivity provision of section 1054, subdivision (e), authorized the Legislature to create the applicable rules in the first instance. Only when interpreting a statute or where a rule of discovery is "mandated by the Constitution of the United States" (§ 1054, subd. (e)) does this court have a role.

(*Id.* at pp. 1108-1109.)[26] Just as the Court may not authorize discovery tools that the Legislature did not provide in the criminal discovery statute, it may not extend criminal discovery to proceedings the Legislature did not expressly identify as within the statute's scope.

In sum, Buenrostro's claim of error in excluding Dr. Kania's testimony about Buenrostro's computer delusions and Dr. Mills's testimony about the MMPI revolves around the intent of the voters and the intent of the Legislature with regard to discovery in competency proceedings. And they are clear: at the time of Buenrostro's trial, the Civil Discovery Act of 1986, not the criminal discovery statute, applied to a pretrial discovery of

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[26] In 2009, the Legislature amended section 1054.3 to respond to *Verdin*. (§ 1054.3, subd. (b)(2).) And recently, this Court held that *Verdin* applied to a defendant's 1995 trial. (*People v. Gonzales* (2011) 51 Cal.4th 894, 927.)

expert witness information in a competency hearing under section 1369, which is a special proceeding civil in nature. The State offers no cogent analysis why the civil rule should not apply.

B. The Trial Court's Sanction Order Exceeded Its Authority Because There Was No Discovery Violation To Remedy Given That The Prosecutor Never Demanded Discovery From Buenrostro Regarding Her Expert Witnesses And The Parties Did Not Otherwise Invoke Discovery Under The Civil Discovery Act Of 1986

The State readily concedes that there was no demand for the exchange of information about expert witnesses pursuant to former Code of Civil Procedure section 2034, subdivision (a), which would have required Buenrostro to provide the prosecution with expert witness declarations as described in former section 2034, subdivision (f)(2). (RB 64, 65.) As Buenrostro previously explained, a formal demand is a prerequisite for invoking the civil discovery rules, and without that triggering event, there was no discovery violation for the trial court to remedy. (AOB 125.) In short, the trial court's order imposing sanctions for supposed discovery violations was without legal basis and being devoid of authority was an abuse of discretion. (*Ibid.*)

In an attempt to patch over this fundamental problem, the State urges this Court to ignore what the Civil Discovery Act of 1986 actually required and to excuse the State's self-described "technical noncompliance" with former Code of Civil Procedure section 2034. (RB 65.) To the extent that the State suggests that under the Civil Discovery Act, Buenrostro's disclosure of her experts' reports triggered all the mandates and remedies attending former section 2034, and, thus, provided a sufficient basis for the trial court's finding of a discovery violation and its exclusionary sanction, its argument is ill-founded. (See RB 65.) The State cites no statutory

language or judicial authority whatsoever for its expansive and creative reading of the Civil Discovery Act of 1986. Such a reading, of course, contradicts former section 2034, which provided "the exclusive mechanics for imposing sanctions for failure to comply with valid requests for discovery." (*Lund v. Superior Court* (1964) 61 Cal.2d 698, 712 [addressing similar section 2034 in the 1957 statute].) The State's suggestion that defense counsel's voluntary provision of Dr. Kania's and Dr. Mills's reports somehow compensated for the State's failure to comply with the unequivocal directives of the civil discovery rule is as unreasonable as it is unsubstantiated.

In any event, even under the State's novel and unsupported notion that Buenrostro's disclosure of Dr. Kania's and Dr. Mills's reports not only inadvertently triggered discovery under former Code of Civil Procedure section 2034 on behalf of the prosecution, but exposed her to sanctions for failing to comply fully with a civil discovery rule that the prosecution never invoked, there still would be no discovery violations here. Former section 2034 requires that an expert declaration contain "[a] brief narrative statement of the *general substance* of the testimony that the expert is expected to give." (Former Code Civ. Proc., § 2034, subd. (f)(2)(B), italics added.) The statute does not require that the expert declaration state every fact later included in the witness's trial testimony. Even assuming, arguendo, that Dr. Kania's and Dr. Mills's reports discharged the prosecutor's duty to demand discovery and functioned as an expert declaration, their reports satisfied the "general substance" requirement because they stated their findings relating to the elements defining incompetence to stand trial under Penal Code section 1367. Thus, there was no discovery violation to remedy because neither expert's testimony went beyond the general substance of their reports.

Indeed, *Bonds v. Roy* (1999) 20 Cal.4th 140, the sole case the State cites to interpret former Code of Civil Procedure section 2034, establishes this point. (See RB 63-65.) In *Bonds*, a medical malpractice action, this Court upheld the exclusion of testimony by defendant's orthopedic surgeon on the standard of care that went beyond the issue of damages identified in the expert declaration and his deposition as the subject of his trial testimony. (*Bonds v. Roy*, *supra*, 20 Cal.4th at p. 143.) In discussing former section 2034, the Court noted that the requirement of an expert declaration is "something of a misnomer since it is prepared and signed not by the expert, but by either a party or the party's attorney" (*id.* at p. 144, fn. 2) and emphasized that the statutory language requires only "*[a] brief narrative statement of the general substance of the testimony that the expert is expected to give*" (*id.* at p. 144, original italics). To expand the scope of an expert's testimony beyond the subjects stated in the declaration, a party must obtain permission under former subdivision (k) for "'leave to . . . amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give.'" (*Id.* at p. 145.)

The defendant in *Bonds* did not comply with this requirement. Nor did he dispute that the proposed standard-of-care testimony of his expert addressed a subject not listed in the expert declaration. Rather, the defendant asserted that because he submitted an expert witness declaration, "the trial court was powerless to limit the scope of [the expert's] testimony no matter how inaccurately the declaration described the general substance of that testimony." (*Bonds v. Roy*, *supra*, 20 Cal.4th at p. 145.) This Court rejected the argument as rendering meaningless the provisions of subdivision (k), which "presuppose that a designated expert may testify only on the subjects set forth in an expert witness declaration" and require "a

party to seek leave to amend the declaration if there are deviations in 'the general substance of the testimony that an expert previously designated is expected to give.'" (*Id.* at p. 146.)

Bonds undercuts, rather than supports, the State's position here. Although *Bonds* recognizes that expert testimony could be excluded under former Code of Civil Procedure section 2034, subdivision (j) for noncompliance with the provision's disclosure requirements, such sanction was conditioned on a demand for exchange of expert declarations and a violation of the specific requirements set forth in section 2034, subdivision (f). (*Bonds v. Roy*, *supra*, 20 Cal.4th at p. 144.) Nothing in *Bonds* supports the fast and loose reading of the Civil Discovery Act that the State urges in this case. Moreover, *Bonds* reiterates that an expert witness declaration under former section 2034, subdivision (f)(2) requires only a brief statement of the general substance of the expert's expected testimony. (*Ibid.*) It does not, as the State's argument here assumes, require that the expert witness must disclose every fact – such as Buenrostro's computer delusions or the Caldwell report based on rescoring Dr. Rath's MMPI results – he or she will recite at trial.

Thus, even assuming, arguendo, that providing the prosecution with Dr. Kania's and Dr. Mills's reports were sufficient to trigger application of former section 2034, there was no discovery violation to remedy because neither expert's testimony went beyond the general substance of their reports, which addressed the subjects relevant to determining competence, i.e. whether Buenrostro (1) suffered from a mental disorder or was malingering; (2) was able to understand the nature of the proceedings against her; and (3) was able to assist counsel with the defense in a rational manner. In contrast to the trial testimony on the standard of care in *Bonds*, which the expert had stated under oath in his deposition he would *not*

address at trial, Dr. Kania's testimony about computer delusions and Dr. Mills's testimony about the recoded MMPI results pertained to the general substance of their report about Buenrostro's incompetence and did not stray into a different subject. In this way, the State was not deprived of notice as to the general substance of their testimony and cannot legitimately claim unfair surprise. The trial court erroneously excluded Dr. Kania's and Dr. Mills's testimony.[27]

C. Even If The Criminal Discovery Statute Applied To A Competency Trial, The Exclusion Of Dr. Kania's And Dr. Mills's Testimony Would Be Error

In her opening brief, Buenrostro explains that even assuming, arguendo, that the criminal discovery statute applied to her competency trial, the exclusion of Dr. Kania's testimony about her computer delusions and Dr. Mills's testimony about the Caldwell report on the MMPI still would be error. (AOB 126, fn. 49.) The State does not respond directly to

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[27] Other decisions upholding the exclusion of expert testimony under former Code of Civil Procedure section 2034 and the current discovery provisions regarding expert witness information (§§ 2034.010-2034.720) are consistent with Buenrostro's position. In them, the expert at trial ventured into a new, unnoticed subject matter, rather than adduced additional facts to support his opinion on an already-noticed topic. (See, e.g., *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 96 [in nuisance action, plaintiff's expert was properly precluded from offering his opinion about cost of remediation when he did not testify about the subject at his deposition]; *Jones v. Moore* (2000) 80 Cal.App.4th 557, 563 [in legal malpractice action, trial court properly excluded testimony of plaintiff's expert on areas of defendant's representation that went beyond his deposition testimony which was limited to standard of care in negotiating plaintiff's divorce settlement and explicitly declined to offer an opinion about standard of care in other areas of lawyer's representation]; *Kennemur v. State of California, supra*, 133 Cal.App.3d at pp. 912-913 [in Tort Claims Act action, trial court properly excluded testimony of plaintiff's expert about causation when, in three pretrial depositions, expert testified he had no opinion on causation].)

this showing, but contends that the defense failed to disclose the statements of experts as required by section 1054.3 and that the trial court's remedy for these discovery violations was proper. (RB 62-63.) The State's position is mistaken.

1. The exclusion of Dr. Kania's testimony about Buenrostro's computer delusions was error under section 1054 et seq.

Although Dr. Kania's written report did not include Buenrostro's account of the computer delusion, there was no discovery violation. (See AOB 126, fn. 49.) Certainly, oral statements made by a defense witness to defense counsel are, with some limitation, discoverable under section 1054.3. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 160.)[28] But, contrary to the State's argument, Dr. Kania's reports of Buenrostro's statements were not subject to pretrial discovery by the prosecution. The section 1054.3 discovery requirement is limited by section 1054.6, which exempts from disclosure materials or information that are "privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1267.) Information that falls under the attorney-client privilege, such as statements of a defendant to defense counsel or a defense expert, is not subject to disclosure at the time the defense "designates" the

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[28] Section 1054.3, subdivision (a) requires the defense to "the names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments or comparisons which the defendant intends to offer in evidence at the trial."

witness, i.e. when the defense reveals that witness to the prosecution as someone it intends to call as a witness at trial. (*Rodriguez, supra,* at p. 1269; see *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1823 [expert's interview notes reflecting defendant's statements are excepted from discovery under § 1054.3, subd. (a)].) Thus, the Courts of Appeal in *Rodriguez v. Superior Court*, *supra*, at p. 1271 and *Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609, 1615 reversed trial court rulings that required the defendant to disclose pretrial his privileged attorney-client statements made to a defense expert. In both cases, the undisclosed portion of the defendant's statement was exempt from discovery even though much, if not most, of his statement had been disclosed in the expert's report. (*Rodriguez*, *supra*, at p. 1270; *Andrade*, *supra*, pp. 1611, 1614.)[29]

The same holds true here. Buenrostro made a statement about her mental condition to an agent for her attorney, Dr. Kania, whom her attorney had retained as an expert to assist in her defense. This communication plainly falls within the attorney-client privilege. (Evid. Code, § 952 [privilege covers disclosure to third persons "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted"]; *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 237 ["the communications of the attorney's agent to the attorney are within the privilege"].) Under section 1054.6, defense counsel was under no pretrial obligation to disclose Buenrostro's privileged statements to the prosecution. Accordingly, the trial court abused its discretion in striking Dr. Kania's testimony about Buenrostro's delusion as a sanction for a nonexistent

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[29] Although this Court has not yet ruled on the issue, it has distinguished *Rodriguez* and *Andrade* without disapproving their analyses or conclusions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 10.)

discovery violation.[30]

Even assuming a discovery violation had occurred, the trial court still would have abused its discretion in striking Dr. Kania's testimony about Buenrostro's computer delusion. Section 1054.5, subdivision (c) cautions that a court "may prohibit the testimony of a witness *only if* all other sanctions have been exhausted." (§ 1054.5, subd. (c), italics added.) "Other sanctions" include immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) As the State notes, the trial court did not impose the most extreme sanction – precluding all testimony by the witness. (See RB 63.) But that is beside the point. The trial court explored none of the lesser remedies as it was required to do. Moreover, contrary to the State's contention, a recess would not have been an inadequate remedy. (See *ibid.*) The prosecutor was familiar with the rest of Dr. Kania's report as well as familiar with all the other evidence relating to Buenrostro's mental state in general and delusions in particular. He would not have needed long to familiarize himself with the evidence about her computer delusions and formulate his cross-examination questions. Indeed, the trial court used a short recess as a remedy for the prosecutor's belated disclosure to the defense of its rebuttal evidence. (See AOB 135-136, citing 5 C-RT 1152-

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[30] The court in *Rodriguez* did not decide whether, and to what extent, any privilege would continue to exist once the expert testifies since some, if not all, of the privileged information might be relevant to the expert's opinion and, therefore, subject to cross-examination. (*Rodriguez v. Superior Court*, *supra*, 14 Cal.App.4th at p. 1270, fn. 5.) In this case, defense counsel elicited the privileged information on redirect examination, thus giving the prosecutor the opportunity to delve into it on cross-examination.

1153; AOB 144.) There was no reason not to use the same remedy here for Buenrostro's purported discovery violation.

The harm arising from any alleged discovery violation here was the prosecution's lack of an opportunity to rebut or impeach Dr. Kania's testimony. The proper remedy would have been a brief recess, if requested, to allow the prosecutor to review the information Dr. Kania had just given the jury in order to prepare for cross-examination. Surely, cross-examination about both the substance of Buenrostro's statements and Dr. Kania's failure to include them in his report would have adequately tested the credibility of this new evidence. (Cf. *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 [upholding exclusion of exculpatory statement of declarant whose identity was not disclosed by defense where lesser sanctions such as continuance would have been inadequate because declarant's whereabouts were unknown, so prosecutor would be precluded from cross-examining declarant].) The trial court abused its discretion when it excluded Dr. Kania's testimony without first exhausting available, appropriate and less drastic sanctions. (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624-1625 [exclusion of witness testimony is sanction of last resort and inappropriate where delaying testimony or continuing matter better addresses harm from lack of preparation].)

2. The exclusion of Dr. Mills's testimony about Dr. Rath's recoded MMPI results was error under section 1054 et seq.

As pointed out in the opening brief, but overlooked by the State, the trial court's ruling misstated the facts regarding the proffered testimony. (AOB 126, fn. 49; see RB 57, 62.) The trial court granted the prosecutor's "motion to exclude the testimony with regards to the Caldwell report that he received, based upon Kania's test. . . ." (4 C-RT 760.) However, Dr. Mills

coded and sent Dr. Rath's – not Dr. Kania's – MMPI testing to Caldwell for scoring. (4 C-RT 756-757.) Dr. Kania also administered the MMPI to Buenrostro, which Caldwell also scored (2 C-RT 496-500, 3 C-RT 519), but there is nothing in the record to suggest that Dr. Mills reviewed or relied on Dr. Kania's testing.[31] Had Dr. Mills relied on the Caldwell report that Dr. Kania obtained based on his own testing, the prosecutor would have had no possible discovery objection, since he had been given both Dr. Kania's Caldwell report and Dr. Kania's own testing materials. (4 C-RT 759, 2 C-RT 500.) The trial court's misunderstanding as to the material facts regarding the testimony defense counsel sought to elicit from Dr. Mills resulted in an abuse of discretion and an uninformed and unjustified ruling. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86 ["'To exercise the power of judicial discretion all the material facts in evidence must be both known and considered'"].)

Furthermore, the trial court was wrong about the requirements of the criminal discovery statute. Section 1054.3, subdivision (b) mandates that the defense must disclose "any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." This requirement does not reach the report of a nontestifying expert that the defense does not intend to introduce into evidence at trial, as the Court of Appeal for the Fourth District concluded in *Hines v. Superior Court* (1993) 20

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[31] The record became a bit confused when in response to the trial court's questioning, Dr. Mills testified that both he and Dr. Kania independently asked the Caldwell service to score Dr. Rath's raw data. (4 C-RT 758.) In fact, Dr. Kania asked Caldwell to score the data from the MMPI he himself had given to Buenrostro. (3 C-RT 519, 616.)

Cal.App.4th 1818.

In *Hines*, the court invalidated a pretrial discovery order requiring the defense to disclose to the prosecution "any documentation or statements of third persons concerning mental examinations or scientific tests which the testifying expert has referred to, considered or relied upon in connection with said expert opinion counsel intends to offer in evidence at the trial." (*Id.* at p. 1821.) The court began its analysis with this Court's admonition that pretrial discovery in a criminal case is prohibited except as provided by section 1054 et seq. (*Hines v. Superior Court*, *supra*, 20 Cal.App.4th at p. 1823, quoting *In re Littlefield*, *supra*, 5 Cal.4th at p. 129 .) It found that the challenged discovery order exceeded the plain language of section 1054.3: "The report of a nontestifying expert which is in some way utilized by a testifying expert is not a document, at least in ordinary circumstances, which the defendant will intend to offer in evidence. It is not, therefore, literally embraced within the description of the statute." (*Hines v. Superior Court*, *supra*, at p. 1823.) The court went on to acknowledge that "such subsidiary report may be discoverable as an aspect of cross-examination of the testifying expert," but that fact does not subject the information to pretrial discovery. (*Ibid.*)

In this case, defense counsel tried to elicit Dr. Mills's testimony about his review of the Caldwell testing service's scoring of the results of the MMPI Dr. Rath administered to Buenrostro. Although Dr. Mills relied on this information to form his opinion, the report was generated by a nontestifying entity (Caldwell) from test data generated by a prosecution witness (Dr. Rath). The Caldwell scoring document was not a report or statement of the testifying defense expert (Dr. Mills), nor was it an exhibit that Buenrostro intended to offer in evidence at trial. As in *Hines*, where the trial court's discovery order was overbroad, the trial court here

erroneously concluded that Buenrostro was required, but failed, to disclose the Caldwell report, which was "subsidiary information" upon which an expert relied, but did not intend to offer in evidence. Certainly, the prosecutor was entitled to cross-examine Dr. Mills about the Caldwell report he requested and used in reaching his opinion about Buenrostro's incompetence, but he was not entitled to discover it pretrial. Because there was no pretrial disclosure duty, there was no discovery breach, and the trial court abused its discretion in excluding all evidence about Dr. Mills's reliance on the Caldwell report's rescoring of Dr. Rath's MMPI test results.

Even assuming, arguendo, that there were a discovery violation, the trial court nonetheless would have abused its discretion in excluding Dr. Mills's testimony about the Caldwell report. As a preliminary matter, the prosecutor already had the Caldwell report obtained by Dr. Kania based on Dr. Rath's test data which, as defense counsel pointed out, "for all practical purposes" was the same as the report Dr. Mills obtained. (4 C-RT 758-759.) Indeed, on appeal the State concedes this point, asserting that "the re-coded MMPI was cumulative since it largely duplicated results that were already in evidence." (RB 63.) The trial court's insistence that the lack of formal disclosure of Dr. Mills's report controlled, regardless of whether the prosecution already had substantially similar information (4 C-RT 759), elevated form over substance. The failure to provide the prosecutor with Dr. Mills's Caldwell report was hardly the "trial by ambush" that the criminal discovery statute sought to eliminate. (*In re Littlefield*, *supra*, 5 Cal.4th at p. 131.)

Moreover, as explained with regard to the error in striking Dr. Kania's testimony about Buenrostro's computer delusion, which is incorporated here by reference, under section 1054.5, subdivision (c), excluding testimony is an extreme sanction that is to be used only if all

other remedies have been exhausted. That was not the case here. A brief recess to permit the prosecutor to review Dr. Mills's Caldwell report would have been appropriate and sufficient remedy. After all, the Caldwell report re-scored the MMPI test that Dr. Rath, a prosecution witness, had administered, so presumably the prosecutor was familiar with this data. Moreover, this remedy was used with regard to the discovery of the data from the MMPI that Dr. Kania administered. When the prosecutor objected to Dr. Kania's testimony about his MMPI test results on the same lack-of-discovery grounds that he asserted with regard to Dr. Mills's testimony, the trial court agreed to defense counsel's offer to provide the discovery and reserve his questioning on the MMPI until the next morning. A short recess – like that taken to hear the prosecutor's objection to Dr. Kania's testimony and later taken to remedy the prosecutor's late disclosure of evidence – would have resolved the problem. (See 4 C-RT 756; 5 C-RT 1151.) Because the trial court did not consider or utilize less drastic remedies, its exclusion of Dr. Mills's testimony about the Caldwell report was an abuse of discretion.

D. The Erroneous Exclusion Of Defense Evidence Was Prejudicial

The State contends that the trial court's exclusion of defense expert testimony was harmless under state law and does not address the error under the federal constitutional standard. (RB 63, 68-69.) Its argument boils down to two points: (1) there was other evidence, both from Dr. Kania and other witnesses, about Buenrostro's delusions and (2) the evidence about the recoded MMPI duplicated results already in evidence and thus was cumulative. (*Ibid.*) What the State overlooks is the closeness of the evidence about Buenrostro's competence, particularly given her preponderance-of-the-evidence burden, and the unique value that each piece

of evidence would have brought to the defense case, which Buenrostro explains in her opening brief and does not repeat in toto here. (AOB 129-131.)

The prejudice resulting from the exclusion of the evidence about Buenrostro's computer delusions is best understood in the context of Dr. Kania's testimony and other defense evidence about Buenrostro's delusions and hallucinations. Dr. Kania was the defense expert who had interviewed Buenrostro the most – at least 12 times. (See 2C-RT 475-476; 3 C-RT 568-569.) He testified that the primary symptom supporting his diagnosis that Buenrostro suffered from a psychotic disorder was her delusions (3 C-RT 544) and that the most prominent delusion was her belief that gas was being pumped into her cell in an attempt to kill or harm her. (3 C-RT 630.) Dr. Kania referred repeatedly to this delusion. (3 C-RT 481-483; 3 C-RT 611-612.) During the prosecution's cross-examination, the trial court questioned Dr. Kania about the possibility that Buenrostro, in fact, may have smelled something odd or unusual in her cell and thus raised question about whether her belief about gas in her cell was delusional. (3 C-RT 563-566.) Resuming his own cross-examination, the prosecutor then established that without evidence of a delusion or a hallucination, Dr. Kania probably would not have reached the conclusion that Buenrostro was psychotic (3 C-RT 566), which went to proving the threshold mental-disorder requirement for incompetence under section 1367.

It was at this point that on redirect examination defense counsel sought to elicit Dr. Kania's testimony about Buenrostro's computer delusions. The evidence was to counter the doubt raised on cross-examination about whether Buenrostro experienced delusions and thus about Dr. Kania's opinion that she had a psychotic disorder. Other evidence about Buenrostro's delusions did not compensate for the exclusion

of Dr. Kania's testimony about her computer delusions. Unlike Dr. Kania, the other defense experts either did not encounter Buenrostro's delusions personally, but rather relied on other witnesses' reports of them (4 C-RT 752 [Mills]; 4 C-RT 414-416 [Perrotti]), or observed her poison-gas delusion only once and simply mentioned it in passing (2 C-RT 293, 343 [Perrotti]). Meanwhile, the reports of lay witnesses about Buenrostro's various delusions came primarily from family members whose impartiality the prosecution called into question. (See 4 C-RT 752 [Mills cross-examination]; 5 C-RT 1183-1184 [prosecutor's closing argument].) Taken in context, the ruling excluding Dr. Kania's testimony about the computer delusions undercut his credibility as a major defense witness and unfairly bolstered the prosecution's contention that Buenrostro was malingering in order to avoid trial and punishment for the murder of her children. (See AOB 129-130.)

The prejudice resulting from the exclusion of evidence about the rescored MMPI results also must be considered in context. Plainly put, Dr. Mills's assessment of Dr. Rath's MMPI results would have been a significant factor in a battle of the experts about whether Buenrostro suffered from a mental disorder or was malingering. Of the five experts who testified at the competency trial, only Dr. Rath concluded she was malingering, and he based his opinion solely on the MMPI results. (4 C-RT 955, 981, 983.) Nonetheless, his testimony undoubtedly had a force and immediacy that the others lacked, not because his opinions were better substantiated or inherently more credible, but because, as an expert who had been retained by the prosecution to interview and test Buenrostro right after the crimes and six months before a question about her competency arose, the prosecution was able to play his tape-recorded investigative interview of Buenrostro for the competency jury. And at least to lay jurors, Buenrostro

probably did not sounded delusional or psychotic in that recording.

The only "objective" test evidence countering Dr. Rath's malingering opinion was Dr. Kania's testimony that the results of the MMPI he administered did not show that Buenrostro was malingering (3 C-RT 542) and that the results of the MMPI Dr. Rath administered, like his own results, showed that Buenrostro was psychotic (3 C-RT 549-550). On cross- examination, the prosecutor questioned Dr. Kania extensively about the MMPI results, trying to discredit his testimony that they showed Buenrostro was psychotic and bolster Dr. Rath's opinion that his test results showed her to be malingering. (3 C-RT 581-598, 616-619, 623-629, 634-636.) Given these dueling opinions about the meaning of the MMPI results for the threshold issue of whether Buenrostro had a mental disorder, Dr. Mills's excluded testimony was very important. The fact that he recoded Dr. Rath's data, asked the Caldwell service to rescore his data and believed its results supported his opinion that Buenrostro suffered from a mental disorder and was not feigning mental illness would have independently corroborated Dr. Kania's opinion about the MMPI and would have confirmed his own clinical observations that Buenrostro suffered from a psychotic delusional disorder. (4 C-RT 755.)

Contrary to the State's view, neither Dr. Kania's testimony about Buenrostro's computer delusion nor Dr. Mills's testimony about the MMPI results was insignificant or cumulative. (See RB 68-69.) Their exclusion prejudiced the competency verdict under both state law (*People v. Watson*, *supra*, 46 Cal.2d at p. 836) and federal constitutional law (*Chapman v. California*, *supra*, 386 U.S. at p. 24.), and the entire judgment should be reversed.

E. The Claim Was Not Forfeited

In her opening brief, Buenrostro explained that her claim of error in excluding portions of Dr. Kania's and Dr. Mills's testimony was cognizable on appeal because her offer of proof made an adequate record for appellate review. (AOB 126-127.) Defense counsel informed the trial court of the "substance, purpose and relevance" of the excluded evidence." (Evid. Code, § 354.) In addition, with regard to Dr. Mills's testimony about the MMPI results, defense counsel explained that, in practical terms, the material was not new information because the report Dr. Mills obtained regarding the test results was substantially the same as the report Dr. Kania obtained which had been given to the prosecutor. In short, the trial court was told there was no discovery violation. The State does not dispute this point.

Instead, the State asserts that Buenrostro's claim should be deemed forfeited because in the trial court she failed to raise the prosecution's noncompliance with the Civil Discovery Act of 1986 as a basis for admitting the evidence. (RB 60.) Its contention should be rejected. As Buenrostro previously set out, this Court has discretion to hear important claims involving a pure question of law based on undisputed facts. (AOB 93, citing *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) This is what occurred in *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478. (See AOB 128, fn. 50.) As in Buenrostro's competency trial, the parties and the trial court in *Baqleh* assumed the criminal discovery rules applied to a proceeding under section 1369, and on appeal the *prosecution* for the first time argued that the Civil Discovery Act rather than the criminal discovery rules governed the case. (*Id.* at p. 491.) The Court of Appeal decided the legal issue although it had not been raised in the trial court. The State does

not dispute this point either.[32]

This Court also has decided new legal issues that were not litigated at trial or even presented by the parties on appeal. In *People v. Wallace* (2008) 44 Cal.4th 1032, 1085-1088, the Court held that the trial court erred in ordering that defendant submit to a psychiatric examination by the prosecution's expert and in admitting evidence at his penalty phase that he refused to participate in the evaluation. (*Id.* at p. 1087.) The Court based its ruling on *Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1116 which, as noted previously, held that a trial court is not authorized by the criminal discovery statutes or any other statute to order that a defendant submit to a mental examination by a prosecution expert. (*Ibid.*) Although at trial and on appeal the defendant had objected to both the examination and the admission of evidence about his refusal to participate on various state law and federal constitutional grounds, he had not argued that the trial court had no authority under the criminal discovery statute to order the evaluation.

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[32] In its forfeiture argument, the State cites ten cases. None of them is analogous because they do not address presenting a new theory on appeal about an important question of law where the merits of the appealing party's motion or objection was litigated at trial. Rather, the State's cases involve the complete failure to present the issue to the trial court (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066; *Estate of Leslie* (1984) 37 Cal.3d 186, 202) or to the intermediate court of appeal (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4) or the failure at trial to assert a corollary federal constitutional claim to the state law claim presented (*People v. Anderson* (2001) 25 Cal.4th 543, 592, fn. 17); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119, fn. 22: *People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174.) In *People v. Williams* (1997) 16 Cal.4th 153, 250, the defendant presented an alternative theory of error on appeal (Evid. Code, § 352) than he had presented at trial (Evid. Code, §210), but unlike Buenrostro's case, his appellate argument did not involve an important question of law this Court had not yet addressed.

(See *id.* at pp. 1084-1089; Appellant's Opening Brief, *People v. Keone Wallace*, Case No. S033360, Penalty Phase Argument IV, at pp. 213-223; Respondent's Brief, *People v. Keone Wallace*, Case No. S033360, Penalty Phase Argument IV, available at 2005 WL 731469, *108-110; Appellant's Reply Brief, *People v. Keone Wallace*, Case No. S033360, Penalty Phase Argument IV, available at 2005 WL 2236900, *68-71.)

As this Court stated more than fifty years ago, "[a]lthough ordinarily a party may not deprive his opponent of an opportunity to meet an issue in the trial court by changing his theory on appeal, this rule does not apply when, as in this case, the facts are not disputed and the party merely raises a new question of law." (*Burdette v. Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726; accord, *Frink v. Prod* (1982) 31 Cal.3d 166, 170-171 [petitioner's concession at trial that substantial evidence rule applied did not preclude her from arguing on appeal that independent judge rule was appropriate standard of review].) Other courts have applied this rule to decide purely legal claims that were not raised or were insufficiently raised at trial. (See, e.g. *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1171-1172 [on appeal deciding defendant's claim that Evidence Code section 1103, subdivision (b) violated due process when at trial defendant argued statute did not apply]; *Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1809 [in state-law misrepresentation action, plaintiff for first time on appeal could rely on federal judicial doctrine and its federal statutory counterpart].) This Court should do so here where the undisputed facts present a purely legal issue which provides an opportunity to give the lower courts guidance on the appropriate procedures for discovery in competency proceedings.

For all the reasons stated in the opening brief and above, the trial court's exclusion of the defense evidence as sanctions for nonexistent

discovery violations was a prejudicial abuse of discretion and violated Buenrostro's state and federal constitutional rights to due process, a fair competency trial, to present evidence in support of her case, and to contest the prosecution's case at the competency trial. (Cal. Const. art. I, § 15; U.S. Const., 6th & 14th Amends.) The entire judgment must be reversed.

IV. THE TRIAL COURT ERRONEOUSLY ADMITTED AS SURREBUTTAL BUENROSTRO'S JAILHOUSE WRITINGS AFTER THE PROSECUTOR WITHHELD THEM DURING THE TRIAL AND MISLEADINGLY INDICATED THAT HE WOULD NOT USE THEM AS EVIDENCE

As set forth in the opening brief, the trial court abused its discretion by admitting as surrebuttal writings by Buenrostro, which had been seized from her cell during the competency trial, to refute defense investigator Moreno's rebuttal testimony that Buenrostro's conversations were not coherent (5 C-RT 1084) and she was not able to structure coherent paragraphs (5 C-RT 1085, 1096). (AOB 132-143.) Buenrostro argues that the writings were improper surrebuttal because the issue of Buenrostro's inability to converse coherently in a consistent manner ran throughout the defense case-in-chief and, if relevant, should have been included as a material part of the prosecution's case-in-chief. (AOB 136-137.) Buenrostro also explains that the trial court abused its discretion by permitting the prosecutor to sandbag the defense with Buenrostro's writings after the prosecutor indicated in open court that he would not use them. (AOB 138-140.) Buenrostro further asserts that the admission of this surrebuttal evidence was prejudicial and rendered her competency trial fundamentally unfair under the due process clause of the state and federal Constitutions. (AOB 132, 140-143.)

In response, the State contends that the writings were probative and properly admitted as surrebuttal because (1) although they would have supported the prosecutor's case-in-chief, they were not material and (2) the admission of the evidence involved no unfair surprise to the defense. (RB 75.) In addition, the State argues that any error was harmless under state law. (RB 77-78.) These arguments should be rejected.

A. The Jailhouse Writings Were Improper Surrebuttal Because They Were Material To The Prosecution's Case-In-Chief And Were Not Made Necessary By Buenrostro's Case

Under the law cited by the State, the jailhouse writings were not proper surrebuttal. In *People v. Young* (2005) 34 Cal.4th 1149, this Court applied the long-standing rules on rebuttal evidence:

> In *People v. Carter*, *supra*, 48 Cal.2d at pages 753-754, 312 P.2d 665, we stated "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt."

(*Id.* at p. 1199; accord, *People v. Harris* (2005) 37 Cal.4th 310, 335-336; see RB 74-75 [relying on *Young* and *Harris*].) Applying this standard to a competency trial, Buenrostro's ability to communicate coherently was both material to the prosecution's case that she was competent to stand trial and raised by the trial court's order requiring a determination of her competency. A defendant's ability "to assist counsel in the conduct of a defense in a rational manner" is an essential element of competence to stand trial. (§ 1367, subd. (a); *Dusky v. United States*, *supra*, 362 U.S. at p. 402.) The question of Buenrostro's ability to assist counsel in a rational manner necessarily encompassed her ability to speak and thus communicate coherently with him.

The prosecution's case-in-chief addressed this very question when responding to defense evidence that Buenrostro's speech was disorganized and difficult to follow. (See, e.g., 2 C-RT 294, 296, 300, 308, 378-379, 403-404 [defense expert Perrotti]; 4 C-RT 812-813 [defense expert Mills].) In answer to the prosecutor's direct questions about Buenrostro's ability to

communicate, Dr. Rath testified that "[s]he communicated very well" and "[a]ny non-cooperation or not wanting to talk is elective on her part." (4 C-RT 976.) Dr. Moral testified in the prosecution's case-in-chief that Buenrostro's speech was unremarkable, by which he meant "ordinary," and was fluid. (4 C-RT 845, 874.) Prosecution witness, Romeo Villar, a psychiatrist at the county jail, testified that Buenrostro's speech was coherent. (5 C-RT 1165-1166.) On cross-examination, the prosecutor elicited from Rose Terrill, a nurse in the county jail, that Buenrostro was coherent, meaning that Terrill could understand and follow what Buenrostro was saying. (3 C-RT 682, 692.) The prosecutor played the entire interview Dr. Rath conducted of Buenrostro in part to show she was able to communicate coherently. (5 C-RT 1176.)[33]

Given this record, Moreno's rebuttal testimony about Buenrostro's incoherence did not raise a new factual question, but rather addressed a material issue, i.e., her ability to consult with and assist counsel in a rational manner, which was framed by the trial court's order for a competency determination and on which both parties already had presented evidence.[34]

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[33] The prosecutor argued to the jury:

> Then I played a tape for you of the person whose voice you never got to hear, the person you really never got to meet, except through others, and that was the defendant, herself.
>
> Was there a sense for a feeling of betrayal, like, "Wait a minute. Why are they talking about this woman being such a lunatic? I heard her speak, she doesn't sound like that. She is not hallucinating and screaming and acting out and seeing things and having to be tied down. She is not talking about bizarre things"?

(5 C-RT 1176.)

[34] The purpose of Moreno's rebuttal testimony was not to establish (continued...)

This point distinguishes *People v. Harris*, *supra*, 37 Cal.4th 310, 335-336, cited by the State. In *Harris*, the rebuttal testimony impeached the defendant's testimony about his position and responsibilities at the auto body shop where he worked and the reason he was gone from work following the murder for which defendant was on trial. In contrast to Buenrostro's case, the rebuttal testimony in *Harris* presented new evidence that was made necessary by the defendant's testimony, but was not material to the prosecution's case-in-chief for guilt. In this case, Buenrostro's writings were relevant to a material element of the prosecution's case, already were in the possession of the prosecution, and should have been introduced in its case-in-chief.

The other cases upon which the State relies also are inapposite. In both *People v. Coffman* (2004) 34 Cal.4th 1 and *People v. Young*, *supra*, 34 Cal.4th 1149, the prosecution's rebuttal evidence directly impeached or directly corroborated testimony about specific facts which either did or did not exist. In *Coffman*, defendant's prior inconsistent statements and admissions were at odds with her trial testimony that she had nothing to do with what happened in a shower between her codefendant and the victim and did not know that her codefendant had killed the victim in a vineyard. (*People v. Coffman*, *supra*, at pp. 68-69.) Coffman's pretrial statements and her trial testimony were contradictory and mutually exclusive. Thus, the

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[34](...continued)
Buenrostro's incoherence, which already was in evidence, but to rebut prosecution evidence that she refused to meet with some people, e.g., Dr. Rath, upon instructions from defense counsel Scott (see 5 C-RT 849-851 [Dr. Moral], 952 [Dr. Rath]), and to show that she did not follow her attorney's advice as evidenced by her repeated refusal, despite Scott's requests, to sign an authorization for the release of information about her (see 5 C-RT 1083-1085). The prosecution raised no objection to Moreno's testimony.

rebuttal evidence directly impeached her trial testimony. In *Young*, rebuttal evidence was permitted to rehabilitate the credibility of a prosecution witness. On direct examination, the witness, Fite, testified that the defendant exited the driver's side of the vehicle and shot the victim. On cross-examination, Fite acknowledged her prior inconsistent statement to police that the passenger, and not the driver, exited the vehicle and did the shooting. In rebuttal, the prosecution called another witness to testify that she saw the man who did the shooting exit the driver's side of the vehicle, while another man was in the passenger seat. (*People v. Young*, *supra*, 34 Cal.4th at p. 1199.) Fite's conflicting statements could not both be true. The rebuttal testimony from an independent witness confirmed one version and impeached the other.

That is not the case with Buenrostro's jailhouse writings. Although the writings may have shown that Buenrostro could write coherent sentences, they were not necessarily inconsistent with Moreno's testimony that Buenrostro was incoherent in their meetings. During the competency trial, the parties presented conflicting testimony about Buenrostro's ability to communicate verbally in a coherent manner. Each witness testified based on his or her own, separate experiences with Buenrostro. Unlike the facts at issue in *Coffman* and *Young*, both the defense evidence and the prosecution evidence, while inconsistent, could be true. Buenrostro could be coherent and incoherent at different times with different people. As explained in the opening brief, the symptoms of mental illness may be sporadic rather than constant, so that a person may appear coherent and rational one day and incoherent and irrational on another day. (AOB 141.) Thus, the contradictory evidence presented by the prosecution and the defense did not directly impeach the veracity of each witness's assessment of Buenrostro's coherence when speaking. In this way, Buenrostro's

jailhouse writings, if relevant to her ability to speak coherently, did not impeach Moreno, and going to a material issue, they were improper rebuttal.

B. The Trial Court's Finding That Introducing The Jailhouse Writings Involved No Unfair Surprise Is Not Supported By The Record, And Their Admission At The Very End Of The Trial Placed Undue Emphasis On This Improper Evidence

Even if Buenrostro's writings could be considered proper surrebuttal, the trial court still abused its discretion by admitting them. Under this Court's restrictions on rebuttal, the evidence should have been excluded "to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial" and "to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial." (*People v. Young*, *supra*, 34 Cal.4th at p. 1199; see RB 74-75 [relying on *Young*'s analysis].)

There can be little question that the prosecution's decision to introduce Buenrostro's "Another 48-Hours (Appointment With Death)" story and other writings on Monday, November 13, after the weekend recess, placed unnecessary emphasis on this evidence. After the defense rebuttal evidence on Thursday, November 9, the trial court adjourned the trial because it could not be concluded that same day. (5 C-RT 1144.) As the trial court explained to the jury, rather than divide the closing arguments with one party arguing that day and the other arguing three days later, the trial would resume on Monday with both parties' arguments being given on the same day. (*Ibid.*) On Monday, the jury expected to hear the attorneys' final statements. At the last minute, the prosecutor introduced Buenrostro's writings right before he gave his closing argument. (5 C-RT 1170-1171.) Buenrostro's story was notable since, as the trial court remarked, it closely

paralleled her own situation. (5 C-RT 1149.) The late introduction of People's Exhibit Nos. 11-12 at the close of the case was likely to underscore the evidence in the jurors' minds.

In the opening brief, Buenrostro shows that the record does not support the trial court's finding that the surrebuttal evidence involved no surprise. (AOB 138-139; 5 C-RT 1151.) Clearly, the prosecutor's final comment regarding Buenrostro's writings before the weekend recess – "All right. That's fine. I will pass" (5 C-RT 1141) – is key to this claim. In defending the trial court's ruling, the State attempts to finesse the record. Addressing the "I will pass" statement, the State argues: "taken in context, the prosecutor's comment does not lend itself *entirely* to the notion that the prosecutor represented he was abandoning his intent to introduce the writings." (RB 77, italics added.) The State's meaning is not clear. At a minimum, it appears to suggest that the record was ambiguous, which at least acknowledges that defense counsel reasonably could have understood that the prosecutor had given up his request to introduce the jailhouse writings. Alternatively, the statement can be read as tacitly conceding that, in fact, the prosecutor did abandon his request to use People's Exhibit Nos. 11-12.

It is important to get the record straight. The proceedings of November 9, 1995, show the prosecutor gave up his attempt to introduce People's Exhibit Nos. 11-12. After Buenrostro presented two rebuttal witnesses, the prosecutor informed the trial court and defense counsel that he had subpoenaed jail records to present. (5 C-RT 1138-1139.) They consisted of one page of progress notes from the jail's forensic mental health department, which was marked as People's Exhibit No. 10. (5 C-RT 1140-1141.) After presenting the subpoenaed mental health records, there was a recess. (5 C-RT 1140.)

When the proceedings resumed, the prosecutor stated his plan to introduce the writings seized from Buenrostro's cell, which later were marked as People's Exhibit Nos. 11-12. (5 C-RT 1140, 1147; 5 SCT 130.) His only hesitation was that the majority of the exhibit was in Spanish. (*Ibid.*) The prosecutor and the trial court discussed the language issue, and defense counsel said nothing. (5 C-RT 1140-1141.) The following colloquy occurred between the court and the prosecutor:

> THE COURT: Normally, when there is a document, there is something written in a different language, it's translated, and then the translated version is what is utilized, not the document in the foreign language.
>
> MR. SOCCIO: True.
>
> THE COURT: So, I -- I would be reluctant to send a document in Spanish into a jury. There may be some people who are fluent in Spanish, there may be some partially fluent. You don't want to do that because you don't know what is going to be the result.
>
> MR. SOCCIO: All right. That's fine. I will pass.

(5 C-RT 1141.)

Immediately after the prosecutor's statement, the trial court proposed starting the closing arguments on the next court day, Monday, November 13. (5 C-RT 1141.) At defense counsel's request, there was a discussion of subpoenaed mental health progress notes, People's Exhibit No. 10. (*Ibid.*) The progress notes were all defense counsel asked to address and the only evidence discussed. (5 C-RT 1141-1143.) Defense counsel objected that the evidence was not proper rebuttal and was being introduced at the very end of the trial. (5 C-RT 1142-1143.) When the trial court asked the prosecutor why he did not present the clinician who wrote the progress notes, the prosecutor relied on the business records exception to the hearsay rule. (5 C-RT 1142-1143.) Defense counsel stated that he did not mind the

witness being produced. (5 C-RT 1143.) There was no question about needing a translation for the progress notes, which were in English, and during this discussion, nothing further was said about Buenrostro's jailhouse writings. (*Ibid.*) At the end of the discussion about People's Exhibit No. 10, the trial court said, "Well, I'll think about it over the weekend." (5 C-RT 1143.)

On Monday morning, November 13, the trial court stated that it had the instructions and verdict forms ready. (5 C-RT 1145.) When the prosecutor said he had issues to take up with the court, the trial court asked, "Several issues on a case that is closed to evidence and ready to argue?" (*Ibid.*) The prosecutor responded that evidence had not closed and reminded the trial court that he had asked about "a subpoenaed document," which the court said it would think about over the weekend. (*Ibid.*) The trial court acknowledged making this statement. (*Ibid.*) The admission of People's Exhibit No. 10, the mental health progress notes, was discussed and resolved with the prosecutor presenting the person who wrote the progress notes and a stipulation from defense counsel. (5 C-RT 1145-1147.)

The prosecutor then moved to the writings "we confiscated from Ms. Buenrostro." (5 C-RT 1147.) He had a translation from a certified interpreter, which he wanted to introduce. (5 C-RT 1147.) Defense counsel objected to admission of Buenrostro's jailhouse writings on the grounds that on the prior Thursday evidence had been closed except for the possibility of the jail medical record (5 C-RT 1148); that the evidence was improper rebuttal and should have been included in the prosecution's case-in-chief (*ibid.*); that the prosecutor said on Thursday he was not going to offer the evidence and then a few minutes before argument he offered it (5 C-RT 1148, 1150); and that the defense was just receiving the exhibit (5 C-RT

1151).

The trial court acknowledged that "I did indicate we were going to leave it open for a ruling on People's 10," but stated that technically the case was not closed to evidence. (5 C-RT 1149; see also 5 C-RT 1151 [repeating same point].) With regard to Buenrostro's seized writings, the court noted that the prosecutor "did not indicate, necessarily, he intended to introduce it, it was considered, it was considered for purpose of introduction as evidence." (5 C-RT 1149.) Before admitting this new evidence, the trial court commented further, "It is not a surprise, we did discuss the information." (5 C-RT 1151.)

Fairly and reasonably read, the record simply does not support the finding that the prosecutor's last-minute request to introduce Buenrostro's seized jailhouse writing did not result in unfair surprise to the defense. At the end of the Thursday hearing, there were two different sets of surrebuttal documents before the trial court – the mental health progress notes (People's Exhibit No. 10) and Buenrostro's seized writings (People's Exhibits Nos. 11-12). They were discussed and ruled on separately. At the end of the discussion of the jailhouse writings, when the trial court said it would not admit a document written in Spanish, the prosecutor said, "All right. That's fine. I will pass." (5 C-RT 1141.) Understanding that the prosecutor was, in effect, withdrawing his request to introduce Buenrostro's writings, defense counsel said nothing further about this evidence. However, he did ask to make a record of his objection about the mental health progress notes. (*Ibid.*) Certainly, if defense counsel believed the prosecutor still was considering introduction of the jailhouse writings, he would have made a record of his objections to them as well. But he did not. After defense counsel made his record, the trial court explicitly kept the evidence open as to the mental health progress notes. That was the only

evidence the trial court indicated it would "think about" over the weekend. (5 C-RT 1143.)

On Monday, when the prosecutor sprung his renewed request to introduce Buenrostro's jailhouse writings, the trial court initially expressed surprise because it thought the case was ready to argue. (5 C-RT 1145.) It then confirmed that it had left open the possibility of admitting the mental health progress notes. (*Ibid.*) However, the trial court made no similar remark with regard to Buenrostro's writings. Nor did the trial court ever acknowledge or address the prosecutor's "I will pass" statement. (See 5 C-RT 1145-1153.) Rather, after noting that technically evidence in the case had not been closed (5 C-RT 1149, 1150-1151), the trial court simply stated that seized writings were "not a surprise, we did discuss the information." (5 C-RT 1151.)

The trial court's observation begs the issue. There is no dispute that the prosecution's proffer of the writings had been discussed on Thursday. The question of surprise arose from the final words said on Thursday about Buenrostro's seized writings. When the trial court ruled that it would not admit a document written in Spanish without a translation, the prosecutor did not say he would have the writings translated. (See Evid. Code, § 753, subd. (a) [requiring translation].) Instead, he said: "All right. That's fine. I will pass." (5 C-RT 1141.) In the context of the Thursday hearing, this definite and unequivocal assertion lends itself to only one reasonable interpretation – that the prosecution would not seek admission of People Exhibit Nos. 11-12. Notably, during the Monday hearing, the prosecutor stayed away from his concluding statement on Thursday and did not attempt to disavow or revise its plain meaning. (See 5 C-RT 1145-1153.) Nor did he dispute defense counsel's assertion that on Thursday the prosecutor had represented he was not going to offer the evidence. (See 5 C-RT 1150;

AOB 138.)

For all these reasons, the trial court's finding that there was no surprise to the defense in the prosecution's late introduction of Buenrostro's jailhouse writing, after the prosecutor had declared he "will pass" on the exhibits, is unsupported by substantial evidence. Such sandbagging tactics should have no place in a trial to determine whether a defendant is competent to stand trial for murder and possibly for her life. The resulting admission of People's Exhibits Nos. 11-12 was an abuse of discretion and rendered Buenrostro's competency trial fundamentally unfair under the state and federal due process clauses. (Cal. Const. art. I, § 15, U.S. Const., 14th Amend; see AOB 138-139.)

C. The Trial Court's Erroneous Admission Of The Jailhouse Writings Requires Reversal

The admission of Buenrostro's jailhouse writings, whether considered by itself or in combination with the evidentiary errors set forth in Arguments II and III, was prejudicial under both the state or the federal harmless error standards. (AOB 139-143.) As explained previously, the writings gave the jury evidence, penned by Buenrostro, that showed she could write sentences and appeared to be more contemporaneous with the trial than the prosecution's other evidence and also suggested that her ability to write a story was inconsistent with being incompetent to stand trial. (*Ibid.*) The State points out that the prosecutor discussed the jailhouse writings only once in his closing argument and asked the jury to consider all the evidence; that defense counsel tried to counter the impact of the admission of this evidence in his closing argument; and that the jury was entitled to reject Buenrostro's evidence. (See RB 76-77.) This argument does not establish that the error was harmless. As discussed in detail in the opening brief and in Arguments I-III *ante* and incorporated here, the

evidence about Buenrostro's competency was closely balanced, a point the State never contests. The pivotal issue was her ability to assist counsel in a rational manner, on which the defense evidence was substantial, and the prosecution's evidence was not. With the burden on Buenrostro to prove her incompetence by a preponderance of the evidence, even a slight shift in the evidentiary mix could affect the jury's decision. The State has not demonstrated beyond a reasonable doubt that the prosecution's last-minute introduction of apparently recent evidence written by Buenrostro and purportedly showing her to be coherent did not influence the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24). And there is a reasonable probability that it did. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Therefore, the entire judgment must be reversed.

VI. THE TRIAL COURT ERRONEOUSLY REFUSED TO GIVE A DEFENSE INSTRUCTION THAT BUENROSTRO WOULD NOT BE RELEASED FROM CUSTODY IF THE JURY FOUND HER INCOMPETENT TO STAND TRIAL

As argued in the opening brief, the trial court violated Buenrostro's state law and federal constitutional rights to an accurate, pertinent requested instruction informing the jury that if Buenrostro were found incompetent, she would not be released from custody. (AOB 146-166.) The instruction was patterned on CALJIC No. 4.01 – "Effect of Insanity Verdict" – and the case law requiring the court, upon request, to admonish the jury that an insanity verdict would result in the defendant's commitment to a mental hospital, not his release to the community. (See AOB 149.)

Buenrostro's proffered instruction told the jury that if the verdict was "incompetent to stand trial," Buenrostro would not be released from custody, and that the criminal proceedings would be postponed until she regained competence. (5 SCT 166.)[35] The instruction correctly stated the consequences of a finding of incompetency as provided in Penal Code sections 1370-1370.01, and was neither argumentative nor duplicative of any other instruction. (See AOB 148-149.) The State does not dispute these points. The instruction also was relevant and important to ensuring a reliable competency verdict, and Buenrostro was thus entitled to the requested instruction under state law. (See AOB 148-152.) Moreover, as Buenrostro demonstrates, because the refusal to give the requested instruction permitted improper jury speculation, the court's error also

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[35] On June 29, 2009, the Court ordered unsealed the portion of the previously-sealed Fifth Supplemental Clerk's Transcript on Appeal cited in this argument. (See *ante*, pp. 4-5, fn. 1.)

violated Buenrostro's federal constitutional rights (AOB 159-164) and was prejudicial under both state and federal harmless error standards (AOB 164-166). In response, the State offers arguments that Buenrostro anticipated and rebutted in her opening brief. (Compare AOB 149-159 with RB 81-86.) Those arguments are not repeated here, except as needed to correct the State's erroneous assertions of fact or law.

The State is mistaken in arguing that Buenrostro's requested instruction was properly refused because it is impermissible for the jury to consider postverdict action. (See RB 81.) The State cites no authority for applying this general, although not absolute, rule to competency proceedings. The purpose of this general rule is to ensure that a jury's decision as to the defendant's guilt or the truth of special circumstance allegations is not influenced by considerations as to the penalty, as CALJIC No. 17.42 and CALCRIM No. 706 and No. 3550 instruct. (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24; *People v. Shannon* (1956) 147 Cal.App.2d 300, 306.) Of course, that concern is irrelevant to a competency determination. Moreover, applying the general rule to a competency trial makes no sense since, as the State itself recognizes (see RB 84), the jury knows that a verdict of incompetence does not terminate, but only suspends, the criminal prosecution. Precisely because the jury knows a verdict of incompetence does not end the criminal case, it is reasonable and likely that jurors will wonder about what happens to an incompetent defendant and will worry about whether an incompetence finding will carry risks for public safety. That is why the requested instruction was necessary. In short, the State not only fails to cite any authority to support its position, but also fails to explain how it furthers, or is at least consistent with, the purpose of a competency proceeding.

Instead, the State relies on two wholly inapposite decisions, *People v. Ramos* (1984) 37 Cal.3d 136 and *People v. Morse* (1964) 60 Cal.2d 631, involving disapproved instructions on the remote, hypothetical consequences of life without possibility of parole and death sentences – the possibility of commutation and eventual parole. The instructions rejected in both *Ramos* and *Morse* invited the jury to consider, and predict, possible future actions by third parties, the Governor or the parole authority, that were rare, unpredictable and discretionary. (*People v. Ramos*, *supra*, at pp. 156-157 ["Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person – a future Governor – will do in response to the defendant's then condition"]; *People v. Morse*, *supra*, at p. 653 [the instructions as to "the Adult Authority's possible grant of parole invite speculative argument to the jury and surmise by it of the possible improper release of a defendant to society in the future" and " foster the dual vices of foisting upon the jury alien issues and concomitantly diluting its own sense of responsibility"].) In both *Ramos* and *Morse*, this Court concluded that the instructions about commutation and parole carried the unacceptable risk that speculative and impermissible factors would influence the jury's choice between life and death. (*People v. Ramos*, *supra*, at p. 159; *People v. Morse*, *supra*, at pp. 643-644.)

In contrast, the instruction proffered here required no projections or conjectures regarding either Buenrostro's or any unknown third-party's actions. Rather, like its model, CALJIC No. 4.01, Buenrostro's proffered instruction set forth only the statutorily-mandated consequences of a finding of incompetency – the defendant's continued confinement. The purpose of Buenrostro's instruction, like that of CALJIC No. 4.01, was to prevent precisely the type of speculation about uncertain, hypothetical events that

this Court in *Morse* and *Ramos* recognized would risk unreliable jury verdicts.

The State is also mistaken in asserting that the record does not support that the jury was operating under any assumed facts or misconceptions regarding the consequences of an incompetency verdict. (RB 81.) Again, the State cites no authority for its supposition that the record must disclose actual juror confusion to warrant the requested instruction. Notably, in the context of insanity, the courts did not base their decisions to mandate an instruction about the consequences of the verdict on juror polling or public surveys. Both *People v. Moore* (1985) 166 Cal.App.3d 540, 548-549, 553-554 and *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1140-1141 ruled that the trial court should give an accurate, requested instruction on the consequences of finding the defendant not guilty by reason of insanity without requiring any showing of actual juror misunderstanding. Rather, the courts recognized that because the consequence of an insanity verdict is not commonly known to jurors, unless instructed, they might speculate and reach an erroneous conclusion. (*People v. Moore*, *supra*, at pp. 554, 555-556; *Dennis*, *supra*, at pp. 1139-1140.) In other contexts, this Court has endorsed use of instructions to cure possible juror misconceptions without demanding empirical verification or overt indications of juror confusion in all cases. (See, e.g., *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [ordering that trial courts give a clarifying instruction at penalty phase of capital case because the statutory "words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role"]; *People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10 [ordering that "to avoid potential misunderstanding" courts give an expanded factor (k) instruction].) Buenrostro was not required to show actual juror confusion about the consequences of an incompetency verdict to warrant

the giving of her requested instruction.

In addition, this Court has recognized that "'[j]urors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience.'" (*In re Lucas* (2004) 33 Cal.4th 682, 696, quoting *People v. Marshall* (1990) 50 Cal.3d 907, 950.) The public, by and large, has no experience with the institutions that confine defendants adjudged insane or incompetent to stand trial. However, many in the jury pool are likely to have some awareness of, or had personal encounters with, non-institutionalized mentally-disturbed people who make up a large percentage of the homeless population. (See Substance Abuse and Mental Health Services Administration, Current Statistics on the Prevalence and Characteristics of People Experiencing Homelessness in the United States (Updated April 9, 2010), pp. 2-3, available at http://homelessness.samhsa.gov/ResourceFiles/ba43vnnd.9.10.pdf [26 percent of sheltered homeless have severe mental illness and 30 percent of the chronically homeless have mental health conditions].) As such, absent instruction, jurors could conclude incorrectly on the basis of their own experience or common opinion that the criminal and mental health systems do not adequately segregate or safeguard the public from the dangerously mentally-ill.

The State is further mistaken in contending that Buenrostro has misapplied the law regarding sanity proceedings. (See RB 81.) Rather, Buenrostro has highlighted the salient similarity between those proceedings and competency hearings – namely jurors' lack of knowledge about the consequences of their decision and attendant anxiety regarding the possible release into their community of dangerous, mentally-disturbed criminals. The State, on the other hand, focuses on the distinction between the verdict in a sanity trial and the verdict in a competency trial with regard to the

criminal charges. (RB 84-86.) But the fact that an insanity verdict ends the criminal prosecution, while an incompetency verdict simply suspends it, does not negate the more important similarity between sanity and competency proceedings for purposes of the claim presented here. In both proceedings, jurors' misconceptions that, as a result of their verdict, an insane or incompetent defendant may be released, even temporarily, into society risks an unreliable verdict based on misinformation and speculation. That was the danger Buenrostro's requested instruction was designed to prevent. And contrary to the State's suggestion, the trial court's remarks to the prospective jurors that the competency trial would "not involve the question of [Buenrostro's] guilt or innocence of the underlying charge" (1 C-RT 78) or that the criminal case would "not go away" if Buenrostro was found incompetent, (1C-RT 147), did not address or counteract this concern. (See RB 85.)

Moreover, the State's argument rests on a faulty premise – that it defies common sense and logic to suggest that an incompetent defendant would be released from custody before the rendering of a not guilty verdict. (See RB 86.) That assumption may be illogical for prosecutors and criminal defense lawyers who are familiar with the competency statutes, but not for lay people. The criminal justice system provides for bail before and during trial (see § 1268 et seq.), a general fact that jurors, like the public at large, are likely to know. Jurors, however, are less likely to know that a defendant adjudged incompetent to stand trial is not released on bail, and almost certainly would be unaware of the detailed statutory procedures for confinement of an incompetent defendant. (See §§ 1370-1370.01.)[36]

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[36] Lay people serving as jurors also would not commonly know that a person charged with an offense punishable by death is not eligible for

(continued...)

Contrary to the State's view, it is not unreasonable for jurors to believe mistakenly that a defendant found incompetent to stand trial might be released from custody. The instruction Buenrostro requested was necessary to dispel such a misconception.

The State relies on this Court's rulings in *People v. Dunkle, supra,* 36 Cal.4th at p. 896, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Marks* (2003) 31 Cal.4th 197, 222; and *People v. Thomas* (1992) 2 Cal.4th 489, 539, and dismisses Buenrostro's careful analysis of the differences between the instructions in those cases and the instruction she requested. (RB 84; see AOB 152-159.) Without explanation, the State suggests there is no "meaningful distinction" between those prior cases and this case "that would necessitate a different result." (RB 84.) The State's response overlooks that in both *Dunkle* and *Marks* the jurors heard testimony about what would happen if the defendant were found incompetent to stand trial, and thus arguably needed no instruction. (*People v. Dunkle, supra,* at p. 896 [expert testified that he told defendant that if he were found incompetent, he would be sent to a state hospital where he would be treated for his mental condition]; *People v. Marks, supra,* at p. 222 [expert's testimony regarding Atascadero State Hospital had provided the jury with basic information].) In contrast, at Buenrostro's competency trial, the jurors at most heard only passing references to Patton State Hospital, which left them free to speculate about Buenrostro's interim custodial status. Indeed, instructing the jury that criminal proceedings would be suspended if Buenrostro were found incompetent, without further explanation about her custodial status, was a

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[36](...continued)
release on bail. (Cal. Const., art. 1, § 28, subd. (f)(3); § 1270.5.)

spur to speculation, rather than the opposite.[37]

For all these reasons, the Court can reasonably assume that, in the absence of instruction, jurors will be tempted to speculate about the consequences of finding the defendant incompetent and suspending all criminal proceedings. As in the insanity context, such speculation could readily lead a jury to find a defendant competent out of a concern that, for example, a mentally-disturbed murderer would be released from jail while her criminal case was in indefinite abeyance. (See *People v. Kelly* (1992) 1 Cal.4th 495, 538 [purpose of CALJIC No. 4.01 is to tell the jury "not to find the defendant sane out of a concern that otherwise he would be improperly released from custody"].) On this record, therefore, it was error to refuse to give Buenrostro's proffered, accurate instruction directed solely to jurors' apprehensions and possible misconceptions regarding the consequences of their verdict.

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[37] Buenrostro also distinguishes *People v. Dunkle*, *supra*, 36 Cal.4th 861 and *People v. Marks*, *supra*, 31 Cal.4th 197 in her opening brief on the grounds that (1) no instruction was requested in *Dunkle* and the Court declined to impose a sua sponte duty to instruct; and (2) the instruction in *Marks* was flawed and misstated the very consequences it sought to clarify. (AOB 153.) Moreover, in *People v. Dunkle*, *supra*, at p. 897, the Court distinguished the approved insanity instruction, CALJIC No. 4.01, from a hypothetical incompetency instruction on the ground that the outcome of any future efforts at restoring a defendant to competency were unknown, hence speculative, when the jury made its decision. This distinction, however, is not supported by the respective laws governing restoration to sanity and restoration to competency. (§§ 1026.2, 1369-1370.) Neither CALJIC No. 4.01 nor the proffered instruction in this case purport to predict the result of future treatment of the defendant. Both instructions merely set forth the prescribed statutory procedures applicable when a defendant is found either insane or incompetent to stand trial. In short, if CALJIC No. 4.01 is not speculative, then neither is a mirror instruction in the context of incompetency.

The State further contends that, even assuming there was error, it was harmless. (RB 86-88.) First, the State asserts that the jury actually knew the consequences of an incompetency verdict based on two remarks made by defense counsel. (RB 86, 88.) This assertion is groundless. Defense counsel's remarks – that doctors visited Buenrostro in jail and that she would not be acquitted and set free if found incompetent – hardly conveyed the information needed to quell jurors' fears and preempt misguided speculation. (RB 86, citing 2 C-RT 239-240; RB 88, quoting 5 C-RT 1207.) That Buenrostro was in jail when evaluated offered no assurance that she would remain in custody if found incompetent. In fact, a finding of incompetence would compel her release from jail, and her transfer to another facility. That Buenrostro would not be acquitted and set free was equally uninformative. Counsel's remark, which linked being set free to an acquittal, reasonably could have been understood to refer to Buenrostro's legal status with regard to the charges, rather than to her detention status, or to mean that she would remain under the supervision of the court pending the uncertain restoration of her competency and revival of the criminal case. Nothing in counsel's comment foreclosed the possibility of provisional, temporary or supervised release from custody. In any event, the jury had been informed that the attorneys' arguments were not evidence (5 C-RT 1210) and the trial court would instruct them on the law (5 C-RT 1209), which sorely undercuts the curative power the State assigns to this single statement.

Second, the State argues that, because the jury could accept the prosecution's experts and reject Buenrostro's experts, there was no reversible error under the *Watson* standard. (RB 86-88.) Its argument ignores the closeness of the evidence especially in light of Buenrostro's preponderance-of-the-evidence burden of proof. (Compare AOB 165-166,

incorporating AOB 81-91, and RB 86-88; see *ante* at pp. 26-28, 48-51, 78-81.) It also does not take account of the prosecutor's closing argument that Buenrostro was malingering to avoid punishment, which injected into this case the additional, prejudicial specter that justice delayed would be justice denied and made the requested instruction all the more necessary and its refusal all the more likely to have been prejudicial. (See AOB 150-151, discussing 5 C-RT 1186.)

In addition to state law error, Buenrostro demonstrates that the trial court's refusing her relevant and accurate instruction violated the due process clause of the Fourteenth Amendment (see AOB 159) and argues that a reversal of the entire judgment is required under a per se standard as well as under state and federal constitutional harmless error analyses (AOB 164-166). Specifically, Buenrostro relies on a line of United States Supreme Court cases finding due process concerns arising from jurors' propensity to speculate about defendants' future release into society. (See AOB 159-164, discussing *Simmons v. South Carolina* (1994) 512 U.S. 154, 156 (plur. opn. of Blackmun, J.), *Shafer v. South Carolina* (2001) 532 U.S. 36, 39 and *Kelly v. South Carolina* (2002) 534 U.S. 246, 248 [all holding in the context of capital sentencing that where a defendant's future dangerousness is at issue, due process requires that the sentencing jury be informed that the defendant is parole ineligible].) As shown in her opening brief, the reasoning of those decisions applies by direct analogy to both the question of error and prejudice in this case. The competency jury, which was not bound by the presumption of innocence, was informed during voir dire that Buenrostro was charged with killing three young children. (1 C-RT 57, 77-78.) Thus, whereas the juries in *Simmons*, *Shafer* and *Kelly* were concerned with the remote possibility that the defendants if sentenced to life in prison would be released someday, the jurors here, as instructed, were

free to contemplate the more immediate prospect that Buenrostro, whom they might well have presumed guilty of a horrific triple murder, would be released for treatment in the community. In response, the State simply asserts that the requested instruction was "'not constitutionally based'" (RB 86, quoting *People v. Marks*, *supra*, 31 Cal.4th at p. 222), implying that any error does not warrant harmless error review under *Chapman v. California*, *supra*, 386 U.S. at p. 24) and sidestepping Buenrostro's federal constitutional claim and prejudice analysis.

In sum, this case presented all the factors likely to trigger potentially verdict-altering speculation. The jurors were likely unfamiliar with the custodial consequences of returning an incompetency verdict. The manifestations of Buenrostro's mental disorders were frightening in themselves, the more so when considered with the repugnant crimes with which she was charged. Under these circumstances, given the closeness of the evidence, jurors needed to be reassured that finding Buenrostro incompetent would not pose a risk to the safety of the community or allow Buenrostro to evade just punishment. The trial court's refusal of Buenrostro's instruction allaying these extraneous, impermissible concerns denied her a fair adjudication of her competency to stand trial and requires reversal. (AOB 165-166.)

VIII. THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE REQUEST FOR A SECOND COMPETENCY HEARING WHEN, AFTER THE PROSECUTION ANNOUNCED IT WAS SEEKING A DEATH SENTENCE, BUENROSTRO BECAME INCREASINGLY IRRATIONAL AND NON-RESPONSIVE

In her opening brief, Buenrostro argues that the trial court abused its discretion and violated Buenrostro's state and federal rights to due process and a fair trial in denying a second competency determination despite a substantial deterioration in Buenrostro's functioning. (AOB 170-186.) Defense counsel sought a new competency determination based on Buenrostro's increasing confusion and unresponsiveness in the wake of the prosecutor's announcing his decision to seek the death penalty. (AOB 172.) Counsel was particularly, though not exclusively, concerned that Buenrostro did not understand the impact of the prosecutor's decision and could not assist in the development of guilt-phase or mitigation evidence. (AOB 172.)

Accepting defense counsel's representations, as well as its own observations of Buenrostro at the *Marsden* proceeding, the trial court, Judge Janice McIntyre, initially agreed to adjourn and to appoint two experts for a more current competency assessment. (AOB 171-172; 1 CT 63; 1 P-RT 51.) However, in the face of the prosecutor's objections that he had not been present, the trial court reversed its position and vacated the order appointing the experts. (1 CT 64; 1 P-RT 53-55.) The motion for a renewed competency hearing was reheard and denied by Judge Vilia Sherman. (1 CT 66-67; 1 P-RT 56-66.) In denying the motion, the trial court found no "sufficient factual basis for distinguishing the defendant's condition now from what it was prior to the previous 1368 referral and prior

to the jury trial on those issues." (1 P-RT 66.)[38]

The State argues both that Buenrostro's conduct did not constitute a sufficient change to trigger a second competency hearing or cast serious doubt on the validity of the prior finding (RB 93) and that Buenrostro already knew the charges rendered her eligible for the death penalty (RB 94). Its arguments do not refute Buenrostro's showing that neither the record nor the case law supports the trial court's retreat from its initial decision that a new competency evaluation was necessary.

With regard to the State's legal argument, neither of the cases it cites defined or restricted the type of changed circumstances required for a renewed competency examination. (RB 93.) In *People v. Marshall* (1997) 15 Cal.4th 1, the Court rejected the defendant's argument that the trial court was required, on its own initiative, to order a second inquiry into mental competency based on bizarre statements the defendant made before jury selection and again after trial. (*Id.* at p. 33.) As repeatedly stated by this Court, bizarre statements, without more, do not raise a doubt of competency, let alone suffice to meet the requirement for a second competency hearing. (*Ibid.* [citing cases].) In *Marshall*, unlike here, defense counsel had raised no further doubt as to the defendant's competency, and the bizarre statements did not establish a substantial change of circumstances. (*Ibid.*)

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[38] The record suggests that Judge Sherman, who had not presided over the competency trial or the recent *Marsden* hearing, had no independent knowledge of the record of the prior proceedings when she denied the defense motion for a renewed competency determination. (See 1 P-RT 56-67.) Instead, the trial court relied on representations of a deputy district attorney who was not assigned to this case and had not litigated the competency trial, but had observed some of the proceedings and had spoken with the deputy who tried the competency case. (1 P-RT 65.)

In *People v. Lawley* (2002) 27 Cal.4th 102, distinguished in the opening brief, the Court found no error in denying a self-represented defendant's motion for new trial on the ground he was tried while incompetent and deferred to the trial judge's finding that the defendant "didn't show me . . . that he was suffering from any kind of a mental disease or mental condition that [a]ffected his ability to represent his own best interests." (*Id.* at p. 138; see RB 93; AOB 183.) Here, in contrast, the judge who initially heard the request found cause for a renewed competency, but the judge who decided the motion after hearing the prosecutor's objection, denied it. Unlike *Lawley*, there was no trial evidence regarding Buenrostro's conduct that supported a conclusion that a second competency hearing was not warranted.

Buenrostro has canvassed and distinguished the leading cases governing subsequent competency hearings. (AOB 179-184.) The State says nothing about these decisions, with the exception of *People v. Lawley*, *supra*, 27 Cal.4th 102, and its silence suggests it has no quarrel with Buenrostro's analysis of them. None of the cases foreclosed a second competency proceeding based, as in this case, on the deleterious progression of existing mental conditions in the face of changed circumstances in the case. None required a changed diagnosis.

As the court emphasized in *People v. Kaplan* (2007) 149 Cal.App.4th 372, the same constitutional and statutory standards and requirements apply to the first and subsequent decision whether to hold a competency hearing. (*Id.* at p. 385.) Defense counsel's account of Buenrostro's mounting incoherence, irrationality and unresponsiveness fully satisfied these standards. Moreover, the record bore out counsel's worst apprehensions regarding Buenrostro's inability to assist and cooperate with her attorneys. Buenrostro repeatedly raised *Marsden* requests to relieve both her original

and substitute attorneys. (See 1 CT 107-108 [*Marsden* motion granted May 13, 1996] and 143-145 [*Marsden* hearing held April 2, 1998]; 2A P-RT 304-312 [unsealed *Marsden/Faretta* hearing held May 4, 1998]; 6A P-RT 662-665 [unsealed *Marsden/Faretta* hearing held July 16, 1998].)[39] The unsealed hearings disclose unremitting conflicts between Buenrostro and her attorneys stemming at least in part from Buenrostro's misunderstanding about the nature of the adversary process and the respective roles of herself as the defendant, the role of the prosecutor and defense counsel, as well as her insistence on strategies that were irrational, counterfactual and contrary to her own best interests. (See 2A P-RT 304-306, 310; 6A P-RT 662-665.) Indeed, on the second day of the prosecution's case in chief, defense counsel told the trial court that Buenrostro was insisting on a defense that was "just not based in reality." (7B RT 703 [July 20, 1998 hearing].) Buenrostro's trial testimony, especially her rambling near-monologue at the penalty phase, which occurred against the advice of counsel, illustrates her utter irrationality given the prosecution's case and her inability to assist counsel. (See AOB 42-43 [guilt-phase testimony] and 48-50 [penalty-phase testimony].)

With regard to the factual showing, the State does not dispute defense counsel's representations regarding the steep decline in Buenrostro's mental functioning, nor challenge that the decline coincided with the announcement that the death penalty would be sought. (RB 94.) Rather, the State simply argues that Buenrostro knew earlier that her case was death-penalty eligible. (RB 94.) The State misses the point. That Buenrostro may have known of the death penalty as a remote, abstract possibility does not negate counsel's

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[39] On July 29, 2009, this Court ordered the clerk to unseal previously sealed transcripts cited in this argument. (See *ante* pp. 4-5, fn. 1.)

observations of Buenrostro's near-catatonic response to the reality that the prosecutor had, in fact, decided to seek her execution. Further, regardless of what Dr. Moral may or may not have considered, his opinion was not, as the State suggests, that Buenrostro was able "to work with counsel on a death eligible case" (RB 94, citing 5 SCT 15), or even that she was able to assist in counsel in any criminal case. Rather, his conclusion was that once Buenrostro became reasonably comfortable with her attorney, she would be able to cooperate with him. (4 C-RT 857.) The State does not dispute that this was Dr. Moral's conclusion, or point to any more definite opinion by him on Buenrostro's ability to assist her attorney in a rational manner as is required for competency to stand trial. (See, e.g. RB 14-15 [describing Dr. Moral's testimony at the competency trial].)

In the end, the precise trigger for Buenrostro's precipitous mental deterioration is not the issue. The crucial question is whether her mental decline precisely when the prosecution decided to make this a capital case amounted to a substantial change in circumstances sufficient to require a reevaluation of her competency. Defense counsel's representations regarding Buenrostro's changed affect and behavior were unquestionably sufficient, as the trial court first found, to raise a renewed doubt and to warrant expert inquiry into Buenrostro's competence. In rescinding its ruling appointing experts, the trial court precluded Buenrostro from presenting expert confirmation of the substantial change in her mental functioning. (Cf. *People v. Kaplan*, *supra*, 149 Cal.App.4th at pp. 385-386 [the substantial evidence standard is satisfied initially and on subsequent requests for a competency determination if at least one expert who has had an opportunity to examine the defendant testifies that the defendant is incapable of understanding the proceedings or assisting in his defense].)

The trial court recognized that a defendant may be legally competent at one time, but incompetent at another time. (1 P-RT 66.) As previously demonstrated, the evidence at the original competency hearing was evenly balanced, and the conclusion of competency was hardly an endorsement of Buenrostro's mental soundness. There was convincing evidence from experts, jail personnel and family members that Buenrostro was, in fact, profoundly disturbed. Thus, it would not require an extreme alteration in Buenrostro's condition to render her incompetent to stand trial. Defense counsel's unchallenged observations of Buenrostro's marked deterioration constituted substantial evidence that she was no longer competent and, thus, compelled a renewed competency determination. In light of both the earlier and the new information, the trial court's refusal to initiate a competency inquiry violated state statutory law as well as the due process clauses of the state Constitution and the Fourteenth Amendment to the federal Constitution. (See *Drope v. Missouri*, *supra*, 420 U.S. at p. 183; *People v. Pennington* (1967) 66 Cal.2d 508, 521.) As explained previously, a remand for a retrospective competency hearing is not feasible. (AOB 185-185.) Accordingly, the entire judgment must be reversed. (*People v. Ary* (2011) 51 Cal.4th 510, 515, fn. 1; *People v. Young* (2005) 34 Cal.4th 1149, 1216-1217.)

IX. THE TRIAL COURT ERRONEOUSLY EXCLUDED THREE PROSPECTIVE JURORS BECAUSE THEY WERE OPPOSED TO, OR WOULD HAVE DIFFICULTY IMPOSING, THE DEATH PENALTY

As set forth in the opening brief, the trial court excluded three prospective jurors for cause based on their death penalty views in violation of Buenrostro's rights due to process and a fair trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412), and article I, section 16 of the California Constitution. (AOB 187-239.) Bobbie R. and Francis P. were excluded solely on the basis of their death-qualification answers in the juror questionnaire, while Richard J. was excluded after voir dire. The information before the trial court did not support its rulings that these prospective jurors' views about the death penalty would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oath. (*Wainwright v. Witt*, *supra*, at pp. 424-426.) The trial court's unconstitutional dismissal of these prospective jurors for cause mandates a per se reversal of the death judgment. (AOB 239, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 [improper exclusion of even a single qualified juror requires reversal per se] and *People v. Heard* (2003) 31 Cal.4th 949, 965-966 [same].)

The State contends that Buenrostro forfeited her right to challenge the trial court's exclusion of Bobbie R. for failing to object at trial. (RB 100-102.) The State also contends that the record before the trial court supported its rulings that the death penalty views of these three prospective jurors rendered them unqualified to serve as jurors in a capital case. (RB 103-112.) The State is wrong on all counts.

A. The State Has Not Refuted Buenrostro's Showing That Bobbie R.'s Written Questionnaire Answers Did Not Establish That Her Ability To Sit As A Juror Was Substantially Impaired, And This Claim Was Not Forfeited

As explained in the opening brief, Buenrostro's challenge to the exclusion of Bobbie R. solely on the basis of her answer in the jury questionnaire was preserved for appeal and is meritorious because the evidence before the trial court was insufficient to establish that she was substantially impaired under the *Witherspoon/Witt* rule. (AOB 191-211.)

1. This claim was not forfeited by a failure to object where defense counsel refused to stipulate, and submitted on the trial court's sua sponte decision, to excuse Bobbie R.

The State readily acknowledges that under state law, a trial objection is unnecessary to raise a claim on appeal challenging an erroneous exclusion of a prospective juror under *Witherspoon* and *Witt*. (RB 101, quoting *People v. Hawthorne* (2009) 46 Cal.4th 67, 82; see AOB 192, fn. 68 [citing much earlier authority].) It further acknowledges that defense counsel refused to stipulate to the exclusion of Bobbie R., although he did stipulate to the exclusion of other prospective jurors based on their jury questionnaire answers. (RB 101.) Nevertheless, the State urges this Court to find that Buenrostro forfeited her claim because defense counsel failed to object to Bobbie R.'s exclusion. (RB 100-101.) The State's contention is contrary to longstanding California law and should be rejected.

As a preliminary matter, it is important to clarify the nature of Buenrostro's claim. The State's forfeiture argument suggests that Buenrostro is challenging the jury selection procedure employed by the trial court. (See RB 102.) That is not correct. Unlike defendants in some other cases, Buenrostro does not challenge the procedure, i.e. the use of jury

questionnaires, by which Bobbie R. was excluded. (See, e.g., *People v. Cook* (2007) 40 Cal.4th 1334, 1341-1344.) Rather, Buenrostro claims that Bobbie R. was erroneously excluded because her questionnaire answers were insufficient to establish that her ability to serve as a juror was substantially impaired. (See AOB 196-210.) To the extent Buenrostro refers to the trial court's failure to conduct follow-up questioning, it is only to underscore the insufficiency of Bobbie R.'s questionnaire answers to establish bias under *Witherspoon* and *Witt*.

In addition, it is important to clarify the record. The trial court began its process of requesting stipulations to cause exclusions with Bobbie R. The discussion between the court and the parties on her exclusion was as follows:

> THE COURT: At this point in time, I'd like to start with Bobbie R[.], Juror Bobbie R[.]. Let's see, on my random list would --
>
> MR. GROSSMAN: 14, your Honor.
>
> THE COURT: -- would be No. 14. Mr. Grossman?
>
> MR. GROSSMAN: We have that questionnaire and we'll submit it. We can't stipulate to them obviously, your Honor, but we know what the Court's concerns me.
>
> THE COURT: Mr. Soccio?
>
> MR. SOCCIO: I marked her for cause.
>
> THE COURT: Yes, based upon the answers and, Mr. Grossman, you're submitting?
>
> MR. GROSSMAN: Yes.
>
> THE COURT: Based upon the answers that the potential juror would not vote for death, and at this time Bobbie R[.] would be excused for cause.

(3 RT 135-136.) The record thus shows that although defense counsel did not object to the exclusion, he also refused to stipulate that the

questionnaire answers established Bobbie R.'s disqualification under *Witt* and submitted the issue to the trial court's authority. His position did not forfeit an appellate challenge to the trial court's ruling.

The rule in this state is that "the failure to object does not waive [a defendant's right to challenge a *Witherspoon-Witt* error] for appeal" (*People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4; *People v. Holt* (1997) 15 Cal.4th 619, 651, fn. 4; *People v. Lanphear* (1980) 26 Cal.3d 814, 844; *People v. Velasquez* (1980) 26 Cal.3d 425, 443); whereas an affirmative stipulation to the dismissal does forfeit the right to challenge the dismissal on appeal (*People v. Thompson* (2010) 49 Cal.4th 79, 99-100). More specifically, when defense counsel simply submits the issue, while it may not be an affirmative objection, neither is it a stipulation. (*People v. Lynch* (2010) 50 Cal.4th 693, 733-734, and authorities cited therein; *People v. Thompson*, *supra*, at pp. 99-100; *People v. Hawthorne* (2009) 46 Cal.4th 67, 82.) Thus, in such situations this Court has consistently declined to find that the issue was forfeited, based on its own precedent that the failure to object does not forfeit the *Witherspoon-Witt* issue on appeal. (*People v. Lynch*, *supra*, at pp. 733-734, and authorities cited therein; *People v. Thompson*, *supra*, at pp. 99-100; *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 82.)

This rule is logical because it is the party seeking exclusion who must show that the potential juror lacks impartiality. (*Witt*, *supra*, 469 U.S. at p. 423; accord, *People v. Stewart* (2004) 33 Cal.4th 425, 445.) When, as here, it is the trial court proposing exclusion, the court may exclude a juror only if there is substantial evidence that the *Witt* standard for disqualification is satisfied. (*Witt*, *supra*, 469 U.S. at pp. 424, 426.) If the proposed exclusion is based upon questionnaire answers alone, evidence sufficient to prove disqualification must appear from the face of the

questionnaire itself. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 529-533; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 445-446, 451-452.)

At bottom, the burden is never on the nonmoving party to prove that a juror is *qualified* under the *Witt* standard. Of course, when the non-moving party *stipulates* that the evidence is sufficient to meet the adversary's burden or sustain a court's finding, that party has forfeited the right to challenge the finding on appeal. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at pp. 99-100.) A "submission," however, is different.

When a court is called upon to rule on a matter, the common usage of the term "submit" simply means that the party is submitting to the *authority* of the court to rule based upon the record before the court – be it the pleadings, argument, or evidence. (See, e.g., *State v. Defiore* (La. App. 5th Cir. 1992) 610 So.2d 273, 275; *Black's Law Dictionary* (5th ed. 1979) p. 1278 [defining "submit" as "'[t]o commit to the discretion of another. To yield to the will of another. To propound; to present for determination; as an advocate submits a proposition for the approval of the court'"]; *Black's Law Dictionary* (8th ed. 2004) at p. 1466 ["to end the presentation of further evidence in (a case) and tender a legal position for consideration."].) When a party agrees to "submit" an issue based on the record, the party ordinarily forfeits the right to challenge the court's *consideration* of that evidence in ruling on the matter. However, the party's "submission" in this regard does *not* amount to an admission that the evidence is *sufficient* to support the ruling. In other words, the party acquiesces as to the state of the evidence yet preserves the right to challenge it as insufficient to support a particular legal conclusion (See, e.g., *In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1236-1237 [party's agreement to "submit" jurisdictional *determination* to court based on report did not mean party admitted court's jurisdictional *findings* based on report or waived right to challenge sufficiency of

evidence in report to sustain findings on appeal]; cf. *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1560-1561 [where moving party bore burden of proof and only evidence offered to meet burden was report, nonmoving party's failure to object to admission of report or argue against its sufficiency at trial did not waive right to challenge sufficiency of evidence to sustain finding on appeal].)

Consistent with these principles, when defense counsel responds that he or she "submits" to a challenge or dismissal of a juror for cause on the basis of the juror's questionnaire answers under *Witherspoon* and *Witt*, counsel has only submitted to the court's authority to rule on the issue of qualification based on the questionnaire. Counsel has not agreed to the ruling or forfeited the right to challenge on appeal the sufficiency of the evidence contained in the questionnaire to prove the juror's disqualification under *Witt*.

The soundness of these concepts is reflected by this Court's consistent refusal to find that a defendant's failure to object to a prospective juror's dismissal for cause under *Witherspoon* and *Witt* forfeits the right to challenge on appeal the *sufficiency* of the evidence to support the dismissal. When defense counsel does not stipulate, but rather "submits" in this context, this Court has recognized that counsel has only tendered the exclusion ruling *to the discretion of the court* based on the evidence before the court, which does not forfeit the right to challenge the *sufficiency* of the evidence to sustain the court's ruling on appeal. (*People v. Thompson*, *supra*, 49 Cal.4th at pp. 99-100; accord, e.g., *People v. Lynch*, *supra*, 50 Cal.4th at pp. 733-734.) This principle is and should continue to be the rule in this state. Accordingly, the Court should reject the State's forfeiture argument.

Even if the Court were to abandon this long-standing rule in favor of a new and different rule, such a rule could not be applied retroactively to any case in which the judgment is not yet final. This Court consistently has held that a defendant should not be penalized for failing to object where existing law required no objection. (See, e.g., *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [new contemporaneous objection rule applied prospectively only]; accord, *United States v. Givens* (9th Cir. 1985) 767 F.2d 574, 579 [court refused to impose subsequently-created requirements for preserving claim on appeal when defendant did all that was necessary to comply with the law applicable at the time of his trial].) As this Court has stated, "[t]o deny defendants their right to appeal on [an] issue because [they followed existing law]. . . would be to change the rules after the contest was over. When the contest is as serious as a criminal prosecution, such unfairness would be intolerable." (*People v. Collins* (1986) 42 Cal.3d 378, 388.) This truth carries particular force when the "contest" is a capital murder prosecution.

Indeed, even when the law at the time of trial was conflicting, unclear, or in a state of flux with regard to whether a preservation requirement was necessary, this Court has refused retroactive application of a subsequently adopted requirement. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 340; *People v. Blair* (2005) 36 Cal.4th 686, 741-742; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) The Court has been clear: when the "question whether defendants have preserved their right to raise [an] issue on appeal is close and difficult, we assume that defendants have preserved their challenge." (*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6; accord, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 813.)

2. Misreading Bobby R.'s questionnaire answers, the trial court erroneously excluded her for a death penalty position she did not take, and no other reason proffered by the State justifies her exclusion

The trial court excluded Bobbie R. for one and only one reason – her opposition to the death penalty. The court was explicit in its ruling: "Based upon the answers that the potential juror would not vote for death, and at this time Bobbie R[.] would be excused for cause." (3 RT 136.) As shown in the opening brief, the trial court misread or misconstrued Bobbie R.'s views. (AOB 196, 198.) She did *not* state in her answers that she "would not vote for death." In fact, she did not answer the question asking how she would vote. (AOB 198-199.) Rather, Bobbie R.'s questionnaire answers show that (1) she did not want to make a decision about the death penalty; (2) she was strongly against the death penalty; (3) her opinion about the death penalty would make it difficult for her to vote for the death penalty; and (4) she never held a different opinion about the death penalty. (AOB 196, 199-203 [analyzing her questionnaire answers].)

Although the State argues that the trial court properly excluded Bobbie R. under the *Witt/Witherpoon* rule (RB 104), it does not dispute Buenrostro's reading of the death-qualification answers in Bobbie R.'s questionnaire. On the contrary, the State appears to agree with it. (See RB 104-105.) The State, however, does not defend the trial court's finding in support of excluding Bobbie R. – that she would not vote for the death penalty. The State's silence should be considered as a tacit acknowledgment that the trial court's finding is not supported by Bobbie R.'s questionnaire answers.

The State also fails to meet Buenrostro's showing that the information before the trial court about Bobbie R.'s death penalty views

does not meet *Witt*'s substantial impairment standard. (See AOB 196-205.) This discussion distinguishes the Court's decisions in *People v. Avila, supra,* 38 Cal.4th 491 and *People v. Wilson* (2008) 44 Cal.4th 758, and explains that this case is analogous to *People v. Stewart*, *supra*, 33 Cal.4th 425. (See AOB 197-198.)[40] Notably, the State does not take issue with Buenrostro's analysis. Nor does the State address the cases making clear that difficulty in voting for a death sentence and reluctance or discomfort to sit on a jury trying a capital case – which is what Bobbie R.'s written responses show – do not prove the juror is unable to obey her oath as a juror and follow the law a required for exclusion under *Wainwright v. Witt, supra,* 469 U.S. at p. 443. (See AOB 203-204.)

Instead of defending the trial court's ruling of Bobbie R. for her death penalty views, the State surveys Bobbie R.'s questionnaire and suggests that her failure to answer over one-third of the questions, taken together with her death penalty views, her uncertainty about particular trial principles, and her inconsistent views about the impact of her religious views on her ability to sit as a juror, demonstrate that her ability to perform her duties as a juror was substantially impaired. (RB 104-105.) The State

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[40] Bobbie R.'s death penalty views are also distinguishable from those of prospective jurors who were properly excluded on the basis of their questionnaire answers in *People v. Russell* (2010) 50 Cal.4th 1228 and *People v. Thompson*, *supra*, 49 Cal.4th 79. Each excluded juror in those cases provided a disqualifying answer that is missing from Bobbie R.'s questionnaire: they indicated that regardless of the evidence, they (1) would refuse to vote for guilt as to first degree murder or refuse to find a special circumstance true in order to keep the case from going to the penalty phase; (2) always would vote for life imprisonment without the possibility of parole; (3) never would vote to impose a death sentence death under any circumstances; or (4) never would vote to impose a death sentence under special circumstances applicable to the case before them. (*Russell*, *supra*, at pp. 1262-1263; *Thompson*, *supra*, at pp. 103-105.) None of those disqualifying answers appears in Bobbie R.'s questionnaire.

appears to justify its approach – searching for disqualifying reasons unrelated to those relied on by the trial court – on the grounds that this Court conducts de novo review of a exclusion based solely on questionnaire answers. (RB 103, citing *People v. Avila, supra,* 38 Cal.4th at p. 529.) However, the State does not cite a single case in which the Court has done the type of review it urges. In applying the de novo review standard, the Court has rendered its own independent judgment on whether the record supports the bias cited by the trial court. (See, e.g., *People v. Thompson, supra*, 49 Cal.4th at pp. 97, 100-101 [one prospective juror's antipathy toward the legal system and law enforcement reflected in his questionnaire answers and cited by trial court as basis for his ruling established cause for the exclusion, and other prospective jurors' death penalty views as stated in their questionnaire answers supported their exclusion where trial court stated it was using questionnaires to exclude obviously *Witt*-impaired prospective jurors]; *People v. Cook, supra*, 40 Cal.4th at pp. 1341-1344 [prospective juror's death penalty views, which was one of three reasons cited by the trial court in its ruling, supported her exclusion].) It should do so again here and hold that Bobbie R.'s death penalty views did not justify her exclusion.

But even assuming, arguendo, that it were appropriate on appeal to search the jury questionnaire for a reason not relied upon by the trial court to justify its exclusion of Bobbie R., the State's argument would fail. Its central point is mistaken: Bobbie R.'s failure to answer a substantial portion of the questions, together with some of the answers she did give, does *not* demonstrate that "she was unable and unwilling to obey her oath and follow the instruction of the trial court" and, whether taken separately or together, these factors did not render her substantially impaired under *Witt.* (RB 104; see also RB 105, 106.) The State cites no authority for its

novel proposition that the *absence* of answers provides sufficient information to support an exclusion for cause. (See RB 104.) As Buenrostro already has explained, the blank portions of Bobbie R.'s questionnaire may have provided reason for the trial court to conduct voir dire, but did not present the trial court with the information necessary to determine whether her death penalty views would prevent or substantially impair her ability to serve as a juror. (See AOB 198-208.)

In relying on the absence of answers in the questionnaire, the State places dubious emphasis on the "Instructions for Juror Questionnaire." (RB 104.) It contends that Bobbie R.'s failure to answer all questions shows she was unwilling or unable to follow the trial court's instructions and, by itself, provides cause for her exclusion. (*Ibid.*) But, as the State itself recognizes, those instructions told prospective jurors: "If you cannot answer a question, please leave the response are blank. During the questioning, you will be given an opportunity to explain or expand any answers if necessary." (33 CT 9222; see RB 99.) Given this specific admonition, it is baffling for the State to argue that doing precisely what the instruction directed "demonstrates without a doubt that she was unable and unwilling to obey her oath and follow the instructions of the trial court." (RB 104.) Such logic might have purchase in Lewis Carol's *Alice's Adventures in Wonderland* (1865), but not in the highest court of this state.

More fundamentally, the State's argument turns the rule regarding exclusion of prospective jurors for cause on its head. As discussed above, the burden is on the party seeking their exclusion to establish cause. (See *ante* at pages 119-120, citing *Wainwright v. Witt, supra,* 469 U.S. at p. 423; accord, *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) This burden necessarily implies that prospective jurors are presumed to be impartial. (*Murphy v. Florida* (1975) 421 U.S. 794, 800 [acknowledging

"presumption of a prospective juror's impartiality"].) The State apparently seeks to reverse this presumption and burden of proof. It argues that the "*absence* of written content [proves] that Bobby R. was substantially impaired." (RB 103, original italics.) In other words, the State would use the lack of information establishing bias to establish bias. The effect would be nothing short of placing the burden on the nonmoving party to prove a prospective juror is impartial, i.e. that her ability to sit as a juror is not substantially impaired. Of course, this approach would be contrary to both *Witherspoon* and *Witt*, which prohibit a presumption of bias arising from a prospective juror's death penalty views. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522; *Wainwright v. Witt, supra,* 469 U.S. at pp. 421, 423-424.) It also would be inconsistent with the law of the state.

In *People v. Avila, supra,* 38 Cal.4th 491, this Court set a high standard for excluding prospective jurors solely on the written questionnaire: the prospective juror's *answers* had to "*leave no doubt* that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties in accordance with the court's instructions and the juror's oath," and it had to be "*clear* from the *answers* that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Id.* at p. 531, italics added; accord, *People v. Wilson, supra,* 44 Cal.4th at p. 787 [stating standard]; see AOB 197-198 [discussing standard].) The Court recently reiterated this rule: "Unless a juror makes it clear that he or she is unwilling to set aside his or her beliefs and follow the law, a trial court may not dismiss a juror under *Witt/Witherspoon* based only on answers provided on a juror questionnaire." (*People v. Booker* (2011) 51 Cal.4th 141, 158-159.) Not only is the burden of proof on the moving party, but the showing that the prospective juror's ability to serve is substantially impaired must be "clear" and "leave no doubt" and arise from

the answers the prospective juror has presented. Even assuming, arguendo, it were proper on appeal to speculate about other reasons that might have provided cause for excluding Bobbie R., her failure to answer parts of the questionnaire does not meet this high standard. The State's argument to the contrary should be rejected.

To be sure, Bobbie R. indicated uncertainty about some trial principles. Given the choices of "yes" "no" and "unsure" as responses, she checked "unsure." (33 CT 9240-9242.)[41] Had she answered "no" to these questions, and had the trial court excluded her on the basis of those responses, then her exclusion for cause might have been lawful. But she did not answer "no." She only stated she was "unsure." And her bare written check marks do not reveal the reason for her answer, e.g. whether she had doubts about what was being asked or about her ability to follow the legal principle being addressed. These answers do not prove a disqualifying bias.[42]

In sum, the State improperly urges that the exclusion of Bobbie R. be upheld on grounds unrelated to her death penalty views, which was the sole

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[41] Bobbie R. marked "unsure" in answering whether she would be able to be fair and objectively evaluate the testimony of each witness (33 CT 9240); agreed with principle that the testimony of a single witness may be sufficient to prove any fact (*ibid.*); would be able to discuss her position with her fellow jurors and listen their thinking about the evidence (33 CT 9241); could reconsider her position if she became convinced she was wrong (*ibid.*); would change her position merely because the other jurors disagreed with her (*ibid.*); and could give the defendant and the People a fair trial (33 CT 9242).

[42] The same holds true for Bobbie R.'s inconsistent answers about whether her religious views would prohibit or make it difficult for her to serve as a juror. (33 CT 9228, 9235.) They do not, by themselves or with her uncertainty about certain trial principles, justify her exclusion. (See AOB 205.)

reason for the trial court's ruling, and does so with illogical and unsubstantiated contentions that invert or ignore established law. Even assuming, arguendo, this Court can look to Bobbie R's questionnaire answers other than those relating to her death penalty views in deciding whether her exclusion was justified, they provide insufficient information to support a finding that her ability to perform the duties as a juror in accordance with the court's instruction and her oath was substantially impaired. Bobbie R. was erroneously excluded; that error alone, and in combination with the exclusions of Frances P. and Richard J., requires reversal of the death judgment. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

B. The State Has Not Refuted Buenrostro's Showing That The Trial Court Erroneously Excluded Frances P. Based Solely On Her Written Questionnaire Answers, Which Established Only That She Did Not Believe In The Death Penalty And Preferred Life Imprisonment Without The Possibility Of Parole

As set forth in the opening brief, prospective juror Francis P. also was erroneously excluded for her death penalty views based solely on her written answers to the jury questionnaire. (AOB 211-223.) Frances P.'s questionnaire answers established that (1) she did not believe in and was moderately opposed to the death penalty (28 CT 7930-7931); (2) she preferred life without the possibility of parole, which she viewed as a more severe penalty (28 CT 7930, 7934); (3) as a Catholic, she believed that "a life for a life is wrong" (28 CT 7932); (4) she could think of "no types of cases/offenses" in which the death penalty should be imposed (*ibid.*); (5) she was unsure whether her opinion on the death penalty would make it difficult for her to vote for the death penalty in this case regardless of evidence (28 CT 7931); and (6) and in a death-eligible case, she would not

always vote for either death or life in prison without parole, but would consider all of the evidence and the court's instructions and impose the penalty she felt was appropriate (28 CT 7933). The prosecutor moved to exclude Frances P. based on her death penalty views. (3 RT 152.) Granting the motion, the trial court cited Frances P.'s answers that she considered a life-without-parole sentence to be more than a death sentence and that she knew someone with the same last name as Buenrostro. (*Ibid.*)

As argued in the opening brief, this information did not establish that her views would prevent or substantially impair her ability to serve as a juror under *Witt,* 469 U.S. at p. 424, and her exclusion, by itself, requires reversal of the death sentence. (AOB 216-221.) Not surprisingly, the State disputes this conclusion (RB 107-112), but its contentions should be rejected.[43]

As a starting point, it is important to be clear about Frances P.'s answers. In describing her questionnaire answers, the State asserts: "She was unsure as to whether she could vote in favor of the death penalty regardless of the evidence in the case. (28 CT 7931.)" (RB 109.) But the cited answer responds to Question 68.c., which did *not* ask whether the prospective juror "could vote" for the death penalty. Instead, Question 68.c. asked, "If you are against the death penalty, would your opinion make it [sic] difficult for you to vote for the death penalty in this case, regardless of what the evidence was?" (28 CT 7931.) Frances P. did not check either the "yes" or "no" answer provided for responding to this question, but

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[43] In her opening brief, Buenrostro explains that neither Frances P.'s view that life-without-parole was more severe than death nor her knowing a woman by the name of "Buenrostro," which were mentioned by the trial court, rendered her substantially impaired to serve as a juror. (See AOB 216-220.) The State does not dispute these points, and its silence should be viewed as agreement that these answers do not support her exclusion.

instead wrote "unsure." (*Ibid.*) Fairly read, she answered that she was unsure whether her opinion would make it difficult for her to vote for a death sentence. The difference between being able to vote for the death penalty and having difficulty voting for the death penalty is crucial, because having difficulty does not disqualify a prospective juror from a capital case. As this Court explained in *People v. Avila, supra,* 38 Cal.4th 491:

> [M]ere *difficulty* in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties. The prospective juror might nonetheless be able to put aside his or her personal views and deliberate fairly under the death penalty law.

(*Id.* at p. 530, original italics; accord, *People v. Stewart*, *supra*, 33 Cal.4th at p. 446; see *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fn. 7 ["[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man."].)

The State contends that Frances P.'s "personal views dictated she vote for life in prison." (RB 110.) But neither the factual record nor the law permits this Court to make that leap. As explained in the opening brief, Frances P.'s answers did not show that she could not or would not vote for death. (AOB 215.) This critical fact distinguishes her exclusion from those affirmed in *People v. Avila, supra,* 38 Cal.4th at p. 528, fn. 23, *People v. Wilson, supra,* 44 Cal.4th at pp. 784-785, *People v. Russell, supra,* 50 Cal.4th at pp. 1262-1263, and *People v. Thompson*, *supra*, 49 Cal.4th at pp. 103-105. As discussed with regard to the exclusion of Bobbie R., *ante* at page 124 and footnote 40, in those cases, the questionnaire answers of the excluded jurors established as result of their objections to the death penalty, they always would not vote to convict the defendant of first degree murder with a special circumstance finding, would vote against the death penalty, or would vote for life imprisonment without the possibility of parole,

regardless of the evidence in the case. In this case, Question 70 of the questionnaire was designed to identify such disqualifying views. Frances P. did not endorse any of them. On the contrary, in answering Question 70, she rejected the disqualifying responses, but instead checked the response stating, "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (28 CT 7932-7933.) This is precisely what is required to be an impartial juror in a capital trial.

In response, the State downplays Frances P.'s answers to Question 70 in favor of her "other anti-death penalty responses in the juror questionnaire." (RB 111.) To the extent that the State is arguing that the answer to Question 70 should be ignored, its argument is wrong. This Court reviews the trial court's exclusion in light of all the information in the questionnaire about the prospective juror's death penalty views. (See, e.g. *People v. Thompson*, *supra*, 49 Cal.4th at pp. 103-105.) To the extent that the State is asserting that Frances P.'s answer to Question 70 is not credible, its argument is misguided. This Court is not in a position to judge a prospective juror's credibility. (*People v. Martinez* (2009) 47 Cal.4th 399, 460 ["the trial court takes into account the credibility and demeanor of the prospective juror, which appellate courts cannot do"].) In fact, not even a trial court is able to determine a prospective juror's credibility on the cold record of written answers in a jury questionnaire. And to the extent that the State is contending that Frances P.'s answer to Question 70 is inconsistent with her other written responses, its argument shows that the information in the questionnaire answers presented an insufficient basis to conclude that Frances P. was substantially impaired under *Witt*. (*People v. Stewart, supra,* 33 Cal.4th at p. 447.) Plainly put, Frances P.'s bare written responses may have provided "a preliminary indication that the prospective

juror might prove, upon further examination, to be subject to a challenge for cause." (*Id.* at pp. 447, 448.) But, by themselves, they were not sufficient to establish a basis for exclusion for cause. (*Id.* at pp. 447, 448-449.)

In discounting Frances P.'s answer to Question 70, the State essentially disputes the principle underlying *Witherspoon* and reiterated in *Witt.* The decision in *Witherspoon* was premised on the notion that a person opposed to capital punishment – even strongly opposed – could set aside her personal views, follow the law as stated in the trial court's instructions, and vote for a death sentence if warranted by the evidence. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519 ["A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror"].) Although in *Witt* the high court replaced *Witherspoon*'s high standard for proving a disqualification with a less stringent one, it endorsed *Witherspoon*'s basic principle that strong views against the death penalty do not disqualify a person from sitting on the jury in a capital case. (*Wainwright v. Witt, supra,* 469 U.S. at p. 421 [trial court's task is to distinguish "between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial"].) More recently, this Court reaffirmed the same principle in *People v. Stewart, supra,* 33 Cal.4th at p. 447 and *People v. Avila*, *supra*, 38 Cal.4th at p. 530.

As set forth above, Frances P.'s other death-qualification answers show that she was moderately opposed to the death penalty, could think of no crime in which the death penalty should be imposed, preferred life without the possibility of parole, believed that taking a life for a life was

wrong, and was unsure whether her death penalty views would make it difficult for her to vote in favor of death penalty in this case regardless of evidence. (See *ante* at pages 129-130.) These answers, taken together, indicate that Frances P. might have difficulty imposing the death penalty, but they do not prove that she would be unable to do so. (See RB 110-111.) Frances P.'s written answers show precisely the type of strong, general opposition to capital punishment that both *Witherspoon* and *Witt* declare is *not* sufficient to establish bias and thus grounds for an exclusion for cause.

Finally, as discussed in the opening brief, there is no question that this claim is cognizable on appeal. (AOB 221-223.) The State seems to recognize as much. In contrast to the claim regarding Bobbie R., the State does not assert that this claim was forfeited. Rather, in a single sentence without any elaboration, the State suggests that defense counsel's statement of no opposition may be viewed as concurring in the trial court's assessment that Frances P. was substantially impaired. (RB 112, citing *People v. Schmeck* (2005) 37 Cal.4th 240, 262.) As one Court of Appeal noted, "[i]ssues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) Under these circumstances, Buenrostro reads the Respondent's Brief as conceding that her claim is not forfeited or otherwise foreclosed on appeal.

Moreover, the State's reliance on *People v. Schmeck*, *supra*, 37 Cal.4th at p. 262, is misplaced. Unlike Frances P., the prospective jurors in that case were excluded after voir dire, not on the basis of their questionnaire answers alone. This Court has ruled that when the trial court and the parties have an opportunity to observe and assess the juror's demeanor in answering the questions, a reviewing court may consider defense counsel's lack of objection as circumstantial evidence he, like the

trial court, had no question – based on evidence not revealed by the cold record – that the juror was disqualified. (*People v. Lynch*, *supra*, 50 Cal.4th at pp. 733-734, citing *Uttecht v. Brown* (2007) 551 U.S. 1, 18; *People v. Cleveland* (2004) 32 Cal.4th 704, 735; *People v. Memro* (1995) 11 Cal.4th 786, 818.) That rule, however, would make no sense where, as here, the prospective juror was excluded on the basis of her questionnaire answers without voir dire, and thus there is no basis from which to conclude that defense counsel concurred in trial court's assessment based on evidence not shown on the cold appellate record. Further, as noted previously, defense counsel in this case clearly signaled his concurrence in some of the trial court's dismissals on the basis of the questionnaires by stipulating to the exclusions, but did not stipulate to excusing Frances P.

In summary, the record before the trial court was insufficient to establish Frances P.'s disqualification under *Witt*. Her erroneous exclusion, by itself and in combination with the exclusion of Bobbie R. and Richard J., requires a per se reversal of the death judgment. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668 and *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

C. The State Has Not Refuted Buenrostro's Showing That The Trial Court Erroneously Excluded Richard J., Who Was Ambivalent About Capital Punishment and Who, Before Hearing Any Evidence, Would Lean Toward Life Imprisonment Without The Possibility Of Parole, But Could Change His Mind And Vote For The Death Penalty

As set forth in opening brief, the trial court erroneously excluded prospective juror Richard J. whose written questionnaire and voir dire answers showed that he was consistent and unequivocal in his views: he was ambivalent about capital punishment, and he leaned toward a sentence of life imprisonment without the possibility of parole, but he could vote for

a death sentence. (AOB 223-238; 4 RT 228-229.) These views did not establish that his ability to serve as a juror was substantially impaired. Fairly read, his questionnaire answers and voir dire demonstrated the hallmark of an impartial, death-qualified juror: he was willing to temporarily set aside his own beliefs and follow the law. (*Wainwright v. Witt, supra,* 469 U.S. at p. 421; *People v. Avila, supra,* 38 Cal.4th at p. 529.)

In his questionnaire answers, Richard J. explained that he used to be in favor of capital punishment, but as a result of his pro-life/anti-abortion work, he wavered and was not sure. (24 CT 6618, 6619, 6620). He rated his views on the death penalty as four on a scale of one to ten, which indicated slight opposition. (24 CT 6619.) He thought the death penalty should be imposed in "preplanned" cases as well as in hired hit-men killings and assaults resulting in death. (24 CT 6620.) He asserted that his opinion about the death penalty would *not* make it difficult for him to vote for the death penalty in this case regardless of the evidence. (24 CT 6619.) He wrote on his questionnaire that he not sure of the degree of his belief in the death penalty. (*Ibid.*) Finally, he would *not* always vote for life or death, but, like Frances P., checked the option stating he would consider all of the evidence and the court's instructions before imposing the penalty he felt most appropriate. (24 CT 6421.)

The voir dire examination confirmed Richard J. as a man who previously supported, but at the time of trial shied away from capital punishment (4 RT 230), leaned toward a life imprisonment without parole verdict (4 RT 228), could change his mind upon listening to the evidence (4 RT 229), could vote for a death penalty (4 RT 228), and had previously believed that the death penalty would be easy, but now felt it was "hard to

say" (4 RT 230).[44] In light of his uncontradicted statement that he could vote to impose the death penalty, neither his misgivings about capital punishment nor his inclination toward a life without parole sentence "would actually preclude him from engaging in the weighing process and returning a capital verdict" as required for exclusion under *Witt.* (*People v. Kaurish* (1990) 52 Cal.3d 648, 699; accord, *People v. Stewart, supra,* 33 Cal.4th at p. 446.)

The State does not contest the facts at the heart of Buenrostro's argument that the trial court erred in finding Richard J.'s ability to sit as a juror to be substantially impaired.[45] Instead, the State contends that the trial court's ruling is supported because (1) during voir dire Richard J. repeatedly said he was biased based on the circumstances of the case; (2) Richard J. was inclined to vote in favor of life imprisonment; and (3) the trial court's finding Richard J. was substantially impaired is entitled to deference. (RB 119.) All these points are mistaken.

First, the State places great weight on Richard J.'s purported admissions of bias, but a fair reading of the record shows they do not exist. In summarizing Richard J.'s written answers, the State notes that he indicated he might be biased because he was pro-life and the deaths of children were involved in the case. (RB 113; 24 CT 6612.) But the State

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[44] Buenrostro disagrees with State's reading of the record, which interprets Richard J.'s as follows: "For Richard J., it was 'hard to say' if he could vote for death. (4 RT 228-230)." (RB 118.) The more reasonable reading is that given above: the "hard to say" comment contrasts his current questions about capital punishment with the ease earlier in his life with which he thought he could have voted for a death sentence.

[45] The State does not dispute that the prosecutor's initial reasons for objecting to Richard J. – his working in pro-life organizations and recently having converted to Catholicism (3 RT 153) – did not establish cause for an exclusion. (See AOB 229-230.)

does not acknowledge that this point was clarified on voir dire. (See AOB 230-231.)

As Buenrostro explains in her opening brief, on voir dire the trial court was concerned that, based on his questionnaire answers, Richard J. might be a little biased against Buenrostro. (4 RT 229.)[46] Richard J. disagreed. (*Ibid.*) The trial court observed that one question indicated he might have a difficult time being fair. (*Ibid.*) Richard J. replied that if he made that statement, he misconstrued the question. (*Ibid.*) Apparently satisfied with this response, the trial court remarked, "We'll just scratch that answer." (*Ibid.*)

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[46] The relevant passage is as follows:

> Q All right.
>
> You indicate also that you might be a little bias [sic] because the death of children is involved in this case. Am I reading that you might be a little bias [sic] against the defendant.
>
> A No. I don't think so because as I indicated, also that I try to be fair and law abiding throughout my life.
>
> Q All right.
>
> A And at this point in time, you say at this point in time, and that's my opinion, that I might be biased.
>
> Q 'Cause you indicate -- I believe you indicated that in your questionnaire -- well, on one question you indicate that you might have a difficult time being fair in this case.
>
> Do you recall making that statement?
>
> A No. If I did I misconstrued it.
>
> Q We'll just scratch that answer.

(4 RT 299.)

The State not only fails to discuss this clarification, but it deletes the passage entirely form its long quotation of this portion of the record. (See RB 116.) The State's quotation cuts off the voir dire examination after this answer by Richard J.: "'And at this point in time, you say at this point in time, and that's my opinion, that *I might be biased.*'" (RB 116, quoting 4 RT 229 and adding italics.) The State then picks up the examination on the next page of the transcript. (RB 116, quoting 4 RT 230.) The State omits the exchange that places Richard J.'s "I might be biased" statement in context and shows that he is simply restating to the trial court its own question about whether he is biased based on his questionnaire answers. (4 RT 229.) Contrary to the mistaken suggestion in the State's strategic editing of the voir dire, Richard J. did not declare that he might be biased. Rather, he directly rejected any suggestion that he was biased, and the trial court, apparently was satisfied with his explanation, stated it would "scratch" his answer to the question he had misunderstood.[47]

Second, Richard J.'s preference and inclination for a sentence of life imprisonment without the possibility of parole did not render him substantially impaired under *Witt*. As explained in the opening brief, to be impartial, a prospective juror need not declare absolute neutrality on the death penalty. (AOB 232-233.) Such neutrality is simply not common in the real world nor required in the law. Certainly pro-death penalty views did not disqualify prospective jurors. (See AOB 235 and footnote 104 [discussing death-inclined prospective jurors.].) Yet, the trial court told

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[47] The State asserts that Richard J. told the trial court "no less than five different time during voir dire that he was biased" (RT 119), but offers no record citations to support its contention. The word "bias" appears in Richard J.'s voir dire three times: twice in the trial court's questions and once in Richard J.'s reference to the trial court's question as discussed above. (See, e.g., 4 RT 229.)

Richard J. that it did not want jurors "leaning one way or the other." (4 RT 229.) Being opposed to the death penalty often goes hand in hand with preferring a life-without-parole sentence. As noted with regard to the exclusions of Bobbie R. and Frances P., this Court has recognized that being opposed – even being firmly opposed – to the death penalty is not disqualifying under *Witherspoon/Witt*. (*People v. Avila, supra,* 38 Cal.4th at p. 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The State is simply wrong to suggest that the trial court's exclusion is substantially supported by the mere fact that Richard J. preferred a sentence of life without the parole to a sentence of death, especially in light of his unimpeached voir dire statement that "he could change [his] mind upon hearing the evidence" and "could vote for the death penalty . . . ." (4 RT 229.) His voir dire made clear that he was "willing to temporarily set aside [his] own beliefs and follow the law." (*People v. Avila, supra,* at p. 529; *Wainwright v. Witt, supra,* 469 U.S. at p. 421.) That is what is required to be an impartial juror in a capital case, and the trial court's exclusion of Richard J. was *Witherspoon/Witt* error.

Third, the State's deference argument should be rejected. (See RB 118-119.) To be sure, the high court in *Uttecht v. Brown, supra,* 551 U.S. at p. 9, underscored the deference owed to trial court determinations of demeanor and credibility in death-qualifying jurors. But since that decision, this Court has adhered to its rule that the trial court's assessment of a prospective juror's state of mind will generally be binding on the reviewing court only when "the juror's responses are equivocal and conflicting . . . ." (*People v. Salcido* (2008) 44 Cal.4th 93, 133, quoted in RB 118.) As explained in the opening brief, that rule does not apply here because, with the exception of a single misconstrued question that the trial court clarified to its satisfaction, Richard J.'s responses about his death penalty views were

not equivocal, conflicting, ambiguous, confused or evasive. (AOB 236-238.) Certainly, he was ambivalent about capital punishment, but he was direct, clear, and consistent in expressing his recent questioning of the death penalty, his preference for life without parole, and his ability to vote for a death sentence notwithstanding his reservations about capital punishment. (*Ibid.*) Although the State suggests, albeit only hypothetically, that Richard J.'s responses were equivocal, it does not substantiate its suggestions. (See RB 119 ["Even if Richard J.'s responses were, at times, equivocal ...."].) Being ambivalent about the death penalty is not the same as being equivocal in stating one's views about the ultimate punishment. Moreover, the deference rule "does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown, supra,* 551 U.S. at p. 20.) That is the error here: the trial court's finding that Richard J. was substantially impaired is not supported by the record as shown above and in the opening brief. (AOB 229-238.)

Finally, as in its response to the claim regarding the exclusion of Frances P., the State does not argue that Buenrostro in any way forfeited the claim regarding the exclusion of Richard J. Its recitation of the procedural facts, however, creates some confusion about the record by suggesting that defense counsel believed Richard J.'s voir dire responses were adequate to establish he was substantially impaired. (RB 117.) This is not a fair or reasonable reading of the record. After the voir dire of Richard J., the trial court asked the prosecutor if he had a challenge. (4 RT 230.)[48] When the

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[48] The relevant passage is as follows:

THE COURT: Mr. Soccio, is there a challenge?

MR. SOCCIO: There is, your Honor.

prosecutor replied affirmatively, the trial court started to exclude Richard J., at which point defense counsel interjected, "Your Honor, for the record, we do object and would like to be heard." (*Ibid.*)

The trial court acknowledged defense counsel's objection and request, excused Richard J., (4 RT 230), and continued with the voir dire of other prospective jurors (4 RT 230-238). This voir dire included Peter M., who believed a person who murdered small children should be sentenced to death. (4 RT 234.) Peter M. also stated it would be "real difficult" for him to be open to making the penalty determination based on weighing the evidence and the factors in aggravation and mitigation. (*Ibid.*) He was excluded on defense counsel's challenge. (4 RT 234-235.)

After the voir dire of these prospective jurors, the trial court gave defense counsel an opportunity to make a record of his objection to the exclusion of Richard J. Defense counsel stated:

> I'm going to submit the objection on Juror [Richard J.], based upon the Court's analysis when it excused Juror [Peter M.], I think the Court used the same standard in excusing what I would consider a prodeath penalty juror.[¶] So based on the Court's analysis, the defense is going to submit the question as to the excusal of Juror [Richard J.]

> THE COURT: All right, [Richard J.] --
>
> MR. GROSSMAN: Your Honor, for the record, we do object and would like to be heard.
>
> THE COURT: All right.
>
> Do you want to be heard? I'm going to excuse him, Mr. Grossman.
>
> [Richard J.], I'm going to excuse you.
>
> The Court finds based upon his answers, the Court feels he's substantially impaired.

(4 RT 230.)

(4 RT 238.) Fairly read, nothing in this statement withdrew or disavowed the objection to excusing Richard J. Rather, in light of the exclusion of Peter M., defense counsel apparently decided not to state his reasons for objecting to Richard J., and instead simply noted that the trial court appeared to apply the same standard to the exclusion of Richard J. and Peter M. If defense counsel was concerned that the trial erroneously excluded Peter M., he had reason not to press his arguments regarding Richard J., for fear that the trial court might revisit Peter M.'s exclusion. Contrary to State's interpretation, in deciding not to elaborate his objection, defense counsel did *not* agree that the trial court's exclusion of Richard J. was correct. (Contrast, *People v. Lynch*, *supra*, 50 Cal.4th at pp. 733-734 [after observing prospective juror's demeanor during voir dire, defense counsel's failure to object to exclusion may be considered circumstantial evidence that he concurred in trial court's assessment that the juror was biased].)

In sum, as with Bobbie R. and Frances P., there was no forfeiture of the *Witherspoon/Witt* claim regarding Richard J. Richard J.'s views were clear and consistent: he was ambivalent about the death penalty and before hearing any evidence leaned toward a sentence of life imprisonment without the possibility of parole, but he could listen to the evidence, change his mind, and vote for death. The record before the trial court did not provide sufficient evidence to support its finding that Richard J.'s ability to sit as a juror in Buenrostro's capital trial was substantially impaired. His erroneous exclusion, by itself and in combination with the exclusions of Bobbie R. and Frances P., requires a per se reversal of the death judgment. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668 and *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966.)

X. THE TRIAL COURT ERRED IN FAILING TO MAKE A CASE-SPECIFIC DETERMINATION ABOUT WHETHER LARGE GROUP VOIR DIRE WAS PRACTICABLE AND, IN THE ALTERNATIVE, IN DENYING BUENROSTRO'S REQUEST FOR INDIVIDUAL, SEQUESTERED VOIR DIRE

As Buenrostro sets forth in the opening brief, the trial court prejudicially erred in denying Buenrostro's unopposed request for individual sequestered ("*Hovey*") voir dire by failing to make the case-specific determination of the practicability of large group voir dire required by California Code of Civil Procedure section 223. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80; AOB 240-246.) Buenrostro demonstrates that the harms resulting from large group voir dire, both generic and case-specific, were present here. (AOB 245-247.) In the alternative, Buenrostro challenges the death qualification inquiry as insufficient to identify jurors who could not be impartial based on their views of the death penalty. (AOB 247-250.) In either case, reversal of the death sentence is required. (AOB 250.)

In response, the State counters that Buenrostro has forfeited her claim that the trial court erred in conducting group voir dire because she failed to raise a motion for attorney conducted sequestered voir dire. (RB 124-125.) On the merits, the State argues that the trial court did not abuse its discretion in conducting large group voir dire without a threshold determination of practicability (RB 125-126), and the death qualification inquiry was adequate to reveal potential biases that would form the basis for challenges for cause (RB 126-129). Finally, the State contends that any error was harmless. (RB 129-130.) The State's arguments are without merit.

The record is clear that Buenrostro first moved for individual, sequestered voir dire and later for augmented attorney questioning. (1 CT 147-155; 4 RT 277.) The record further shows that the trial court failed to engage in the statutorily-mandated practicability analysis, and that the resulting large group voir dire fostered wide exposure to tainting, disqualifying views of the death penalty as well as both the incentive and the opportunity for concealment of such views. Even putting aside this defect, the voir dire that the trial court did conduct was manifestly inadequate to uncover the types of bias on which Buenrostro was entitled to exercise challenges for cause. These prejudicial deficiencies in the conduct of voir dire, whether considered individually or cumulatively, require reversal of the death judgment in this case.

A. Because The Trial Court Made No Case-Specific Finding That Group Voir Dire Was Practicable In This Case, And Because This Court Is Not Unsuited To Make Such A Fact-Intensive Determination In The First Instance, Reversal Is Required

1. Buenrostro did not forfeit her claim

Contrary to the State's contention, the claim regarding the trial court's failure to make a case-specific determination of the practicability of group voir dire has been preserved for appeal. Buenrostro timely moved for individual, sequestered death qualification of the jury, which the prosecutor did not oppose. (AOB 240, citing (1 CT 147-155 and 3 CT 608-613.) Judge Sherman granted the motion in part and conducted what she described as "modified-*Hovey*" voir dire. Judge Sherman selected this method based on her prior practice, not on a case-specific determination of practicability. (2 P-RT 349-350; 2 CT 457.) After he took over the case, Judge Magers discarded the "modified-*Hovey*" approach, and instead

questioned groups of prospective jurors in the open presence of the entire panel.[49]

The State contends that it was incumbent upon Buenrostro to raise her motion for individual, sequestered voir dire when the jury selection process started anew under different procedures than those adopted by Judge Sherman. (RB 124.) However, when Judge Magers came into the case, the parties stipulated to "all the pretrial motions previously litigated and ruled upon by Department 62." (1 RT 2.) As defense counsel Macher explained, "[w]e had litigated all the motions that were filed and Judge Sherman had ruled upon those and we don't believe it is necessary to bring those rulings up anew at this point." (*Ibid.*) Defense counsel Grossman, and the prosecutor agreed. (*Ibid.*) This was consistent with a prior proposed agreement between the parties. (10 P-RT 1776-1777.) Defense counsel apparently and reasonably understood that the claims litigated in the pretrial motions were preserved for appeal. Judge Magers ruled that, "aside from the jury selection issue," he would adopt Judge Sherman's pretrial rulings "unless there's an objection otherwise." (1 RT 2.) Fairly read, this record shows that the legal claims and objections made in Buenrostro's pretrial motions were preserved for appeal.

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[49] In his initial jury-selection colloquy with counsel, Judge Magers described his procedures for qualifying the panels of potential jurors in terms of hardship. (1 RT 2-3.) The remaining jurors would then be provided questionnaires. (1 RT 3.) The first three days of jury selection focused on stipulated excusals for hardship and cause. (21 CT 5953-5955 [6/29/98], 1 RT 13-108; 32 CT 8932, 2 RT 111-133 [6/30/1998]; 35 CT 9829, 3 RT 134-157 [7/06/1998].) Actual jury selection did not begin until the fourth day of trial, at which point Judge Magers first explained his procedures for conducting voir dire. (3 RT 158-159.)

The State reads Judge Magers's statement as an invitation to renew motions related to jury selection procedures and as a requirement to reiterate motions that already had been presented and denied. (See RB 125.) That reading of the record ignores not only the understanding of the parties as discussed above, but what had transpired during the jury selection procedure before Judge Sherman. When Judge Magers referred to "the jury selection issue" (1 RT 2), he most likely meant the controversy that arose when Judge Sherman insisted that defense counsel Macher, who entered the case as second counsel, pick the jury in the absence of lead counsel Grossman, who was trying another murder case in another department of the same court. (See 1 P-RT 4; 4 P-RT 592-593, 658; 5 P-RT 679, 693-698; 7 P-RT 1112-1117, 1174-1180, 1185; 8 P-RT 1240; 9 P-RT 1434-1443, 1557-1563; 10 P-RT 1633-1639, 1740-1770.) This dispute led to Judge Sherman's decision to grant the defense motion to recuse herself. (10 P-RT 1831.) The case was reassigned to Judge Magers, who decided to accept the parties' proposal to stipulate to excuse the jury, which had been seated but not sworn, and begin jury selection anew (10 P-RT 1784-1797, 1841-1843, 1847.)[50] Rather than extend an invitation to renew Buenrostro's motion for individual, sequestered voir dire, Judge Magers's exception of "the jury selection issue" (1 RT 2) made clear that he was not following Judge Sherman's order that the jury be selected without the participation of lead attorney Grossman. Nothing in Judge Magers's ruling to abide by Judge Sherman's other pretrial orders indicated that he considered any of them, including those regarding the manner of voir dire, as tentative, provisional or open for reconsideration or that a renewed objection would

[50] In fact, 10 P-RT 1847 is not paginated, but it follows page 1846, so Buenrostro's counsel uses the next number for ease of reference.

be required to avoid a forfeiture.

Moreover, none of the cases cited by the State to support its forfeiture argument is apposite. The only jury selection case cited, *People v. Mayfield* (1997) 14 Cal.4th 668, is readily distinguished. (See RB 124.) In *Mayfield*, where the death-qualification voir dire was conducted *individually*, the defendant complained for the first time on appeal that prospective jurors had been called for questioning in alphabetical order, not randomly. (*Id.* at p. 728.) The Court declined to reach the claim because the defendant had raised no objection to the selection procedure at trial. (*Ibid.*) In contrast, in this case, an unopposed *Hovey* motion was timely filed and in the record for Judge Magers to consider when he replaced Judge Sherman during jury selection. (1 CT 147-155, 168-177; 1 RT 2.)

People v. Anderson (2001) 25 Cal.4th 543 and *People v. Samayoa* (1997) 15 Cal.4th 795, as the State's own synopses make clear, involved forfeitures in completely different contexts. (RB 124-125.) *Anderson* involved a *tentative* in limine ruling upholding a potential witness's assertion of marital privilege. (*Id.* at p. 581.) As noted by the State, as part of the ruling, the court outlined a procedure for obtaining a final determination of the issue if the witness were called and claimed the privilege. (*Ibid.*) *Samayoa* similarly related to a *provisional* ruling granting the prosecution's motion in limine to restrict certain cross-examination for the purpose at that point of guiding counsel during voir dire. (*Id.* at p. 827.) Here, in contrast, no evidentiary question or other ruling was deferred for later review. Rather, with respect to jury selection, Judge Magers announced his procedures and then immediately implemented them. (3 RT

158-159; 4 RT 190-191.)[51]

In short, there was no forfeiture in this case. Buenrostro's *Hovey* motion was before Judge Magers and he, no less than Judge Sherman, had a full opportunity to consider the alternatives for death qualifying the jury and to exercise his discretion under section 223. Accordingly, Buenrostro's claim of error for the trial court's failure to make the case-specific determination of practicality required by Code of Civil Procedure section 223 has been adequately preserved for appeal.

2. The trial court abused its discretion in conducting group voir dire without a determination of practicability pursuant to Code of Civil Procedure section 223

In pressing its forfeiture argument, the State contends that compliance with Code of Civil Procedure section 223 should be presumed because a finding that group voir dire was practical was implicit in the court's ruling, rejecting individual, sequestered voir dire. (RB 125, citing Evidence Code §§ 664, 666 [evidentiary presumption that official duty has been performed and the law obeyed].) This assertion appears to address the merits of Buenrostro's claim, rather than whether the claim is preserved for review. In any event, this same contention was rejected in *Covarrubias v.*

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[51] In light of Judge Magers's decision not to follow even the modified *Hovey* procedure adopted by Judge Sherman, it would have been, at best, a mere formality, or more likely, a futile gesture for Buenrostro to resubmit her motion at that juncture. (See *People v. Chatman* (2006) 38 Cal.4th 344, 380 [concluding that the lodging of further objections would be futile, and hence excused, where the court's rulings indicated it would generally admit the challenged line of questioning]; *People v. Hill* (1998) 17 Cal.4th 800, 820 [applying futility doctrine with regard to claim of prosecutorial misconduct].)

Superior Court (1998) 60 Cal.App.4th 1168, a decision that this Court has endorsed. (See *People v. Vieira* (2005) 35 Cal.4th 264, 288; *People v. Waidla* (2000) 22 Cal.4th 690, 713-714.)

Covarrubias made clear that where the court has failed to exercise its discretion in conformity with section 223 – to determine whether group voir dire is practicable under the particular circumstances of a case – the presumptions of regularity and obedience to the law set forth in Evidence Code section 664 and 666 do not apply. (*People v. Covarrubias*, *supra*, 60 Cal.App.4th at pp. 1182-1183.) In *Covarrubias*, the court refused to apply Evidence Code sections 664 and 666 to a case where the trial court had articulated general, but not particularized, reasons for proceeding by way of group voir dire. (*Id.* at p. 1182.) A fortiori, the evidentiary presumptions do not apply to this case, where the record is silent and reflects no exercise of the requisite discretion whatsoever. (*Ibid.* [holding that trial court that altogether fails to exercise its discretion to determine the practicability of group voir dire has not complied with its statutory obligation]; *People v. Vieira, supra,* 35 Cal.4th at p. 288.)

Expressly addressing the merits, the State argues that the trial court did not abuse its discretion because Buenrostro has identified at most potential, not actual, bias resulting from large group voir dire. (RB 125-126; *People v. Vieira*, *supra*, 35 Cal.4th at p. 287.) Granted, the risks identified in *Hovey* do not, in themselves, establish actual bias. However, Buenrostro has not merely demonstrated the presence in this case of these general risk factors, but also specified an array of prejudicial comments to which the entire panel of prospective jurors were exposed. (See AOB 246 [e.g., 4 RT 216, 224, 234, 244, 259, 271, 274].) Short of the impossible demand that a juror declare himself biased as a result of collective voir dire,

the panel's actual and repeated exposure to biased views favoring the death penalty, as occurred here, should suffice to establish actual prejudice and a reversible abuse of discretion.

Moreover, the mere fact that jurors were openly exposed to such biased views belies the State's assertion that the use of questionnaires preserved the confidentiality of the death qualification inquiry and accomplished the purposes of *Hovey* voir dire. (RB 126-127; cf. *People v. Waidla* (2000) 22 Cal.4th 690, 713.)[52] Nor does the use a jury questionnaire, which is a routine feature of every capital trial, satisfy the trial court's duty under Code of Civil Procedure section 223 to determine whether group voir dire is "practicable." If use of a jury questionnaire is sufficient to satisfy the requirement of a case-specific inquiry, then the inquiry means nothing at all. On this record, the jury selection procedure did not fulfill the purposes of individual, sequestered voir dire, and thus created the risk that the jury would not be impartial. And because, as explained previously, remand is not feasible, reversal of Buenrostro's death sentence is required. (See AOB 244-245.)

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[52] The limits of jury questionnaires were highlighted in the voir dire of prospective juror Richard J., who, as discussed above at pages 137-138, stated he did not intend one of his written answers in the questionnaire, but had misconstrued the question (4 RT 229), as well as in *People v. Brasure* (2008) 42 Cal.4th 1037, where a prospective juror observed, in explaining the difference between his oral response and his answer on the questionnaire, "I guess I didn't answer that one very good or the question was obscure" (*Id.* at p. 1052). A questionnaire thus may be an aid to voir dire, but it is no substitute for individual questioning.

B. The Trial Court's Inquiry Was Insufficient To Protect Buenrostro's Right To An Impartial Jury

Even if the trial court had made a case-specific determination that group voir dire was practicable, reversal of the death judgment still would be required because the trial court's questioning of prospective jurors was constitutionally inadequate to identify those jurors whom defense counsel legitimately could challenge for cause based on their views of the death penalty. (AOB 247-250.) In support of this argument, Buenrostro points to the trial court's use of leading questions that signaled the only acceptable answers and thus were unlikely to promote any circumspection or elicit any hidden bias. (AOB 248-249.) The State responds by arguing that the time allotted defense counsel for follow-up voir dire was sufficient to "'ferret out hidden biases.'" (RB 129, quoting *People v. Brasure* (2008) 42 Cal.4th 1037, 1050.) However, the bland, uninformative responses elicited by the judge-conducted voir dire would have left counsel in the dark about which jurors harbored deep-seated bias and which did not. The State's argument simply ignores the concern, central to *Hovey*, that voir dire in a group setting creates a serious impediment to discovering prospective jurors who cannot be impartial about the death penalty without exposing the partial juror's bias and thus risking that others will be tainted by his views. (See AOB 249, fn. 109.) Thus, irrespective of whether defense counsel was afforded a total of 30 or 40 minutes to question the panel, the death-qualification voir dire was inadequate and raises a serious doubt as to whether the penalty phase jury was impartial. (*Morgan v. Illinois* (1992) 504 U.S. 719, 738.)

C. Because The Trial Court's Voir Dire Was Constitutionally Inadequate, A New Penalty Phase Is Required

The State argues that Buenrostro was not prejudiced by the trial court's voir dire because she "has not alleged, nor can she prove, that any of the persons who ultimately sat on her jury were incompetent or impartial." (RB 129-130.) This, however, is not the standard for assessing prejudice for this claim. On the contrary, as noted above and in the opening brief, where a trial court's voir dire is inadequate to assure the impartiality of a penalty phase jury to which a capital defendant is entitled, reversal of the penalty phase is required. (See AOB 247-248, 250; *Morgan v. Illinois*, *supra*, 504 U.S. at p. 738; *Turner v. Murray* (1986) 476 U.S. 28, 37-38.)

The State ignores *Morgan* and *Turner* and, instead, cites *People v. Bittaker* (1989) 48 Cal.3d 1046. (RB 129.) But *Bittaker* does not support the State's position at all. In that case, during voir dire the answers of two prospective jurors about the death penalty gave defense counsel "reason to believe the jurors [should be] disqualified . . .." (*Id.* at p. 1083.) After the trial court erroneously limited defense counsel's ability to question these two prospective jurors, defense counsel exercised peremptory challenges to discharge them, and neither sat on the jury. On this record, the Court held there was no need for a new penalty phase. (*Id.* at pp. 1085-1086, discussing *Ross v. Oklahoma* (1988) 487 U.S. 81.)

Bittaker does not apply here. This case does not involve limiting defense counsel's ability to question prospective jurors who were discharged anyway. Like *Morgan* and *Turner*, this case involves limiting defense counsel's ability to ensure that the penalty phase jury as a whole was impartial. The State's implicit invitation for this Court to ignore both *Morgan* and *Turner* should be declined. As a result of the error here, the death judgment in this case cannot stand.

XI. THE TRIAL COURT ERRONEOUSLY DENIED BUENROSTRO'S REQUEST TO REPRESENT HERSELF

As shown in the opening brief, the trial court erred in denying Buenrostro's request for self-representation as untimely, not made in good faith, and taken to obstruct or delay the trial. (AOB 251-281; 7B RT 700, 704-705.)[53] First, Buenrostro challenges the constitutionality of California case law conditioning the right to self-representation on the timing of the request. (AOB 251-263; compare *People v. Windham* (1977) 19 Cal.3d 121, 128-129 with *Faretta v. California* (1975) 422 U.S. 806.) Buenrostro maintains that the only constitutionally permissible ground for denying self-representation is that proceeding pro se will seriously and unjustifiably disrupt or obstruct the trial. (AOB 254-263.) Second, Buenrostro demonstrates that granting her *Faretta* motion would not have delayed, disrupted or otherwise obstructed the proceedings. (AOB 266-268.) As such, neither federal constitutional law nor the record support the trial court's reflexive dismissal of Buenrostro's assertion of her right to represent herself. Finally, Buenrostro shows that even if *Windham* were not inconsistent with *Faretta*, the trial court still would have abused its discretion in denying her self-representation motion (AOB 269-275), and even under the state law harmless error test, reversal is required (AOB 276-281).

The State fails to respond to much of Buenrostro's argument. It completely ignores Buenrostro's contention that her Sixth Amendment right to self-representation did not, as the trial court presumed, evaporate at the impanelment of the jury. In addition, although the State acknowledges the rule of per se reversal for *Faretta* error (RB 132-133), it fails to respond to

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[53] This Court's order unsealing certain sealed transcripts is summarized, *ante* at pages, 4-5, footnote 1.

Buenrostro's argument that the view of some intermediate courts of appeal that *Windham* error is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818 is wrong, and even under that approach, the denial of her request to represent herself was prejudicial.

The State also makes no effort to support the trial court's actual finding that Buenrostro's motion was "certainly designed to obstruct or delay" the proceedings. (7B RT 700; see 7B RT 704 [repeating finding].) This finding is, in fact, insupportable. Buenrostro did not condition her request for self-representation on a continuance. On the contrary, when asked, she told the trial court she was able to proceed that day "without any further delay" to represent herself. (*Ibid.*) Although her attorneys opposed her *Faretta* request, defense counsel Grossman made clear that Buenrostro was not trying to delay the trial and "never expressed any desire to continue the case at all." (7B RT 701.) Moreover, despite her conflicts with counsel, which Grossman described as placing them "almost at total loggerheads" (*ibid.*), Buenrostro always had maintained her composure in the courtroom and only had been heard to yell at counsel once *in private*. (7B RT 700.)

Rather than respond to these arguments, the State counters formulaically that Buenrostro's *Faretta* motion was properly denied because it was untimely and unequivocal. (RB 130-136.) Its arguments are without merit. With regard to the timeliness question, the State simply asserts that the motion was properly denied because it was not brought, as required under *Windham*, within a reasonable time prior to the commencement of trial. (RB 134, citing *People v. Windham*, *supra*, 19 Cal.3d at p. 128.) But even under *Windham*, the untimeliness of the request does not, standing alone, defeat self-representation. The trial court, and this Court on review, still must consider the other factors specified in *Windham*.

(*Ibid.*)[54] In her opening brief, Buenrostro demonstrates that under these criteria, the trial court abused its discretion in denying her *Faretta* motion. (AOB 269-275.) Responding to none of this analysis, the State tacitly concedes that these *Windham* factors do not support the trial court's ruling.

Moreover, as the State itself notes, the purpose of the timeliness requirement is to "'prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.'" (RB 133, quoting *People v. Doolin* (2009) 45 Cal.4th 390, 454 [*Faretta* request was made after death verdict on day of sentencing].) The Court emphasized this very point in *People v. Lynch* (2010) 50 Cal.4th 693, when explaining the rationale for its new "totality of the circumstances" rule for determining the timeliness of a pretrial *Faretta* motion, which echoes *Windham*'s multi-factor approach for deciding a midtrial motion. (*Id.* at p. 726.) As Buenrostro has established and the State does not contest, her request to represent herself was *not* made to obstruct or delay her trial, which would have continued without interruption had her motion been granted. That fact goes a long way to establish that, even under *Windham*, the trial court abused its discretion in denying her *Faretta* motion.

Although the trial court made no such finding, the State now contends that Buenrostro's request to relieve counsel was not unequivocal. (RB 134-135.) The State acknowledges, as it must, that Buenrostro repeatedly and unqualifiedly stated that she wished to represent herself. (RB 134, citing 7B RT 700, 703.) Nevertheless, the State argues that

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[54] These factors are familiar to this Court: "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

Buenrostro should not be taken at her word because she made her motion out of frustration with her attorneys for their refusal to present her theory of the case. (RB 134-135.) The record, however, establishes to the contrary that Buenrostro was not ambivalent about seeking self-representation, nor was her request made in passing anger or frustration.

Buenrostro's frustration and dissatisfaction with defense counsel was longstanding and based on mounting strategic conflicts, as they themselves reported. On May 4, 1998, defense counsel first informed the court that Buenrostro had prepared her own defense, one that counsel rejected, and that Buenrostro was ready to represent herself. (2A RT 304.) However, when Buenrostro explained her position, she made clear that she was not moving for a new attorney or for self-representation. (2-A RT 306, 308.) Rather, Buenrostro requested additional time to consider these alternatives. (2-A RT 307.) Nevertheless, the trial court ruled that to the extent Buenrostro had brought a *Marsden* motion, it was denied, and to the extent it was a *Faretta* motion, it also was denied. (2A RT 311-312.)

Thereafter, over several days preceding her *Faretta* motion, Buenrostro continued to bring her dissatisfactions with counsel to the court's attention. (6A RT 662-665.) It was only after hearing in court a tape recording of her police interrogation, which her attorneys had not played for her previously and she believed to be fraudulent, that Buenrostro finally moved definitively to represent herself. (7A RT 691-692; 7B RT 696 [line 18]- 706.) However, Buenrostro's invocation of her right to self-representation was not a momentary, impulsive reaction, but resulted, in her attorney's words, from a "continuing problem that [was] exacerbated every day there [was] more testimony." (7A RT 692.)

That was not the case with the *Faretta* motion in *People v. Marshall* (1997) 15 Cal.4th 1, on which the State relies. (RB 135.) In *Marshall,* the

defendant had been granted and then relinquished pro se status when the trial court would not appoint cocounsel of the defendant's choosing. (*People v. Marshall*, *supra*, at p. 15.) Later, the defendant renewed his request to represent himself because he was upset over the court's order, on defense counsel's motion, that the defendant supply biological samples. (*Id.* at p. 25.) Although the defendant articulated a wish to "take the pro per status," it was only a small part of a statement that was "rambling and laced with requests for time to think and allusions to extraneous matters." (*Ibid.*) When considered with the defendant's maneuvers to avoid being required to supply the samples, the court concluded that the statement "does not convey an unmistakable desire to forego counsel and resume the duties defendant had found impossible to shoulder earlier in the proceedings." (*Ibid.*) Unlike the defendant in *Marshall*, Buenrostro had not been granted and then abandoned self-representation, nor was her *Faretta* request an impromptu tactic undertaken for reasons other than the desire to take control of her defense and represent herself.

Moreover, Buenrostro's subsequent actions confirmed that her *Faretta* motion was brought in good faith for the sole purpose of presenting her theory of the case to the jury. As defense counsel reported to the court, when they refused to accede to Buenrostro's request that they challenge the validity of the tape recording, she responded that she would be forced to do so either by testifying or managing the case herself. (7B RT 698.) When the court foreclosed the latter option, Buenrostro, without delay or disruption of the trial, pursued the first alternative; she testified and to disastrous effect. (10 RT1038 et seq. [guilt phase] and 12 RT 1303 et seq. [penalty phase].)

It is apparent that Buenrostro's attorneys distanced themselves from her testimony. In his closing argument at the guilt phase, defense counsel

Macher quickly acknowledged Buenrostro's testimony and then based his argument on a different version of the facts than she had presented. (10 RT 1102.) At the penalty phase, defense counsel Grossman elicited from Buenrostro that she was testifying against the advice of counsel (12 RT 1303), and her conflict with them ended up on display during her testimony (12 RT 1305-1308).

Buenrostro's attorneys could not be compelled to present Buenrostro's theory of defense, and Buenrostro could not be compelled to forego her own testimony. The obvious resolution of this conflict, consistent with *Faretta* and the Sixth Amendment, would have been to grant Buenrostro's motion for self-representation. Instead, by rejecting her motion, the trial court ensured that the jury would be made aware that her own attorneys disbelieved Buenrostro and were hostile to her defense. In this way, to her substantial detriment Buenrostro was denied both the advocacy of her attorneys and the right to represent herself.

Finally, contrary to the State's suggestion, the wisdom of Buenrostro representing herself in light of the constitutional right to effective assistance of counsel, has no bearing on whether there was *Faretta* error. (See RB 134, 135.) It is well-settled that a defendant's right to self-representation outweighs her right to skilled or effective advocacy. (*People v. Blair* (2005) 36 Cal.4th 686, 739-740, citing *Faretta*, *supra*, 422 U.S. at p. 834.) There is a reason for this rule. Although both the right to counsel and the right to self-representation emanate from the Sixth Amendment's Counsel Clause, they serve distinct interests. The right to counsel exists "to ensure that criminal defendants receive a fair trial" (*Strickland v. Washington* (1984) 466 U.S. 668, 689), which is a trial leading to a just and reliable result. (*Id.* at pp. 685- 687; accord, *United States v. Cronic* (1984) 466 U.S. 648, 658 [the right to counsel "is recognized not for its own sake, but

because of the effect it has on the ability of the accused to receive a fair trial"].) On the other hand, the right of self-representation does not emanate from the concern for a fair trial. It is the right "to make one's own defense personally" (*Faretta v. California, supra*, 422 U.S. at p. 819) and "exists to affirm the dignity and autonomy of the accused . . . ." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 176-177). Contrary to the State's intimation, the trial court's alleged concern for Buenrostro's right to effective assistance of counsel cannot justify its decision to deny her right of self-representation.

In sum, the trial court's denial of Buenrostro's motion for self-representation was based on no valid ground and violated the Sixth and Fourteenth Amendment to the federal Constitution as well as this Court's rule in *People v. Windham, supra*, 19 Cal.3d 121. Accordingly, a per se reversal of the entire judgment is required.

XII. THE INSTRUCTIONS ON THE DEGREE OF MURDER AND THE INSTRUCTION ON MOTIVE IMPERMISSIBLY DILUTED AND UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In her opening brief, Buenrostro argues that the trial court's instructions to the jury on the degree of murder and on motive diluted the prosecution's burden of proof. (AOB 282-292.) Preliminarily, the State contends that Buenrostro has forfeited these arguments for failure to raise objections to the challenged instructions. (RB 136.) But Buenrostro already anticipated and disposed of that argument, relying on Penal Code section 1259, which provides that a legally erroneous instruction affecting the defendant's substantial rights is reviewable without the requirement of objection at trial. (AOB 283, fn. 127; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) In addition, this Court rejected a related invited-error argument with regard to a similar challenge to CALJIC Nos. 8.71 and 8.72 in *People v. Moore* (2011) 51 Cal.4th 386, 410.

This Court's recent decision in *Moore* also shows that Buenrostro's claim of error regarding CALJIC No. 8.71 (6th ed. 1996) is meritorious. The defendant in *Moore* argued, as Buenrostro argues here, that this version of the instruction violated federal constitutional due process and jury trial rights by suggesting to jurors that they must return a verdict on the greater offense unless they unanimously doubted whether it had been proven. (See AOB 287-288.) In the words of the defendant in *Moore*:

> "a juror who believed that [defendant] was guilty of some offense, but not necessarily first degree murder, would also believe that first degree murder must apply in the face of any disagreement. In other words, first degree murder became the default verdict."

(*People v. Moore*, *supra*, 54 Cal.4th at p. 410.) Agreeing with Moore, this Court concluded that "the better practice is not to use the 1996 revised

versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter." (*Id.* at p. 411.) The Court further observed that the language referring to unanimity in these instructions was unnecessary because "CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser." (*Id.* at pp. 411-412.)

The 1996 version of CALJIC No. 8.71 was used at Buenrostro's trial, just as it was used at Moore's trial. However, the potential that the instruction misled the jury was greater in this case than in *Moore* because the jury here was not instructed in the final clause of CALJIC No. 8.71[55] or in any part of CALJIC No. 8.75,[56] which were given in *Moore*. These

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[55] The jury in Buenrostro's trial was given everything *except* the bracketed portion of the 1996 version of CALJIC No. 8.71 (10 RT 1126), which read as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree [as well as a verdict of not guilty of murder in the first degree].

The jury was not given CALJIC No. 8.72.

[56] At the time of the trial, CALJIC No. 8.75 (6th ed. 1996) read as follows:

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder [as charged in Count[s] ____] and you unanimously so find, you may convict [him] [her] of any lesser

(continued...)

[56](...continued)
crime provided you are satisfied beyond a reasonable doubt that [he] [she] is guilty of the lesser crime.

You [will be] [have been] provided with guilty and not guilty verdict forms [as to Count[s] ____] for the crime of murder in the first degree and lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. [[Voluntary] [and] [Involuntary] manslaughter [is] [are] lesser to that of murder in the second degree.]

[Disregard the instruction previously given which requires that you return but one verdict form as to this count.]

Before you return any final or formal verdicts, you must be guided by the following:

1. If you unanimously find a defendant guilty of first degree murder, [as to Count[s] ____], your foreperson should sign and date the corresponding guilty verdict form. All other verdict forms [as to Count[s] ____] should be left unsigned.

2. If you are unable to reach a unanimous verdict as to the charge [in Count[s] _____] of first degree murder, do not sign any verdict forms [as to that Count], and report your disagreement to the court.

4. If you find a defendant not guilty of murder in the first degree [as to Count[s] ____] but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the not guilty of murder in the first degree form, and should report your disagreement to the court. Do not sign any other verdict forms.

5. If you unanimously find a defendant not guilty of first degree murder, but guilty of second degree murder, your foreperson should sign and date the corresponding verdict forms. Do not sign any other verdict forms [as to that Count].

6. The court cannot accept a verdict of guilty of [voluntary] [or] [involuntary] manslaughter unless the jury also unanimously finds and returns a signed not guilty verdict form as to both murder of the first degree and murder of the second degree.

7. If you unanimously find a defendant not guilty of murder in the first degree, and not guilty of, murder in the second degree, but are unable to unanimously agree as to the crime of [voluntary] [and/or]

(continued...)

instructions indirectly (CALJIC No. 8.71) and directly (CALJIC No. 8.75) tell the jury that it must unanimously find and return a verdict of not guilty as to first degree murder before the court can accept a verdict of guilty of second degree murder.

To appreciate the misleading potential of the instructions, the Court need only envision a likely scenario in the jury room in this case. Assume the jurors all agree that the prosecution has proved murder beyond a reasonable doubt, but they are divided about whether the prosecution has proved premeditation and deliberation beyond a reasonable doubt with a majority finding the elements for first degree murder proved. For the sake of simplicity, assume the hypothetical division is 11 jurors finding premeditation and deliberation and 1 juror having reasonable doubts about whether premeditation and deliberation are established, although the same analysis would apply with additional jurors in the minority. The jurors know from CALJIC No. 1.00 that they are to find the facts and apply the law to the facts according to the judge's instructions. (35 CT 9877; 10 RT 1125-1126.) They know from CALJIC No. 17.40, that each of them must decide the case for himself or herself, "but should do so only after discussing the evidence and instructions with other jurors." (35 CT 9923; 10 RT 1144.) They also know from CALJIC No. 17.40 that they should "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision," but, at the same time, they should "not hesitate to change an opinion if you are convinced it is wrong." (35 CT 9923; 10 RT 1144.)

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[56](...continued)
[involuntary] manslaughter, your foreperson should sign and date the not guilty verdict form for first and second degree murder, and you should report your disagreement to the court.]

The jurors look to the instructions for guidance in resolving their disagreement about the degree of murder. They find three instructions – versions of CALJIC Nos. 8.70, 8.71, and 8.74. (35 CT 9912-9914; 10 RT 1140-1141.) None of these instructions tells them how to approach their situation. CALJIC No. 8.70 tells the jurors they must determine whether the murder is first or second degree, and CALJIC No. 8.74 tells them they must agree unanimously as to the degree.[57] Without CALJIC No. 8.75, they are not given a roadmap for figuring out which verdict to return or whether to report a disagreement. Moreover, without CALJIC No. 8.75, and without the final portion of CALJIC No. 8.71, the jurors are not informed of the basic principle that they cannot return a guilty verdict on the lesser offense, second degree murder, unless they first agree unanimously that Buenrostro was not guilty of the greater offense, first degree murder. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329.)

The jury turns to the remaining instruction on setting the degree of murder, the confusing CALJIC No. 8.71. The jurors know they have satisfied its introductory clause – they unanimously agree Buenrostro committed murder, which means at least second degree murder. They then encounter the clause of the instruction that *Moore* found confusing. The jurors do *not* "unanimously agree that [they] have a reasonable doubt whether the murder was of the first or of the second degree," which is the

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[57] As set forth in the opening brief, the instruction given pursuant to CALJIC No. 8.74 did not alleviate, but rather compounded, the problem created by the flawed CALJIC No. 8.71. (AOB 286.) Indeed, the requirement in CALJIC No. 8.74 that the jurors "must agree unanimously as to whether [Buenrostro] is guilty of murder of the first degree or murder of the second degree" (10 RT 1141) implied an equivalency of both degrees of murder that conflicts with the default status of second degree murder compelled by Penal Code section 1097, *People v. Dewberry* (1959) 51 Cal.2d 548, 554, and *In re Winship* (1970) 397 U.S. 358, 364.

precondition for giving Buenrostro "the benefit of that doubt" and returning a verdict of second degree murder. (35 CT 9913; 10 RT 1141.)

The minority juror knows he has a reasonable doubt about the proof of premeditation and deliberation. This is a factual finding that, under CALJIC No. 1.00, is his to make based on his own view of the evidence. (35 CT 9877; 10 RT 1125-1126.) The question is what consequence flows from his decision about the facts. That is determined by the law which, as he knows from CALJIC No. 1.00, is given by the trial court in its instructions. In fact, CALJIC No. 1.00 goes further. It tells the juror: "You must accept and follow the law as I state it to you, regardless of whether you agree with the law." (35 CT 9877; 10 RT 1126.) He returns to CALJIC No. 8.71. In discussion with the other jurors (or perhaps reading the instruction on his own without the benefit of group discussion), the minority juror understands the "unanimously agree that you have a reasonable doubt" language as stating that, as a matter of law, he cannot give effect to his reasonable doubt – and thus return a benefit-of-the-doubt verdict of second degree murder – because his doubt is not shared unanimously by the other jurors.

The minority juror's dilemma does not end here. He still does not know what to do. Nothing in either CALJIC No. 8.71 or any other instruction on degree setting tells him that, in this situation, the proper course of action is not to return any verdict and inform the court of the jury's disagreement as to the charge(s) of first degree murder. The juror looks at CALJIC No. 8.74.[58] It reenforces that the jury must be unanimous as to the

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[58] The instruction under CALJIC No. 8.74 read:

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

(continued...)

degree of murder. Looking once more at the "unanimously agree that you have a reasonable doubt" language, the minority juror concludes that a second degree murder verdict is impossible, and following the only alternative he sees, he surrenders his own reasonable doubt about premeditation and deliberation and votes for first degree murder.

As this scenario illustrates, there was an even greater potential in this case than in *Moore* that the jury was reasonably likely to have understood and applied CALJIC No. 8.71 in an unconstitutional manner. Not only was the instruction confusing, but the jury here was given no guidance, whether by the concluding clause of CALJIC No. 8.71 or the detailed CALJIC No. 8.75, that at least would have informed the jury that the "benefit of the doubt" instruction in CALJIC No. 8.71 did not come into play unless and until the jury unanimously agreed that Buenrostro was not guilty of first degree murder. In *Moore*, the Court specifically noted this aspect of both instructions. (*People v. Moore*, *supra*, 54 Cal.4th at p. 411.)

In *Moore*, this Court did not decide whether the possibility of confusion in CALJIC No. 8.71 "is adequately dispelled by instruction with CALJIC No. 17.40 on the jurors' duty of individual decision," as the Third District Court of Appeal found in *People v. Gunder* (2007) 151 Cal.App.4th 412, 425 and *People v. Pescador* (2004) 119 Cal.App.4th 252, 255-258. (*People v. Moore*, *supra*, 54 Cal.4th at p. 412.) The Court of Appeal, of course, did not have the benefit of the decision in *Moore* finding that CALJIC No. 8.71 was potentially confusing. The courts in *Gunder* and

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[58](...continued)
she is guilty of murder of the first degree or murder of the second degree.

(10 RT 1141.)

Pescador relied in part on CALJIC No. 17.40 to reject the reading of the instruction that this Court found meritorious in *Moore* and that Buenrostro presents here. (*People v. Gunder*, *supra*, at p. 425; *People v. Pescador*, *supra*, at p. 257.)[59] Thus, they did not decide whether instruction under CALJIC No. 17.40 could cure the defect in CALJIC No. 8.71. In Buenrostro's view, it does not.

To be sure, CALJIC No. 17.40 in this case directed the jury "do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (35 CT 9923; 10 RT 1144; see *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425; *People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257)[60] But in focusing on this part of the instruction, the court in *Gunder* ignored the rest. The other portions of CALJIC No. 17.40 make clear that each juror's individual decision should be made "only after

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[59] *People v. Pescador*, *supra*, 119 Cal.App.4th at p.257 also relied on the fact that the jury was instructed under CALJIC No. 8.50 and CALJIC No. 17.11. (*People v. Pescador*, *supra*, 119 Cal.App.4th at pp. 257-258.) Buenrostro's jury was not similarly instructed. Defense counsel's request for CALJIC No. 17.11 was refused. (35 CT 9941.)

[60] The jury at Buenrostro's trial was instructed pursuant to CALJIC No. 17.40 as follows:

> The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(35 CT 9923; 10 RT 1144.)

discussing the evidence and instructions with the other jurors" and explicitly instruct the jurors, "[d]o not hesitate to change an opinion if you are convinced it is wrong." (35 CT 9923; 10 RT 1144.) As directed, the jury here would have considered the instruction "as a whole" and would not have "single[d] out any particular sentence . . .and ignore[d] the others." (35 CT 9879; 10 RT 1127 [CALJIC No. 1.01].) Applying CALJIC No. 17.40 in its entirety, the minority juror in the scenario set forth above would not have been convinced he could stick to his position that there was reasonable doubt as to premeditation and deliberation, but rather, as explained above, would have become persuaded that he could not give effect to his view and had to join the majority in voting for first degree murder. The instruction does not dispel the confusion resulting from CALJIC No. 8.71.

Finally, in contrast to *Moore*, the special circumstance verdicts in this case do not provide a basis for concluding that the jury unanimously convicted the defendant of first degree murder on a legal theory and instructions that were *not* affected by the confusing language in CALJIC No. 8.71. In *Moore*, this Court held that any instructional error was harmless beyond a reasonable doubt because the jury's true findings on the burglary-murder and robbery-murder special circumstances established that the jury must also have found the defendant guilty of first degree murder on those felony-murder theories. (*People v. Moore*, *supra*, 54 Cal.4th at p. 412.) Because felony murder during burglary or robbery can only be in the first degree, the jury's unanimous verdict on first degree felony murder would not be affected by the confusing degree-setting instruction. But that is not the case here.

Certainly, the instructions on the multiple-murder special circumstance required that "[the] defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of

murder of the first or second degree." (35 CT 9917; 10 RT 1141-1142.) The multiple-murder special circumstance verdicts thus indicated that the jury had found Buenrostro guilty of first degree murder. But they rested on the very same premeditated and deliberated murder theory as the first degree murder convictions themselves. That was the only theory of first degree murder presented to the jury. The special circumstance findings simply confirm what the jury found in returning the first degree murder verdicts. As such, the multiple-murder special circumstance verdicts do not present a basis independent of the first degree premeditated murder convictions – one unaffected by the confusing degree-setting instruction – for finding that the defect in the CALJIC No. 8.71 instruction was cured or harmless beyond a reasonable doubt.[61]

In its response to Buenrostro's claim, filed before *Moore* was decided, the State does not rely specifically on CALJIC No. 17.40, but refers to numerous other instructions which it asserts correctly informed the jury that to convict of first degree murder, it had to agree unanimously that the prosecution had proved premeditation and deliberation beyond a reasonable doubt. (RB 137-140.) However, none of the listed instructions, either individually or collectively, directly or impliedly, counteracted the problem with CALJIC No. 8.71 identified in *Moore*. (See RB 138.) The instructions on reasonable doubt in general and on the sufficiency of circumstantial

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[61] Although in *Moore* the Court found that the special circumstance verdicts rendered any error harmless under *Chapman v. California*, *supra*, 386 U.S. at p. 24, Buenrostro believes that the special circumstance verdicts in *Moore* established there was no error. The unanimous first degree felony murder finding necessary for the those verdicts established that, in fact, there was no reasonable likelihood that the jury understood and applied CALJIC No. 8.71 in an unconstitutional manner. (See *People v. Moore*, *supra*, 54 Cal.4th at p. 410 [stating standard].) Under either formulation, the special circumstance verdicts in this case did remedy the error or render it harmless.

evidence do not remedy the more specific, confusing instruction on reasonable doubt as to degrees of murder in CALJIC No. 8.71. As the scenario described previously shows, a juror who has reasonable doubt as to the elements for first degree murder and is in need of guidance most likely and reasonably will look to the specific, but confusing, CALJIC No. 8.71 on degree setting (35 CT 9913), rather than general instructions addressing reasonable doubt in other contexts. (See *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect to element, more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 and n.8 [in determining how jurors would understand a series of instructions, "the more specific charge controls over the general charge"].)

None of the cases on which the State relies addresses the confusing and inconsistent directives of the CALJIC instructions underlying Buenrostro's claim. *People v. Dewberry*, *supra*, 51 Cal.2d 548, of course, supports Buenrostro's argument in mandating the "benefit of the doubt" with respect to all crimes with lesser degrees or included offenses. (*Id.* at p. 556; see RB 141-142.) The only other cases the State cites, *People v. St. Germain* (1982) 138 Cal.App.3d 507 and *People v. Friend* (2009) 47 Cal.4th 1, did not involve the confusing CALJIC No. 8.71 given at Buenrostro's trial, and simply found CALJIC No. 17.10, as given in each case, was sufficient to communicate the statutory and judicial benefit-of-the-doubt principle. (*People v. St. Germain*, *supra*, at p. 522; *People v. Friend*, *supra*, at p. 55.)

In short, the State has not rebutted Buenrostro's showing that the jury was not properly instructed with regard to setting the degree of murder. In light of these deficiencies in CALJIC No. 8.71, now supported by the

Court's decision in *Moore*, and the exacerbating effect of CALJIC No. 8.74, there is a reasonable likelihood that the jury applied the instructions about the degree of murder on a standard that is less than the constitutional requirement of proof beyond a reasonable doubt in violation of the due process clause of the Fourteenth Amendment. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

In addition, as set forth in the opening brief, the instruction on motive pursuant to CALJIC No. 2.51 further undermined the requirement of proof beyond a reasonable doubt. (AOB 289-291.) Contrary to the State's contention (RB 144-145), this claim is not forfeited, but is reviewable on appeal under section 1259. Moreover, in light of this Court's repeated rejection of the same claim on the merits in other cases, Buenrostro has explained that she is raising the claim to preserve it for possible federal court review. (AOB 291.) The State counters with a discussion of the Court's decision rejecting the claim. (RB 145-147.) Accordingly, the issue is joined and needs no further elaboration. (See RB 144-145.)

Finally, instructing the jury in CALJIC No. 8.71, by itself or in combination with instructing in CALJIC Nos. 8.74, and 2.51, requires reversal under the federal Constitution. As discussed in the opening brief, the central, disputed issue a the guilt phase was whether the homicides were first or second degree murders. The defense disputed the prosecution's circumstantial evidence of premeditation and deliberation and argued for second degree murder convictions. (10 RT 1103-1110.) Although the prosecutor argued that the evidence established premeditation and deliberation, he plainly stated that the murders resulted from an "explosion of [Buenrostro's] anger (10 RT 1119), which a juror could have found gave rise to reasonable doubt about first degree murder. Moreover, there was a basis for doubt about Buenrostro's rationality at the time of the killing – a

doubt sufficient to warrant second degree murder verdicts under due process and the *Dewberry* standard. Guiding the jury on this key issue, the confusing and misleading instruction under CALJIC No. 8.71, along with CALJIC Nos. 8.74 and 2.51, was prejudicial because the prosecution cannot prove beyond a reasonable doubt that the instructions did not contribute to the first degree murder verdicts. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The entire judgment must be reversed.

XIV. THE TRIAL COURT ERRONEOUSLY ADMITTED VICTIM IMPACT EVIDENCE AND ERRONEOUSLY REFUSED TO GIVE A CAUTIONARY INSTRUCTION AS TO ITS USE

In her opening brief, Buenrostro presents several claims of error with regard to the victim impact evidence admitted at her penalty trial. (AOB 297-331.) The State disputes all of them. (RB 151-173.) Some issues are now fully joined and need no further discussion. (See AOB 299-300 [arguing that *Payne v. Tennessee* (1991) 501 U.S. 808 was wrongly decided]; AOB 300-306 [arguing that under circumstances of this filicide case, victim impact evidence should not have been admitted]; AOB 306-316 [challenging the admission of videotaped victim tribute]; and AOB 324-326 [challenging the rejection of the requested defense instruction] .) On other issues, Buenrostro presents the following reply.

A. The Court Should Reconsider Its "Anything Goes" Approach To Victim Impact Evidence

In defending the admission of victim impact evidence in this case, the State relies on the plain fact that in California, there is virtually no limit to the use of victim impact evidence as an aggravating factor at the penalty phase of a capital trial. (See RB 155-156.) After the high court decided *Payne v. Tennessee* (1991) 501 U.S. 808, this Court opened the door to victim impact evidence in *People v. Edwards* (1991) 54 Cal.3d 787. *Edwards* involved extremely circumscribed victim impact evidence – three photographs of the two 12-year-old victims as they appeared shortly before the murder and attempted murder. (*Id.* at p. 832.) Over vigorous dissenting views, the Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Id.* at p. 835.) The Court advised, "[w]e do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily

includes all forms of victim impact evidence and argument allowed by *Payne*, *supra*, 501 U.S. 808 . . . ." (*Id.* at pp. 835-836.)

At the same time, the Court cautioned in *Edwards* that its holding "does not mean there are no limits on emotional evidence and argument." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The Court adhered to its prior law that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason," as well as its requirement that "'[i]n each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial'" and curtail "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*Id.* at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.) More recently, the Court reiterated these principles in *People v. Panah* (2005) 35 Cal.4th 395, 495.

Since *Edwards*, the Court has not adhered to its stated standard and incrementally has expanded the scope of victim impact evidence by affirming death sentences over challenges to all sorts of victim impact evidence. Rejecting bright-line restrictions, the Court has approved victim impact evidence from witnesses other than the murder victims' relatives or people present during the crime (see RB 162, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1183), by more than a half-dozen witnesses (*People v. Huggins* (2006) 38 Cal.4th 175, 237), regarding circumstances not known or foreseeable to the defendant at the time of the crime (*People v. Hamilton* (2009) 45 Cal.4th 863, 928-929), about specific traits and activities of the victim, including a recording of sad songs about loss of a loved one sung by the victim for her father shortly before she was murdered (*People v. Verdugo* (2010) 50 Cal.4th 263, 297, 298-299), and in the form of videotaped memorial tributes set to music, including views of the

victim's grave (see AOB 312-313 and RB 165, citing *People v. Kelly* (2007) 42 Cal.4th 763, 797 and *People v. Zamudio* (2008) 43 Cal.4th 327, 363-367). The Court has issued only one admonition, but no restrictions, regarding victim impact evidence. As the State notes, the Court has advised that trial courts should exercise caution in admitting "a lengthy videotaped or filmed tribute to the victim" that "emphasizes the childhood of an adult victim, or is accompanied by stirring music." (RB 164, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1289.) In short, California's de facto position on victim impact evidence, as prosecutors and trial courts surely must perceive, is that, as the Cole Porter song declares, "anything goes."

This position results in large part from the state-law rule, cited in the State's brief, that victim impact evidence is admissible as a circumstance of the crime under 190.3, factor (a) "[u]nless it invites a purely irrational response from the jury" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056) or is "so inflammatory as to elicit[s] from the jury an irrational or emotional response untethered to the facts of the case" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180). (See RB 157, 160, 162.) The "purely irrational response" standard has been referred to repeatedly in decisions in recent years (see, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 190; *People v. Burney* (2009) 47 Cal.4th 203, 258; *People v. Dykes* (2009) 46 Cal.4th 731, 781), but that is not the standard originally adopted by the Court. In *People v. Haskett*, *supra*, 30 Cal.3d 841, this Court held that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 864.) As noted above, *Edwards* adopted this language from *Haskett* as setting a limit on emotional victim impact evidence and argument. (See *ante* at page 175.) At some point, the Court dropped the first part of the standard and began to apply only the second part.

The difference between *Haskett* and the "purely irrational" standard may be subtle, but it is important, even when the first clause of *Haskett* is disregarded. In *Haskett*, the Court directed that evidence inviting a purely subjective or irrational response be limited. (*People v. Haskett*, *supra*, 30 Cal.3d at p. 864.) This placed a duty on the trial court to screen out inflammatory evidence. In contrast, the Court's reformulated test places an absolute burden on the defendant that must be met before inflammatory evidence can be excluded. Evidence now "is admissible . . . *[u]nless*" the defendant shows that "it invites a purely irrational response from the jury" (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1056, italics added) or, alternatively, "elicit[s] . . . an irrational or emotional response untethered to the facts of the case" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 781).

The Court's standard is illusory. First, the standard may be impossible to meet. If the prosecution's victim impact evidence shows the specific harm caused by the defendant, then it is hard to imagine that the jury's response, however described, ever will be "untethered to the facts of the case." (*People v. Dykes, supra*, 46 Cal.4th at p. 781.) The jury's response will be based on evidence of the harm done, which under *Edwards*, is part of the circumstances of the crime. The victim impact evidence thus will be grounded in the facts of the case. The "irrational or emotional response untethered to the facts of the case" formulation simply seems to restate the basic requirement of *Payne* and *Edwards* that victim impact evidence demonstrate the specific harm resulting from the murder.

Second, the meaning of "a purely irrational response" is not obvious. In its literal meaning, the phrase "purely irrational" refers to a response that is "not according to reason" (Webster's Third New International Dictionary (2002) p. 1195), which presumably refers to a response based only on emotion and feeling. But that definition simply restates the Court's

standard without clarifying its meaning or indicating how the standard should be applied. At bottom, the Court's amorphous "purely irrational response" standard is no standard at all. It gives trial courts no guidance in deciding when victim impact evidence should be excluded because it elicits a "purely irrational response" and when it should be admitted because it does not. And the phrase offers no clue as to the difference between "irrational" and "purely irrational" responses. In fact, Buenrostro is aware of no case in which this Court has found that victim impact evidence has violated the "purely irrational response" rule. Although a bright-line demarcation may be impossible to draw, this Court at least should devise a more precise, workable test.

Without some intelligible definition, there can be no uniformity and consistency in how trial courts throughout this state apply the "purely irrational response" test, which currently is the only state-law limitation on victim impact evidence. Without guidance from this Court, trial judges are left on their own to make ad hoc decisions about admitting victim impact evidence. They are left to apply their own subjective notions of what is permissible and what is proscribed which, in other contexts, this Court has said they may not do. (See, e.g., *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184 [where this Court had not yet defined meaning of "unfair" under the state Unfair Practices Act, lower "courts may not apply purely subjective notions of fairness"].) Without guidance from this Court, each trial judge trying to decipher what the "purely irrational response" standard means may have no choice but to "define the kinds of material . . . to be embraced within that shorthand description" under the "I know it when I see it" test Justice Stewart used for obscenity. (*Jacobellis v. State of Ohio* (1964) 378 U.S. 184, 197.) That is the antithesis of a rational, consistent and non-arbitrary

capital punishment system.

The highly emotional nature of much victim impact evidence is beyond question. (See, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 192-193 [testimony of victim's mother included emotional descriptions of her suicide attempt and hospitalizations, and she nearly fainted while testifying]; *People v. Brady* (2010) 50 Cal.4th 547, 579-581 [noting evocative and emotional nature of victim impact evidence presented regarding murder of police officer]; see also *United States v. Johnson* (N.D. Iowa 2005) 362 F.Supp.2d 1043, 1107 [federal judge described the victim impact evidence as "the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years"].) Whatever the legal theory for introducing victim impact evidence, its powerful emotional impact, which is almost always impossible to rebut, is often the real point of using the evidence and can place an enormous, even decisive, weight, on death's side of the sentencing scale. Coupled with the virtually unlimited range of victim impact evidence permitted under state law, the very emotionality of the evidence risks undermining the Eighth Amendment requirement that a jury's "death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) In failing to provide any enforceable standard for determining the admissibility of victim impact evidence, the Court's "purely irrational response" rule does not prevent death sentences resulting from the inflamed emotions of jurors understandably moved by heart-rending victim impact testimony and documentary evidence. In short, the state standard does not adequately guard against fundamentally unfair capital-sentencing trials leading to the arbitrary, capricious and unreliable imposition of a

death sentence in violation of the Eighth Amendment and Fourteenth Amendments.

This is the law as it now exists, and the law the State asserts in defense of the victim impact evidence admitted at the penalty phase of Buenrostro's trial. Under this law, there is no apparent limit on the harms that may be introduced as victim impact evidence so long as they result from the murder the defendant committed (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 926-927 [evidence of husband's alcohol abuse and circumstances of his death 16 years after wife's murder was properly admitted]). And even highly emotional evidence is admissible so long as it does not invite a "purely irrational response" from the jury. (*People v. Brady*, *supra*, 50 Cal.4th at pp. 573-580 [extensive and emotional evidence, including videotapes, murdered police officer's childhood hardships, lifelong desire to be a police officer, achievements, engagement and future plans, death, funeral service, and aftereffects of his death].) In Buenrostro's view, it is time for the Court to refine its rules and impose some real limit on the admission of victim impact evidence.

Payne held that victim impact evidence was not per se inadmissible under the Eighth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) It did not hold that victim impact evidence is required or that all victim impact evidence is admissible. And *Payne* placed no limit on this Court's authority to devise rules, if it decided victim impact evidence was admissible under state law, to guarantee that harms flowing from a murder that are attenuated from the defendant's culpability and inflammatory evidence are not injected as aggravating factors into the jury's decisionmaking and do not unfairly tip the evidentiary balance toward death. Indeed, this Court has an obligation to enforce its ruling in *Edwards* and to calibrate the contours of victim impact evidence to make sure that, in

deciding whether a capital defendant should be sentenced to death, there is consistency and uniformity in the admission of victim impact evidence and that the standard governing this powerful evidence reduces the risk that victim impact evidence and rhetoric do not encourage a jury's emotions reign over its reason and do not divert its attention from making a reasoned, moral decision about the defendant's deathworthiness based on his or her personal culpability. This case presents an opportunity for this Court to rule that California does not endorse an "anything goes" use of victim impact evidence.

B. The Court Should Limit Victim Impact Evidence To The Reasonably Foreseeable Harm Resulting From The Murder To The Victim's Family Or, In The Alternative, To Individuals Who Had A Close Personal Relationship With The Murder Victim

In her opening brief, Buenrostro argues that the trial court erroneously admitted testimony from Deborah De Forge, the principal of Vicente's and Susana's school, about the effect of their deaths on "everybody at the school." (11 RT 1239; see AOB 316-321.) This claim highlights the problems with the Court's approach to victim impact evidence discussed in section A of this argument. In her opening brief, Buenrostro asks this Court to reconsider its rulings permitting evidence of the impact of the murder victim's death on people beyond his or her family and, like Tennessee, Florida, Louisiana, and Oklahoma, forbid such attenuated victim impact evidence. (AOB 319-320.) Since the filing of the opening brief, this Court has approved victim impact testimony by witnesses who were not family members or close friends of the victim. (See *People v. Taylor* (2010) 48 Cal.4th 574, 645-646 [director of after-school program where victim had volunteered testified about effect of her death on staff and children]; *People v. Ervine* (2009) 47 Cal.4th 745, 792-

793 [sheriff testified about the effect of deputy's murder on the members of county sheriff's department].)

In its response, also filed before the Court's recent decisions, the State relies on this Court's decisions approving victim impact testimony from friends (RB 161-162), without acknowledging that the evidence admitted at Buenrostro's penalty phase was even more removed from the original, narrow concept of victim impact evidence endorsed in *Payne* and in *Edwards* than the evidence in the cases it cites. The State contends that "the jury was entitled to hear of the specific harm and devastating effect the deaths had on the community to which Susana and Vicente belonged" (RB 162), without explaining why, in light of the Eighth Amendment requirement of a reliable and non-arbitrary capital sentencing, the other aggravating factors in section 190.3, and the jury's role as the voice of the community in capital sentencing, it makes jurisprudential sense to turn general community impact or community harm into a factor in favor of a death sentence. This is an important question, which the State leaves unanswered in its brief and this Court leaves unanswered in its recent decisions approving further expansion of victim impact evidence.

In *People v Edwards*, *supra*, 54 Cal.3d 787, this Court held that victim impact evidence was admissible under section 190.3, factor (a) as a "circumstance of the crime." The Court reasoned:

> The word "circumstances" as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.) The specific harm caused by the defendant does surround the crime "materially, morally, or logically."

(*Id.* at p. 833.) Under this formulation, causation-in-fact is key; it defines

the relevance of evidence as a "circumstance of the crime." The Court logically could posit – and in effect has ruled – that any harm flowing from the crime under a causation-in-fact theory is attributable to the defendant's crime and is admissible as an aggravating factor. (See, e.g., *People v. Ervine*, *supra*, 47 Cal.4th at p. 793 [specific harm caused by the defendant may include effects of murder on victim's friends, coworkers, and the community and is not limited to expressions of grief, but encompasses the spectrum of human responses, including anger, aggressiveness, fear, and inability to work].)

This approach, however, is inconsistent with how California traditionally has defined a defendant's culpability for purposes of selecting the appropriate punishment. In non-capital sentencing, the harm caused – the type of personal injury (including death) or the amount of property taken or destroyed – sets the statutory range of sentences through the definition of the crime and applicable enhancements. In non-capital sentencing, the "circumstances in aggravation" that affect the sentence selection within the statutory range include "factors relating to the crime," but these are limited to facts about the manner in which the defendant committed the crime[62] or actual harm inflicted on or threatened to the actual, immediate victim.[63]

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[62] See, e.g., Cal. Rules of Court, rule 4.421(a)(1) (crime involved great violence), rule 4.421(a)(2) (defendant was armed or used weapon), rule 4.421(a)(8) (crime indicated planning, sophistication or professionalism)

[63] See, e.g. Cal. Rules of Court, rule 4.421(a)(1) (crime involved great bodily harm or threat thereof), rule 4.421(a)(3) (victim was vulnerable), rule 4.21(a)(5) (defendant induced minor to commit or participate in crime), rule 4.21(a)(6) (crimes that illegally interfered with judicial process); rule 4.421(a)(10) (crime involved attempted or actual taking or damage of great monetary value), rule 4.421(a)(11) (crime involved large amount of contraband).

When the sentencing choice is between life and death, the state should not be more casual in defining its aggravating factors than when the sentencing choice is, for example, three, four or six years for first degree robbery. (§ 213, subd. (a)(1)(B).)

To be sure, a capital-sentencing decision generally looks more broadly at a defendant's background than does non-capital sentencing. With regard to aggravation, in a capital case, the defendant's entire history of prior felony convictions and other crimes of force or violence may be considered (§ 190.3, factors (b) and (c)), but in a non-capital case, only the crimes for which the defendant is being sentenced are considered, and are considered in a limited way, as an aggravating circumstance (rule 4.421(a)(7)). With regard to mitigation, in a capital case, in addition to evidence regarding the other statutory mitigating factors, the defendant is entitled under section 190.3, factor (k) to present evidence of any sympathetic or other aspect of her character or record as a basis for a sentence less than death. (*People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10; CALJIC No. 8.88; see CALCRIM No. 763.) In a non-capital case, there is no similar catch-all mitigating circumstance, but the enumerated mitigating circumstances in rule 4.423 are more extensive than those listed in section 190.3.

The broader inquiry into a defendant's background and character at capital sentencing, however, does not justify using all the harms resulting from the murder to aggravate the defendant's personal culpability. Even *Payne*'s premise, which Buenrostro disputes, that victim impact evidence is justified to counteract the defendant's mitigating evidence by reminding the sentencer that the victim's death represents unique loss (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825) does not lead ineluctably to this Court's position that evidence of the harm to the community, including

people who had no close personal relationship with the victim, should be admitted as aggravating evidence. Without some principled basis for limiting the harm resulting from the murder that can be said to aggravate the defendant's personal culpability, there is no end point in the chain of causation that results in victim impact evidence.

Principal De Forge testified about the effect of the murders on "everybody at the school" (11 RT 1239) and the fear among the students that the same could happen to them (11 RT 1241). There was no evidence that all children on whose behalf De Forge spoke knew Susana or Vicente or had an any personal relationship with them. Under *Edwards*'s causation-in-fact principle, all sorts of other victim impact evidence would have been admissible in this case. People in the larger community could experience similar feelings of fear and horror from learning of the murders on the radio, television or newspaper. With causation-in-fact as the touchstone for admitting victim impact evidence, there logically would be no bar, for example, to testimony by the parents of the children at Hyatt Elementary School about the distress their sons and daughters suffered as a result of the murders, even if their children were not friends with Susana or Vicente, or testimony by anyone in the town of San Jacinto or even Riverside County about the upset they experienced from these crimes, even if they did not personally know the Buenrostro family. In short, under the Court's causation-in-fact standard, all the negative effects flowing from a murder, without end, can become aggravating evidence under factor (a), i.e., a "specific harm caused by the defendant" which "surrounds materially, morally, or logically" the murders. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) But that should not be how *Edwards* – or *Payne* – is read because such harms simply would be too remote to reflect on Buenrostro's personal, moral culpability for the murder of her children and thus too attenuated to

be relevant to her deathworthiness.

The Court implicitly recognized that there must be some limit to *Edwards*'s causation principle in *People v. Harris* (2005) 37 Cal.4th 310. There, the mother of one victim testified that at the end of the funeral his casket mistakenly was opened and that several people screamed in horror and two people fainted, one falling on the top of the partially opened casket. (*Id.* at p. 352.) The Court found the claim was forfeited for a failure to object at trial, but went on to state that the occurrence "was too remote from any act by defendant to be relevant to his moral culpability." (*Ibid.*) The Court, however, provided no principle for determining when victim impact evidence becomes "too remote." The Court should do so here.

The testimony of Deborah DeForge about the effect of Susana's and Vicente's murders on the teachers and students at their school also was too remote to be admitted as victim impact evidence. It did not help "'the jury to assess meaningfully the defendant's moral culpability and blameworthiness.'" (*People v. Harris*, *supra*, 37 Cal.4th. at p. 351, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825). Causation-in-fact is inadequate to permit the jury to use this harm to increase her deathworthiness. As argued in the opening brief, this Court should return to the core principles of *Payne* and *Edwards* as illuminated by their facts and at a minimum should draw a bright line restricting victim impact evidence to show only a "quick glimpse" of the victim's life so he does not remain "a faceless stranger" at the penalty phase (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 830, 831 (conc. opn. of O'Connor, J.) and the reasonably foreseeable specific harm resulting from the murder to the victim's family (*id.* at p. 838-830 (conc. opn. of Souter, J.)). (See AOB 319-320.) But if this Court will not limit victim impact evidence to the victim's family, it at least should rule that victim impact evidence is only admissible to show the reasonably

foreseeable specific harm resulting from the murder to individuals who had a close personal relationship with the murder victim.

C. The Admission Of Victim Impact Evidence And The Denial Of The Requested Instruction Require Reversal Of The Death Sentence

In her opening brief, Buenrostro explains that the State cannot demonstrate beyond a reasonable doubt that the cumulative and prejudicial videotaped tribute to the children, the testimony of school principal De Forge, and the videotape of Alejandro Buenrostro's emotional reaction to learning that his children had been killed did not influence the jury toward a death sentence and that the trial court's refusal to give the instruction Buenrostro requested exacerbated the prejudice resulting from these evidentiary errors. (AOB 326-331.) Buenrostro discusses the impact of the erroneously-admitted evidence in the context of the entire case before the sentencing jury: the aggravating evidence and mitigating evidence (AOB 326-328); the uniqueness of filicide, especially of a mother killing her own children, which although a horrendous crime is known to result in a life sentence (*ibid.*); the prosecutor's emphasis on the victim impact evidence in his closing argument (AOB 328-330); the questions raised by the evidence and the jury's mid-deliberation note about Buenrostro's mental state at the time of the crimes as well as during trial (AOB 327-328, 330), and the fact that the jury did not return its death verdict quickly (AOB 330). Disputing that any error was prejudicial, the State contends that the evidence was "not unduly prejudicial or overly inflammatory." (RB 170; see RB 172.)

A prejudice analysis with regard to error at a capital-sentencing phase deserves serious consideration. The assessment of the prejudice resulting from the erroneous admission of victim impact evidence in this case should be informed by several basic principles:

- Buenrostro's right to have her fate decided by a jury not

influenced by error, rather than by an appellate court hypothesizing such a jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.);

- the inability of appellate attorneys and the reviewing court to observe witnesses's demeanor (*People v. Stewart* (2004) 33 Cal.4th 425, 451) and the limited capacity of the participants in the appellate process to develop a "'feel' for the emotional environment of the courtroom" (*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913; see *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330, 340, fn. 7);
- the difficulty, if not impossibility, of knowing what goes into the subjective weighing with which capital-sentencing jurors are charged (*Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258; *People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 744, fn. 40), particularly since they are permitted to rely on mercy or sympathy for the defendant (*People v. Caro* (1988) 46 Cal.3d 1035, 1067; *People v. Easley* (1983) 34 Cal.3d 858, 875-880) and are required to exercise their own moral and normative judgment in arriving at the appropriate punishment (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779);
- the principle that reversal is required if one juror might have decided differently if not influenced by error (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *In re Lucas, supra,* 33 Cal.4th at p. 734);
- the heinous nature of a capital crime rarely, if ever, makes a death sentence a foregone conclusion (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244), and juries return sentences of life imprisonment without the possibility of parole in highly aggravated cases (see, e.g.

People v. Scott (1991) 229 Cal.App.3d 707, 710-711 [life-without-parole sentence returned for execution-style killing of drug dealer and three people living with him]; *People v. Brown* (1985) 169 Cal.App.3d 728, 732-734 [life-without-parole sentence returned for two murders during four-day crime spree that included home invasion robberies, assault, and rapes]); and

- the constitutional concern for reliability in both the making and the review of a state's decision to execute one of its residents (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 329, fn. 2; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885).

The State's argument not only gives short shrift to much of the record that is relevant to assessing prejudice, but ignores the care with which a harmless error analysis must be conducted when the question is whether error might have affected the jury's choice between life and death. (*Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258). Under both the state and federal standards, the harmlessness inquiry depends not on whether the evidence was "overly inflammatory," or on this Court's analysis of the relative strength of the prosecution's case in aggravation and Buenrostro's case in mitigation, but instead on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California*, *supra*, at p. 24.)

The State bears a heavy burden of proving the harmlessness of federal constitutional error. (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.) In light of the aggravating and mitigating evidence, the prosecutor's closing argument, and available information about the jury's deliberations, there is reason to conclude that the victim impact evidence could have influenced or contributed to at least one juror's decision to vote

for death. (See AOB 326-331.) The State has not carried its burden of proving beyond a reasonable doubt that without the error "the record contains evidence that could rationally lead" only to a death sentence. (*Neder v. United States, supra,* 527 U.S. at p. 19.) Accordingly, Buenrostro's death sentence should be reversed.

XV. THE TRIAL COURT ERRONEOUSLY ADMITTED, AND ERRONEOUSLY INSTRUCTED ON, THE UNADJUDICATED OTHER-CRIMES EVIDENCE

In her opening brief, Buenrostro argues that the trial court erroneously admitted evidence of two separate crimes that lacked the force or violence required under section 190.3, factor (b); that the admission of this evidence violated her federal constitutional rights; that the trial court erroneously failed to define for the jury the force-or-violence requirement for factor (b); and that the error requires reversal of the death sentence. (AOB 332-369.) In response, the State answers some, but not all, of these claims. (RB 173-184.) Its arguments should be rejected.

A. The Pill-Run Incident (Misdemeanor Battery) Was Not Assaultive Conduct Nor Part Of "A Continuous Course Of Criminal Activity," And Did Not Involve The Force Or Violence Required For Factor (b) Aggravation

The facts underlying the factor (b) crime are straightforward. When Buenrostro was housed on the medical floor of the jail, a nurse, accompanied by sheriff deputy Anaya, conducted a "pill run" to distribute medication. They stopped at Buenrostro's cell to deliver her medication. Buenrostro stepped out of her cell and raised her hands toward Anaya. Anaya grabbed Buenrostro's hands, which were slippery from medical ointment she just received. Buenrostro grabbed the nurse's sleeve. Anaya got Buenrostro into her cell, where they struggled, fell to the floor and struggled further before other deputies subdued Buenrostro. No one was hurt. (11 RT 1125-1126 [in limine] and 11 RT 1253-1257 [trial].) As explained in the opening brief, the parties and the trial court understood the criminal act to be Buenrostro's act of grabbing the nurse's sleeve after officer Anaya grabbed Buenrostro's hands and *not* in struggling with Anaya as he tried to restrain her. (AOB 339-340.) In fact, the prosecution's theory

was reflected in the battery instruction, which explicitly stated that "[t]he touching essential to a battery may be a touching of person or the person's clothing or something attached to or closely connected with the person." (12 RT 1397.)[64]

Buenrostro argues that, because the purpose of factor (b) evidence is to show that the defendant's history of or propensity for violence makes her deathworthy, a battery (§ 242) should be as admissible as other-crimes evidence only when its commission causes, threatens to cause, or is likely to cause serious bodily harm. (AOB 340-346.) Otherwise, admission of conduct that constitutes a battery permits the jury to consider a "trivial incident[] of misconduct and ill temper" that should not "influence a life or death decision." (*People v. Boyd* (1985) 38 Cal.3d 762, 774, 776; see AOB 343.) As Buenrostro explains, her act of grabbing the nurse's sleeve was a battery, i.e., a wilful and unlawful touching of another person (§ 242), but did not cause or threaten to cause and was not likely to cause serious bodily harm and so should not have been admitted under factor (b). (AOB 345-346.)[65]

In response, the State contends that (1) Buenrostro's act was more than a simple battery and carried sufficient force, violence and threat of

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[64] Buenrostro apologizes for any confusion caused by the mistaken reference to section 417, instead of section 242 on page 339 of her opening brief.

[65] Buenrostro recognizes that this Court has found that a simple battery is admissible as aggravation under factor (b). (*People v. Hamilton* (2009) 45 Cal.4th 863, 934.) However, the defendant in *Hamilton* did not raise the claim Buenrostro asserts here, but rather argued that the evidence was insufficient to prove an assault, and the evidence of a battery was speculative. (*Ibid.*) *Hamilton* does not foreclose Buenrostro's claim. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered].)

violence to qualify as factor (b) evidence and (2) under *People v. Pinholster* (1992) 1 Cal.4th 865, 961, the circumstances surrounding the incident show that Buenrostro acted with force or violence or threat of violence within the meaning of factor (b) (AOB 180-181.) The State's first argument rests on its repeated description of Buenrostro's act of raising her hands as "assaultive." (RB 176, 178, 180.) But that overstates the record. Over defense objection and only for purposes of the in limine hearing, Anaya was permitted to characterize the manner in which Buenrostro reached out her hands as "trying to assault us." (11 RT 1225.) But the prosecutor did not elicit similar testimony at the penalty phase, where Anaya testified that Buenrostro gestured toward Anaya (11 RT 1253) and raised her hands toward him (11 RT 1254). Nor does the evidence that Buenrostro grabbed the nurse's sleeve after Anaya grabbed her hands show an "assaultive" act. Objecting to the evidence, defense counsel opined that the evidence at most established a battery. (11 RT 1228.) Although the trial court made no ruling as to the crime established at the in limine hearing (*ibid.*), the prosecutor decided to litigate the crime as a battery, not as an assault. (11 RT 1228; 12 RT 1281, 1284.) In short, the evidence does not establish that the act that everyone at trial agreed was the battery – grabbing the nurse's sleeve – carried the type of force or violence or threat of violence that should be required for admission under factor (b).[66]

The State's second contention – that the circumstances surrounding the incident present the requisite force or violence for factor (b) – is undercut by this same point. The criminal conduct was Buenrostro's single

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[66] In asserting that the battery in this case involved force, violence and the threat of violence, the State cites *People v. Davis* (1995) 10 Cal.4th 463, 542 (RB 180), which Buenrostro has shown is readily distinguishable. (AOB 343-344 [noting that defendant in *Davis* kicked, pushed, choked and lunged at victim with a sword].)

act of grabbing the nurse's sleeve, not disobeying jail rules in stepping out of her cell or struggling with Anaya after he grabbed her hand. Moreover, in her opening brief, Buenrostro distinguishes the sole case on which the State relies, *People v. Pinholster*, *supra*, 1 Cal.4th 865. (AOB 344-345.) In *Pinholster*, the battery, throwing urine at deputies, was not admitted on the theory that a simple battery qualified as factor (b) evidence, but because the battery was part of a series of clearly violent acts – punching, kicking, striking and threatening to kill deputies – that were admissible under factor (b). (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 961.) Here, the State contends that a simple battery is admissible under *Pinholster*, but it was not part of a series of violent crimes that the prosecution introduced in aggravation. Simply stated, unlike *Pinholster*, there was no "continuous course of criminal activity" providing the threshold of force or violence which would permit application of the rule that "all crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent." (*Ibid.*, internal quotation and citation omitted.) The pill-run battery was an isolated act of grabbing a jail nurse's sleeve, not a continuing series of violent criminal acts.

In sum, the arguments the State advances for finding that the battery Buenrostro committed in grabbing the nurse's sleeve rose to the level of force or violence contemplated by factor (b) are belied by the record and unsupported by the law. As Buenrostro argues, a simple battery should not be admitted as a factor (b) aggravator unless the evidence shows that the battery caused, threatened to cause, or was likely to cause serious bodily injury. (AOB 342.) The State does not contend that showing was made here, and it was not. The trial court abused its discretion in admitting the pill-run incident.

B. The State Improperly Tries To Defend The Admission Of The Mop-Wringer Incident (Exhibiting A Deadly Weapon) As A Crime That Was Not Considered Or Presented At Trial And Plainly Is Not Supported By The Record

For the Court to review Buenrostro's challenge to the admission of evidence about the mop-wringer incident, it needs to be clear not only about the evidence regarding the crime, but the trial court's ruling, the prosecutor's position, and the claims raised on appeal. At the in limine hearing, the trial court rejected the prosecution's theory that the evidence regarding the mop-wringer incident established an assault, but ruled that the evidence could be admitted to prove a violation of section 417, subdivision (a)(1), exhibiting a deadly weapon. (11 RT 1222-1223; see AOB 337, 346.) The evidence was presented to establish, and the jury was instructed in, that crime and only that crime. (12 RT 1398 [exhibiting a deadly weapon instruction].)

As with the pill-run incident, the facts about the mop-wringer incident, as presented at both the in limine hearing and at the penalty phase, are straightforward. (See AOB 336, 347.) When returning to the day room from a visit while confined in jail before trial, Buenrostro picked up the wringer from a mop bucket in a sally port, held it over her shoulder like a baseball bat, did not obey directions to put down the mop wringer and move into the day room, and maintained her frozen, defensive position until deputies arrived and took the mop wringer from her without incident. (11 RT 1216-1220 [in limine hearing] and 1245-1250 [trial.] The testifying officer, who observed the incident, was completely separated from Buenrostro by a metal and glass enclosure, and no one was near Buenrostro until the deputies arrived and retrieved the mop wringer. (11 RT 1246, 1248.) Buenrostro made no aggressive movement toward anyone. (11 RT

1247, 1249-1250.) She said nothing and displayed no emotion. The State does not dispute these facts. (See RB 175-176, 179.)

On appeal, Buenrostro asserts that the prosecution failed to establish that the crime Buenrostro committed in picking up and holding the mop wringer involved the type of force or violence (or threat of force or violence) necessary to qualify as an aggravating factor under section 190.3, factor (b). (AOB 346-349.) The definition of the crime of exhibiting a deadly weapon (§ 417, subd. (a)(1)) and the instructions given to the jury prove this point: a person commits the crime when she exhibits a deadly weapon "in a rude, angry *or* threatening manner . . ." (12 RT 1398, italics added.) Indeed, at the in limine hearing, the prosecutor himself summed up his evidence as showing that in grabbing and holding the mop wringer, Buenrostro "took a defensive stance" (11 RT 1190) and "not a threatening position" (12 RT 1221). (See AOB 347-348.) As Buenrostro agues, the facts show only that Buenrostro rudely exhibited the mop wringer, which does not establish the force or violence necessary under section 190.3, factor (b) before a jury is permitted to use evidence of a defendant's history or propensity for violence in deciding whether she should be executed. (See AOB 347, 342.)

In response, the State does not refute the argument Buenrostro makes. Instead, it defends the admission of the mop-wringer evidence as showing that Buenrostro knowingly possessed a potentially dangerous weapon in custody. (RB 178-179.) The State does not mention the penal statute to which it refers, but Buenrostro assumes the crime is that defined in section 4502, subdivision (a).[67] (See *People v. Phillips* (1985) 41 Cal.3d

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[67] At the times relevant to Buenrostro's trial, section 4502, subdivision (a) provided:

(continued...)

29, 72 [only conduct that violates a penal statute may be admitted under section 190.3, factor (a)].) In any event, no possession crime was alleged or litigated at trial. As stated above, the trial court ruled that the evidence was sufficient to present as a violation of section 417, subdivision (a)(1), and the jury was instructed only on that offense. In urging an alternative offense to support the mop-wringer evidence, the State appears to suggest that this Court may cure the erroneous admission of factor (b) evidence by finding that the prosecution could have proved a different crime than that delineated in the trial court's in limine ruling and litigated by the parties at trial. Notably, the state cites no authority for its unorthodox proposal, and Buenrostro is aware of none.

The State's approach would violate state law as set forth in *People v. Phillips*, *supra*, 41 Cal.3d 29 as well as Buenrostro's state and federal due process rights. The entire point of the pretrial hearing recommended in *Phillips* is to enable the trial court "to determine whether there is substantial evidence to prove each element of the other criminal activity" and the prosecution to "request an instruction enumerating the *particular* other crimes which the jury may consider as aggravating circumstances in

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[67](...continued)
(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony and shall be punished by imprisonment in the state prison for two, three, or four years, to be served consecutively.

determining penalty." (*People v. Phillips*, *supra*, at p. 72, fn. 25, internal quotations omitted and italics added.) That occurred here. (12 RT 1284.) *Phillips* clearly envisions that both the pretrial determination and trial litigation be about a specific crime or crimes. That occurred here. (12 RT 1397-1398.) Indeed, *Phillips* goes on to admonish that " [t]he jury should be instructed not to consider any additional other crimes in fixing the penalty." (*People v. Phillips*, *supra*, at p. 72, fn. 24.) That occurred here. (12 RT 1395.) The State's argument would encourage an end-run around the *Phillips* procedure. It would allow the prosecution at trial to litigate one crime and, after it obtains a death judgment, on appeal to justify its use of questionable aggravating evidence as a different crime about which the defendant was given no notice and no opportunity to rebut. (See *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 161, quoting *Gardner v. Florida, supra,* 430 U.S. at p. 362 ["The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain'"].) The Court should reject this proposal outright.

Even assuming, arguendo, there were some legal basis for the State's approach, it would fail on its merits. Contrary to its suggestion, section 4502, subdivision (a) does not proscribe the "knowing possession of a potentially dangerous weapon in custody." (RB 178.) Rather, that provision criminalizes the possession of certain specified weapons by a person confined in a penal institution. The weapons possessed by the defendants in the cases cited by the State all are listed in section 4502, subdivision (a). (*People v. Dykes* (2009) 46 Cal.4th 731,776 [loaded and cocked .25-caliber semiautomatic firearm in possession]; *People v. Lewis* (2008) 43 Cal.4th 415, 529 [shank concealed inside the defendant's mattress]; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1053 [knife]. A mop wringer is not.

Thus, the factual record defeats the State's suggestion that the jurors could have found Buenrostro guilty beyond a reasonable doubt of possessing a dangerous weapon in jail, a crime not mentioned by the prosecutor in litigating the admissibility of the evidence or the trial court in its jury instructions.

In short, the State fails to refute Buenrostro's challenge to the admission of the mop-wringer incident as a violation of section 417, subdivision (a) and instead defends the trial court's ruling with a plainly insupportable argument that is at odds with the prosecutor's theory, the trial court's in limine ruling, the instructions governing this factor (b) evidence, and the evidence itself.

C. The State Offers Only A Minimal Response To Buenrostro's Federal Constitutional And Instructional Claims And A One-Sided Argument About Prejudice

Buenrostro also asserts that the admission of the other crimes evidence resulted in three separate constitutional violations: (1) using an invalid aggravating factor in violation of the Eighth Amendment under *Brown v. Sanders* (2006) 546 U.S. 212 (AOB 349-351); (2) admitting constitutionally irrelevant evidence in violation of the Eighth Amendment and the due process clause of the Fourteenth Amendment (AOB 351-354); and (3) employing a procedure for adjudicating other-crimes evidence as an aggravating factor at a capital-sentencing trial that violates the Sixth, Eighth and Fourteenth Amendments (AOB 355-359.)

In addition, Buenrostro presents a two-fold challenge to the trial court's failure to define for the jury the force-or-violence requirement of factor (b). First, she argues that under the scheme envisioned in section 190.3, the jury should determine not only whether the alleged crime is proved, but whether the alleged crimes qualifies as a factor (b) aggravator. (AOB 363-364.) Second, she argues that assuming the jury should decide

whether the unadjudicated crime, if proved, qualifies as a factor (b) aggravator, the battery instruction given to her jury was ambiguous as to the force-or-violence requirement and created a reasonable likelihood that, in violation of the Eighth Amendment's requirement of reliable and non-arbitrary capital sentencing, the jury could have weighed the battery, i.e. the grabbing of the nurse's sleeve, in favor of a death sentence even though it lacked probity of her propensity for violence. (AOB 365-366.)

In response, the State argues that there is no Sixth Amendment right to a jury determination of whether the other crime evidence established the force-or-violence requirement under factor (b) (RB 182-183) and summarily asserts there was no violation of Buenrostro's Eighth and Fourteenth Amendment right to a reliable penalty determination (RB 184). It does not counter Buenrostro's other arguments. Buenrostro's federal constitutional and instructional error claims are before the Court and, except for one point, need no further elaboration. Regarding the question whether the jury or the trial court decides if the alleged criminal act involves force or violence, Buenrostro notes that this Court's decisions continue to be inconsistent. (Compare *People v. D'Arcy* (2010) 48 Cal.4th 257, 302 and *People v. Moore* (2011) 51 Cal.4th 1104, 1139; see AOB 361-365.) As Buenrostro asserts, under the structure of section 190.3, the jury decides the force-or-violence question, and under the Sixth Amendment, that decision must be made by a unanimous jury. (AOB 358-366.)

The parties obviously disagree about whether admission of the mop-wringer and pill-run incidents, if error, was harmless under either the state or federal standards. (Compare AOB 367-369 and RB 183-184.). In arguing that the admission of the other crimes evidence could not have prejudiced the jury's choice between life and death, the State considers only the aggravating evidence and wholly ignores the circumstances that the jury

could have found to be mitigating. And it ignores the prosecutor's closing argument for death, which drew directly on the factor (b) evidence to assert that she would be dangerous to staff and inmates in prison. (AOB 367-368, citing 12 RT 1411.) An assessment of prejudice from error at a capital penalty phase requires more than a lop-sided recitation of the aggravating evidence, especially since, as discussed above with regard to Argument XIV, the heinous nature of a capital crime rarely, if ever, makes a death sentence a foregone conclusion (*People v. Sturm, supra,* 37 Cal.4th at p. 1244) and reversal is required if just one juror might have decided differently if not influenced by error (*In re Lucas, supra,* 33 Cal.4th at p. 734). As set forth in the opening brief, there was error, and it was prejudicial. The death sentence should be reversed.

XVI. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY THAT DEATH WAS THE MORE SEVERE OF THE TWO AVAILABLE PENALTIES

In her opening brief, Buenrostro argues that, under the facts of this case, the trial court's failure to instruct the jury that the death penalty is a more severe punishment than life imprisonment without the possibility of parole was erroneous, violated her state and federal constitutional rights to a fair penalty trial and a reliable and non-arbitrary determination of penalty (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th & 14th Amends.), and requires reversal of her death sentence. (AOB 370-374.) The instruction was particularly important here where, before jury selection, defense counsel had asked that the prospective jurors be informed of this legal principle and asked if they could follow it, but the trial court denied the request (AOB 370-371), and then, during jury selection, it became apparent that the majority of sitting jurors did not understand this legal principle (AOB 371-372). Although longstanding decisions of the United States Supreme Court hold that death is more severe (see AOB 373, citing *California v. Ramos* (1983) 463 U.S. 992, 1024), the trial court did not instruct the jury at the penalty phase that death was the more severe penalty. (AOB 371-372.) In response, the State asserts that the claim was forfeited because Buenrostro failed to request such an instruction; that Buenrostro was not entitled to the instruction under rulings of this Court; and that CALJIC No. 8.88 indicated that death was always the ultimate punishment. (RB 183-187.)

On the procedural point, the claim is cognizable on appeal under section 1259, even in the absence of a request at trial. (AOB 370, fn. 141; *People v. Thomas* (2011) 52 Cal.4th 336 [128 Cal.Rptr.3d 489].) On the merits, Buenrostro recognizes that this Court has rejected similar claims. (See, e.g., *People v. Cook*, *supra*, 40 Cal.4th 1334, 1363 [no error to deny

requested instruction].) Indeed, in *People v. Tate* (2010) 49 Cal.4th 635, 706-707, this Court found no error when a deadlocked jury asked the trial court to clarify whether death or life without the possibility of parole was more severe punishment, and the trial court responded it could not answer the question and referred the jury to the concluding sentence of CALJIC No. 8.88.

Buenrostro understands that, after *Tate*, it is unlikely that the Court will reconsider its position on this issue. But it should. Plainly put, the assumption underlying the decisions in *Cook* and *Tate* blinks at reality: CALJIC No. 8.88 is not sufficient to tell jurors that "[u]nder California law, death is a greater punishment than life imprisonment without possibility of parole" (*People v. Thomas*, *supra*, 128 Cal. Rptr.3d at p. 509.) In deciding whether to vote to execute a defendant or spare her life, jurors must follow this law. But they cannot follow it unless they know it. Undoubtedly, there are reasonable people serving as capital jurors who view sitting in prison for one's entire life with no hope of freedom as the worst possible punishment (see *People v. Wilson*, *supra*, 44 Cal.4th at p. 835), and execution as a merciful release from that fate. In this case, eight of the sitting jurors did not have an opinion as to whether death or life in prison was the more severe punishment. (See AOB 371, citing jury questionnaire answers.) As the facts in *Tate* should attest, CALJIC No. 8.88 is not enough to inform them of California's law on this question.

As explained in the opening brief, our system of capital punishment rests on the fundamental premise that death is more severe than life imprisonment – even without the possibility of parole. (AOB 372.) When California asks its citizens to decide whether another person should be executed for her crimes, it should be absolutely certain they understand this essential principle and their obligation to abide by it. But without a clear

and direct instruction, many jurors may not know the law. Neither the Eighth Amendment, nor our collective conscience, can tolerate a person being sentenced to death as a perceived act of mercy. But that risk exists today. And it existed at Buenrostro's trial. She asks this Court to reconsider its rulings on this question in *Cook* and *Tate*, and to reverse her death sentence.

CONCLUSION

For all of the reasons stated above, as well as for the reasons stated in Appellant's Opening Brief on automatic appeal, the entire judgment of conviction and sentence of death in this case must be reversed.

DATED: August 30, 2011

Respectfully submitted,

MICHAEL J. HERSEK
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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, NINA RIVKIND, am a Supervising Deputy State Public Defender, and am appellate counsel for DORA BUENROSTRO in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 61,020 words in length.

Nina Rivkind

NINA RIVKIND
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Dora Buenrostro* S073823

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Felicity Senoski
P. O. Box 85266
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Jay Grossman
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Riverside County Superior Court
ATTN: CLERK OF THE COURT
4100 Main Street
Riverside, CA 92501

David Macher
Capital Defender's Office
3801 University Avenue, Suite 350
Riverside, CA 92501

Each said envelope was then, on August 30, 2011, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Pursuant to Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4, counsel for appellant will personally serve appellant with Appellant's Reply Brief, on or before September 20, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 30, 2011, at San Francisco, California.

Glenice Fuller
DECLARANT