In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SANDI DAWN NIEVES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S092410

Los Angeles County Superior Court Case No. PA030589-01
The Honorable L. Jeffrey Wiatt, Judge

RESPONDENT'S BRIEF
(Volume 2 of 2)

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III. THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE DEFENSE ACCESS TO IRRELEVANT EVIDENCE

Appellant contends that the trial court prejudicially refused to allow appellant access to evidence relevant to impeach appellant's son, David, who was the only surviving eyewitness to the events in the house the night of the slumber party, besides appellant. This evidence consisted of the records of Dr. Alan Jacobs and Dr. Deborah Wheatley, private psychologists who had treated and evaluated David. The trial court found that the information was privileged. Appellant contends the trial court's refusal to enforce the defense subpoenas seeking the information violated her constitutionally protected rights under the Sixth and Fourteenth Amendments. (AOB 193-209.) The trial court did not commit error and therefore this claim fails.

A. Background

On March 28, 2000, there was a hearing on the defense motion for release of David's mental health records. (10RCT 2286-2301.) Defense counsel sought mental health records from Dr. Catherine Koverola, Dr. Alan Jacobs, and Dr. Deborah Wheatley. (11RCT 2504; 9RT 424, 427.) The trial court stated that in order to rule on the issue it would first have to determine whether there was a psychotherapist/patient privilege as to any of the three doctors with regard to David. The court would have to determine whether David was a patient within the meaning of the psychotherapist privilege, and if there was a privilege, whether there was some exception to it or had it been waived. Moreover, even if there was a privilege, and there was no exception and no waiver, whether appellant's needs outweighed David's interests. (9RT 427.)

The trial court reviewed a "Psychological Assessment Report" on David, authored by Dr. Koverola, and dated September 10, 1998. The report stated that David was referred for a psychological assessment to

evaluate his functioning after his sisters' deaths. The trial court stated that there was no psychotherapist/patient privilege as to Dr. Koverola, because David could not be considered her patient. He was not seeing her for diagnosis or treatment, but for an assessment. (9RT 428.)

Fernando Nieves was called by the defense to testify at the hearing. He testified that he was David's biological father and current legal guardian. (9RT 432-433.) During the questioning, the prosecutor objected to one of defense counsel's questions as irrelevant, prompting defense counsel to complain that the prosecution had no "standing here." The trial court responded, "Well, he does have standing, just as you have standing. The way he can get over the standing in a New York second is he could join in your motion for disclosure." The prosecutor suggested that the court appoint an attorney for David, Fernando, and Dr. Koverola. (9RT 434-435.) The court responded that it did not need to appoint anybody. "If they want to have an attorney, they can get one and bring him in." (9RT 435.)

Fernando Nieves testified that he was asked by somebody in the sheriff's department to take David to see Dr. Koverola, in order to be evaluated by a specialist who dealt with children who had experienced trauma. David saw Dr. Koverola two or three times. (9RT 435.) Based on Fernando's testimony, the trial court ordered Dr. Koverola to bring her entire file to court. (9RT 437.)

Defense counsel continued to question Fernando regarding Dr. Jacobs and Dr. Wheatley. (9RT 439.) Fernando testified that he and his entire family, including David, went to see Dr. Wheatley and Dr. Jacobs for "family therapy" to help them cope with the fire in July 1998. (9RT 440.) Dr. Jacobs wrote a letter to the courts with his opinion about where David should be placed. (9RT 440-441; see 10RCT 2301.) The letter and the

information from Dr. Wheatley and Dr. Jacobs assisted Fernando in getting legal guardianship of David in December 1998. (9RT 441.)[16]

Based on this testimony, defense counsel argued that any privilege that might have existed was waived because the information was given to a third party. The trial court stated that it could not make that determination based on what was currently before it. (9RT 441.) The trial court stated it would need to see the letter that was written and filed with the court. Defense counsel stated that the court had the letter, a report from Alpha Treatment Centers from Dr. Jacobs. (9RT 442; 10RCT 2301.) The court then stated that "the question is whether the letter from Dr. Jacobs waives the entire privilege as to everybody that he consulted." (9RT 443.)

Defense counsel argued that the privilege had been waived because Fernando used the "reports" for "an unrelated purpose, to get custody or legal guardianship of the child." (9RT 443.) Defense counsel additionally argued that he believed David had made statements to the doctors concerning the facts of the case, and he asked the court to review the doctors' files "in camera if you wish. I believe the statements to the doctors would assist counsel in not only showing certain inconsistencies in the boy's statements, but also for purposes of impeachment in case he gives a different story now." (9RT 445.)

The trial court then asked Fernando Nieves if he was claiming the psychotherapist/patient privilege for David involving his communications with Dr. Jacobs, Dr. Wheatley, or Dr. Koverola. Fernando claimed the privilege as to Dr. Jacobs and Dr. Wheatley, but not as to Dr. Koverola. (9RT 445.)

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[16] Defense counsel had a copy of the letter from Dr. Jacobs and a copy of Dr. Koverola's report, attached to his moving papers. (10RCT 2293-2301.)

The trial court found there was a psychotherapist/patient relationship between Dr. Jacobs and David. The court found that Fernando Nieves was the holder of the privilege and that he claimed it, and that the letter from Dr. Jacobs to the Riverside County Superior Court did not waive the privilege. The court did not find "anything before the court that I could find that it's in the interests of the defendant to have disclosure that overrides the nature of the privilege." The court further found that it was "precluded from making an in camera review of the records to determine whether that is privileged." The trial court further stated that if David's "psychological well-being" became an issue at the penalty phase, then there might be a need for the defense to get that information. "But until that occurs, there is no need at this point to trump his privilege, and I am not going to do it at this point." (9RT 447-448.)

The trial court reiterated its belief that the law did not allow the court to make an in camera review of records to determine if there has been a waiver of the psychotherapist/patient privilege. (9RT 449.) On that same date, the trial court signed an order directing Dr. Koverola to deliver to the trial court all of David's records. (11RCT 2499; see also 9RT 430, 437, 455.)

On April 24, 2000, Deputy County Counsel Tracey F. Dodds appeared in court on behalf of Susan Celentano and Allison Willis, social workers employed by the Department of Children and Family Services (DCFS). (11RT 610, 614.) Defense counsel had served subpoenas on Celentano and Willis. Dodds stated that Celentano and Willis were willing to speak with defense counsel, but they requested the presence of county counsel during the interview. (11RT 615-616.) The trial court instructed defense counsel to work with Dodds, who stated that she would make Celentano and Willis available. (11RT 616.) Defense counsel stated that he also had a problem with records he received pursuant to the subpoenas:

the records were redacted. (11RT 617.) Dodds stated that under section 827 of the Welfare and Institutions Code, as well as various local rules of court, some juvenile records were confidential and unavailable regardless of a subpoena. Dodds further stated that defense counsel would have to make a motion in juvenile dependency court if he wanted access to confidential records. (11RT 618.)

Defense counsel objected under the Fifth, Sixth, and Fourteenth Amendments, and asked the trial court to order DCFS to provide the defense with the documents. The trial court denied this request: "You remedy is with the presiding judge of the juvenile court or the supervising judge of dependency. They're the ones that make that determination, not this court." (11RT 619.)

On May 30, 2000, Willis and Celentano appeared before the court, but they asserted a privilege, stating that Welfare and Institutions Code sections 827 and 10850 dictated that they not divulge information absent an order from the presiding judge of the juvenile court. (28RT 3671-3673.) Defense counsel stated that these witnesses had interviewed both David and Fernando Nieves within one to two days of the fire, and that he wanted to question them about inconsistencies with David's and Fernando's testimony. (28RT 3673-3674.) The prosecutor asked for "an offer of proof as to specifics." Defense counsel was unable to provide a specific offer of proof. The trial court sustained the privilege and excused Willis and Celentano. (28RT 3674.) The trial court further asked defense counsel if he had applied to the presiding judge of the juvenile court for release of the records. Defense counsel stated that he did make an application, and county counsel had first claimed no objection to the request, but subsequently claimed a privilege. However, at that time the petition was still pending. (28RT 3675-3676.)

On June 13, 2000, defense counsel stated that he had finally received an answer to the petition for records from the juvenile court. Judge Jerry B. Friedman, the Presiding Judge of the Juvenile Court, granted the petition and said there was no privilege with regards to the medical health records involving the Alpha Treatment Center, Dr. Jacobs, Dr. Wheatley, or DCFS workers Celentano and Willis. However, as the trial court observed, "[i]t's a little late to talk about it now" because David had already testified. (32RT 4449.) Defense counsel did not ask the trial court to recall David to the witness stand.

Appellant did not raise the issue again until she filed a motion for new trial. Appellant acknowledged that she had the reports from Celentano and Willis, and she argued that their testimony would have contradicted David and Fernando. However, the motion was devoid of specifics as to what statements would have served as impeachment. Likewise, appellant argued that she had obtained access to statements by both Dr. Jacobs and Dr. Wheatley, yet she was unable to point to any statements that had impeachment value. (22RCT 5570.)

B. Applicable Law

Evidence Code section 912, subdivision (a), provides in relevant part that the right of any person to claim the psychotherapist/patient privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone."

Subdivision (d) of section 912 of the Evidence Code provides in pertinent part that a disclosure in confidence of a communication that is protected by the psychotherapist/patient privilege, "when disclosure is reasonably necessary for the accomplishment of the purpose for which the ... psychotherapist ... was consulted, is not a waiver of the privilege." (See, e.g. *Rudnick v. Superior Court of Kern County* (1974) 11 Cal.3d 924,

930-931 ["for example, if the physician reported to defendants the adverse effects of the drug on his patient so as to obtain assistance in the use of the drug in treating the patient, such disclosure even if consented to by the patient would not constitute a waiver of the privilege]; *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 341 ["The mere exchange of petitioner's records between Dr. Ely and the other physicians treating her did not constitute a waiver of the psychotherapist-patient privilege"].)

"The statute clearly provides that it is the holder of the privilege ... who may waive the privilege, either by disclosing a significant part of the communication or by manifesting through words or conduct consent that the communication may be disclosed by another. The language of the statute indicates that we are to look to the words and conduct of the holder of the privilege to determine whether a waiver has occurred." (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 652.) Merely admitting the existence of a psychotherapist/patient relationship, does not amount to disclosure of "a significant part of the communication" within the meaning of Evidence Code section 912, such that it waives the privilege holder's right "subsequently to claim the privilege as to other elements of the communication." (*In re Lifschutz* (1970) 2 Cal.3d 415, 430.)

A party seeking a juvenile's court records must file a petition in the juvenile court. (Welf. & Inst. Code, § 827, subd. (a)(2)(A).)

> It is the express intent of the Legislature "that juvenile court records, in general, should be confidential." ([Welf. & Inst. Code] § 827, subd. (b).) The strong public policy of confidentiality of juvenile proceedings and records has long been recognized. (*T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 778; *Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 228.) Courts have recognized, however, that this policy of confidentiality is not absolute. The juvenile court, which is in the best position to determine whether disclosure is in the best interests of the minor, has been vested with "exclusive authority to determine the extent to which juvenile records may be

> released to third parties." (*T.N.G. v. Superior Court, supra*, at pp. 778, 781.) Confidentiality cannot always be honored. For example, where the principle of confidentiality conflicts with a defendant's constitutional rights of confrontation and cross-examination, it must give way. (*Foster v. Superior Court, supra*, at p. 229.)

(*In re Keisha T.* (1995) 38 Cal.App.4th 220, 231.)

C. The Trial Court Properly Ruled on the Psychotherapist/Patient Privilege

Appellant contends that the psychotherapist/patient privilege between David and Dr. Jacobs and Dr. Wheatley was waived when Fernando Nieves, who held the privilege for David, requested Dr. Jacobs submit a letter to the Riverside County Superior Court in his efforts to obtain legal guardianship of David. (AOB 198-199.) Not so.

Fernando testified that he and his entire family, including David, went to see Dr. Wheatley and Dr. Jacobs for "family therapy" to help them cope with the fire the killed David's sisters in July 1998. (9RT 440.) Dr. Jacobs subsequently wrote a letter to the courts with his opinion about where David should be placed. (9RT 440-441.) In the letter, Dr. Jacobs stated that he had been treating the Nieves family since July 1998, due to the trauma they had experienced over the murdered girls and attempted murder of David. The letter described the deep bond that had formed between David and his father, stepmother, and half siblings. The letter also described David's "maturation" as "progressing within normal limits due to the stability of his home life ...." The letter recommended that David remain with his current family "to prevent future trauma, loss, stress, or upheaval in David's life".... (10RCT 2301.)

The disclosure here did not waive the privilege within the meaning of subdivision (d) of section 912 of the Evidence Code, because the disclosure was reasonably necessary for the accomplishment of the purpose for which

Dr. Jacobs was consulted, which was to provide family therapy so as help David maintain progress in maturation and to prevent future trauma in David's life. (See also *Rudnick v. Superior Court of Kern County, supra,* 11 Cal.3d at pp. 930-931; *Roberts v. Superior Court, supra*, 9 Cal.3d at p. 341.)

Appellant argues that the privilege was waived as to both Drs. Jacobs and Wheatley because Dr. Jacobs' letter was "tantamount to having Dr. Jacobs testify before the Riverside Court." (AOB 200.) This contention is not well taken.

Appellant relies primarily on *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 590, for the proposition that "courts have held 'the patient waives the privilege when he calls the psychotherapist as a witness in an unrelated trial and elicits information disclosing a significant part of the communications.'" (AOB 199, citing also *People v. Garaux* (1973) 34 Cal.App.3d 611, 612-613.) However, this letter was certainly nothing like sworn testimony given in court. Rather, it was a nontestimonial disclosure of a privileged communication made in a non-public setting, and not otherwise widely disseminated, and in fact was subject to judicial protection from wide dissemination. Indeed, beyond making diagnostic opinions as to David's then-current and future psychological well-being, Dr. Jacobs' letter revealed nothing of what was said between David and Dr. Jacobs. (See Welf. & Inst. Code, § 827, subd. (b); see also *San Diego Trolley v. Superior Court of San Diego County* (2001) 87 Cal.App.4th 1083, 1093 ["waiver of the psychotherapist/patient privilege which has occurred in one proceeding must be carefully limited with respect to its later use in entirely unrelated proceedings"].) As to Dr. Wheatley, the doctor made no comparable disclosures to that of Dr. Jacobs, so there could be no conceivable waiver as to Dr. Wheatley. Accordingly, the trial court's ruling that the privilege was not waived was correct.

Appellant contends that the trial court's ruling violated her Sixth and Fourteenth Amendment right to records and testimony relevant to impeach David's testimony, citing *People v. Hammon* (1997) 15 Cal.4th 1117, 1127, where this Court held that the Sixth Amendment does *not* confer a right to discover privileged psychiatric information before trial. (AOB 201, also citing *People v. Gurule* (2002) 28 Cal.4th 557, 592 and *People v. Anderson* (2001) 25 Cal.4th 543, 577, fn. 11.)[17] As respondent has demonstrated above, the psychotherapist/patient privilege existed between David and Dr. Jacobs and Dr. Wheatley, and was never waived. Accordingly, there has been no Sixth Amendment violation here. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 138, fn. 1 ["rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none"].)[18]

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[17] Appellant also makes a vague unfocused two-sentence reference to the prosecution's due process obligation to turn over favorable and material impeachment evidence, citing *Brady v. Maryland* (1963) 373 U.S. 83, 87. (AOB at 201.) Because this claim is undeveloped without any discussion of any facts or application of any particular rule, it is waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; Cal. Rules of Court, rule 8.204(a)(1)(B).) And even were this not true, it is of no moment because appellant cannot predicate a due process claim under *Brady* on the conduct of private parties or agencies not associated with the prosecution against him. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 903.) Both Dr. Jacobs and Dr. Wheatley worked for Alpha Treatment Centers, which appellant recognizes as a private agency. (AOB at 203-204.) Hence, the prosecution had neither actual nor constructive possession and authority to turn over any treatment records from Alpha Treatment Centers.

[18] Appellant discerns an exception applicable here that allows for "pretrial discovery of unprivileged information in the hands of private parties" (AOB 201, citing *People v. Hammon, supra*, 15 Cal.4th at p. 1128.) However, as shown above, the privilege is fully applicable.

Appellant further argues, as to the records and testimony from DCFS employees, that the trial court was required to examine the information in camera to make a determination whether it was material to guilt or innocence. (AOB 202.) However, the proper procedure for disclosure of this information was by way of a petition to the juvenile court, which has "exclusive authority to determine the extent to which juvenile records may be released to third parties." (See *In re Keisha T., supra,* 38 Cal.App.4th at p. 231; see also Welf. & Inst. Code, 827, subd. (a)(2)(A).) The trial court acted properly in directing defense counsel to file a petition for disclosure in the juvenile court, and not in superior court. And appellant therefore allowed David to leave the witness stand without ever mentioning that his petition remained unresolved.[19]

Appellant next argues that the trial court improperly allowed the prosecution to intervene in third party discovery matters. (AOB 203-204.) Appellant acknowledges that in *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 749, this Court held that prosecutorial participation in third party subpoena hearings "is not prohibited." This Court, however, warned against a prosecutor assuming formal representation of third party interests. (*Id* at p. 754.) Since the practice is not prohibited, and the prosecution never at any point assumed formal representation of David, appellant's argument must fail.

Appellant also argues that the trial court erred when it allowed Fernando, who had a conflict of interest, to assert privileges on behalf of

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[19] As already noted, even after being armed with the DCFS and Alpha Treatment records, appellant was unable in his new trial motion to point to any statement that might have impeached David's testimony. (22 RCT 5570.) Tellingly, appellant does not raise the denial of the new trial motion as a claim on appeal. Appellant's silence in this regards confirms no possible constitutional violation exists here.

his son David, while improperly ignoring the parental rights of appellant. (AOB 205-206.) First, this claim is forfeited because defense counsel never argued to the trial court that it was error to allow Fernando, due to a conflict of interest, to assert privileges on behalf of David. In fact, in the motion for order for disclosure of psychiatric records, appellant did not argue, as she does now, that it was error to allow Fernando to assert a privilege on David's behalf. (See 10RCT 2286-2292.) Nor was this issue raised during oral argument on the motion. Thus, this claim is forfeited. (See *People v. Combs* (2004) 34 Cal.4th 821, 863-864 [where defendant raised only the psychotherapist/patient privilege at trial, he waived on appeal his claims that trial court ruling violated his attorney/client and work product privileges, and Fifth Amendment privilege against self-incrimination].)

In any event, Fernando did not have a conflict of interest with David, such that he was disqualified from asserting the psychotherapist/patient privilege on his behalf. Appellant cites *People v. Superior Court (Humberto S.), supra*, 43 Cal.4th at p. 753 in support of his argument, but that case is distinguishable. In *Humberto S.*, the victim's father was also the brother of Humberto S., who was accused of molesting the victim. The victim's father sought to waive the psychotherapist/patient privilege on behalf of his daughter, and against the wishes of the victim's mother.

This Court found that the father had a "manifest conflict of interest." (*Ibid.*) Here, on the other hand, Fernando was seeking to assert the privilege on behalf of David, not waive it, as was the father of the victim in *Humberto S.* (Cf. also *Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 48 [recognizing a "'potential conflict of interest'" where a father and his children are co-claimants in wrongful death action brought after loss of children's mother, independent guardian ad litem might be appropriate].

Fernando was not seeking to waive the privilege on behalf of his son, as was the father in *Humberto S.*, and he had no monetary conflict of interest, as did the father in *Williams*. While Fernando was indeed a witness for the prosecution, this does not translate into a conflict of interest with David, and indeed, appellant fails to present a persuasive argument for why Fernando testifying against appellant represented a conflict of interest with David. Rather, based on *Humberto S.*, it was appellant who had the "manifest conflict of interest" with David, the sole survivor of her murderous spleen and the principal witness to her crimes. This "manifest conflict of interest" disqualified appellant from waiving the privilege on behalf of David. (*Humberto S., supra*, 43 Cal.4th at p. 753.) There was no error here and this claim fails.

But even assuming there was error, it was harmless under either the *Watson* or *Chapman* harmless error standards. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.) While appellant argues that she had the right to impeach David with his prior inconsistent statements, appellant never made a specific offer of proof as to any prior inconsistent statements made by David. Even now, appellant cannot point to any prior inconsistent statements by David, even after having access to the reports. (See 22RCT 5570.) Accordingly, she cannot show that any error in failing to allow defense counsel to impeach David with prior inconsistent statements was prejudicial.

IV. THE TRIAL COURT DID NOT ERR IN ORDERING APPELLANT TO UNDERGO A PSYCHOLOGICAL AND NEUROLOGICAL EXAMINATION

Appellant next contends that the trial court prejudicially erred when it ordered appellant to submit to psychological and neurological examinations by the prosecution. Appellant relies primarily on this Court's recent opinion in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116 (*Verdin*),

superseded by statute as stated in *Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280, 1290. (AOB 209-228.)[20] *Verdin* does not support appellant's claim.

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[20] Section 1054. 3 was amended in 2009 to respond to *Verdin*:

(b) (1) Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert.

(A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding.

(B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term "tests" shall include any and all assessment techniques such as a clinical interview or a mental status examination.

(2) The purpose of this subdivision is to respond to *Verdin v. Superior Court* 43 Cal.4th 1096, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to Section 602 of the Welfare and Institutions Code. Other than authorizing the court to order testing by prosecution-retained mental health experts in response

(continued...)

A. Background

On March 20, 2000, prior to the commencement of the trial, the trial court signed an "Order for Appointment of an Expert Under § 730 of the Evidence Code," appointing Dr. Barry T. Hirsch for the purpose of interviewing and testing appellant. (10RCT 2337.) The trial court also signed "Order[s] for Appointment of an Expert under § 730 of the Evidence Code," appointing Drs. Robert Brook, Edwin Amos and Robert Sadoff, to perform "face to face interviews with witnesses." (11RCT 2530-2531, 2557, 18RCT 4471.) However, appellant refused to submit to an examination by Dr. Hirsch unless Dr. Kaser-Boyd was present during the examination. (29RT 3782-3783, 3908-3909.) The prosecution objected to Dr. Kaser-Boyd's presence in the examination room, but offered to have the examination videotaped and to allow Dr. Kaser-Boyd to observe the examination from another room. Defense counsel refused. (29RT 3910.)

When Dr. Brook testified for the prosecution as a rebuttal witness, he stated he was not able to interview appellant. When he was asked why, defense counsel objected on hearsay grounds. (38RT 5375.) The objection was overruled, as well as objections based on relevance and suggestiveness. Dr. Brook the testified that he was told that appellant refused to be evaluated by him. (38RT 5376.)

During cross-examination, defense counsel asked Dr. Brook whether it would make a difference to Dr. Brook if he knew that appellant had agreed to an examination on the condition that there be someone in another

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(...continued)

> to *Verdin v. Superior Court, supra*, it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence.

room watching the examination. The prosecutor objected to this question as irrelevant. The trial court then instructed the jury, "when the defendant submits their mental state as an issue in the case, the defendant must submit to an examination by the prosecution experts without condition. That was not forthcoming in this case." (38RT 5485.)

The next day, when defense counsel objected to the instruction, the trial court replied that defense counsel's questions to Dr. Brook "creat[ed] the false impression that it was all right to impose conditions for a defendant to have somebody there, and that's not a correct statement." (39RT 5576.)

When Dr. Sadoff testified, also during rebuttal, he was asked whether he sought to evaluate appellant. (47RT 7066-7067.) Over defense counsel's hearsay objection, he testified that he was told that he would not be able to examine her. The prosecutor then asked Dr. Sadoff if appellant had refused. Defense counsel objected, the objection was overruled, but the prosecutor then asked another question before Dr. Sadoff could answer the question about whether appellant had refused. (47RT 7067.)

When Dr. Amos testified during rebuttal, he was asked whether he had been told that appellant had refused his request to examine her. Over a defense hearsay objection, he testified that he was told that she had refused. (48RT 7273.)

During guilt phase closing argument, the prosecutor reminded the jury that Drs. Brook, Sadoff, and Amos had requested to evaluate appellant, but she refused. (56RT 8767, 8771, 8783.) Defense counsel objected that the argument was a "false statement" as to Dr. Amos, only, and the objection was overruled. (56RT 8783.) The prosecutor also reminded the jurors about the trial court's instruction that once a defendant places her mental state at issue, the defendant must submit to an evaluation. (56RT 8805-8806.) The prosecutor further argued that the jury could take such a refusal

into account when determining the weight and credibility of the defense experts' opinions, the validity of the defenses, and the validity of the information that appellant gave to the defense experts. The prosecutor also stated, without objection, that appellant's refusal to be examined could be considered "as an attempt to suppress or conceal evidence against her." (56RT 8806.)

B. There Was No Error in Appointing the Experts under Evidence Code section 730

In *Verdin, supra*, 43 Cal.4th at page 1100, this Court considered "whether a trial court may order ... a criminal defendant, to grant access for purposes of a mental examination, not to a court-appointed mental health expert, but to an expert retained by the prosecution." This Court concluded that neither California's criminal discovery statutes, any other statute, nor the United States Constitution authorize a compelled mental examination of a criminal defendant conducted by an expert retained by the prosecution. (*Verdin, supra*, 43 Cal.4th at p. 1116.) However, this Court in *Verdin* did not disapprove of the procedure described in Evidence Code section 730. Evidence Code section 730 provides in relevant part:

> When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required.

(*Ibid.*) In *Verdin*, this Court found that the prosecution had forfeited any claim that the expert was properly appointed under Evidence Code section 730 because "not only did the People fail to invoke Evidence Code section 730, the trial court did not appoint an expert pursuant to that section, but instead ordered petitioner to submit to an examination by an expert retained

by the prosecution." (*Verdin, supra,* at p. 1110.) This Court concluded: "The People remain free on remand to move the trial court to appoint an expert pursuant to Evidence Code section 730 if, in its discretion, it decides that expert evidence "is or may be required." (*Id.* at p. 1117.)

The trial court here appointed Drs. Hirsch, Brook, Sadoff and Amos pursuant to Evidence Code section 730, for the purpose of evaluating appellant, and that procedure has been approved in *Verdin*. Appellant's reliance on *Verdin* is therefore misplaced. Accordingly, the trial court did not commit error when, in its discretion, it appointed the experts. Indeed, any argument that appointment under section 730 was improper was forfeited when appellant failed to specifically object on that basis below. (*Verdin*, *supra*, 43 Cal.4th at pp. 1109-1110.) And even if this were not so, it is undisputed that appellant intended to assert a mental health defense at both the guilt and penalty phase trials. The trial court was therefore within its discretion to order the examinations. (See *United States v. Byers* (D.C. Cir. 1984) 740 F.2d 1104, 1110-1111 [where defendant has placed his mental state at issue, no Fifth Amendment violation occurs in a compelled court-ordered psychiatric examination].) It follows, therefore, that the trial court did not commit error when it instructed the jury "when the defendant submits their mental state as an issue in the case, the defendant must submit to an examination by the prosecution experts without condition." (38RT 5485.)

Additionally, the prosecution's arguments to the jury were not in error. Appellant's analogy to a prosecutor's comment on the exercise of the Fifth Amendment right to silence (AOB 220) is inapt, since appellant had no right to refuse to be evaluated pursuant to Evidence Code section 730. Appellant's reliance on Evidence Code section 913 is also unavailing. (AOB 221.) That section pertains to comments on the exercise of a privilege, and appellant had no "privilege" to decline evaluation under

Evidence Code section 730, once she put her mental state into play. As to appellant's claim that she did not "personally" refuse to be examined and therefore it was error for the court and the prosecution to so state to the jury, the claim is frivolous. Appellant was represented by counsel and was present during the proceedings regarding her mental state. There was no indication on the record that she disagreed with her counsel's refusal to have her examined unless it was in the presence of a defense expert.

Appellant further argues that the trial court's failure to caution the jury that the refusal to submit to a mental examination was insufficient to prove any required mental state element, and thus deprived her of her right to due process by lessening the prosecution's burden of proof. (AOB 222-223.) Since appellant did not request a "cautionary instruction," however, this claim is forfeited. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 306-307.) In any event, such a cautionary instruction was unnecessary. The jury was properly instructed on the State's burden to prove beyond a reasonable doubt that appellant had the required mental state for a finding of guilt for the murders of her children. (20RCT 5102-5104.)

Further, the prosecutor's argument correctly informed the jurors that they could determine the weight and significance of appellant's refusal. The court also instructed the jury that "the weight and significance of any concealment ... are matters for your consideration." (20RCT 5114.) True, the court did not add that the concealment was not sufficient in itself to establish appellant's guilt, but this omission was made up for by other, correct instructions on the State's burden of proof. When other proper instructions adequately guide the jury in reaching factual determinations on issues which would have been presented to the jury by the omitted instruction, there is no prejudice. (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) Contrary to appellant's high-pitched expression of outrage, the

jury was not "free to use the evidence of refusal and the prosecution's argument in any way, to prove anything, without limit or restraint." (AOB 224.) Finally, it further follows that, since there was no violation of state law, there was likewise no violation of appellant's federal constitutional right to due process. (See *People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 138, fn. 1.)

In any event, assuming there was error, appellant was not prejudiced. That is, it is not reasonably possible that the jury would have returned more favorable verdicts if the trial court had not ordered appellant to submit to a psychological evaluation and then informed the jurors that appellant had refused to submit to an examination by the prosecution's experts. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1087-1088.) When testifying in rebuttal, Dr. Brook did not agree with Dr. Humphrey's conclusions regarding appellant's alleged cognitive impairment. (38RT 5377.) However, in criticizing the defense expert's methodology and conclusions, Dr. Brook did not rely on appellant's refusal to participate in the court-ordered examination. The testimony of Dr. Sadoff, Amos, and Brook, likewise, did not rely on appellant's refusal to participate in the court-ordered examination. Additionally, the evidence of appellant's alleged mental impairments was decidedly thin, while the evidence of her premeditated culpability in her children's deaths was overwhelming. Accordingly, it is not reasonably possible that the jury would have returned more favorable verdicts in this case if the trial court had not allowed the experts to testify regarding appellant's refusal to cooperate with the court-ordered psychiatric examination. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.)

V. THE TRIAL COURT DID NOT PREJUDICIALLY RESTRICT THE SCOPE OF DEFENSE EXPERT TESTIMONY

Appellant next contends that the trial court prejudicially restricted the scope of defense expert testimony on appellant's mental status and motivations, and precluded defense experts from relying on any out of court statements by appellant or her family. (AOB 229-248.) Respondent submits that the trial court did not prejudicially restrict the scope of testimony of appellant's defense experts.

A. Del Winter's Testimony Was Not Impermissibly Infringed upon by the Trial Court's Ruling

1. Background

On May 3, 2000, prior to appellant's opening statement, the prosecution asked "that no expert be allowed to testify or be asked regarding the ultimate issue of her state of mind, and whether she could form whatever intents are involved. Those go to the ultimate issue." Defense counsel responded that "an expert can testify based on their expertise" and the trial court asked, "Are you talking in the form of a hypothetical: 'assuming these facts to be true, what is your opinion of that person's state of mind.' Is that what you're talking about?" Defense counsel responded, "Sure. Yeah, sure. That's admissible." (14RT 1271.) The trial court observed, "Well, that's somewhere down the line, is it not [?]" and "the only time it's going to come up, I suppose, is when you present the evidence." Defense counsel complained, "they're trying to gag the defense before we even get going." (14RT 1272.) The trial court stated that it did not know what evidence defense counsel was planning on presenting regarding appellant's mental state, and therefore, "it's hard for me to decide that issue now." (14RT 1273.) The trial court asked the prosecution to wait until it had the expert's report, and the prosecutor, Mr. Barshop, responded, "I don't anticipate getting the witness' reports

beforehand, because counsel had indicated he doesn't have to turn them over until they've raised the issue. When the first witness testifies, I will not have those reports on direct examination." The prosecutor further stated that, "The defense arson expert, Mr. Winters [*sic*], in his report makes a statement that it was not [appellant's] intent to burn down the entire house," to which the trial court responded, "Well, I don't see how that would be admissible." (14RT 1274.) The trial court asked whether Mr. Winter had a degree in psychiatry or psychology, and the prosecutor responded that he did not believe so. The trial court responded:

> He might be able to talk about his physical observations, and based upon that, maybe form some opinion on how a fire started, or something like that. [¶] But as far as describing whether somebody intended to burn a house down, he might say that it would be a very poor way to try and burn a house down, or something like that, but to take the next step and ascribe some intent to it, that's another thing.

(14RT 1275.) Defense counsel again complained, "they try to gag us before we even get going." (*Ibid.*)

On May 31, 2000, Del Winter, a recently retired fire investigator, testified as the defense's arson expert. (29RT 3803-3807.) Winter opined that the fire was obviously set in several places and a very small amount of gasoline was used. (29RT 3808.) Winter found it odd that the fires were set in locations that were not likely to cause a great amount of damage. Three of the fires were started on carpet that was fire resistant. Also, the fires were started on flat surfaces that do not burn very well. He also found it odd that the gasoline can was put back in its location. (29RT 3809-3810.)

Defense counsel later asked Winter his opinion on whether the fire was set "with the intent to burn the structure?" The prosecution objected that the question was beyond the scope of Winter's expertise, and the objection was sustained. The trial court told defense counsel that Winter's opinion was "limited as to whether this fire was intentionally set and the

manner and means of that, and that's it." The trial court then asked Winter whether he had an opinion on whether the fire was intentionally set, and Winter replied that in his opinion, the fire was intentionally set. (29RT 3818.)

On redirect, Winter testified, over a "speculative" objection by the prosecution, that he would place the fire started by appellant in the "psycho category," because the motive was "obscure." (29RT 3864-3865.) However, the next day, the trial court, having reread the testimony, sustained the objection. The trial court explained that the testimony went to "intent and the ultimate issue and it's not relevant." Further, after defense counsel objected that Winter's testimony merely went to "motive," the trial court observed that his testimony was "misleading" and "even a psychiatrist is not entitled to give an opinion on whether somebody formed a specific mental state." (30RT 3927-3928.) The trial court further told defense counsel, that he could recall Winter, who had returned to Minnesota, "if you think it's so important on that one tiny issue." (30RT 3929-3930.) The trial court then called the jurors in and told them that it had erred and was striking Winter's answer that the fire was in the "psycho category," and the jury was to disregard it. (30RT 3954.)

2. The trial court did not abuse its discretion

"A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion." (*People v. Vieira* (2005) 35 Cal.4th 264, 292 (*Vieira*).) The trial court here did not abuse its discretion in striking Winter's classification of the fire as in the "psycho category." The testimony was an attempt to get in the back door what counsel could not get in the front door, namely, whether appellant had formed a specific mental state. "'Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections

28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state.'" (*Vieira*, *supra*, at p. 292, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 582, fns. omitted, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)[21]

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[21] Section 28 states:

(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. [¶] (b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing. [¶] (c) This section shall not be applicable to an insanity hearing pursuant to Section 1026. [¶] (d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense.

Section 29 states:

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether

(continued...)

In *Vieira*, this Court found that the trial court did not commit error in excluding the testimony of a defense expert on cults. The expert's testimony was offered to establish that the defendant, under the mind control techniques of a codefendant, was unable to form the mental state required for first degree murder. (*Vieira, supra,* at p. 291.) The trial court concluded that the expert, who was not a psychologist or a psychiatrist, was not qualified to render an opinion as to whether the defendant suffered from a mental illness at the time he committed the murders that would raise a doubt about whether defendant had the mental state requisite for first degree murder; nor was the expert qualified to testify generally about the relationship between mental illness and certain types of behavior. (*Id.* at p. 292.) This Court concluded that the trial court did not abuse its discretion in determining that the expert's testimony was not relevant to any guilt phase issue and should be excluded. (*Ibid.*) Like the expert in *Vieira*, Winter's was not a psychologist or a psychiatrist, and thus was not qualified to render an opinion on whether a fire belonged in the "psycho" category. The trial court did not abuse its discretion in limiting Winter's testimony in this regard. Even assuming that the court erred, appellant could not have possibly been prejudiced. The testimony that the fire belonged in the "psycho" category was a two-edged sword: the term "psycho" surely having some negative connotations. Any error in striking that small portion of Winter's testimony did not result in a miscarriage of justice. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

(...continued)

> the defendant had or did not have the required mental states shall be decided by the trier of fact.

B. Restrictions on the Testimony of Defense Mental Health Experts Did Not Infringe on Appellant's Right to Present a Defense

1. Background

On June 12, 2000, the prosecution filed a motion to limit defense psychiatric testimony. (18RCT 4551-4559.) Defense counsel filed a response, which argued that the expert opinion proffered in the case was relevant, and to the extent that it was based on hearsay, could not be excluded so long as it satisfied the threshold requirement of reliability. (18RCT 4613-4619.) At a hearing on the motion on June 15, 2000, the trial court stated that it had read the motion and "the gist of it" was to secure a ruling that the defense's experts could not "testify to the ultimate issue" regarding appellant's mental state, and could not use appellant's statements until after appellant had testified. (34RT 4661, see also 34RT 4666.) The prosecution agreed with the court's summation. (34RT 4663.) After a lunch break, during which the trial court read appellant's reply brief, the court invited further argument from defense counsel. (34RT 4680-4681.) After further argument, the trial court ruled as follows:

> A lot of the predicate acts that you're seeking to establish could be done through witnesses, live witnesses. Perhaps Dolores Martin. Maybe Al Lucia. Maybe Penny Lucia; I don't know if she was in the picture at that point. Or maybe the defendant herself. And until those people testify under the subjective crucible of cross-examination, I'm not going to allow the experts to base their opinion on any of that evidence. And the experts are not going to be able to come in and talk about anything the defendant told them to form the basis of their opinion, because her statements do not have an indicia of reliability. [¶] .... [¶] Furthermore, as to any expert witness -- Dr. Humphrey, Dr. Ney, Dr. Kaiser-Boyd, or any other psychological-psychiatric witness -- they may not testify with regard to the defendant's levels of drugs in her system at the time of the crime since there's no independent evidence of that. [¶] They can talk about they have considered that there is some

> evidence that she had phentermine in her system, with the understanding there's going to be an explanation to the jury -- there already has been an explanation -- that could have been in her system for seven days prior to July the 1st. [¶] They can't express an opinion on what was in the defendant's mind at or about the time of the alleged incident. [¶] They may discuss her psychological background to the extent there's reliable evidence on which it is based. So far I've found there is none. [¶] The defendant's statements to the experts cannot be relied on unless the defendant herself will testify. [¶] The fact these experts have spent, I mean, a massive amount of hours with the defendant, coupled with the fact that the defendant has refused to submit to interviews by the prosecution experts without the unreasonable conditions that were imposed, it has further bearing on the court's view that the defendant's statements are unreliable. [¶] Experts can testify to a defendant's general mental condition so long as it's supported by reliable evidence. [¶] What the experts cannot do is testify to what the defendant did at the time of these fires when they were started, just before and just after, or her responses to the fires. [¶] They cannot testify to the ultimate issue. They can't talk about her being in a dissociative state. They can't testify she was in a dissociative state. [¶] A lot of the reports express the ultimate opinion. That's the problem with the reports. When you're making an offer of proof, Mr. Waco, with respect to the reports, they're [*sic*] expressed the ultimate issue. [¶] That's my ruling.

(34RT 4732-4734.)

Defense counsel objected to the trial court's ruling as a violation of appellant's rights under the Fourth, Sixth, Eighth, and Fourteenth Amendments, as a "violation of due process." (34RT 4734.)

Despite the trial court's clear ruling, defense counsel attempted to elicit inadmissible testimony from defense experts. Thus, during Dr. Ney's testimony, defense counsel asked whether he had formulated an opinion that appellant "did or did not consciously attempt suicide at the time this fire started?" The prosecution objected that the question went to the "ultimate issue" and the trial court sustained the objection, citing section 29. (40RT 5747.) Trial counsel persisted in trying to formulate a question

that would permit Dr. Ney to voice his opinion on the "ultimate issue" of appellant's mental state at the time of the fire, but the trial court sustained each objection by the prosecution. (40RT 5747-5749.) The court then dismissed the jurors. (40RT 5749.) The trial court admonished defense counsel as follows:

> Penal Code section 29 does not simply forbid the use of certain words, it prohibits an expert from offering an opinion on the ultimate question on whether the defendant had or did not have a particular mental state at the time that he acted. [¶] An expert may not evade the restrictions of [section] 29 by couching an opinion in words that are or would be taken as synonyms for the mental states involved. Nor may an expert evade section 29 by offering the opinion that the defendant at the time he acted had a state of mind which is the opposite of, and necessarily negates, the existence of the required mental state. [¶] Mr. Waco, I told you before the jury was here that you might want to proceed by way of hypothetical questions and avoid this problem. You elected not to do that.

(40RT 5750-5751.) Despite this admonishment, defense counsel ignored the trial court's ruling and continued questioning Dr. Ney regarding appellant's mental state at the time of the crime. The prosecution continued to object that the questions went to the "ultimate issue" or "ultimate conclusion" and the court continued to sustain the objections. (See, e.g., 40RT 5756-5757, 5759-5760, 5767, 5782, 5788, 4800; 42RT 6076, 6084-6086; 43RT 6283.) In any event, Dr. Ney was able to eventually testify without objection that appellant's "history and symptoms" fit the diagnosis of a "major depression," "postpartum depression," "dissociative state," and "serotonin syndrome." (43RT 6370.)

Defense counsel later asked defense surrebuttal expert, Dr. Gordon Plotkin, to assume that someone was in a "state of dissociation at the time of lighting this fire...." The prosecutors objected to the testimony as going to the ultimate issue, and for lack of foundation. The trial court sustained the objection, without specifying the ground. (52RT 7889.)

2. *The trial court did not abuse its discretion*

The trial court here did not abuse its discretion in ruling against appellant's persistent efforts to elicit inadmissible testimony from her experts. This Court has approved of the exclusion of expert testimony that goes to the "ultimate issue" of a defendant's mental state at the time of the crime. In *People v. San Nicholas* (2004) 34 Cal.4th 614, this Court stated:

> A criminal defendant has the due process right to the assistance of expert witnesses, including the right to consult with a psychiatrist or psychologist, if necessary, to prepare his defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 83 [].) The Sixth and Fourteenth Amendments to the United States Constitution also guarantee a defendant's right to present the testimony of these expert witnesses at trial. (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 543.)
>
> Nonetheless, expert psychiatric testimony may be limited by statute. (*People v. Saille* (1991) 54 Cal.3d 1103, 1111.) Section 28, subdivision (a) provides that evidence of mental illness "shall not be admitted to show or negate the capacity to form any mental state." Subdivision (b) of section 28 states that as a "matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action ...." Section 29 prohibits expert witnesses from directly stating their conclusions regarding whether a defendant possessed a required mental state. It provides, "[i]n the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states ... . The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

(*People v. San Nicholas, supra*, 34 Cal.4th at pp. 661-662; see also *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364 [Section 29 "does not simply forbid the use of certain words, it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted"].)

In *San Nicholas,* this Court held that the trial court did not abuse its discretion in limiting the testimony of the defense expert. In reaching this conclusion, this Court considered the totality of the expert's testimony and concluded that "considerable" expert testimony was admitted regarding the defendant's mental condition. (*Id.* at p. 663, citing *People v. Jones* (1998) 17 Cal.4th 279, 304.) This Court also found that "those portions of the testimony that were excluded were narrow and fell directly within the prohibitions of sections 28 and 29." (*People v. San Nicholas, supra*, 34 Cal.4th at p. 663.)

Such was the case here. Although the trial court sustained most of the prosecution's objections based on the question going to the "ultimate issue," Dr. Ney was able to eventually testify without objection that appellant's "history and symptoms" fit the diagnosis of a "major depression," "postpartum depression," "dissociative state," and "serotonin syndrome." (43RT 6370.) Dr. Ney also opined that appellant had a history of epilepsy (40RT 5757) and that appellant had "significant postpartum hormonal effect from the abortion five days before the fire." (40RT 5757-5758.) Those portions of Dr. Ney's testimony that were excluded fell directly within the prohibitions of sections 28 and 29, because they went directly to appellant's mental state at the time of the crime.

Likewise, the trial court did not abuse its discretion by limiting the testimony of Dr. Plotkin. Dr. Plotkin was able to testify that Al Lucia's description of appellant's symptoms when she was 18 months to two years was consistent with a diagnosis of "seizures." (48RT 7381, 7390-7392.) Dr. Plotkin further testified that blood drawn from appellant at Henry Mayo Hospital after the fire showed a "dramatically elevated" level of an enzyme ("CPK") that is associated with seizures. (48RT 7425-7426.) The level of CPK found in appellant's blood was "very suggestive" of her having had a seizure recently around the time of the blood being drawn on July 2, 1998.

(48RT 7428.) Further, a person who was in a carbon monoxide atmosphere where four people died could suffer from delirium and make "poor choices." (48RT 7429.)

Dr. Plotkin further opined that appellant likely had a carbon monoxide level of between 16 and 32 at the time that she was rescued. (48RT 7432.) A person with carbon monoxide levels between 10 and 30 per cent would experience mental status changes including a "flat demeanor." (48RT 7433.) Another effect of carbon monoxide poisoning was lack of recall or amnesia. (52RT 7847-7848.) Dr. Plotkin further testified that a "dissociative state" brought on by stress could express itself through amnesia or a person believing he or she was someone else. (52RT 7828.)

Further, Dr. Plotkin testified that a combination of Zoloft and Phentermine could lower a person's threshold for having a seizure and could cause serotonin syndrome. (52RT 7838, 7867.) There was no specific amount of drugs needed to cause serotonin syndrome in any given individual. It depended on the individual. (52RT 7843.) Delirium was a symptom of serotonin syndrome. If a person were in such a delirium, he or she would have a "shoddy memory for that period of time." During that period of time, a person could not plan complex actions, but might be able to do actions that appear complex, such as tear off bandages and try to get out of a hospital bed. (52RT 7835-7836.) It was "not inconceivable" that somebody in such a state of mind could light a fire. (52RT 7837-7838) If a person had serotonin syndrome 12 to 15 hours before going to a hospital, Dr. Plotkin would not necessarily expect to find any signs of that syndrome if that syndrome had passed. (52RT 7880.) Those portions of Dr. Plotkin's testimony that were excluded fell directly within the prohibitions of sections 28 and 29, because they went directly to appellant's mental state at the time of the crime. (See 52RT 7889 [trial court sustains objections to question regarding a "state of dissociation at the time of lighting this fire"].)

Appellant argues that the prosecution successfully blocked mental state evidence on the ground that it was inadmissible under section 29, yet the prosecution "conceded during the conference to settle guilt phase instructions, that serotonin syndrome, a dissociative state, and epilepsy are not mental diseases, mental defects, or mental disorders, thereby undercutting their own argument" that section 28 and 29 precluded the defense experts from giving their opinions on "ultimate issues." (AOB 239-240, citing 46RT 7027-7029, 7036.)

Respondent submits that there is no "undercutting" here: it was appellant's position that she had a mental disease, defect, or disorder that prevented her from forming a required mental state. The prosecution's position was two-fold: (1) Section 29 prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time that she acted; and (2) appellant did not present sufficient evidence that she had a mental disease, defect or disorder. (See 46RT 7028.) The prosecution's stances were not contradictory, but rather, were complimentary. The trial court here did not err in exercising its discretion to limit the testimony of appellant's mental experts.

Nor does the application of the ordinary rules of evidence generally impermissibly infringe upon appellant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) Appellant argues that the trial court's application of section 28 and 29 was one-sided and arbitrary, depriving her of due process and the right to a fair trial, because it allowed the prosecution to present comparable evidence that had been denied to appellant. (AOB 240.)

Appellant cites as an example the prosecutor's hypothetical questions to Dr. Plotkin, which the trial court permitted Dr. Plotkin to answer. (AOB 239, citing 53RT 8123-8126, 8131-8133.) The key difference, here, of

course, is that the prosecutor was able to articulate a proper hypothetical question rooted in the facts as shown by the evidence, something which defense counsel refused to do. (See 40RT 5750-5751.) "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Thus, this claim must be rejected.

In any event, the limitations placed on the defense witnesses was not prejudicial. Appellant argues that the exclusion of the evidence was prejudicial, because her defense was based on medical, psychological, and neurological evidence that she was unconscious or did not form the requisite intent necessary for conviction of each of the crimes charged beyond a reasonable doubt. (AOB 241-248.) Not so. The evidence that appellant was unconscious or unable to form the requisite mental state for conviction of the crimes was slim and unconvincing; in contrast, there was incredibly strong evidence that appellant intentionally set the fires that killed her children in order get revenge on the men in her life. (See Arg. I.C.4, *supra*.) Appellant's experts, who had the advantage over the other experts of talking to her, were unable to capitalize on their advantage because appellant offered the experts nothing but speculation to support their opinions. And so, any error here was nonprejudicial, under either the state or federal harmless error standards. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.)

C. The Trial Court Did Not Abuse Its Discretion by Prohibiting Appellant's Defense Experts from Relying on Unreliable Hearsay from Appellant and Her Family

Appellant next argues that the trial court prejudicially precluded defense experts from relying on any out of court statements by appellant or her family. (AOB 243-248.) The trial court did not abuse its discretion.

The trial court stated that it would not allow appellant's experts to base their opinions on statements by appellant and her family members "until those people testify under the subjective crucible of cross-examination .... And the experts are not going to be able to come in and talk about anything [appellant] told them to form the basis of their opinion, because her statements do not have an indicia of reliability." (34RT 4732.) The trial court further ruled that Dr. Humphrey, Dr. Ney, and Dr. Kaiser-Boyd "may not testify with regard to [appellant's] levels of drugs in her system at the time of the crime since there's no independent evidence of that." The trial court found that appellant's out-of-court statements lacked indicia of reliability unless she testified herself; the court further stated that appellant's refusal to be examined by prosecution experts "without the unreasonable conditions that were imposed, " had "further bearing on the court's view that [appellant's] statements are unreliable." (34RT 4733.) The trial court allowed the defense experts to testify as to appellant's general mental condition so long as it was supported by reliable evidence. (34RT 4734.)

"[A]ny material that forms the basis of an expert's opinion testimony must be reliable." (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) This is a threshold requirement that must be satisfied before an expert may be allowed to offer opinion testimony. (*Ibid.*) A trial court has "considerable discretion" to prevent a jury from hearing expert testimony based on unreliable hearsay. (*Id.* at p. 619) The application of the ordinary rules of

evidence generally do not impermissibly infringe upon a defendant's constitutional rights. (*People v. Prince, supra,* 40 Cal.4th at p. 1229.) Here, the trial court properly set forth some reasonable ground rules before allowing appellant's experts to offer opinions based on the statements of appellant and her family members. The trial court first required those witnesses to testify under the "crucible of cross-examination." Thus, as an example, Albert Lucia, appellant's stepfather, testified that he witnessed appellant's "seizures" when she was a young child. (37RT 5061, 5079.) In similar fashion, appellant testified that the week following the abortion, including the evening of June 30th, she took diet pills and Zoloft. (37RT 4796-4797.) Following Lucia's and appellant's testimony, the trial court permitted the defense's experts to offer opinions based on their testimony.

Thus, Dr. Humphrey testified that appellant's behavior, based on Lucia's reports, was consistent with epilepsy and "brain malfunction." (37RT 5147-5148.) Dr. Humphrey further testified that the descriptions of head trauma testified to be Lucia would be consistent with causing the brain damage that Dr. Humphrey observed. (37RT 5203.)

Dr. Ney also testified, following the testimony of appellant and Lucia. Dr. Ney found that appellant had a history of epilepsy. (40RT 5757.) He gave appellant a "pregnancy loss survivor questionnaire" and the results were in the "extreme range." (40RT 5745-5746.)

Dr. Ney also testified regarding the symptoms of serotonin syndrome, including confusion, delirium, and "chills." (43RT 6381-6382.) According to Dr. Ney, on the night of the fire, appellant heard a "loud roaring," which was an "epileptic aura." Appellant then passed out. (43RT 6270.) Appellant's use of the oven on June 30, 1998, to warm herself, was consistent with someone who has "serotonin syndrome because of a combination of drugs" such as Zoloft and Phentermine." (43RT 6278-6279.) Phentermine had since been withdrawn from the market because of

its toxicity. (43RT 6367.) The combination of Zoloft and Phentermine could affect some people but not other people. (43RT 6367-6368.) Dr. Ney did not find it of "great importance" that appellant did not have a prior recorded history of dissociative disorder, because "none of the precipitating conditions existed prior to this." (43RT 6279-6280.) A person experiencing a psychological dissociative state "can do very, very complex things." If a person is experiencing an "organically" determine dissociative state "set off by seizures," then that person will be "clumsy" and not aware of what he or she is doing. (43RT 6282.) Appellant's history and symptoms fit the diagnosis of major depression, postpartum depression, dissociative state, and serotonin syndrome. (43RT 6370.)

Dr. Plotkin testified that Al Lucia's description of appellant's symptoms when she was 18 months to two years was consistent with a diagnosis of "seizures." (48RT 7381, 7390-7391.) Lucia's description of appellant shaking uncontrollably one afternoon and then going to the hospital was also consistent with a diagnosis of "seizures." (48RT 7392.)

Thus, the trial court's ruling did not preclude appellant's experts from offering their opinions based on what Lucia and appellant said, once appellant and Lucia had testified.

Appellant argues that the effect of the court's ruling was that Dr. Kaser-Boyd, who had spent about 25 hours interviewing appellant, could not testify about any opinions based on those interviews. (AOB 244.) This is not true. Dr. Kaser-Boyd could have testified to any opinions based on the interviews once appellant had testified and undergone cross-examination. Appellant did testify and undergo cross-examination. Defense counsel ultimately chose not to call Dr. Kaser-Boyd to testify, for tactical reasons having nothing to do with the trial court's ruling. (41RT 5925-5926 [defense counsel informs court, after court stated that it would hold 402 hearing on Kaser-Boyd's testimony, that he was not going to call

the doctor].) Appellant further argues that the trial court "ruled that all 'the defendant's statements are unreliable.'" (AOB 244.) This is a misstatement. The trial court was justifiably suspicious of appellant's statements to the defense experts because she would not consent to be interviewed by the prosecution's experts. However, once she testified, Dr. Ney could offer his opinions based on her statements, including his opinion that she was experiencing an "epileptic aura" and symptoms of serotonin syndrome on the night of the fire.

Appellant additionally argues that both Dr. Kaser-Boyd and Dr. Ney were restricted from testifying about sexual molestation of appellant. (AOB 246.) However, Dr. Chang testified that appellant told him that she had been sexually assaulted by one of her mother's boyfriends. Appellant also told Dr. Chang that her mother was physically and emotionally abusive towards her. (43RT 6336.) Appellant was thus not denied her right to present a defense. There was no abuse of discretion here. Moreover, any error here was nonprejudicial, under either the state or federal harmless error standards, because the jury ultimately heard testimony from appellant's defense experts and other witnesses to the effect that she suffered from, among other ailments, seizures, epilepsy, and serotonin syndrome. (*Chapman*, *supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.)

VI. THE TRIAL COURT DID NOT ERR BY EXCLUDING THE PET SCAN EVIDENCE AT THE GUILT PHASE; ANY ERROR IN EXCLUDING THE PET SCAN EVIDENCE AT THE PENALTY PHASE WAS HARMLESS

Appellant next contends that the trial court erred by excluding evidence of the positron emission tomography (PET) scan at both the guilt and penalty phases, which would have provided medical corroboration for opinions of defense experts and a basis for sympathy. (AOB 249-269.) There was no error in excluding the PET scan evidence at the guilt phase.

Moreover, any error in excluding the PET scan evidence at the penalty phase was harmless.

A. Background

On March 10, 2000, defense counsel handed over to the prosecution the defendant's witness list for the guilt phase and some reports, including a one-page report from Dr. Brian King to Dr. Michael Gold, regarding a PET scan of appellant's brain, conducted on February 18, 2000. (11RCT 2434, 2439.) The report noted a "[m]oderate degree of diminished tracer activity within the posterior temporal region and adjacent left occipital region." (11RCT 2439.)

On June 5, 2000, while the trial was in recess due to defense counsel's discovery violations, the prosecutor orally requested a *Kelly-Frye*[22] hearing on the PET scan evidence that appellant was planning on presenting. The prosecutor stated that she had done research and "apparently it's not a test that is generally accepted in the scientific and medical community for the purpose it's being offered." The trial court stated that it had also done research, and found a Ninth Circuit Court of Appeal case and a California court case that indicated that "the PET scan is junk science, in effect." (31RT 4145.) A hearing was scheduled for June 12, 2000. Defense counsel stated that he had not checked with any of his doctors to see if they were available that date. (31RT 4146.) The trial court ordered defense counsel to have his witnesses present in court on that date. (31RT 4147.) The defense filed a motion on June 7, 2000, asking the trial court to reconsider the order for a *Kelly-Frye* hearing or, alternatively, to continue the hearing date for at least two weeks, so that the defense could prepare for

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[22] *People v. Kelly* (1976) 17 Cal.3d 24. The *Kelly-Frye* rule is now referred to in California as the *Kelly* rule due to changes in the Federal Rules of Evidence that supersede *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. (*People v. Bolden, supra*, 29 Cal.4th at p. 545.)

the hearing. (18RCT 4530-4537.) The prosecution filed a motion on the day of the hearing to exclude the PET scan evidence, because it was "'new' for *Kelly* purposes" and as a scientific procedure, "carries an 'aura of infallibility.'" (18RCT 4560-4561.) The prosecution also argued that the evidence was inadmissible under Evidence Code section 352 and on relevancy grounds. (18RCT 4562.) At the hearing on June 12th, defense counsel called Dr. Michael Gold, a licensed neurologist. (31RT 4179.) Dr. Gold testified that PET scans show a "functional image of how the brain is working. It tells us which parts are active or inactive, and which parts may have been injured in the past." (31RT 4183.) The PET scan procedure involves glucose, marked with a radioactive compound, injected into the bloodstream and passing to the brain. If there is a part of the brain not actively functioning, it will not use glucose like the rest of the brain and thus no radioactivity will be released at that spot in the brain. A functionally inactive part of the brain will be revealed on the PET scan. (31RT 4184.) The PET scan had been in use since the 1970s and was used by neurologists around the country and around the world. (31RT 4184-4185.) PET scans have been used to evaluate brain tumors, epilepsy, cognitive disorders, brain trauma, Alzheimer's disease, stroke, and birth injury. (31RT 4186.) The results of appellant's brain scan showed a "significant injury," as shown by Dr. King's report (the radiologist) and Dr. Gold's report. (31RT 4188.) If someone was poisoned by carbon dioxide, it would likely affect the entire brain, rather than only a part of the brain. (31RT 4189.) Appellant's PET scan results indicated that she had experienced brain trauma, and the injury was not typical of carbon monoxide poisoning. (31RT 4190.) Blue Cross of California, the largest private insurer in California, approved of PET scans as a diagnostic technique. If a test is considered experimental, an insurance company will not cover it. (31RT 4190.) PET scans are "constantly mentioned as a

diagnostic tool" in journals read by Dr. Gold. (31RT 4191.) The American Academy of Neurology "feels that the PET is a useful diagnostic tool in neurology." (31RT 4192.) Dr. Gold opined that the PET scan is a "universally and widely accepted way to evaluate the brain." (31RT 4194.)

On cross-examination, Dr. Gold testified that he could not say whether a "majority" of researchers accepted the PET scan as a reliable forensic tool. (31RT 4209.) The prosecutor asked Dr. Gold what specific diagnosis appellant's brain pattern indicated. Defense counsel objected that the prosecutor was deposing Dr. Gold. The prosecutor countered that the question had relevance "because if there is no link from this PET scan to any sort of behavior, then it's irrelevant to the case." The trial court overruled the objection. (31RT 4213.) Dr. Gold responded that appellant's brain pattern was "consistent with epilepsy." (31RT 4214.)

Appellant's next witness was Dr. Arthur Kowell, a licensed neurologist. (31RT 4235.) He testified that various insurance companies paid for PET scans and PET scans had been widely used in the medical community since the 1970s. (31RT 4242-4245.) On cross-examination, Dr. Kowell agreed that in most cases he could not date a brain injury with a PET scan alone. The prosecutor followed-up by asking "[i]f you see a PET scan today, could you tell if there was any injury that occurred a year ago as opposed to six months ago?" Defense counsel objected that the question was irrelevant to the admissibility of the PET scan to the general scientific community. (31RT 4249.) The trial court overruled the objection. (31RT 4250.) Dr. Kowell responded that he could not tell how long trauma had been present based on one PET scan. (31RT 4250.) A PET scan alone cannot be used to make a diagnosis. (31RT 4253.) Dr. Kowell did not know if a PET scan could be used to evaluate criminal behavior. (31RT 4254.) On the basis of a single PET scan, Dr. Kowell would be unable to tell anything about the brain that had occurred two or 10 years earlier.

(31RT 4256.) The best screening tool for epilepsy was a "good physical and history examination," followed by an EEG and an MRI, and then "possibly a PET scan after that." (31RT 4260.) Dr. Kowell could not give a retrospective diagnosis based on a PET scan. (31RT 4262.)

Dr. Mark Mandelkern, a doctor of nuclear medicine, testified next for the defense. (31RT 4264.) He had operated a PET scan center at the West Los Angeles V.A. hospital for 15 years. He had "published quite a few articles regarding PET scan diagnosis of epilepsy," and other brain conditions. (31RT 4265.) Dr. Mandelkern testified that there was a split in the scientific community regarding whether PET scans were reliable for purposes of diagnosis. (31RT 4269.) On cross-examination, Dr. Mandelkern testified that PET scans were used "all the time" as a diagnostic tool for temporal lobe epilepsy but were not as useful in the area of psychiatric disorders. (31RT 4272.) A PET scan could not be used to diagnose a "dissociative state." (31RT 4273.) Dr. Mandelkern had "no experience in the criminal arena" and did not know whether a person facing capital murder charges would lie about his or her life history prior to receiving a PET scan. (31RT 4276.)

Dr. Helen Mayberg, a research neurologist, was called as a witness for the prosecution. Dr. Mayberg had conducted fulltime research on PET scans for 15 years. (31RT 4292-4293, 4296.) She had published 40 to 50 articles on PET scans in peer review journals. (31RT 4296-4297.) Dr. Mayberg testified that PET scan patterns "to be used for individual subjects to corroborate diagnoses is currently not generally accepted or usable ...." (31RT 4300.) PET scans are not generally accepted in the medical and scientific community as a general screening tool for neurologic and psychiatric disorders. (31RT 4304.) For people with "proven temporal lobe epilepsy, meaning their seizures have been well-described, well-identified, and they fit into a particular complex partial seizure class where

there is corroborative evidence on EEG, even in that situation [PET scans are] only 75 to 80 percent sensitive; meaning people who categorically have temporal lobe epilepsy, the ability of the PET scan to be able to corroborate that diagnosis is not even a hundred percent in people that you're categorically sure have the disease process." (31RT 4306-4307.) If a person has a seizure that fits the pattern of epilepsy, then the next step is to order an EEG. (31RT 4321.) For a person who does not have a well-documented history of epilepsy, and has a normal EEG, then a PET scan would not be a generally accepted way to screen for epilepsy. (31RT 4322.) There are no well-established PET scan patterns to determine behavior or mental states. (31RT 4307.) In terms of a person who has been identified with a frontal lobe abnormality based on a neuropsychiatric test, the PET scan patterns in that area have been "highly variable." (31RT 4308.) A clinician cannot look at a PET scan in isolation and then successfully extrapolate to a patient's behavior. (31RT 4309-4310.) Low regional brain glucose metabolism does not necessarily indicate brain damage, because there are many "contributors" to a PET scan pattern that may have affected the brain. Just remembering a "sad event" can change a brain scan pattern. (31RT 4314.) There are no brain pattern studies involving people using phentermine. There are no well-established brain patterns for people suffering from depression. (31RT 4319.) There are no PET scan studies for people who are impulsive. (31RT 4320.) The use of PET scans to identify or diagnose depression, criminal behavior, or impulsivity is "highly experimental." (31RT 4320-4321.)

Dr. Mayberg studied Dr. Gold's report. (31RT 4325.) Dr. Mayberg opined that appellant's PET scan had no "significance," because "any finding on the scan in the context of the reasons in which it was ordered don't match up with the generally accepted ways in which we know how to use this technology." (31RT 4326.) Appellant's PET scan had no bearing

on whether or not she had a dissociative disorder or epilepsy. "[N]o conclusions can be drawn" from the PET scan. (31RT 4327.) PET scans cannot be used to predict behavior. (32RT 4336.) There is no way to date abnormalities in a PET scan unless one had a pre-existing PET scan. It is "absolutely impossible" to use a PET scan to understand a person's behavior a year and a half before the scan. (32RT 4337.) Defense counsel objected to this line of questioning as "getting case relevant," but the trial court overruled the objection, stating, "The court is interested in the relevance of this evidence. It's not limited to the *Kelly-Frye* issue ...." Dr. Mayberg opined that "you can draw no conclusions from anything you see on the scan done in March 2000 to what was going on" at the time of the fire. (32RT 4338.)

Looking at the particular scans in this case, Dr. Mayberg testified that the "color scale is markedly skewed" and appeared to be "almost manipulated." (32RT 4340.) The scans were "wildly prejudicial" and had very little probative value. (32RT 4341.) The color range of the scans had been adjusted in a way that "exaggerate small differences." (32RT 4343.) Just looking at the pictures alone would lead a person to conclude that the "brain is grossly abnormal, and in fact it is not" and has only been "enhanced by the use of the color scale...." There was no established scan pattern for serotonin syndrome, dissociative state, depression, anoxia as a baby, or hormonal imbalances attributed to pregnancy and abortion. (32RT 4346-4347.)

After Dr. Mayberg concluded her testimony, defense counsel objected that he had been given no notice by the prosecution's moving papers that the *Kelly-Frye* hearing would include the issue of relevance, and if he had known he would have subpoenaed Dr. King. (32RT 4438.) The trial court responded, "[r]elevance is always an issue in a case, and the People could object at any time on relevancy grounds." (32RT 4439.) The prosecution

stated that they were objecting to the PET scan evidence under *Kelly-Frye,* on relevance grounds, and under Evidence Code section 352. (32RT 4440-4441.) The trial court noted that "the People can object at any time on relevancy grounds or 352 grounds." The trial court further observed that it was "leaning in the direction of finding [the PET scan evidence] inadmissible under 352 grounds." (32RT 4445.)

The prosecution's next witness was Dr. Edwin Amos, a neurologist. (33RT 4463.) He testified that he used PET scans to make decisions on how to treat patients. The medically acceptable uses for PET scans fell into three categories: (1) in the evaluation of dementia; (2) to determine whether someone has a recurrence of a brain tumor; and (3) surgical removal of a portion of the brain to control seizures caused by epilepsy. PET scans are not generally accepted in the scientific or medical community as a screening or diagnostic tool for neurologic and/or psychiatric disease. (33RT 4466.) Normal healthy people can have tremendous variations on a PET scan. Variations on a PET scan do not necessarily relate to behavior. (33RT 4467.) Low regional brain glucose metabolism alone does not indicate brain damage. (33RT 4468.) Without an MRI or a CAT scan, a PET scan alone "is without value and impossible to interpret." (33RT 4471.) There are no published PET scan patterns to confirm a diagnosis of depression, childhood brain trauma, criminal behavior or impulsivity, serotonin syndrome, dissociative states, hormonal imbalances due to pregnancy or abortion, mood disorder, or anoxia as a baby. (33RT 4472-4473.) A PET scan is unreliable as a predictor of future behavior. A PET scan is not generally accepted in the medical community as a screening device for epilepsy. (33RT 4473.) Dr. Amos reviewed the PET scans in this case, and was unable to attribute any clinical significance to the scans. (33RT 4474.) Dr. Amos also opined that "the scale at which we're presenting this data is skewed toward showing us subtle changes

which may not actually be abnormalities." Further, there was no way to compare appellant's PET scan with PET scans from similarly situated individuals. (33RT 4475.) Appellant's PET scan was "useless," was not medically indicated, and was done specifically for forensic purposes rather than medical purposes. (33RT 4476.) Assuming that the PET scan showed an abnormality, Dr. Amos could not tell when the abnormality occurred. In Dr. Amos's opinion, a PET scan was not generally accepted in the medical and scientific community for forensic purposes. (33RT 4479.)

Dr. Amos had a discussion with Dr. King about appellant's PET scan. Dr. King indicated he had adjusted the color scale. (33RT 4477.) Over a hearsay objection, Dr. Amos testified that Dr. King indicated to him that, without any kind of a structural picture of the brain such as a CAT scan or an MRI, appellant's PET scan could not be interpreted for purposes of a diagnosis. Dr. King also indicated that "structural images" usually precede a PET scan. (33RT 4478.) A PET scan is a "dynamic image" that changes day to day. (33RT 4535.)

Following Dr. Amos's testimony, defense counsel again objected that he was given inadequate notice and preparation for the hearing. (33RT 4543.) The trial court reiterated that the prosecution could object to evidence at any time as irrelevant or inadmissible, and did not necessarily have to raise the objection in an Evidence Code section 402 hearing. (33RT 4543-4544.)

Defense counsel recalled Dr. Mandelkern to the stand. (33RT 4546.) Dr. Mandelkern met with Dr. King and looked at appellant's PET scan gray scale images on a computer monitor. (33RT 4547-4548.) The images showed two significant, severe, unambiguous abnormalities to the brain. One area showed severely decreased glucose use, but Dr. Mandelkern did not know what effect it would have on appellant. (33RT 4553.) Dr. Mandelkern did not expect appellant's PET scan, which showed

asymmetrical abnormalities, to change. Asymmetrical abnormalities of that kind do not change. (33RT 4558.) The abnormalities could have been caused by trauma, congenital abnormality, encephalitis, and birth problems. The abnormalities were consistent with happenings in early childhood. (33RT 4559-4560.) It is possible to have a normal EEG and an abnormal PET scan. (33RT 4561.) On cross-examination, Dr. Mandelkern testified that the results of appellant's PET scan could not tell him anything about appellant's behavior on the night of the fire. (33RT 4561.) He had seen abnormal PET scans such as appellant's, where the patient appeared to be functioning normally. On redirect, Dr. Mandelkern testified that appellant's brain abnormalities were consistent with temporal lobe epilepsy, which frequently manifests itself as complex partial seizures. (33RT 4568.) It is sometimes hard to tell if someone is having a seizure. (33RT 4569.)

Dr. Gold was then recalled as a defense witness. (33RT 4572.) Dr. Gold considered the abnormalities shown on appellant's gray scale PET scan images as significant. (33RT 4572-4573.) The most likely cause of the abnormalities was traumatic injury to the brain. (33RT 4573.) The abnormalities were consistent with a complex partial seizure or a temporal lobe seizure. (33RT 4579.) It is difficult to detect a complex partial seizure. (33RT 4580.) On cross-examination, in response to questioning by the court, Dr. Gold opined that appellant's brain abnormalities as reflected on the PET scan would affect the way a person thinks and acts. (33RT 4583-4584.)

Following Dr. Gold's testimony, defense counsel stated that he was unable to get Dr. King into court that afternoon. (33RT 4602-4603.) The trial court asked for an offer of proof as to Dr. King's proposed testimony. (33RT 4603.) Defense counsel stated that Dr. King would testify that the PET scan was done under professional guidelines and procedures and

established medical practice. The trial court responded that there was sufficient evidence establishing those facts and therefore, there was no need to bring Dr. King into court. (33RT 4607.)

After the parties presented argument on *Kelly-Frye*, relevancy, and Evidence Code section 352 issues (33RT 4609-4636), the trial court ruled:

> As to the *Kelly-Frye* issue, the purpose of the *Kelly-Frye* rule is to preclude the use of untested and developing scientific methods of fact determination. [¶] In this case, the court believes based on the testimony and the evidence I've heard, that for the purpose for which the defense is offering this PET scan, it doesn't meet the *Kelly-Frye* test because it is a new and novel method, and it has not been demonstrated that it's a procedure that has any reliability. [¶] As far as this Court is concerned, based on the evidence presented, there is no substantial agreement and consent in the scientific community regarding the process's reliability for the purposes for which it's being used. [¶] Going beyond that, the Court finds that there's little, if any, relevance to this material because it's highly speculative. [¶] There's no dating of the condition. It basically is speculating that because there is some perceived abnormality -- and there's some dispute as to whether there is an abnormality -- to the extent it is seen, it doesn't say anything about what impact that would have had on the defendant on July 1st of 1998 or several days before that. [¶] And even if it has some relevance, under 352 it clearly is outweighed by the undue consumption of time, confusing of the issues to the jury, undue prejudice because of the way the photographs will heighten attention and refocus the jury on something and cause them to speculate. [¶] For all of those reasons the Court will not permit any evidence or any reference or any argument regarding the PET scan evidence in this case. [¶] No expert may talk about it, may not refer to it, and any opinion they state must be based on something aside from the PET scan evidence.

(33RT 4636-4638.) The trial court also denied defense counsel's request for a continuance to have an MRI and an additional PET scan performed on appellant, due to a lack of due diligence. (33RT 4638-4640.)

Defense counsel filed a motion for reconsideration of the order excluding PET scan evidence. (19RCT 4695.) On July 6, 2000, the trial

court denied the motion as to the guilt phase. As to the penalty phase, the trial court stated, "we can discuss that at a later time." (44RT 6443.)

On July 26, 2000, while the jury was deliberating during the guilt phase, the trial court addressed appellant's motion for reconsideration. (57RT 8976.) Defense counsel argued that the PET scan was admissible under section 190.3, subdivision (k), because it showed "an aspect of [appellant's] brain which is a part of her physical or mental condition, which may invoke sympathy from at least one juror." (57RT 8980.)[23] The prosecution countered that the PET scan did not "show brain abnormality" and merely showed, at most, "that the glucose is not processing properly." (57RT 8986.) The trial court acknowledged that "under factor K the jury can consider mental or emotional conditions" but the court did not find that the PET scan at issue here actually showed any mental or emotional conditions. The trial court found that under Evidence Code section 352, the evidence had very little probative value, and any probative value it had was outweighed by the undue consumption of time and confusion of the issues. (57RT 8988.) The court thus denied appellant's motion for reconsideration and ruled that the PET scan evidence was inadmissible at the penalty phase. (57RT 8989; see also 58RT 9042 [reiterating reasons for denying admission of PET scan evidence].)

B. Applicable Law

Evidence obtained through a new scientific technique is admissible if its reliability is established under a three-pronged test. (*People v. Willis* (2004) 115 Cal.App.4th 379, 385, citing *People v. Mitchell* (2003) 110

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[23] Section 190.3, provides in relevant part: "In determining the penalty [for first degree special circumstance murder], the trier of fact shall take into account any of the following factors if relevant: (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Cal.App.4th 772, 782-783.) "First, there must be proof that the technique is considered reliable in the scientific community. Second, the witness testifying about the technique must be a qualified expert on the subject. Third, there must be proof that the person performing the test used correct scientific procedures." (*Ibid.*) "The analysis is needed where the evidence is so foreign to everyday experience that it is difficult for laypersons to evaluate merely using their own common sense and good judgment. [Citation.]" (*Ibid.*) The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970 [abrogated on other grounds as noted in *People v. Yeoman* (2003) 31 Cal.4th 93, 117].) The issue of the general acceptance of the new scientific technique in the relevant scientific community is reviewed independently on appeal. (*Id.* at p. 971.) The resolution of the issues of expert qualification and use of correct scientific procedures are reviewed on the basis of the abuse of discretion standard. (*Ibid.*)

Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Likewise, the trial court's ruling on whether evidence is irrelevant is reviewed for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 214.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Even assuming the trial court erred in excluding the evidence, the error is harmless unless it is reasonably probable that a result more

favorable to the appellant would have resulted had the evidence been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

C. The PET Scan Evidence Was Inadmissible at the Guilt Phase

Here, the PET scan evidence did not meet the requirements of *Kelly* at the guilt phase. Prosecution expert Dr. Amos testified that PET scan evidence was generally accepted in the relevant scientific and medical communities for three purposes only: (1) in the evaluation of dementia; (2) to determine whether someone has a recurrence of a brain tumor; and (3) surgical removal of a portion of the brain to control seizures caused by epilepsy. PET scans were not generally accepted in the scientific or medical community as a screening or diagnostic tool for neurologic and/or psychiatric disease. (33RT 4465-4466.) Dr. Mayberg testified that PET scans are not generally accepted "for individual subjects to corroborate diagnoses ...." (31RT 4300.) PET scans are not generally accepted in the medical and scientific community as a general screening tool for neurologic and psychiatric disorders. (31RT 4304.)

Appellant's own expert, Dr. Gold, testified that he could not say whether a "majority" of researchers accepted the PET scan as a reliable forensic tool. (31RT 4209.) Appellant's next witness, Dr. Kowell, testified that a PET scan alone could not be used to make a diagnosis. (31RT 4253.) Appellant's next witness, Dr. Mandelkern, testified that there was a split in the scientific community regarding whether PET scans were reliable for purposes of diagnosis. (31RT 4269.) On cross-examination, Dr. Mandelkern testified that PET scans were used "all the time" as a diagnostic tool for temporal lobe epilepsy but were not as useful in the area of psychiatric disorders. (31RT 4272.) A PET scan could not be used to diagnose a "dissociative state." (31RT 4273.)

While the *Kelly* test does not demand "absolute unanimity of views in the scientific community" it does require that the "use of the technique is supported by a clear majority of the members of that community." (*People v. Guerra* (1984) 37 Cal.3d 385, 418.) Here, there was no clear majority view that PET scan evidence was generally accepted in the relevant scientific and medical community for forensic purposes or for diagnosing psychiatric disorders. There was also evidence that Dr. King did not use correct scientific procedures when he manipulated the color scans to highlight the discrepancies in appellant's PET scan. Accordingly, the trial court did not err in ruling the evidence inadmissible under *Kelly*.

Appellant cites *People v. Leahy* (1994) 8 Cal.4th 587, 601, for the proposition that proponents of scientific evidence "can establish 'general acceptance' without showing a consensus of opinion, or even majority support by the scientific community." (AOB 259.) Appellant misreads *Leahy*. In *Leahy*, amicus curiae and respondent urged this Court to "fix" the *Kelly* rule by clarifying that "general acceptance" did not require a showing of consensus of opinion or even majority support in the scientific community. (*Leahy*, *supra*, at p. 601.) This Court declined the invitation. (*Ibid.*) Thus, appellant was required to show "general" acceptance in the relevant community for the use of PET scans as forensic evidence at the guilt phase of her trial. She failed to do so.

Appellant additionally argues that all of the experts who testified at the hearing "concurred that PET scans are generally accepted in the scientific community as a reliable method of measuring metabolic activity in the community." (AOB 260.) However, the PET scan evidence was not offered at the guilt phase to show appellant's "metabolic activity." Rather, appellant sought to use the evidence to show that she had a traumatic brain injury that somehow was responsible for her behavior on the night of the fire. As Dr. Gold opined, appellant's brain abnormalities as reflected on

the PET scan would affect the way a person thinks and acts. (33RT 4583-4584.) The evidence was inadmissible under *Kelly* for that purpose, because there was a lack of general acceptance in the relevant scientific community that PET scans could be used for forensic purposes.

Appellant further argues that the *Kelly* hearing was "fundamentally unfair" because the trial court did not grant appellant a continuance to prepare for the hearing. (AOB 260.) As appellant acknowledges, the determination whether a continuance should be granted rests within the sound discretion of the trial court. (AOB 261.) Continuances in criminal cases may only be granted for good cause. (§ 1050, subd. (e).) A trial court may not exercise its discretion over continuances so as to deprive the defense of a reasonable opportunity to prepare (*People v. Snow, supra*, 30 Cal.4th at p. 70.) The trial court did no such thing here.

On June 5, 2000, the prosecutor orally requested a *Kelly-Frye* hearing regarding the PET scan evidence that appellant was planning on presenting. (31RT 4145.) The trial court set the hearing for June 12, 2000. Defense counsel stated that he had not checked with any of his doctors to see if they were available that date. (31RT 4146.) The trial court ordered defense counsel to have any of his witnesses present in court on that date. (31RT 4147.) The defense filed a motion asking the trial court to reconsider the order for a *Kelly-Frye* hearing or, alternatively, to continue the hearing date for at least two weeks, so that the defense could prepare for the hearing. (18RCT 4530-4537.) The trial court denied the motion prior to the hearing. (31RT 4173.) The defense subsequently presented three witnesses at the hearing, Drs. Gold, Kowell, and Mandelkern. Appellant has not shown why she needed more time, given that she was able to have three defense experts at the hearing. Even assuming, for the sake of argument only, that the trial court abused its discretion, appellant cannot show prejudice, precisely because she was able to have three defense experts at the hearing,

including Dr. Gold, who wrote the report interpreting the PET scan findings (Def. Exh. EE). (See *People v. Snow, supra*, 30 Cal.4th at p. 75.)

Appellant also argues that the trial court erred by giving the prosecution an unauthorized opportunity to depose the defense experts at the *Kelly* hearing. She argues that the hearing should have been confined to general questions about the PET scans use as a forensic tool, as was raised in the prosecution's motion. (AOB 263-266.) As appellant acknowledges, however, the prosecution's motion also urged that the evidence was inadmissible because it was irrelevant, as well as more prejudicial than probative under Evidence Code section 352. (18RCT 4562.) Moreover, as the trial court noted, objections based on relevance and Evidence Code section 352 could be raised anytime, including at the *Kelly* hearing. Appellant is unable to cite a single case holding that a relevance objection or a section 352 objection cannot be raised during a *Kelly* hearing. Indeed, it is not uncommon to raise a relevance or a section 352 objection in conjunction with a *Kelly* hearing. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 238.) Appellant argues that defense counsel was not given an opportunity to address these "new issues." (AOB 266.) To the contrary, defense counsel was able to address these issues through the testimony of Drs. Gold and Mandelkern, and argued the issue to the trial court. (See 33RT 4620-4621.)

Appellant additionally argues that exclusion of the PET scan evidence at the guilt phase violated his right to a fair trial and to present a meaningful defense. (AOB 266-268.) As previously pointed out, however, the application of the ordinary rules of evidence do not generally impermissibly infringe upon appellant's constitutional rights. (*People v. Prince, supra,* 40 Cal.4th at p. 1229.) Here, the trial court not only ruled that the PET scan evidence was inadmissible under the *Kelly* rule, it also ruled that the evidence was inadmissible because it was irrelevant, unduly time

consuming, would confuse the jury, and was unduly prejudicial because of the way the PET scans would cause the jury to speculate. (33RT 4637.)

The trial court's ruling was supported by substantial evidence. Appellant's own expert, Dr. Kowell, agreed that in most cases he could not date a brain injury with a PET scan alone, could not tell how long trauma had been present based on a single PET scan, a PET scan alone could not be used to make a diagnosis, and he could not give a retrospective diagnosis based on a PET scan. (31RT 4249-4250, 4253, 4262.) Dr. Mandelkern testified that PET scans were not generally useful in the area of psychiatric disorders and a PET scan could not be used to diagnose a "dissociative state." (31RT 4272-4273.) Dr. Amos opined that appellant's PET scan was "skewed toward showing us subtle changes which may not actually be abnormalities." (33RT 4475.) Appellant's PET scan was "useless," was not medically indicated, and was done specifically for forensic purposes rather than medical purposes. (33RT 4476.) Dr. Mayberg opined that appellant's PET scan had no bearing on whether or not she had a dissociative disorder or epilepsy. (31RT 4327.) She further opined that it is "absolutely impossible" to use a PET scan to understand a person's behavior a year and a half before the scan. (32RT 4337.) Based on this overwhelming evidence of the general uselessness of the PET scan evidence here, the trial court did not abuse its broad discretion. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 9-10; *People v. Alvarez, supra,* 14 Cal.4th at p. 214; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1124.) It follows that appellant's constitutional rights to present a defense and to a fair trial were likewise not abused.

Assuming there was error in excluding the PET scan evidence at the guilt phase, the error was harmless because it was not reasonably probable that a result more favorable to appellant would have resulted had the evidence been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

The evidence was highly speculative and if it would have been admitted, would have been countered by the prosecution's experts, who would have persuasively testified that the PET scan was meaningless for the forensic purpose for which it was used. Additionally, even without the PET scan evidence, appellant was able to present evidence that she was depressed after her abortion (30RT 3981, 4049) and that the week after the abortion she started using diet pills and Zoloft (35RT 4795-4796). She also presented evidence, through Al Lucia and Dr. Humphrey, that she had a history of seizures that was consistent with epilepsy "brain malfunction." (37RT 5147-5148.)

Dr. Humphrey further testified that appellant was impulsive, had trouble paying attention, and had problems around the orbital frontal region of the brain. (37RT 5170, 5186.) Dr. Ney also testified that on the night of the fire, appellant heard a "loud roaring" that was an "epileptic aura." (43RT 6270.) Dr. Ney also testified that appellant's behavior the night of the fire was consistent with "serotonin syndrome" caused by a combination of drugs such as Zoloft and Phentermine. (43RT 6278-6279.) Thus, appellant was not prevented from presenting the jury with a defense based on brain trauma, brain damage, epilepsy, depression, impulsivity, or serotonin syndrome. Appellant argues that the PET scan evidence offered a basis from which the jury could infer that she did not premeditate or deliberate the murders (AOB 267), but this argument is outweighed by the evidence that appellant intentionally set the blaze as an act of revenge against the men in her life. The exclusion of the PET scan evidence at the guilt phase was not prejudicial.

D. The Exclusion of the Pet Scan Evidence at the Penalty Phase Was Proper; in Any Event, Its Exclusion Was Not Prejudicial

Since the conclusion of appellant's penalty phase trial, PET scan evidence has been admitted during the penalty phase of capital trials without examination of whether it meets the requirements under *Kelly-Frye*. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 935; *People v. Leonard* (2007) 40 Cal.4th 1370, 1384; *People v. Smith* (2005) 35 Cal.4th 334, 346; *People v. Kraft* (2000) 23 Cal.4th 978, 1029.) However, longstanding and unexamined use of outside laboratory and contested courtroom settings does not render a scientific technique "settled." (*People v. Leahy*, *supra*, 8 Cal.4th at pp. 605-606.) In any event, there was no error in this case, because the trial court correctly found that PET scan evidence here was more prejudicial than probative. "The trial court determines relevancy of mitigating evidence and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Guerra, supra*, 37 Cal.4th at p. 1145 [trial court did not err by excluding photograph of defendant's horse at the penalty phase], overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The trial court ruled that the PET scan evidence at issue here did not actually show any mental or emotional conditions. The trial court found that under Evidence Code section 352, the evidence had very little probative value, and any probative value it had was outweighed by the undue consumption of time and confusion of the issues. (57RT 8988.) The trial court's ruling is supported by the evidence, as previously set forth, *post*.

Even assuming that the trial court erred by excluding the evidence in this case, the error was not prejudicial. First, as shown by the prior list of

capital cases in which the PET scan evidence was admitted at the penalty phase, and where the defendant nonetheless received a capital sentence, PET scan evidence is not the kind of mitigating evidence that routinely evokes sympathy from jurors. Turning to this case, appellant's penalty phase evidence was designed to show that she was raised by an abusive mother who verbally and physically abused her, but nonetheless appellant had been a good mother to her own children up until the fateful night that she killed them. On the other hand, as the *Kelly* hearing revealed, the PET scan evidence was highly speculative and would not have bolstered appellant's theory of mitigation. Additionally, as previously set forth in the Statement of Facts and Argument I.C.4, *ante*, the aggravating evidence in this case was overwhelming, given the nature of the crimes. "Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is 'a reasonable possibility it affected the verdict.'" (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.) There is no reasonable possibility that the exclusion of this highly speculative PET scan evidence affected the penalty phase verdict.

VII. THE TRIAL COURT DID NOT ERR IN REFUSING TO DISQUALIFY DR. CALDWELL

Appellant next contends that the trial court prejudicially refused to disqualify a prosecution expert, Dr. Caldwell, who she alleges had been "poached" from the defense. (AOB 271-303.) This claim is without merit, because appellant waived any privilege pertaining to the use of Dr. Caldwell.

A. Background

On June 6, 2000, the trial court signed an order for appointment of Alex Caldwell, Ph.D., to assist the prosecution and to provide expert

testimony regarding interpretation of an objective personality test, the Minnesota Multiphasic Personality Inventory-2 test (MMPI-2).[24] (18RCT 4527.) Appellant took an MMPI-2 in 1997, administered by Dr. Suiter, and another MMPI-2 in 1999, administered by Dr. Kaser-Boyd. (36RT 4986-4987.)

On June 13, 2000, the prosecution raised the issue of the defense attempting to interfere with the prosecution's witness, Dr. Caldwell. (32RT 4456.) Dr. Caldwell reported to the prosecution that he had been contacted by a defense representative, and that he felt "pressured and threatened." The prosecution stated that it intended to call Dr. Caldwell as a witness. Defense counsel objected that the prosecution's retention of Dr. Caldwell violated the attorney/client privilege, the doctor/patient privilege, due process, and violated the discovery statutes, because the prosecution was aware that Dr. Kaser-Boyd had used Dr. Caldwell to score the MMPI-2 test she had administered to appellant. (32RT 4457.)

The trial court asked whether Dr. Caldwell had administered any standardized tests. The prosecution responded that Dr. Kaser-Boyd had administered the test. There were only two groups that were licensed to score the MMPI by computer: the National Computer Research Center (NCRC) and Dr. Caldwell. Dr. Caldwell scored 14,000 to 15,000 MMPI tests per year.[25] Dr. Caldwell did not know anything about the person other than what was on the MMPI test. (32RT 4458.) The trial court asked the defense to file written objections to the prosecution's use of Dr. Caldwell. (32RT 4459.)

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[24] The test is referred to interchangeably as the MMPI and the MMPI-2. The MMPI-2 is a later version of the MMPI.

[25] NCRC was also referred to in the record as "NCS."

On June 14, 2000, appellant filed a motion to vacate the appointment of Dr. Caldwell to assist the prosecution. (18RCT 4571.) Appellant contended that Dr. Caldwell, a clinical psychologist with expertise in interpreting the MMPI-2, scored and interpreted the MMPI raw data submitted to him by defense expert Nancy Kaser-Boyd, and Dr. Caldwell sent a confidential report to Dr. Kaser-Boyd. Thus, Dr. Caldwell was a part of the "'defense team'" whose findings and opinions were protected by the Fifth and Sixth Amendments, the attorney-client privilege, the psychotherapist/patient privilege, and attorney work product. (18RCT 4572.)

On June 16, 2000, appellant filed a copy of Dr. Caldwell's report, dated February 3, 2000. The report indicated that appellant was referred by Dr. Kaser-Boyd. (18RCT 4620-4621.) Dr. Caldwell's report had been previously furnished to the prosecution as part of discovery. (34RT 4746.)

At a hearing on the motion to vacate, held on June 19, 2000, defense counsel argued that Dr. Caldwell's report was disclosed to the prosecution by the defense pursuant to the defense's discovery obligations; Dr. Caldwell was a defense expert; and Dr. Caldwell had received privileged information. (35RT 4753.) Defense counsel stated that Dr. Barry Hirsch, a prosecution expert, had used Dr. Caldwell to evaluate a 1997 MMPI test received from the defense in discovery. According to defense counsel, the defense had asked Dr. Caldwell to give an opinion on a 1999 MMPI test. Defense counsel requested that Dr. Caldwell's appointment as a prosecution expert be vacated, that the prosecution be precluded from contacting Dr. Caldwell, and that a "*Kastigar*" hearing[26] be held to

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[26] *Kastigar v. United States* (1972) 406 U.S. 441, 460 [32 L.Ed.2d 212, 92 S.Ct. 1653] (imposing on the prosecution the affirmative duty to (continued...)

determine what evidence the prosecution had obtained from Dr. Caldwell, in order to preclude the prosecution from using that evidence against appellant. (35RT 4754.)

Defense counsel acknowledged that Dr. Caldwell had only scored appellant's MMPI-2 test responses and had never spoken to appellant. (35RT 4759.) The trial court declined to rule on the motion until such time as the defense called an expert and the prosecution sought to cross-examine the expert based on Dr. Caldwell's work for the prosecution, or unless the prosecution called Dr. Caldwell as an expert. (35RT 4760, 4763.) The court ruled that the motion was premature until such time. (35RT 4761-4762.)

However, the next court day, the trial court revisited the issue. Defense counsel stated at this hearing that Dr. Caldwell was not appointed pursuant to section 987.9; rather, Dr. Kaser-Boyd "enlisted" Dr. Caldwell's services and paid him out of her section 987.9 funds. (36RT 4956-4957.)[27]

(...continued)
prove that the evidence it proposes to use is derived from a legitimate source wholly independent of compelled testimony).

[27] Section 987.9, subdivision (a) states:

> In the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the

(continued...)

Defense counsel provided the court with a Declaration of Nancy Kaser-Boyd, as an addendum to the defense's motion to vacate the appointment of Dr. Caldwell. (36RT 4963; 18RCT 4642.) Dr. Kaser-Boyd declared that she had conducted a confidential psychological/forensic evaluation of appellant, that she used Dr. Caldwell for scoring and interpreting appellant's responses to the MMPI-2, and that she also spoke personally to Dr. Caldwell about appellant. (18RCT 4643.) Dr. Kaser-Boyd declared that she considered her work with appellant as confidential and legally privileged, and she only spoke to Dr. Caldwell based on her assumption that she had a confidential relationship with him. (18RCT 4643-4644.)

During the hearing, the trial court noted that appellant had already testified and the defense had already disclosed reports from Drs. Humphrey, Ney, and Kaser-Boyd, and therefore appellant had arguably waived any attorney/client privilege. (36RT 4965.)

Over a defense objection, the prosecution thereafter called Dr. Barry Hirsch to testify about the MMPI-2. (36RT 4967-4968.) The MMPI-2 is a series of true/false questions in a test booklet. The test-taker reads the questions and answers all of the questions to the best of his or her ability. (36RT 4972-4975.) Once the test-taker has completed the test, the test is then forwarded to Dr. Caldwell or NCRC to be automatically scored by a computer that generates an interpretive report. (36RT 4976-4977, 4980.) The interpretation is done by the software in the computer program. An

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> request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

individual psychologist reviewing the interpretation can then agree with or disagree with the interpretation. (36RT 4980.)

In the instant case, there were two MMPI-2s that were submitted to Dr. Caldwell from different years. (36RT 4981.) Dr. Hirsch resubmitted the most recent MMPI-2 test scores to Dr. Caldwell, and got back the same results as Dr. Kaser-Boyd. (36RT 4981.) Dr. Hirsch testified that there were no "ethical limitations" or ethical violations involved in having the MMPI-2 test that was initially administered by Dr. Kaser-Boyd and scored by Dr. Caldwell, rescored by Dr. Caldwell at Dr. Hirsch's request. (36RT 4982.) However, the report that comes back from Dr. Caldwell is privileged material, in Dr. Hirsch's opinion. The test-taker hold the privilege. (36RT 4983.) Dr. Hirsch read Dr. Kaser-Boyd's declaration, wherein she stated that she had spoken to Dr. Caldwell. (36RT 4985.) Dr. Hirsch assumed that Dr. Kaser-Boyd did not give Dr. Caldwell any identifying information, because that would "violate the client's confidentiality by Kaser-Boyd even consulting him." (36RT 4986.)

On cross-examination, Dr. Hirsch testified that he received the results from the 1997 and the 1999 MMPI-2s administered to appellant, and had the results rescored by Dr. Caldwell and then again by NCS. (36RT 4987-4989.) Dr. Hirsch then compared the results of the rescored tests. (36RT 4989.) Dr. Hirsch reiterated that using Dr. Caldwell with the knowledge that Dr. Kaser-Boyd had also used Dr. Caldwell was ethical and in accordance with the licensing law for psychologists in California. (36RT 4990.) Dr. Hirsch could have scored the raw data himself, but it would have taken him about 15 hours to do so. (36RT 4991.) However, Dr. Hirsch believed he would make more errors than a computer scoring the test. (36RT 4995.)

The trial court then asked defense counsel whether he objected to Dr. Hirsch using the raw data in coming to a conclusion. Defense counsel

responded that Dr. Hirsch could so testify. The trial court then stated that "it really boils down to whether he strives for accuracy, whether he uses a computer program or whether he scores it by hand at maybe $200 an hour at county expense for 15 hours. (36RT 4996.) Defense counsel stated that he also objected to the "narrative interpretation" provided by Dr. Caldwell's computer program. However, the defense had no objection to the prosecution using the NCS computer program to score the raw data. (36RT 4997-4998.)

The "narrative interpretation" can be obtained from Dr. Caldwell or NCS, and is generated by computer software. (36RT 4998.) Thus, one could run the raw data through Caldwell's computer a "thousand times" and it would generate the same narrative output. (36RT 4999.) In response to questioning by the trial court, Dr. Hirsch testified that he found "some" "significant differences" between NCS and Dr. Caldwell's reports. The differences were due to differences in proprietary software and "the meaning of the scales." (36RT 5001.) Dr. Hirsch testified that he suggested to the prosecutor that Dr. Caldwell be appointed because Dr. Kaser-Boyd used some of the interpretive narrative from Dr. Caldwell and directly inserted it into her report without attribution. (36RT 5003.)

On redirect, Dr. Hirsch testified that Dr. Caldwell told him he had been threatened by an attorney from the public defender's office, Ann Maloney-Dwadziak, who told him that if he testified in this case he would be violating confidentiality and would be "legally liable for anything that occurred from that." (36RT 5006-5007.)

At the conclusion of Dr. Hirsch's testimony, the trial court denied the motion to vacate the appointment and the request for a "*Kastigar*" hearing. (36RT 5013.) The trial court observed that because Dr. Caldwell and NCS were the only two computer-generated MMPI-2 services in the country, all Dr. Kaser-Boyd had to do was submit appellant's raw test data to both Dr.

Caldwell and NCS, and the prosecution would be "forever precluded from getting computer-generated interpretive result[s]." (36RT 5014.) The next day, the prosecution stated that a review of the discovery they had received revealed that Dr. Kaser-Boyd also used NCS to score the raw data. (37RT 5044.)

On July 5, 2000, defense counsel renewed his objections to Dr. Caldwell's testimony for the prosecution. (44RT 6458.) Defense counsel argued that the prosecution's use of Dr. Caldwell violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, violated the attorney/client and patient/psychotherapist privileges, and violated *Wardius v. Oregon,*[28] *Kastigar*, and *North.*[29] (44RT 6459.) The prosecution argued that there was no privilege because Dr. Lorie Humphrey testified that she relied on the Caldwell Report, and defense counsel questioned Dr. Brook about the Caldwell Report. (44RT 6460; see 38RT 5332-5346 [Dr. Humphrey]; 5396-5397 [Dr. Brook].) The trial court ruled that any privilege had been waived, because there had been extensive references to the Caldwell Report before the jury and the report was disclosed to the prosecution without objection. (44RT 6462.)

Dr. Caldwell was called as a prosecution rebuttal witness. Defense counsel objected to the prosecution asking Dr. Caldwell about what he perceived to be a threat from defense attorney Maloney-Dwadziak. The objection was overruled and defense counsel moved for a mistrial, which the trial court did not rule on. (44RT 6574.) Dr. Alex Caldwell testified he was a clinical psychologist who owned a company called "Caldwell Reports," which prepared MMPI-2 test reports. The MMPI is a personality

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[28] *Wardius v. Oregon* (1973) 412 U.S. 470, 474, 476 [37 L.Ed.2d 82, 93 S.Ct. 2208].

[29] *U.S. v. North* (D.C. Cir. 1990) 910 F.2d 843, 861-868.

test or personality inventory, with 567 statements that one answers as "true" or "false." (44RT 6579.) Dr. Caldwell developed a computer program that generated reports based on MMPI-2 response scores. The narrative reports "essentially predict the likely behavior of the person who took the test." (44RT 6584, 6587.) Dr. Caldwell's company scored the 1999 MMPI-2 that was administered by defense expert, Dr. Kaser-Boyd, to appellant in December 1999. Dr. Caldwell issued a report in February 2000. (44RT 6589.)

Dr. Caldwell reviewed the report of the profile generated from appellant's MMPI-2 responses. (44RT 6590.) Dr. Caldwell opined that appellant "clearly did set out to try to look bad on the test." (44RT 6593.) That is, based on appellant's responses, she was either "floridly psychotic" or "grossly exaggerating." (44RT 6594.) If someone were that psychotic, it would be noticeable to "most anybody." (44RT 6596.) Dr. Caldwell was asked a hypothetical based on appellant's "lucid, coherent, organized, and responsive" testimony. Dr. Caldwell opined that such testimony would be "inconsistent" with a profile of "overt psychosis" and "consistent" with "malingering or faking bad." (44RT 6596.) Dr. Caldwell was presented with a hypothetical question based on the facts surrounding the instant crime. Dr. Caldwell opined that the profile obtained was consistent with someone who deliberately set the fire after writing an angry suicide note. (44RT 6598-6599.)

Dr. Caldwell also rescored the MMPI-2 test that was administered to appellant in July 1997 by Dr. Suiter in the midst of a custody battle between appellant and her ex-husband, Dave Folden. Dr. Suiter found that appellant was "malingering" by "faking good," that is, trying to represent herself in the most favorable light. Based on his rescoring of the MMPI-2, Dr. Caldwell agreed with Dr. Suiter that appellant was trying to "look as

healthy as possible" in the context of a custody dispute. (44RT 6600-6602.)

Dr. Caldwell opined that the notes appellant wrote to Dave Folden, Alethea Volk and Scott Volk were suicide notes. (44RT 6613-6615.) The prosecution did not ask Dr. Caldwell about any threats from defense counsel.

B. Applicable Law

A defendant forfeits any protections that the attorney-client privilege, the attorney work product doctrine, and the privilege against self-incrimination affords him or her regarding all matters that a testifying defense expert considers or on which they rely, including reports by other experts. (*People v. Combs, supra*, 34 Cal.4th at p. 864, citing Evid. Code, §§ 721, subd. (a) & 912, subd. (a).) Moreover, a defendant who places his or her mental state in issue waives the psychotherapist/patient privilege and the privilege against self-incrimination. (*Ibid.*; see also Evid. Code, § 1016 [psychotherapist/patient privilege under Evidence Code section 1014 is lost if a defendant tenders the issue of his or her mental condition].) When a defendant waives the privileges in regard to an expert's report, the prosecution is free to call the author of the report as a rebuttal witness and to question him about that report. (*Ibid.*, citing Evid. Code, § 804, subd. (a).)

C. Appellant Has Forfeited Her Claim

Appellant contends that the trial court erred in refusing to vacate the appointment of Dr. Caldwell, thereby violating the psychotherapist/patient and attorney/client privileges, and violating appellant's right to a fair trial. (AOB 288-290.) Appellant's claim lacks merit. She waived any protections that the attorney-client privilege afforded her once Dr. Humphrey testified that she considered Dr. Kaser-Boyd's report, which was

scored by Dr. Caldwell's service (38RT 5340-5344). (See *People v. Combs, supra*, 34 Cal.4th at p. 864; see also *People v. Coleman* (1989) 48 Cal.3d 112, 151-152 ["exclusionary principles do not apply to a defendant's statements made to an expert retained by the defense, if the statements were relied upon in forming opinions to which the expert testified when called as the defendant's own witness. To the contrary, such statements are not privileged and are a proper subject of cross-examination"].)

Likewise, because appellant placed her mental state at issue, she waived the psychotherapist/patient privilege and the privilege against self-incrimination. (*People v. Combs, supra*, 34 Cal.4th at p. 864; *People v. Clark* (1990) 50 Cal.3d 583, 1005, 1007-1008.) Because appellant waived these privileges in regards to Dr. Caldwell's report, the prosecutor was free to call Dr. Caldwell as a rebuttal witness and question him about that report. (*People v. Combs, supra,* at p. 864, citing Evid. Code, § 804, subd. (a).) While appellant argues that she did not waive any privilege (AOB 283-284), she fails to cite to any authority to support her conclusion. Rather, she argues that because Dr. Kaser-Boyd did not testify, the privilege had not been waived. (AOB 284.) This argument fails to confront the fact that once Dr. Humphrey was called as a defense expert, the prosecution could then cross-examine her about any reports that she considered, including both Dr. Kaser-Boyd and Dr. Caldwell's reports. (See 38RT 5332-5346 [Dr. Humphrey is questioned about the Caldwell Report], 5347 [Dr. Humphrey is questioned about Dr. Kaser-Boyd's report]. And, it follows that once the privileges were waived as to both Dr. Kaser-Boyd and Dr. Caldwell's reports, the prosecutor was free to call Dr. Kaser-Boyd and/or Dr. Caldwell as a rebuttal witness. It was plainly appropriate, once Dr. Humphrey testified that she considered Dr. Kaser-Boyd's MMPI report, for the prosecution to call Drs. Kaser-Boyd and

Caldwell about the administration of the MMPI, and its scoring by Dr. Caldwell.

Appellant cites to numerous federal and out-of-state cases for the proposition that the trial court erred in refusing to vacate the appointment of Dr. Caldwell to assist the prosecution. Appellant argues that the trial court permitted Dr. Caldwell to "switch sides" in the middle of her case and thus failed to protect the psychotherapist/patient privilege and the attorney-client privilege. (AOB 288-296.) As respondent has shown, appellant waived the privileges, so there was no error, and the federal and out-of-state cases cited by appellant have no relevance here.

Additionally, Dr. Caldwell was never retained as a defense expert, because he was never appointed pursuant to section 987.9. (36RT 4956-4957.) Since he was never formally retained by the defense, he never "switched sides." Dr. Kaser-Boyd, who was a formally retained defense expert, used Dr. Caldwell's computerized service to automatically score appellant's MMPI-2 raw test scores from 1999. Dr. Caldwell never personally spoke to appellant; indeed, given the great volume of MMPI-2 tests scored by Dr. Caldwell's computerized services (estimated at 14,000 to 15,000 cases annually), Dr. Caldwell had no personal knowledge of appellant's case. (See 32RT 4458.) And while Dr. Kaser-Boyd stated in her declaration that she had spoken to Dr. Caldwell, she only "briefly described the facts of the case as one where a woman was charged with the murder of her four children by arson." (18RCT 4643.) This brief description did not impart any confidential information to Dr. Caldwell and did not turn Dr. Caldwell into a defense expert. (See *Hewlett-Packard Co. v. EMC Corp.* (N.D. Cal. 2004) 330 F.Supp.2d 1087, 1093 [the party seeking disqualification of an expert witness bears the burden of demonstrating that it was reasonable for it to believe that a confidential

relationship existed and, if so, whether the relationship developed into a matter sufficiently substantial to make disqualification appropriate].)

Moreover, there were only two services that were licensed to generate computerized test scores of the MMPI-2, Dr. Caldwell's service and NCS. In the absence of these two services, it would take an expert approximately 15 hours to score the raw data by hand (36RT 4991), and the manual scoring method was more prone to errors than a computer scoring the test (36RT 4995). While appellant argues that she had no objection to the prosecution using NCS (AOB 297, citing 36RT 4997-4998), this lack of objection was based on defense counsel's incorrect assertion that the defense had not used NCS. In fact, appellant's expert, Dr. Kaser-Boyd, used both Dr. Caldwell's service and the NCS service to score the 1999 MMPI-2 test given to appellant. (37RT 5044.) Thus, appellant's arguments could have applied to both services. Respondent submits it would be fundamentally unfair to prevent the prosecution from using any of the two computerized scoring services, merely because the defense had gotten there first. (See *Paul v. Rawlings Sporting Goods Co.* (S.D. Ohio 1988) 123 F.R.D. 271, 278 [the court has inherent authority to determine whether it is "fundamentally unfair" to permit an expert to change sides]; *Conforti & Eisele, Inc. v. Division of Building and Construction* (1979) 170 N.J. Super. 64, 72 [same].)

In sum, there was no error here because appellant waived the privileges at issue. Moreover, appellant has not shown that she had a confidential relationship with Dr. Caldwell. Finally, it would have been fundamentally unfair to the prosecution to have forced it to use another service or to have had an expert hand score the MMPI-2 data. Conversely, since the defense was completely amenable to waiving any applicable privilege with respect to the NCS scoring of the very same 1999 MMPI data, there is no possible privilege here.

VIII. THE TRIAL COURT DID NOT IMPROPERLY "GLAMORIZE" DR. DEHAAN

Appellant next contends that the trial court improperly "glamorized" a prosecution expert witness, Dr. John Dehaan, thus giving him additional credibility on the critical issue of intent. (AOB 305-312.) There was no improper "glamorization" here.

A. Background

At the conclusion of recross-examination of prosecution rebuttal expert Dr. Dehaan, the trial court asked the doctor whether he had ever "as part of your expertise or your training and experience, ... appeared on any television shows ...." Dr. Dehaan replied that he had. The trial court asked if Dr. Dehaan had appeared on the Discovery Channel, and the doctor replied that he had appeared on two shows on the Discovery Channel and one on the Fox Family Channel. The trial court excused Dr. Dehaan and ordered the jurors not to form or express any opinions about the case or to talk about the case. The trial court then asked juror number seven to remain, and recessed the other jurors. (44RT 6569.)

Out of the presence of the other jurors, the trial court asked juror number seven about a note he wrote stating that he recognized Dr. Dehaan from a television program, possibly on the Discovery Channel, and that he would not let it be an influence on how he viewed the doctor's testimony. The trial court then asked, "Now that you've heard the court question him on that, apparently he has appeared on the Discovery Channel. You have heard his testimony. [¶] Is it still your view that whatever you may have seen on the television will not influence your opinion of his testimony in any way?" Juror number seven replied, "It is." The trial court then excused the juror with the admonishment not to discuss the matter with the other jurors "[a]nd when you deliberate, don't mention that you saw him on a T.V. show." (44RT 6570-6571.)

Defense counsel thereafter objected to the trial court questioning Dr. Dehaan in the presence of the jury regarding his television appearances. Defense counsel argued that the questioning had the effect of advertising the doctor's credentials and indicated the trial court's "potential bias" towards the prosecution. (44RT 6571.) Defense counsel moved for a new trial based on the court's questioning of Dr. Dehaan. The trial court denied the motion for new trial. (44RT 6572.)

Later that same day, the prosecution informed the trial court that Dr. Dehaan would appear on the Fox Channel the following night. (44RT 6573-6574.) At the end of the day, the trial court informed the jury that "there's going to be a program [on FOX Channel at 9:00 p.m.] that involves one of the witnesses who has testified in this case." The trial court ordered the jurors to not look at the channel or get information about the program from any other source. (44RT 6634.) The trial court repeated the admonition the following night, without mentioning the expert witness by name. (45RT 6811-6812.)

B. Applicable Law

Article VI, section 10 of the California Constitution states in pertinent part:

> "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." Moreover, Evidence Code section 775 permits the court, "on its own motion or on the motion of any party, [to] call witnesses and interrogate them the same as if they had been produced by a party to the action." Inherent within Evidence Code section 775, then, is the judge's authority to interrogate witnesses called by the parties. The authority conferred on the trial court by Evidence Code section 775 to question witnesses sua sponte therefore extends beyond the rather narrow judicial role set forth in Evidence Code section 765, subdivision (a), which declares that the court "shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as

rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."

We have elaborated on the purposes and limitations of the trial court's interrogation of witnesses in *People v. Carlucci* (1979) 23 Cal.3d 249. Evidence Code section 775, which is a codification of case law, "'confers upon the trial judge the power, discretion and affirmative duty ... [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.'" (23 Cal.3d at p. 256, quoting Gitelson, *A Trial Judge's Credo* (1966) 7 Santa Clara L.Rev. 13-14.)

The constraints on the trial judge's questioning of witnesses in the presence of a jury are akin to the limitations on the court's role as commentator. The trial judge's interrogation "must be ... temperate, nonargumentative, and scrupulously fair. The trial court may not ... withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.)

(*People v. Hawkins* (1995) 10 Cal.4th 920, 947-948; see also *People v. Cook, supra*, 39 Cal.4th at p. 597 [trial court's questioning must not convey to the jury the court's opinion of the witness's credibility].)

C. The Trial Court's Questioning Was Proper

In the present case, the trial court's questions were within the bounds of propriety. The trial court asked only two questions of Dr. Dehaan and the questions were neutrally phrased. The questions themselves did not create the impression that the court was allied with the prosecution. The questions did not convey to the jury the court's opinion of Dr. Dehaan's credibility. Appellant's argument that the questions conferred "stardom" on Dr. Dehaan (AOB 308), is pure hyperbole, without justification or

support. The trial court did not tell the jury that the doctor's competency had never been challenged, as had the trial court in *People v. Lynch* (1943) 60 Cal.App.2d 133, 144. (See AOB 311.)

Additionally, the court's subsequent admonitions did not mention the doctor by name, and explicitly informed the jurors not to watch the FOX Channel on the evening in question. Moreover, at the conclusion of the guilt phase, the trial court instructed the jurors that they should not conclude from "any questions I may have asked" what "you should find to be the facts, or that I believe or disbelieve any witness," and reminded them to "form your own conclusion." (20RCT 4991 [CALJIC No. 17.30].) That instruction reminded the jury of the trial judge's role as an impartial presiding officer whose occasional questions to witnesses were designed to clarify the evidence without favoring either side. (*People v. Monterroso* (2004) 34 Cal.4th 743, 782.)

Further, the evidence of guilt was strong and the weaknesses in appellant's assertions regarding her intent in starting the fire were apparent to the jury even absent the court's questions. Given the "now-you-won't-have-to-support-any-of us" note she sent to Dave Folden the night she started the fire, appellant's intent in setting the fire was clearly apparent. It is not reasonably probable the jury would have reached a different verdict had the court refrained from asking these questions. (*People v. Harris, supra*, 37 Cal.4th at pp. 350-351.) It follows that there was no violation of appellant's constitutional right to a fair trial. This claim must be rejected.

IX. THE PROSECUTION DID NOT COMMIT MISCONDUCT AND THE TRIAL COURT DID NOT PREJUDICIALLY PERMIT THE PROSECUTION TO QUESTION A DEFENSE EXPERT WITNESS ABOUT THE VERACITY OF ANOTHER DEFENSE WITNESS

Appellant next contends that the prosecution committed misconduct and the trial court prejudicially permitted the prosecution to question Dr. Gordon Plotkin about the veracity of Al Lucia. Appellant argues that,

because credibility determinations are reserved for the jury, the trial court erred by permitting this line of questioning, violating her right to a fair trial and due process of law. (AOB 313-320.) This claim is forfeited and, in any event, there was no misconduct here.

A. Background

Al and Penny Lucia were first mentioned by the defense on March 20, 2000, in an ex-parte in chambers hearing seeking funding for transportation costs. (8RT 300.) Defense counsel stated that they were appellant's step-parents and "will be testifying on the guilt phase in a couple of areas to show my client's relationship with her daughters and that there was no animosity or ill will, and she would never in her right state of mind seek to kill them in any way. Also they had a last day conversation with her about a half hour or 45 minutes or so on June the 30th, and so they're necessary witnesses for the defense." (8RT 301.)

At a hearing on May 31, 2000, defense counsel clarified that he also wanted the Lucias to testify "with regards to information that they told the doctors about [appellant's] background; about prior epileptic fits, seizures, about the manner and method in which [appellant's] mother raised her in an abusive fashion, both physically and mentally." (29RT 3772; see also 29RT 3778.)

Prior to Al Lucia's testimony, the prosecutor stated he had "no problems" with the Lucias testifying about their observations. Further, the prosecutor stated he had "no problems" with statements made by appellant to the Lucias in a phone call on the day of the incident. (30RT 3934.) Defense counsel, however, wanted to question the Lucias about statements appellant made to them a year before the fire, to rebut evidence that the prosecution had relied on, that appellant had written to Fernando, "Take them [the children] away from me before I hurt them as I have hurt you." (30RT 3933, 3935.) The trial court deferred its ruling, stating, "We are

talking generalities here. I don't know what specific questions you're going to ask, or what specific topics are going to come up, and I could see there may be some things that -- regarding her state of mind a year ago that might be relevant. I am not saying that it's not. [¶] So I guess the way to handle it is either two ways: They testify after the experts, or they testify now and I will hear objections and rule on them." (30RT 3936; see also 30RT 3957.) Defense counsel stated that he would have the Lucias testify to as much as they could at that time. The trial court responded that "I will excuse them subject to recall if it turns out that subsequent discovery [of Dr. Kaser-Boyd's notes] generates a need for them to be examined further" by the prosecution. (30RT 3958.)

When Al Lucia testified before the jury on June 1, 2000, defense counsel did not ask him any questions pertaining to his observations of appellant as a child. (See 30RT 4089-4095.) At the conclusion of his testimony, Al Lucia was "excused, subject to recall." (30RT 4112.)

On June 16, 2000, there was a hearing on the prosecution's motion regarding the admissibility and scope of defense psychiatric evidence. The gist of the motion was that appellant's defense experts be precluded from testifying to "the ultimate issue" "until the defendant either testifies or if there's some other way to establish the predicate facts upon which the experts base their opinions." (34RT 4661.) The prosecution further elaborated its concern that Dr. Kaser-Boyd would testify regarding statements made by appellant to the Lucias, without the prosecution's ability to cross-examine the witnesses, who had already testified. (34RT 4664.) Defense counsel argued that the trial court had found the statements made by appellant to the Lucias to be hearsay and further represented to the trial court that the court had said, "'Well, your expert will testify to that.... That's not needed from these people." (34RT 4667.) The trial court asked defense counsel to cite the page and line number of the transcript where the

court had made those statements. (34RT 4667-4669.) Defense counsel was unable to provide a specific citation, even though he had the opportunity to research the matter over the lunch break. Instead, defense counsel stated, "It was right at the beginning of their testimony; before they testified, I believe." (34RT 4685.)

Defense counsel further stated that the Lucias had returned to Indiana and he could not "rush them back and forth like ping pong balls -- it seems to me within reason the experts can rely on statements of [appellant's] history, physiological history and psychological history that were given by these people." (34RT 4686.) Defense counsel later explained that he believed the trial court had limited the Lucias to testifying about "the last year" and that the court had "at least suggested" that the experts could testify as to the Lucias' personal observations of appellant's behavior as a child. (34RT 4706.)

After further argument, the trial court observed that defense counsel had not been limited in questioning the Lucias about their observations. (34RT 4717.) Defense counsel then admitted, "I misinterpreted the court" (34RT 4718) and stated "maybe I was incompetent to misinterpret the court ...." (34RT 4719). (See also 34RT 4723 ["If it's all my fault for creating error, then I suppose some appellate court is going to find me incompetent and give her a new trial for incompetence of counsel"].)

The trial court ruled that Al Lucia would have to testify first to his observations of appellant's alleged epilepsy, which was the basis of the "predicate acts" that Dr. Kaiser-Boyd wanted to testify to based on her discussions with appellant after her arrest. Appellant's experts would not be allowed to testify until then, because appellant's statements to the experts lacked an indicia of reliability. (34RT 4731-4732.)

Defense counsel subsequently requested funds to transport Al Lucia from Indiana to testify regarding appellant's childhood history and

"previous epileptic fits." (35RT 4851-4852.) The trial court stated that it would not sign an order for transportation fees without a "specific offer of proof" in writing, because Lucia had already testified and defense counsel had the opportunity to ask him at that time about his observations, but had not done so. (35RT 4852.) The trial court eventually signed the order for transportation fees, and Lucia flew back from Indiana to testify again. (35RT 4905, 4937.)

Lucia testified on June 21, 2000, that appellant was 11 months old when Lucia married her mother. Lucia saw appellant daily from that time until she was four years old, when appellant's mother left and took appellant. (37RT 5057, 5076, 5091.) As a child appellant would regularly "take a deep breath and pass out." (37RT 5058.)

These incidents happened more often when appellant's mother would scream at and hit appellant. (37RT 5058-5059.) During these incidents appellant would be "out" for 30 seconds to a minute. When appellant was about two years old, Lucia saw her suddenly go limp and start shaking. She fell to the ground and shook all over. Her eyes rolled back and Lucia stuck his finger under her tongue. Lucia rushed her to the hospital. Appellant stayed in the hospital for approximately 10 days, where she was examined, tested, and medicated. (37RT 5059-5060.)

Appellant was released from the hospital with medication, but she continued to have seizures about once a month, or more often if her mother was screaming at her. (37RT 5061, 5079.) Appellant's mother hit appellant and called her names on a daily basis. Her favorite location to hit appellant was on the back of the head. (37RT 5065.) Appellant would fall down or fall against things when hit in this fashion. Once, when appellant was in a high chair and holding her breath, her mother "smacked" appellant, causing the high chair to fall over and appellant to hit her head on the floor. As a result of the fall, appellant got a "big knot about the size

of a golf ball on the back of her head." (37RT 5066.) Appellant was unconscious for a couple of minutes. (37RT 5066-5067.) Appellant's mother was also verbally abusive towards appellant. She would tell appellant she was ugly and could do nothing right. (37RT 5067.)

On July 12, 2000, defense expert Dr. Gordon Plotkin began his testimony in surrebuttal. (48RT 7376-7380.) During cross-examination, Dr. Plotkin confirmed that in reaching his diagnosis of seizure disorder he had relied on Lucia's description of appellant's symptoms as a child. (52RT 7963-7964.) Further, Dr. Plotkin had relied on Lucia's statements regarding appellant's hospital admission and workup. Without objection, Dr. Plotkin credited Lucia's statements because "I find it a low probability that people that are unsophisticated could come up with the proper sequence of events per a workup. So I would take that probably stronger than some of the other people have stated in this case, because I think that a person has to have the sophistication to develop that theory." (52RT 7971.) The following colloquy ensued:

> Q What if that individual, Mr. Lucia, was coached as to what to say?
>
> Mr. Waco: There's no -- objection.
>
> By Mr. Barshop:
>
> Q would that affect --
>
> Mr. Waco: Assuming facts not in evidence.
>
> The Court: Overruled.
>
> The Witness: Assuming that he was coached, then the idea that he would have to be sophisticated enough to come up with it, obviously, would be a moot point.
>
> By Mr. Barshop: You realize he testified twice?

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

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

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

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

Mr. Waco: Your honor, there's no testimony with regards to what he testified to the first time. It misstates the evidence. Mischaracterizes the evidence.

The Court: Is that an objection?

Mr. Waco: Yes.

The Court: Overruled.

The Witness: I'm sorry. Could you give me the question again?

The Court: Yes. Read back the question.

(record read)

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

By Mr. Barshop: Both have validity, correct? You can't tell one from the other; correct?

A That's correct.

Q So it would be like flipping a coin as to whether you wish to believe Mr. Lucia, or believe whether he was coached; is that correct?

A Without additional data to suggest that (a), he wasn't coached; or (b), he was coached, I think it was -- it would be an equal probability of both of those. But I'm not aware there's any data on that. (52RT 7971-7973.)

B. Applicable Law

"The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman, supra*, 34 Cal.4th at p. 82, citing Evid. Code, § 801, subd. (a) and *People v. Cole* (1956) 47 Cal.2d 99, 103.)

"[T]he value of an expert's opinion is dependent upon the truth of the assumed facts." (*People v. Beach* (1968) 263 Cal.App.2d 476, 487.) An expert's opinion, which is based on "an assumption of fact of which there is no direct evidence, and as to the probability of the truth of which circumstantial evidence has created a strong counterweight, is of little value." (*Ibid.*)

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; see *People v. Cash, supra*, 28 Cal.4th at p. 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969.)

C. This Claim Is Forfeited and, in Any Event, Without Merit

Defense did not object on the grounds that Dr. Plotkin was impermissibly rendering an opinion as to Lucia's credibility. Rather, he objected that the prosecution's questions assumed facts not in evidence, misstated, or mischaracterized the evidence. The failure to object on the same grounds raised on appeal means this claim is forfeited. (*People v. Coffman, supra,* 34 Cal.4th at pp. 81-82.) The trial court is not required to interpose a specific objection on the defendant's behalf, as appellant suggests. (See AOB 316.) "Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry." (*People v. Visciotti* (1992) 2 Cal.4th 1, 79.)

Additionally, defense counsel did not object to the prosecutor's questions on the ground of misconduct and request the jury be admonished, or show that an admonitory comment would not have cured the harm. (*People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.) This Court has held: "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury." [Citation.]' [Citation.]" (*People v. Cox, supra*, 53 Cal.3d at p. 682 overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn., 22.) Appellant's prosecutorial misconduct claim has therefore been forfeited.

In any event, this claim is without merit. The prosecutor here did not ask Dr. Plotkin if he believed Albert Lucia was truthful, as was the case in *People v. Coffman, supra*, where the prosecutor asked the expert, "Do you

believe Coffman was telling you the truth during your interviews?" (*Id.* at p. 82, fn. 26.) Rather, the prosecutor was exploring the factual basis for Dr. Plotkin's opinion by asking the doctor whether his opinion crediting Lucia's statements would change assuming that Lucia had been coached what to say. This is no different from asking an expert if his opinion would change if he became aware that the defendant had malingered. (Cf. *People v. Alfaro, supra*, 41 Cal.4th at p. 1325 [prosecutor could extensively cross-examine experts on meaning of notation "probable fake bad"].) Additionally, given that defense counsel could have -- but did not - question Lucia about his observations of appellant as a child the first time he testified, the prosecutor's questions to Dr. Plotkin, asking him to assume that Lucia had been coached because he testified twice, were not improper. And even assuming that the prosecution's questions suggesting that Al Lucia had been coached to provide a false story that appellant had a history of seizures as a child were improper, they were not so deceptive or reprehensible as to render appellant's trial a denial of due process. (*Id.* at p. 1329.)

Moreover, even assuming there was error, it was harmless. That is, it is not reasonably probable that a result more favorable to appellant would have been reached absent the misconduct or that any error so infected the trial with unfairness as to make the resulting conviction a denial of due process in violation of the federal Constitution. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1071.) Al Lucia testified that he observed appellant, as a child, hold her breath until she passed out. (37RT 5058.) Also, when she was about two years old, she had a seizure and was hospitalized for about 10 days, where she was examined, tested, and medicated. (37RT 5059-5060.) It was based on this testimony that appellant sought to present the defense that she was unconscious on the night she set the fire that killed her daughters. However, even without the prosecutor's questions to Dr. Plotkin

suggesting that Lucia had been coached, this defense was rebutted by Dr. Amos, who testified that seizures are not uncommon in children and most children grow out of it. (48RT 7276.) The fact that a child has a seizure at two years of age is not indicative of epilepsy at a later age. (48RT 7277.) Based on an analysis of appellant's medical records, Dr. Amos opined that appellant did not have "any significant brain problem." Further, following the fire appellant's vital signs were found to be normal at the Henry Mayo Hospital, which would be "very inconsistent with someone having suffered a bout of recurrent seizures without regaining consciousness." (48RT 7284.)

Additionally, a person who had a history of recurrent seizures or epilepsy could not perform at appellant's level on neurological tests. There was nothing in appellant's test results that was consistent with a history of seizure disorder. A person is unable to have goal-directed, purposeful, intentional behavior during a seizure. (48RT 7285.) Dr. Amos reviewed an EEG performed on appellant; the results were "normal," which would be inconsistent with epilepsy or a seizure disorder. (48RT 7291-7292.)

There was also no indication in appellant's jail medical records that she had a seizure disorder. (48RT 7297.) Dr. Amos believed appellant suffered from migraines, not epilepsy. (48RT 7307-7308.) Additionally, Fernando Nieves and Dave Folden both testified that in the 20 years they each had known appellant, they had never seen her have black-outs, seizures or loss of consciousness. (23RT 2834; 24RT 3026-3027.) Thus, it is not reasonably probable that the jury would have found in favor of appellant's defense of unconsciousness but for the prosecution's questioning of Dr. Plotkin. It follows that there was no denial of due process, either. (*People v. Wallace, supra,* 44 Cal.4th at p. 1071.)

X. THE PROSECUTION DID NOT COMMIT MISCONDUCT DURING CROSS-EXAMINATION OF DR. PLOTKIN

Appellant next contends that the prosecution committed prejudicial misconduct during cross-examination of defense expert Dr. Gordon Plotkin by repeatedly asking questions that assumed inflammatory facts not in evidence. Specifically, appellant contends that the prosecution's questions improperly suggested that appellant had been found guilty of perjury and fraud when no such determinations had been made by a trier of fact. (AOB 321-326.) The claim is forfeited, and also without merit.

A. Background

Clare Cserney, appellant's landlady, testified for the prosecution that appellant told her that she intended to move into the rented home with her husband, Fernando Nieves, and three children. Cserney was not aware that appellant was single and had five children. (20RT 2307.) Appellant took a blank rental application from Cserney and returned it with a signature purporting to be from Fernando Nieves. (20RT 2308.) However, Fernando Nieves testified that he never signed the rental application and he did not give appellant permission to forge his name. (23RT 2822.) Further, both Fernando and Dave Folden testified that they had never seen appellant have blackouts, fainting spells, or seizures, in the 20 years each had known her. (23RT 2834; 24RT 3026-3027.)

Dr. Charanjit Saroa testified for the prosecution that he examined appellant on July 1, 1998, at Henry Mayo Hospital. Appellant told Dr. Saroa she was taking doxycycline, an antibiotic, but there were no indications in the doctor's records that appellant told him she was taking Prozac or Zoloft. (20RT 2209.) Appellant, however, later testified that she took Zoloft and diet pills on June 30, 1998. (35RT 4797.)

Dr. Alex Caldwell testified on rebuttal that his company scored the 1999 MMPI-2 administered to appellant by Dr. Kaser-Boyd. Dr. Caldwell

reviewed the report of the profile generated from appellant's MMPI-2 responses. (44RT 6590.) Dr. Caldwell opined that appellant "clearly did set out to try to look bad on the test." (44RT 6593.) Appellant's responses were consistent with "malingering or faking bad." (44RT 6596.)

Dr. Caldwell also rescored an MMPI-2 test that was administered to appellant in July 1997 by Dr. Suiter in the midst of a custody battle between appellant and her ex-husband, Dave Folden. Dr. Suiter found that appellant was "malingering" by "faking good," that is, trying to represent herself in the most favorable light. Based on his rescoring of the MMPI-2, Dr. Caldwell agreed with Dr. Suiter that appellant was trying to "look as healthy as possible" in the context of a custody dispute. (44RT 6600-6602.)

During cross-examination of defense surrebuttal expert, Dr. Plotkin, the prosecution questioned Dr. Plotkin regarding appellant's statements that she had taken Zoloft the evening before she set the fire that killed her daughters.

> Q Is there any evidence other than what the defendant said in anything that you have read that leads you to the opinion that the defendant took Zoloft the evening of June 30th?
>
> A Only the -- the direct statements from her and the statements that she made to other professionals. The data comes up more than once.
>
> Q And does the fact that she has a history of malingering and faking good and faking bad affect that opinion?
>
> Mr. Waco: Misstatement of the evidence, your honor. Mischaracterization of the evidence.
>
> The Court: Overruled.
>
> The Witness: Actually, I think that the statement that she was faking good or faking bad in the MMPI does not lead to the diagnosis of malingering in an absolute case. It suggests that there are some reasons that a person would give variable

responses in the test, and it's subject to a validity interpretation. But that's not my level of expertise. I don't do psychological tests.

By Mr. Barshop:

Q Are you familiar with Dr. Alex Caldwell? Have you heard of that name?

A I've heard of that name in the context of this case.

***

Q Are you aware of the fact that he testified that the defendant was both malingering at the time that she took the test in 1997 and in 1999?

Mr. Waco: Objection, your honor. Also beyond the state of the evidence, not only direct examination, but also probative value.

The Court: Overruled.

The Witness: Could you repeat the question?

The Court: Are you aware that Dr. Caldwell testified in this case that the defendant was malingering on the MMPI-2 in 1997 faking good, and on the MMPI-2 in 1999 was faking bad?

The Witness: I'm not aware of that.

By Mr. Barshop:

Q If I were to tell you that, would that affect your opinion as to whether the defendant might well have had some secondary gain and not told the truth to the mental health professionals that she took Zoloft on the evening of June 30th?

Mr. Waco: Objection. Misstates the evidence, mischaracterizes the evidence. I'll submit on that.

The Court: Overruled.

The Witness: That really wouldn't lead to a direct opinion of her malingering, whether she used Zoloft or not.

By Mr. Barshop:

Q What if I were to tell you that the defendant took the witness stand and out and out lied, and was proven to be a liar by physical evidence when she said that she did not use certain words, and there were writings of her words on pieces of paper removed from her house?

Mr. Waco: Objection, your honor. Mischaracterizes the evidence; misstates the evidence.

The Court: Overruled.

The witness: What was the question?

By Mr. Barshop:

Q Would that affect your opinion if I told you that the defendant out and out committed perjury when she took the witness stand?

A Would that affect my opinion -- would that affect my opinion as to validity?

Mr. Waco: Objection to the form of the question. Calls for legal conclusion, as well as factual misrepresenting the testimony, your honor.

The Court: Overruled.

The Witness: I think, like many things in this case, you can't say 100 percent. I think you can say pretty close that if she's lying about something, and lied about it on the stand, that that gives you significant power in order to predict the truth of other statements. Is it 100 percent? It's not. But it is predictive.

By Mr. Barshop:

Q So would it affect your opinion as to the likelihood that she, in fact, took Zoloft on June 30th if we put all these factors together -- that being the opinions of Dr. Caldwell regarding malingering on separate occasions, the fact that the defendant took the witness stand and lied?

Mr. Waco: Object to the form of the question, your honor. Both mischaracterizes the evidence --

The Court: It's in the form of a hypothetical. It's overruled.

By Mr. Barshop:

Q That she further fabricated a rental agreement and committed fraud upon the landlords -- would these factors affect your opinion regarding the fact that she may well not have taken Zoloft on the night of June 30th?

Mr. Waco: Objection, your honor. Misstates the evidence and mischaracterizes the evidence. I object to the form of the hypothetical.

The Court: Overruled.

The Witness: I think that really goes to determining the personality that one has and whether they're prone to lying, whether they're prone to embellishing, and I think those would all have predictive value in that. Again, in terms of the final issue whether she took Zoloft, I don't find it anymore predictive than evaluating the other things she said.

(52RT 7954-7958.)

B. Applicable Law

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright, supra,* 477 U.S. at p. 181; see also *People v. Cash, supra*, 28 Cal.4th at p. 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye, supra*, 18 Cal.4th at p. 969.)

C. The Claim Is Forfeited, and Also without Merit

Appellant's claim of prosecutorial misconduct is forfeited, because defense counsel never objected to the prosecutor's questioning of Dr. Plotkin on the grounds of misconduct, nor did he request that the jury be admonished to disregard the questioning. (*People v. Lopez, supra,* 42 Cal.4th at p. 966; *People v. Alfaro, supra,* 41 Cal.4th at p. 1328.) "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury." [Citation.]' [Citation.]" (*People v. Cox, supra,* 53 Cal.3d at p. 682.) "Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry." (*People v. Visciotti, supra*, 2 Cal.4th at p. 79.) Thus, appellant's prosecutorial misconduct claim has been forfeited.

Moreover, the claim is without merit. An expert may offer opinion testimony on the basis of assumed facts posed in a hypothetical question; the questions, however, "'must be rooted in facts shown by the evidence.....'" (*People v. Ward* (2005) 36 Cal.4th 186, 209.) A hypothetical question may be framed upon any theory that can be deduced from any properly admitted evidence (*People v. Boyette* (2002) 29 Cal.4th 381, 449), and on cross-examination, wide latitude is allowed to test the expert's credibility. (*People v. Busch* (1961) 56 Cal.2d 868, 874.)

Here, the prosecutor did not commit misconduct when he asked Dr. Plotkin questions based on Dr. Caldwell's opinion testimony that appellant was "faking bad" on her 1999 MMPI-2 responses and "faking good" on her 1997 MMPI-2 responses. (See *People v. Alfaro, supra,* 41 Cal.4th at p. 1325 [prosecutor could extensively cross-examine experts on meaning of

notation "probable fake bad"].) The questions were "rooted in facts" shown by the testimony of Dr. Caldwell. (See 44RT 6590, 6593, 6596.) Additionally, the prosecutor's questions regarding appellant committing fraud were "rooted in facts." Appellant's landlady testified that appellant told her that she was moving into the home with her husband, Fernando Nieves, and three children. Appellant took a blank rental agreement and returned it to Cserney with a signature purporting to be from Fernando Nieves. (20RT 2307-2308.) Fernando, however, testified that he never signed the rental application and he did not give appellant permission to forge his name. (23RT 2822.) Moreover, appellant moved into the rented house with five children, not three, and without Fernando. (See 21RT 2391.) Based on this evidence, it was not misconduct for the prosecutor to ask Dr. Plotkin if it would affect his opinion as to the likelihood that appellant took Zoloft on June 30th, if he considered that appellant "fabricated a rental agreement and committed fraud upon the landlords." (52RT 7958.)

Further, the prosecutor did not commit misconduct when he asked Dr. Plotkin: "What if I were to tell you that the defendant took the witness stand and out and out lied, and was proven to be a liar by physical evidence when she said that she did not use certain words, and there were writings of her words on pieces of paper removed from her house?" (52RT 7956.) This hypothetical question was proper because it was "rooted in facts." Appellant previously testified on cross-examination that she did not recall sending the note to Dave Folden that said "Now you don't have to support any of us." She further testified that what was written in the letter ("fuck you") was not her "normal way of talking." She did not use "obscenities" in her normal way of talking or writing. (35RT 4930.) In rebuttal, the prosecution presented evidence that Sergeant Taylor recovered from appellant's bedroom some cards with pager codes written on them.

(46RT 6949.) One of the pager codes used the phrase "fuck you." (46RT 6950.) Further, appellant told Debbie Wood on June 30th that she did not "give a fuck anymore." (46RT 6947.) Given this evidence, the prosecutor did not commit misconduct in asking Dr. Plotkin to consider "what if" appellant lied on the stand.

Moreover, even assuming the prosecutor committed misconduct, it was harmless. That is, it is not reasonably probable that a result more favorable to appellant would have been reached absent the misconduct or that the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process in violation of the federal Constitution. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1071.)

Dr. Plotkin testified, in response to the question whether his opinion that appellant took Zoloft on June 30th would be affected by "the fact that [appellant] has a history of malingering and faking good and faking bad," that there could be "reasons that a person would give variable responses in the test, and it's subject to a validity interpretation." (52RT 7955.) He further testified that, if appellant had lied on the stand, it was not 100 percent "predictive" that she lied in her other statements. (52RT 7957.) However, "in terms of the final issue whether she took Zoloft, I don't find it anymore predictive than evaluating the other things she said." (52RT 7958.)

In short, like any experienced expert, Dr. Plotkin was able to answer the prosecutor's questions in a manner that emphasized his original opinion without quite answering the questions as posed, and thus minimizing any potential prejudice. It is therefore not reasonably probable that the jury would have rendered a favorable verdict in the absence of the misconduct, or that appellant was denied due process under the federal Constitution. (*People v. Wallace, supra,* 44 Cal.4th at p. 1071.)

XI. THE TRIAL COURT DID NOT MISINSTRUCT THE JURY WHEN IT INFORMED THE JURY IT COULD CONSIDER AS A BASIS FOR GUILT THE DISCOVERY VIOLATIONS ATTRIBUTED TO APPELLANT

Appellant next contends that the trial court prejudicially instructed the jury to consider, as a basis for guilt, discovery violations that the court attributed personally to appellant. Moreover, the trial court erroneously instructed the jury that appellant concealed and failed to timely disclose witness statements of non-testifying witnesses (Delores Morris and Aunt Lenora Frey), in violation of section 1054.3, subdivision (a). Further, the trial court erred because the defense was not required by the discovery statute to create legible versions of the raw notes of Dr. Philip Ney and Dr. Lorie Humphrey. (AOB 327-371.) Appellant acknowledges that the defense failed to timely disclose the witness statements of Debbie Woods, Rhonda Hill, Al Lucia and Penny Lucia, and failed to disclose a set of norms Dr. Humphrey used to score a test she administered to appellant, but she contends that the prosecution was not "inhibited" by the delayed disclosure, and therefore it was error to instruct the jury regarding the delayed disclosure. (AOB 352-353.) The trial court did not err in any of its rulings regarding discovery violations.

A. Background

On March 27, 2000, the prosecution filed a motion for discovery pursuant to section 1054.3. (11RCT 2432.) In response, the prosecution received a defense witness list for guilt phase witnesses, a revised defense witness list for guilt phase witnesses with addresses and telephone numbers, an investigator's report of the fire, a medical imaging report, a report by Nancy Kaser-Boyd, a neuropsychological assessment report by Dr. Lorie A. Humphrey, a report by Dr. Philip G. Ney, and a report from Barry T. Hirsch. (11RCT 2434-2485.)

Dr. Humphrey's report stated that she relied on a memo from defense paralegal Tina Katz to Howard Waco, dated August 11, 1999, regarding her interview with Delores Morris, and conversations with Al Lucia and "Ms. L. Frey." (11RCT 2452-2453.) Dr. Ney's report stated that he interviewed appellant in jail. (11RCT 2469.) Dr. Hirsch's report, addressed to prosecutor Ken Barshop, stated that in light of Dr. Ney's report that he had interviewed appellant, it was "necessary to obtain all of [Dr. Ney's] notes in a legible format, which may require his transcription to obtain legibility, in order to know what information he gleaned from his interview" that may have been the basis for his opinions as set forth in his report. (11RCT 2479, bolding and underlining in original.) That same day, the trial court signed the prosecution's discovery order, ordering appellant to provide discovery to the prosecution immediately. (11RCT 2486.)

On April 5, 2000, defense counsel filed a notice to limit the prosecution's pretrial discovery. (11RCT 2537.) Defense counsel objected to turning over Tina Katz's August 11, 1999 memo, and notes by Dr. Humphrey of her conversations with Al Lucia and Lenore Frey. (11RCT 2540-2541.)

On April 11, 2000, the trial court signed an amended order to the defense to provide discovery to the prosecution. (11RCT 2560.) The order required that "defendant and her attorney shall disclose to the prosecuting attorney *forthwith*" any "relevant written or recorded statements" of persons the defense intended to call at trial and any "reports or statements of experts *made in connection with* the case." (11RCT 2561, italics in original.)

On May 12, 2000, the prosecution filed a Request for Immediate Discovery, including all notes from Dr. Humphrey of interviews with Lucia and Frey, and notes from Dr. Ney of his conversations with Dr. Kaser-Boyd, Dr. Humphrey and Dr. Gold. (18RCT 4440.)

On May 15, 2000, there was a hearing on the prosecution's Request for Immediate Discovery. (19RT 1984.) Defense counsel stated that he had provided the prosecution with the "interviews with Mr. Lucia and Miss Frey" and that, in fact, he had earlier complied with this discovery request. (19RT 1985-1986.) Defense counsel was ordered to provide the prosecution's experts with the requested discovery, and the discovery could only be used to cross-examine the experts. (19RT 1988.)

On May 25, 2000, defense counsel provided the prosecution with notes from Dr. Ney and Dr. Humphrey. On May 26, 2000, the prosecution moved for a continuance on the ground that its experts needed additional time to assist the prosecution in preparing to cross-examine the defense's experts. (27RT 3578-3581, see 3587-3588.)

On May 30, 2000, just before the defense started its case, the prosecution stated that they had just received discovery of interviews by the defense of Rhonda Hill, from August 1998 and June 1999, a defense interview of Debbie Wood from August 1998, and defense interviews of Al and Penny Lucia from July 1998 and August 1999. (28RT 3665, 3754-3755.) Defense counsel stated that the notes of the interviews had been in his paralegal's computer, and he had not had copies of the notes in his paper trial file. The interview notes contained statements that were different and contradictory to the reports that the prosecution had from those individuals. (28RT 3666-3667.) The trial court stated that it would not allow the defense to call the witnesses until a hearing was held. (28RT 3668.) The trial court instructed the jury that defense counsel, Mr. Waco, had failed to provide the prosecutors with statement of witnesses that should have been disclosed 30 days before trial. The trial court further stated that it would give additional "instructions on this discovery noncompliance later on when the issues are more clarified." (28RT 3709-3710.)

On May 31, 2000, the prosecution stated that the notes they had received from Dr. Ney and Dr. Humphrey needed to be "deciphered." Dr. Ney's notes were "totally illegible." (29RT 3911-3912; see 30RT 3940-3941.) On June 1, 2000, defense counsel offered to call Dr. Ney and ask him if he could "either rewrite" or "dictate" his notes. (30RT 3959.) Defense counsel stated he had "no problem" with the concept that the prosecution was entitled to read and decipher the notes from his experts. (30RT 3940-3941.) The trial court stated it would be "acceptable" for Dr. Ney and Dr. Humphrey to have their notes transcribed, typed or computer-generated, and submitted to the prosecution by 4:00 p.m. on June 6th. Dr. Hirsch, the prosecution's expert, observed that he had been requested in the past to dictate his notes, because his handwriting was "atrocious." (30RT 3960-3961.)

After Wood, Hill, and the Lucias had testified for the defense, the trial court informed the jury that there would be a two-week continuance because "the defense" had delayed in disclosing information from their defense experts, which was permitted by law but which "necessitated a need to continue this case so that the People can prepare to examine the witnesses." Further, more time was needed because "the notes of some of their experts are indecipherable to a great degree" and the prosecution needed time to get the notes into "some kind of a form where they can be read and interpreted by the People's experts." (30RT 4112-4113.) The court further instructed the jury:

> [T]he prosecution and defense are required to disclose to each other before trial evidence each intends to present at the trial so as to promote the ascertainment of truth, save court time, and avoid any surprise which may arise during the course of the trial. [¶] Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-compliant party's evidence. [¶]

> Disclosure of evidence is required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. [¶] In this case, the defendant has concealed and failed to timely disclose evidence regarding witness statements -- witness statements of Debbie Woods [*sic*], Rhonda Hill, Al Lucia, Penny Lucia, Delores Morris, and Aunt Lenore [Lenora Frey]. [¶] Although this concealment and failure to timely disclose evidence was without lawful justification, the court will, under the law, permit the production of this evidence during the trial. [¶] The weight and significance of any concealment and delay of disclosure are matters for your consideration. [¶] However, when you do start to deliberate in this case, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters that are established by other credible evidence. [¶] So remember the admonition. [¶] You're not to form or express any opinion about the case or the participants.

(30RT 4113-4114.)

After the trial court had admonished the jury, defense counsel stated that he had "no problem" with the "first part" of the admonition and the "first part was accurate." However, defense counsel "took exception" to the "second part' regarding "specific witness statements." (30RT 4115.) Defense counsel did not object that appellant was held personally responsible for the delay, nor did he request that the trial court strike that portion of the instruction. (30RT 4115-4116.)

During Dr. Humphrey's cross-examination on June 22, 2000, she admitted that she had not provided the prosecution with a set of the norms she had used to score one of the neuropsychological tests she had administered to appellant, even though she had been ordered to do so by the trial court. (38RT 5293-5295.) After the prosecution had completed their cross-examination of Dr. Humphrey (38RT 5299-5319, 5321-5328, 5331-5361), the trial court ordered Dr. Humphrey to return later that afternoon with her notes, and to be available for further examination that afternoon, if

the prosecution had concluded their examination of Dr. Brooks, who was taken out of order. (38RT 5362-5363.)

On June 23, 2000, Dr. Humphrey was called as a witness at an Evidence Code section 402 hearing regarding discovery violations. (39RT 5506.) Dr. Humphrey testified that she received information regarding new norms from Dr. Satz. (39RT 5507; Peo. Exh. 73.) The trial court stated the reason for the hearing was that Dr. Humphrey had not obeyed a court order to turn over a document at 1:30 p.m., and she did not turn it over until 5:00 p.m. (39RT 5508-5509.) The trial court believed Dr. Humphrey might have lied. (39RT 5559.) Dr. Brook testified next at the section 402 hearing. (39RT 5560.) Dr. Brook testified that he talked to Dr. Satz, who stated he did not give Dr. Humphrey new norms. Dr. Satz further denied knowing anything about People's Exhibit 73, the "new" norms Dr. Humphrey had testified she had obtained from Dr. Satz. (39RT 5562.) The trial court believed that Dr. Humphrey had perjured herself in this regard. (39RT 5573.) The prosecution also stated that there were two letters that Dr. Ney had relied on, dated August 6, 1999, and September 1, 1999, that were mentioned in Dr. Ney's report on the first page and that still had not been provided to the prosecution. The trial court ordered defense counsel to contact Dr. Ney and have Dr. Ney bring his entire file to court. (39RT 5580.)

On June 26, 2000, the trial court ordered Mr. Waco to provide the prosecution with Mr. Waco's letter to Dr. Ney dated August 6, 1999. (40RT 5597.) On June 27, 2000, during an Evidence Code section 402 hearing, Dr. Ney turned over some notes that he had not previously disclosed to the prosecution. (40RT 5840.) The notes pertained to appellant's pre-existing conditions that made her susceptible to dissociative states, as well as depression factors and symptoms. (40RT 5841-5843.)

The trial court stated that if there had been a discovery violation, an appropriate sanction would be to exclude Dr. Ney's testimony, but the court would consider other sanctions, as well. (40RT 5852.) The trial court found that there was a "significant discovery problem" in the middle of the guilt phase trial. (40RT 5862.) The trial court told the jury that the "defense provided to the prosecution some new documents from Dr. Ney" and as a result there would be a break so that the trial court could determine whether the defense had committed a discovery violation. (41RT 5867-5868.) Dr. Ney was ordered to return on June 29, 2000. (41RT 5997.)

On June 29, 2000, the prosecution asked for discovery sanctions against Dr. Ney and defense counsel in the amount of $1,500 each, and a jury instruction on the discovery violation. (42RT 6069.) After further cross-examination in front of the jury, Dr. Ney was ordered back on July 5, 2000. (42RT 6208, 6214.)

On July 5, 2000, the prosecution's request for sanctions for failure to comply with discovery was heard and denied as to Dr. Ney. The prosecution renewed its request for sanctions against defense counsel. Defense counsel argued that sanctions were not appropriate because the prosecution did not ask for a continuance, did not show any prejudice, and made "wide aspersions." (43RT 6433-6434.)

During a discussion of guilt phase instruction, defense counsel objected to the trial court giving CALJIC No. 2.28, Failure to Timely Disclose Evidence. Defense counsel stated that the defense had not failed to timely disclose evidence, while the prosecution had. (46RT 6996.) Defense counsel did not object to the instruction on the grounds that it held appellant personally responsible for the discovery violation, nor did he request that the instruction be modified to delete or reword that portion. (See 46RT 6996-7001.)

The trial court instructed the jury as follows:

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time, and avoid any surprise which may arise during the course of the trial. Concealment of evidence and delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or to produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. [¶] In this case, the defendant concealed and failed to timely disclose the following evidence: [¶] Witness statements of Debbie Wood, Rhonda Hill, and Al Lucia. [¶] Readable notes and reports and other materials relied upon [by] witnesses Dr. Philip Ney and Dr. Lorie Humphrey. [¶] Although the defendant's concealment and failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any concealment and delayed disclosure are matters for your consideration. [¶] However, you should consider whether the concealed and untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

(54RT 8382-8383.)

During closing argument, the prosecution argued, without objection:

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

(57RT 8864.)

B. Applicable Law

Section 1054.3 provides in relevant part:

> (a) The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> (1) 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.
>
> (2) Any real evidence which the defendant intends to offer in evidence at the trial.

Section 1054.5, subdivision (b) provides in relevant part:

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

Section 1054.7, provides in relevant part:

> The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

In *Verdin v. Superior Court, supra*, 43 Cal.4th at pages 1103 through 1104, this Court held that the defense's statutory obligation to disclose evidence pursuant to section 1054.3 included "*all* written or recorded

information in [the expert's] possession" and moreover, the discovery statute did not "exclude other types of materials from the reach of the criminal discovery statutes." (*Ibid.*, italics added; see also *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 486 ["raw written notes of a witness interview are witness statements, regardless of whether they later are used to prepare a report of the statement"].) The discovery provisions of section 1054 et seq. apply to the penalty phase of a capital trial. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 937.) "[T]he reciprocal discovery provisions contemplate both guilt and penalty phase disclosure ordinarily would occur at least 30 days prior to commencement of the trial on *guilt* issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1238, italics in original.) The decision whether to give a sanction instruction for failure to provide discovery is addressed to the sound discretion of the trial court. (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

C. The Trial Court Did Not Abuse Its Discretion by Instructing the Jury Regarding the Discovery Violation

Appellant first contends that the defense was not required to disclose witness statements of non-testifying witnesses, in this case, appellant's mother, Delores Morris and "Aunt Lenore" Frey. Thus, appellant argues that the trial court erred in instructing the jury that "the defendant has concealed and failed to timely disclose evidence regarding witness statements" of Morris and Frey. (AOB 346-347.) However, defense counsel turned over the witness statements of Morris and "Aunt Lenore" Frey not once, but twice, without objection (see 19RT 1985-1986), so appellant's argument that the defense was not required to disclose these witness statements is forfeited. (See *People v. Tillis, supra*, 18 Cal.4th at p. 292; *People v. Mitchell* (1962) 209 Cal.App.2d 312, 319.)

Additionally, even though the defense did not intend to call Delores Morris or "Aunt Lenore" as guilt phase defense witnesses, the defense's experts relied on the statements of Morris and Frey in forming their opinions. (See 11RCT 2452-2453; 30RT 4115-4116.) Therefore, the statement were discoverable because they were relied upon by the defense's experts in forming their opinions. (See *Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1103-1104.) Finally, Frey testified at the penalty phase, and thus her statements were discoverable at the guilt phase. (*People v. Superior Court (Mitchell), supra*, 5 Cal.4th at p. 1238.) Appellant did not provide the trial court with any good cause for delaying discovery of penalty phase witnesses until after the conclusion of the guilt phase. (*Id.* at pp. 1238-1239.)

Appellant further contends that the defense was not required to create legible versions of defense experts' raw notes or disclose all of its experts' raw notes and source material prior to trial. Thus, she argues that the trial court erred when it instructed the jury that appellant failed to timely disclose readable notes and other materials relied upon by Dr. Ney and Dr. Humphrey. (AOB 347-350.) This contention is forfeited on appeal because defense counsel did not object to his experts' creating legible versions of their notes. (See *People v. Tillis, supra,* 18 Cal.4th at p. 292; *People v. Mitchell, supra,* 209 Cal.App.2d at p. 319.) In fact, defense counsel acknowledged that his experts were willing to interpret words, phrases, or "anything else" and he offered to call Dr. Ney and ask him if he could rewrite his notes. (30RT 3916, 3959.)

Further, the claim is without merit. The criminal discovery statute requires disclosure of relevant statements and reports of experts whom the defendant intends to call as witnesses. (§ 1054.3, subd. (a).) This disclosure requirement includes an expert's raw written notes. (See *Verdin v. Superior Court, supra*, 43 Cal.4th at pp. 1103-1104; *Thompson v.*

Superior Court, supra, 53 Cal.App.4th at p. 486.) Appellant's argument that she had no obligation to produce legible versions of an expert's raw notes is untenable in light of the purpose of the discovery statute, which is to "promote the ascertainment of truth." (§1054, subd. (a).)

To allow a defendant to circumvent the purpose of the discovery statute by disclosing illegible notes would deny the prosecution a reasonable opportunity to investigate the defense's expert witnesses before trial so as to determine the nature of their anticipated testimony, to discover any matter that might reveal a bias or otherwise impeach the witnesses' testimony, and to avoid the need for midtrial continuances for these purposes. (See *In re Littlefield* (1993) 5 Cal.4th 122, 131.)

Appellant argues that disclosure of a defense expert's raw notes is precluded by *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, and *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818. (AOB 348.) Those cases are factually distinct. In *Sandeffer*, the Court of Appeal held that the trial court could not require defense counsel to disclose the identity of, or produce reports and notes by, an expert the attorney has not yet determined to call as a witness. (*Sandeffer v. Superior Court, supra*, 18 Cal.App.4th at p. 678.)

In *Hines*, where the expert had been identified, the Court of Appeal determined the discovery statute did not provide for pretrial disclosure of random notes in the expert's file, interview notes reflecting the defendant's statements, preliminary drafts of the expert's report, the expert's notes to himself, interim conclusions or subsidiary reports on which the expert may rely. (*Hines v. Superior Court, supra*, 20 Cal.App.4th at p. 1823.)

Here, on the other hand, Dr. Ney and Dr. Humphrey were both experts that the defense intended to call at the guilt phase. (11RCT 2435.) They were ordered to produce legible notes from the raw notes they used to reach their conclusions in their reports. This was not an unreasonable or

unusual request. (Cf. 30RT 3960-3961 [Dr. Hirsch states that he had been requested in the past to dictate his notes, because his handwriting was "atrocious"].)

Moreover, these were not "random notes" but notes that were very relevant to the experts' conclusions, as expressed in their reports. Accordingly, the trial court did not abuse its discretion in requiring the experts to produce legible versions of their raw notes, or in instructing the jury regarding the failure to disclose readable notes.

Appellant further argues that the error was all the more "egregious" because the trial court imposed the transcription obligation only on the defense. (AOB 350.) In fact, as previously pointed out in Argument I.C.3, *post*, the trial court denied Mr. Waco's request as to Dr. Brook without prejudice to a later request for transcription, if Mr. Waco could establish a sufficient factual basis for the request. (35RT 4850; 36RT 4948.) The trial court further observed that there was no need to transcribe Dr. Brook's notes, because defense expert Dr. Humphrey was going to meet with Dr. Brook and go over the notes with him. (36RT 4953.) Thus, appellant has not established that the transcription obligation was unfairly placed on the defense, alone.

Appellant further argues that the trial court did not have authority to order disclosure of Dr. Humphrey's and Dr. Ney's "source materials." However, appellant recognizes that the trial court ruled that the defense's experts were not required to disclose "text or reference works" prior to their testimony. Appellant therefore argues that the trial court's error lay in instructing the jury that appellant violated the law by disclosing expert source materials less than 30 days before trial. (AOB 350-351, citing 19RT 1987.) The instruction, however, when read in context, states that appellant concealed and failed to disclose "[r]eadable notes and reports and other materials relied upon [by] witnesses Dr. Philip Ney and Dr. Lorie

Humphrey." (54RT 8382-8383.) There is no way the jury could infer that this referred to text or reference materials. The "other materials" did not refer to "source materials" such as texts or reference works, but to "other materials" such as the new norms that Dr. Humphrey did not turn over, and Dr. Ney's notes pertaining to dissociative states and depression as factors in appellant's mental state at the time of the crime. Thus, there was no error.

Appellant next argues that the instructions were not justified, appropriate, or necessary. (AOB 351-356.) In particular, appellant argues that the instructions were not appropriate sanctions because the prosecution was not prejudiced by the delayed disclosure of discovery materials. While appellant acknowledges that the defense failed to timely disclose witness statements of Debbie Wood, Rhonda Hill, Al Lucia and Penny Lucia, and a set of norms Dr. Humphrey used to score a test she administered to appellant, she contends that the prosecution was not "inhibited" by the delayed disclosure and therefore it was error to give the instructions. (AOB 352-353.)

This argument fails because a discovery violation instruction is appropriate even if the nondisclosure did not have an actual effect on the other party's ability to respond. Here, the trial court's instructions to the jury following the testimony of Wood, Hill, and the Lucias (30RT 4113-4114), and at the conclusion of the guilt phase (54RT 8382-8383), were similar to CALJIC No. 2.28, which as this Court has noted "has been the subject of significant criticism in the Courts of Appeal." (*People v. Riggs* (2008) 44 Cal.4th 248, 306, citing, e.g., *People v. Bell* (2004) 118 Cal.App.4th 249.)[30] However, this Court stated in *Riggs* that a discovery

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[30] CALJIC No. 2.28 provides in relevant part:

The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at

(continued...)

violation instruction is appropriate even if the nondisclosure did not have an "actual effect on the other party's ability to respond." (*Id.* at p. 308.) "Whether or not the prosecution was actually impaired by the attempt to conceal the evidence would not change the circumstance that defendant tried to inhibit the prosecution's efforts. In other words, while not constituting evidence of the defendant's consciousness of his or her own guilt, the fact of a discovery violation might properly be viewed by the jury as evidence of the defendant's consciousness of the lack of credibility of the evidence that has been presented on his or her behalf." (*Ibid.*) This, in fact, is precisely what the prosecution argued to the jury. (57RT 8864 [informing the jurors that they could not find appellant guilty because of the discovery violation, but it showed the jury that the defense knew the People's evidence was "overwhelming" and so needed a strategic

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(...continued)

> trial so as to promote the ascertainment of truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the Defendant failed to timely disclose the following evidence: ... [¶] Although the Defendant's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.

CALJIC No. 2.28 has been replaced by CALCRIM No. 306, which extensively revised the instruction on this subject. (*People v. Riggs, supra*, 44 Cal.4th at p. 307.)

advantage].) Thus, appellant's argument that the instruction was inappropriate because the prosecution was not "inhibited" by the delayed disclosure has been rejected by this Court in *Riggs*, and should be rejected now.

In any event, it is not necessary for this Court to address the problems with CALJIC No. 2.28, because there is no reasonable probability that an outcome more beneficial to appellant would have been achieved in the absence of the instruction (see *People v. Watson, supra*, 46 Cal.2d at p. 836) and any federal constitutional error was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24). (*People v. Riggs, supra*, 44 Cal.4th at p. 311.) Appellant argues that the repeated use of CALJIC No. 2.28 constituted structural error requiring automatic reversal, because the error defied harmless error analysis. (AOB 368-370.) However, in *Riggs*, this Court analyzed any error in giving CALJIC No. 2.28 under both state and federal harmless error standards. (*People v. Riggs, supra*, 44 Cal.4th at p. 311, citing *People v. Bell, supra*, 118 Cal.App.4th at p. 257 and *People v. Saucedo* (2004) 121 Cal.App.4th 937, 944.)

Here, any error was harmless. The evidence that appellant deliberately and with premeditation murdered her four daughter was entirely overwhelming, especially in comparison with the exceedingly weak testimony provided by Wood, Hill, the Lucias, Dr. Humphrey and Dr. Ney. (Cf. *People v. Bell, supra*, 118 Cal.App.4th at p. 257 [noting that "[t]he prosecution's case was not overwhelming," and included no physical evidence tying defendant to the scene or the victim, or statements by defendant concerning the crime].)

Wood's testimony merely established that appellant was depressed about her abortion and upset at Volk and Folden the night that she set the fire. (30RT 3989-3991.) Hill's testimony merely corroborated Wood's

testimony that appellant was depressed about the abortion and hurt by Folden's attempt to nullify the adoption of her three oldest children. (30RT 4049-4050.)

Al Lucia testified that appellant would hold her breath until she passed and, and had seizures as a child. (37RT 5058-5061.) Lucia's testimony supported the opinions of Dr. Ney and Dr. Humphrey, that appellant suffered from epilepsy. (37RT 5147; 40RT 5757.) Dr. Ney further opined that appellant's history and symptoms fit the diagnosis of "dissociative state" and "serotonin syndrome." (43RT 6370.)

However, the evidence that appellant was in a dissociative state or epileptic haze when she set the fire that killed her children was, to put it mildly, unimpressive, especially in light of the powerful evidence that appellant deliberately set the fire to exact revenge on the men in her life, particularly Dave Folden. Moreover, the prosecution correctly informed the jurors during closing argument that they could not find appellant guilty because of the discovery violation. (57RT 8864.) In sum, there is no reasonable possibility or probability that the challenged instructions affected the outcome or fairness of appellant's trial.

XII. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES

Appellant next contends that the trial court's refusal to instruct the jury on the lesser included offense of involuntary manslaughter was prejudicial error requiring reversal. Appellant also contends that the trial court committed reversible error by refusing to instruct on the lesser included offenses to felony arson. (AOB 371-394.) There was no error here, because there was no substantial evidence to support such instructions.

A. Background

During a discussion of jury instructions, the trial court denied a defense request for instruction on manslaughter and voluntary manslaughter. Defense counsel then requested an instruction on involuntary manslaughter. (46RT 7038.) Counsel argued that there was evidence from which the jury could find that appellant was "somewhat intoxicated due to the alcohol" and that she had killed while unconscious due to voluntary intoxication. (46RT 7038-7039.)

Counsel also asked for "lesser-included offense" instructions (CALJIC Nos. 14.82, 14.85, 14.86, 14.88) on the arson count because appellant "could have acted in a grossly negligent manner with regards to causing great bodily injury, or causing damage to the house." (See 19RCT 4765 [defense instruction on "Arson-Intoxication (Lesser Offense) refused by trial court].) The prosecution argued that the crimes defense counsel referred to as "lesser-includeds" were actually "lesser-relateds." (46RT 7039.) The trial court ruled that the evidence did not justify any lesser included offense instructions to the arson count. (46RT 7041.) Additionally, the court noted that the lesser included instructions were inconsistent with appellant's defense that she committed the crime "because of some dissociative state or some other mental impairment." (46RT 7041-7042.) Defense counsel argued that the jury could find that appellant was "walking around with the gas can in a negligent manner" but her son "actually did the pouring." The trial court pronounced this theory "so ridiculous as to not warrant any comment." (46RT 7042.) The trial court repeated that it would not give any lesser included instructions to the arson count. The trial court stated, "[t]he only evidence in this case suggests, without any doubt, that a fire was set intentionally, set by pouring gasoline." (46RT 7043.)

During a further discussion on instructions, the trial court invited defense counsel to articulate a theory as to why an involuntary manslaughter instruction was appropriate. (50RT 7602.) Defense counsel replied that "there are other acts of a misdemeanor nature that I believe -- including misdemeanor arsons -- that are available, 452(d) and 452(a) that -- as well as just merely possession of flammable materials or combustible materials, such as a gas can." The trial court responded, "Well, that's a necessarily lesser-included offense of arson." (50RT 7603.)

Defense counsel responded that acting "without due caution and circumspection in an aggravated and reckless manner certainly would be included herein as indicated in CALJIC No. 8.46, and even just doing a lawful act in an unlawful manner, is sufficient to invoke the involuntary manslaughter" instruction. (50RT 7603-7604.) The court again refused to give an instruction on involuntary manslaughter. (50RT 7604.) At this point, the prosecution suggested that there was evidence to support a theory of involuntary manslaughter based on testimony that appellant voluntarily drank and that she acted in a "dissociative state or delirium." (50RT 7605.) The prosecution suggested that the court give CALJIC Nos. 8.45 and 8.47 because "there is some evidence that the jury could conceivably accept as to involuntary manslaughter." Defense counsel also requested CALJIC No. 8.46. (50RT 7606.)[31]

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[31] CALJIC No. 8.46, due caution and circumspection -- defined, states:

> The term "without due caution and circumspection" refers to [a] negligent act[s] which [is] [are] aggravated, reckless and flagrant and which [is] [are] such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be in disregard for human life, or an indifference to the consequences of such act[s]. The facts must be such that the consequences of the negligent act[s]

(continued...)

The trial court then went through the language of CALJIC No. 8.45. (50RT 7606-7607.)[32] After agreeing to the removal of most of the bracketed portions of CALJIC No. 8.45, because they were inapplicable, the prosecutor stated, "I am rethinking my position now, after looking at these instructions." (50RT 7607.)

(...continued)

could reasonably have been foreseen. It must also appear that the [death] [danger to human life] was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated, reckless or grossly negligent act.

[In determining whether a result is natural and probable, you must apply an objective test. It is not what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected likely to occur. The issue must be decided in light of all the circumstances surrounding the incident. A "natural" result is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. "Probable" means likely to happen.]

[32] CALJIC No. 8.45, as requested by the prosecution, stated:

Every person who unlawfully kills a human being, without malice aforethought and without an intent to kill, is guilty of the crime of involuntary manslaughter in violation of Penal Code Section 192(b). [¶] When a person renders herself unconscious through voluntary intoxication and kills while in that state, the killing is attributed to her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if she voluntarily procured her own intoxication. [¶] In order to prove this crime, each of the following elements must be proved: 1. A human being was killed; and 2. The killing occurred while the defendant was unconscious; and 3. Unconsciousness was caused by defendant's voluntary self-intoxication.

(19RCT 4956.)

The trial court invited defense counsel to make any further arguments in support of CALJIC Nos. 8.45 and 8.47. (50RT 7608.) Defense counsel again argued that there was evidence that appellant was voluntarily intoxicated from alcohol and prescription pills. (50RT 7609.) This evidence, combined with evidence that appellant suffered from depression, serotonin syndrome, and dissociation, supported giving an involuntary manslaughter instruction. (50RT 7612.)

During further discussions on instructions, the defense and prosecution again requested instructions on involuntary manslaughter. (51RT 7749-7755; see also 52RT 8034-39.) Defense counsel requested CALJIC Nos. 8.45 and 8.47, based on the theory that appellant carried around a gas can in a negligent or dangerous manner.[33] (52RT 8034-8035.) The prosecution requested an instruction on involuntary manslaughter based on criminal negligence due to a combination of "drugs and/or alcohol." (52RT 8038, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 423.) Defense counsel objected to the instruction as modified by the People. (52RT 8039.)

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[33] CALJIC No. 8.47, involuntary manslaughter -- killing while unconscious due to voluntary intoxication, states:

> If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without an intent to kill and without malice aforethought, the crime is involuntary manslaughter. [¶] This law applies to persons who are not conscious of acting but who perform act or motions while in that mental state. The condition of being unconscious does not require an incapacity to move or to act. [¶] When a person voluntarily induces [his] [her] own intoxication to the point of unconsciousness, [he] [she] assumes the risk that while unconscious [he] [she] will commit acts dangerous to human life or safety. Under those circumstances, the law implies criminal negligence.

The trial court refused to give the prosecution's requested modified instruction on involuntary manslaughter. (19RCT 4956; 52RT 8039.) The modified instruction, based on CALJIC No. 8.45 and *People v. Ochoa*, *supra*, instructed the jury that a person who killed while unconscious due to voluntary intoxication, is guilty of involuntary manslaughter. (52RT 8034; 19RCT 4956.) Defense counsel requested that CALJIC No. 8.45 be given under a "theory of an unlawful act," which the trial court refused. (52RT 8038.)

The trial court did instruct the jury on the effects of voluntary intoxication:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. [¶] In the crime of arson as charged in count 6, which is a general intent crime, the fact the defendant was voluntarily intoxicated is not a defense and does not relieve her of responsibility for the crime. [¶] It is the general rule that no act committed by a person while in a state of ... voluntary intoxication is less criminal by reason of that condition. [¶] Thus, in the crimes and all allegations alleged in this case, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve her, the defendant, of responsibility for any crime or negate any allegation or special circumstance. [¶] However there is an exception to this general rule, namely, where a specific intent or mental state is an essential element of a crime, allegation, or special circumstance. [¶] In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the applicable crime, allegation, or special circumstance.
>
> As has been mentioned elsewhere in these instructions, in the crimes of murder and attempted murder and in the special circumstances of murder while lying in wait and murder committed during the commission of arson, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state. [¶] If the evidence shows that the defendant was intoxicated at the time of the applicable alleged crime, you should consider that fact in deciding whether or not

the defendant had the required specific intent or mental state. [¶] If from all the evidence you have a reasonable doubt whether the defendant had a required specific intent or mental state, you must find that the defendant did not have that specific intent or mental state.

The crime of arson as charged in count 6 is a general intent crime. Thus, if you believe that the defendant was voluntarily intoxicated, it is not a defense and does not relieve her from responsibility for this crime. Intoxication of a person is voluntarily ... if it results from the willing use of any intoxicating liquor, drug, or other substance knowing that it is capable of an intoxicating effect or when she willingly assumes the risk of that effect. [¶] Voluntary intoxication includes the voluntary ingestion, injecting, or taking by any other means of any intoxicating liquor, drug, or other substance. [¶] A person who while unconscious commits what would otherwise would be a criminal act is not guilty of the crime. [¶] This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium, a fever, or because of an attack of epilepsy, a blow on the head, the involuntary taking of drugs, or the involuntary consumption of intoxicating liquor, or any similar cause.

Unconsciousness does not require that a person be incapable of movement. [¶] Evidence has been introduced for the purpose of showing that defendant may have been unconscious at the time and place of the commission of the alleged crimes for which she is here on trial. [¶] If after a consideration of all the evidence you have a reasonable doubt that the defendant was conscious at the time the alleged crimes were committed, she must be found not guilty. [¶] If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged crimes the defendant acted as if she were conscious, you should find that she was conscious, unless from all the evidence you have a reasonable doubt that the defendant was, in fact, conscious at the time of the alleged crimes. [¶] If the evidence raises a reasonable doubt that the defendant was, in fact, conscious, you must find that she was then unconscious.

(54RT 8388-8393.)

B. Applicable Law

In a capital case the due process clause compels the giving of instructions on lesser included offenses where warranted by the evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637 [100 S.Ct. 2382, 65 L.Ed.2d 392]; see also *Hopper v. Evans* (1982) 456 U.S. 605, 611-612 [102 S.Ct. 2049, 72 L.Ed.2d 367]; *People v. Moon* (2005) 37 Cal.4th 1, 27.) Where there is no substantial evidence supporting instruction on a lesser included offense, *Beck v. Alabama* is not implicated. (*People v. Romero* (2008) 44 Cal.4th 386, 404 [insufficient evidence to require instruction on second degree murder as lesser included offense].)

California similarly requires a court to instruct sua sponte on lesser included offenses if the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Moon, supra,* 37 Cal.4th at p. 25.) However, "'"due process requires that a lesser included offense instruction be given *only* when the evidence warrants it."'" (*People v. Gray* (2005) 37 Cal.4th 168, 219, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 696, emphasis in original.) "[T]he existence of any evidence, no matter how weak will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is substantial evidence to merit consideration by the jury. Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense but not the greater offense was committed." (*People v. Romero, supra,* 44 Cal.4th at p. 403 [internal quotations & citations omitted]; see also *People v. DePriest* (2007) 42 Cal.4th 1, 50; *People v. Huggins* (2006) 38 Cal.4th 175, 215.)

"'Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by

the omitted instructions adversely to defendant under other properly given instructions.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 392, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Elliot* (2005) 37 Cal.4th 453, 475.) It is not prejudicial error to refuse an involuntary manslaughter instruction where the jury's finding on a special circumstance shows the defendant intentionally killed the victim. (*People v. Beames* (2007) 40 Cal.4th 907, 928.)

C. There Was No Substantial Evidence to Support An Instruction on Involuntary Manslaughter Based on Unconsciousness

Involuntary manslaughter is a killing committed "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) "Generally, involuntary manslaughter is a lesser offense included within the crime of murder." (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.) When based on an unlawful act not amounting to a felony, involuntary manslaughter involves an act that "was dangerous to human life or safety under the circumstances of its commission." (*People v. Cox* (2000) 23 Cal.4th 665, 675.) "[I]f, in a murder case, evidence of mental illness or intoxication raises a reasonable doubt the defendant premeditated or deliberated, but establishes he did harbor malice aforethought, then he is guilty of second degree murder; if such evidence negates malice aforethought, the only supportable verdict is involuntary manslaughter or acquittal." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

> When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. "Unconsciousness is ordinarily a complete defense to a charge

> of criminal homicide. (Pen. Code, § 26, subd. [Four].) If the state of unconsciousness results from intoxication voluntarily induced, however, it is not a complete defense. (Pen. Code, § 22.) ... [I]f the intoxication is voluntarily induced, it can never excuse homicide. [Citation.] Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication." [Citations.] Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: section 26 describes as "[in]capable of committing crimes ... [¶] ... [¶] ... [p]ersons who committed the act ... without being conscious thereof." (Italics added.) Thus unconsciousness "'can exist ... where the subject physically acts in fact but is not, at the time, conscious of acting.'" [Citations.]

(*People v. Ochoa, supra,* 19 Cal.4th 353, 423-424; see also *People v. Heard* (2003) 31 Cal.4th 946, 981.) Appellant contends that there was substantial evidence that she was unconscious the night of the fire due to a mental disorder and her voluntary consumption of alcohol and/or pills. (AOB 378.) To the contrary, the record here fails to reflect substantial evidence that appellant was unconscious due to a mental disorder or intoxication.

Appellant testified that she drank beer and a wine cooler, and ingested Zoloft and dies pills on the night of the fire. (35RT 4796-4797, 4809.) However, she did not testify that she was intoxicated. The evidence showed that there were two beer bottles and two wine cooler bottles in the kitchen's trash receptacle (26RT 3455-3456), but appellant testified that Debbie Wood "had a couple of drinks" when she had been over at the house that weekend. (35RT 4810.) Thus, the evidence established that appellant, at most, drank two of the four bottles. Further, at the hospital, appellant stated that she was taking doxycycline, an antibiotic, but mentioned nothing about taking Zoloft in the week prior to the fire. (20RT 2208; 43RT 6319-6320, 6322.)

Toxicological tests taken at the hospital showed that appellant had phentermine, a diet drug, in her system (29RT 3793), but the drug could have been ingested anywhere from three to seven days prior. (29RT 3795-3796.) Furthermore, appellant's actions just prior to starting the fire are inconsistent with any suggestion that appellant was unconscious due to intoxication or a mental disorder when she started the fire.

David testified that appellant organized the slumber party the night before the fire, insisted that David participate in the slumber party even though he did not want to, and that when he awoke in the middle of the night choking on smoke, appellant told him to stay where he was, not to go outside even though he wanted to, and to breathe into his blankets. Appellant would not even allow her daughter to get up and vomit in the bathroom, but ordered her to vomit on the floor.

Further, the evidence established that appellant wrote and mailed a letter to Dave Folden just prior to the fire, which told him in the most scathing and obscene manner possible that he no longer had to support her or any of the children. Prosecution arson expert Dr. Dehaan also testified that the fire was intentionally set. (44RT 6503-6504.) Thus, the record does not show substantial evidence that appellant was unconscious due to intoxication or a mental disorder prior to starting the fire. Under the circumstances, the trial court properly refused the instruction on the lesser included offense of involuntary manslaughter.

In any event, assuming there was error in failing to instruct on involuntary manslaughter, the error was harmless because the jury necessarily decided the factual questions posed by the omitted instruction adversely to appellant under other properly given instructions. (*People v. Chatman, supra,* 38 Cal.4th at p. 392.) It is not prejudicial error to refuse an involuntary manslaughter instruction where the jury's finding on a

special circumstance shows the defendant intentionally killed the victim. (*People v. Beames, supra,* 40 Cal.4th at p. 928.)

The jury here was instructed that the mental state for the special circumstance allegation of murder while lying in wait required (1) the specific intent to kill and (2) premeditation and deliberation. (20RCT 5103.) The jurors found that appellant had the required mental state for the lying-in-wait special circumstance when they found the special circumstance "true." (20RCT 5138-5141.) Thus, the trial court's refusal to instruct on involuntary manslaughter was not prejudicial error because the jury's finding on the lying-in-wait special circumstance showed the jury decided the issue of whether appellant intentionally killed her children adversely to appellant. (See *People v. Beames, supra*, 40 Cal.4th at p. 928.)

D. There Was No Substantial Evidence Supporting Lesser-Included Offenses to Felony Arson

Alternatively, appellant argues that if the jury has been instructed on involuntary manslaughter and the lesser included offenses to felony arson, the jury could have found that she did not have the specific intent to commit felony arson, as required for a first-degree murder conviction. (AOB 386-389.) This claim is without merit.

Appellant was convicted of arson, in violation of section 451, subdivision (b), which states "Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years." The jury was instructed on the special circumstance allegation that the murders were committed while committing an arson in violation of section 451, subdivision (b). (20RCT 5107.) The jury was further instructed the "required specific intent for the crime of murder of [the] first degree on a theory of murder which occurs during the commission of the crime of arson, is specific intent to commit the crime of arson." (20RCT 5103.)

Appellant argues that there was substantial evidence from which the jury could have found that the fire was set in a reckless manner, which would have been misdemeanor arson under section 452, subdivision (d), a lesser-included offense of arson. (AOB 387, citing *People v. Lopez* (1993) 13 Cal.App.4th 1840, 1846.) To the contrary, the record here fails to reflect substantial evidence that appellant started the fire in a reckless manner.

The prosecution's arson expert, Dr. Dehaan, testified that the fire was intentionally set. (44RT 6503-6504.) The defense arson expert, Del Winters, likewise testified that the fire was intentionally set. (29RT 3818.) Accordingly, there was no substantial evidence that appellant started the fire in a reckless manner, and there was no basis for any instructions on lesser-included arson offenses or an involuntary manslaughter instruction based on starting the fire in a reckless manner.

Likewise, any error in failing to instruct on lesser-included offenses to arson was harmless under other, properly given instructions. The jury found true the special allegation that appellant murdered her daughters while she was engaged in the crime of arson. (20RCT 5138-5141.) The arson special circumstance required the jury to find beyond a reasonable doubt that appellant had the specific intent to commit the crime of arson. (20RCT 5100.) Thus, the trial court's refusal to instruct on involuntary manslaughter was not prejudicial error because the jury's finding on the arson special circumstance showed the jury decided the issue of whether appellant intentionally set the fire adversely to appellant. (See *People v. Beames, supra*, 40 Cal.4th at p. 928.)

XIII. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING OF LYING-IN-WAIT

Appellant next contends that the special circumstance of lying-in-wait (§ 190.2, subd. (a)(15)), which the jury found true, is unconstitutionally

vague and overbroad. Further, the evidence at trial was insufficient to support the jury's finding on this special circumstance. (AOB 395-405.) Similar claims have been repeatedly rebuffed by this Court.

"The lying in wait special circumstance requires 'an intentional murder committed under circumstances which include (1) a concealment of purposes, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Moon*, *supra*, 37 Cal.4th at p. 22, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 388.)

This Court has recently and repeatedly found that the lying-in-wait special circumstance is not unconstitutionally vague. (*People v. Carasi, supra*, 44 Cal.4th at p. 1310; *People v. Lewis* (2008) 43 Cal.4th 415, 516; *People v. Nakahara* (2003) 30 Cal.4th 705, 721; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; see also *Morales v. Woodford* (9th Cir. 2003) 388 F.3d 1159, 1174-1178.) Nor is the lying-in wait special circumstance overbroad. The lying-in-wait special circumstance sufficiently narrows the class of murderers eligible for the death penalty, provides a principled way of distinguishing capital murders from other first degree murders, and thus comports with the Eighth Amendment. (*People v. Lewis, supra,* 43 Cal.4th at p. 516; *People v. Moon, supra*, 37 Cal.4th at p. 44; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 721.) Appellant fails to provide any compelling reasons to revisit the issue of the constitutionality of the lying-in-wait special circumstance.

Appellant also asserts that there is insufficient evidence to support the lying-in-wait special circumstance. (AOB 401-405.)

> A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction. [Citation.] Reviewed in the light most favorable to the judgment, the record must contain reasonable and credible

> evidence of solid value, "such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."

(*People v. Stevens* (2007) 41 Cal.4th 182, 201.)

There was sufficient evidence to support the lying-in-wait special circumstance. This special circumstance requires "'an intentional murder committed under circumstances which include (1) a concealment of purposes, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Moon, supra,* 37 Cal.4th at p. 22.)

First, there was substantial evidence of concealment of purpose. Scott Volk testified that appellant and the children never had slumber parties in the kitchen, either in their Perris home or their Santa Clarita home. (19RT 2118.) David testified that on June 30, 1998, appellant told him and his sisters that they were going to have a slumber party at their home in the kitchen. They had never had a slumber party in the kitchen before, and David told appellant he did not want to sleep in the kitchen. (21RT 2392.) Appellant told David that he had to. (21RT 2393.)

David and the girls put down blankets on the floor, ate popcorn, watched two movies, then fell asleep on the kitchen floor. (21RT 2393-2394.) Appellant's actions showed a concealment of purpose; her true purpose was to gather the children together in one room for the purpose of ensuring they all died when she set the house on fire. She concealed her purpose by telling the children they were having a slumber party. She waited until the opportune time, when the children were all asleep after having watched two movies, and then she poured gasoline throughout the house and intentionally set the house on fire.

Appellant argues that there was insufficient evidence because David could not "pinpoint the time of these events." (AOB 404.) "[T]he lying-in-

wait special circumstance requires 'that the killing take place during the period of concealment and watchful waiting.'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149.) Here, a reasonable jury could have found that appellant intentionally murdered her children under circumstances that included a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and, immediately thereafter, a surprise attack on her unsuspecting victims from a position of advantage. There was no requirement that David specifically pinpoint the time of the events. This is particularly true here because all of the victims were asleep when appellant set the fire. This claim fails.

XIV. THE JURY'S FINDING OF THE ARSON-MURDER SPECIAL CIRCUMSTANCE ALLEGATION WAS SUPPORTED BY SUFFICIENT EVIDENCE; NOR WAS THE JURY MISINSTRUCTED ON THE ALLEGATION

Appellant next contends that the findings on the arson-murder special circumstance (§ 190.2, subd. (a)(17)(H)) must be reversed because the evidence is insufficient to support the allegation and because the trial court misinstructed the jury. Specifically, appellant argues that the jury was permitted to find the arson-murder special circumstances true without determining beyond a reasonable doubt that she had an independent felonious purpose for committing arson. (AOB 405-432.) To the contrary, sufficient evidence supports the special circumstance allegation and the jury was properly instructed.

A. Background

The prosecution requested that the trial court instruct the jury with a modified version of CALJIC No. 8.81.17, the arson special circumstance instruction. Defense counsel objected to the modified version as a misstatement of the law. (50RT 7652, 7654.) The prosecutor argued that the modification was appropriate under *People v. Raley* (1992) 2 Cal.4th

870, 902-903 and *People v. Clark, supra*, 50 Cal.3d 583 because it could be argued that appellant had a separate intent to burn the house in order to commit suicide. Relying on *Raley*, the trial court overruled the objection and instructed the jury with the modified version of CALJIC No. 8.81.17. (50RT 7655-7658.) The trial court refused to instruct the jury, as requested by defense counsel, that "[i]f the sole purpose of the arson was to kill, then the special circumstance would not apply." The trial court stated, "[b]ut your proposal is not the law. The *Raley* case and the *Clark* case indicate that there can be concurrent purposes." (51RT 7721.)

The jury was instructed as follows, with the prosecution's modification indicated in italics:

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

(54RT 8366-8367.)

During opening argument, the prosecution argued that the arson special circumstance was satisfied if appellant intended to commit the arson and the children died as a result of the arson. (54RT 8419.) The prosecutor further argued that "[t]here is no requirement for this special circumstance that she intended to kill the children. She did. But that's not required." (54RT 8420.) The prosecutor also argued that appellant intended to

commit suicide by setting the house on fire and that she also intended for the children to die in the fire. (54RT 8421, 8451, 8457.) Defense counsel argued that appellant was depressed but not suicidal. (55RT 8536, 8538.) Defense counsel further argued that the People's "theory was that this arson was done with the specific purpose of doing herself and her children in," but the theory would not support an arson special circumstance finding." (56RT 8672.) On rebuttal, the People argued, "[i]f you find there were dual or concurrent intents; in other words, the intent to commit arson, along with the intent to kill, the special circumstance is true." (57RT 8895.)

B. Applicable Law

In *People v. Green* (1980) 27 Cal.3d 1, a case in which the "felony murder" special circumstance of the 1977 death penalty law was construed, this Court held that the special circumstance was inapplicable to cases in which the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so. (*Id.* at pp. 61-62.) This Court subsequently explained in *People v. Robertson* (1982) 33 Cal.3d 21, however, that when the defendant has an independent purpose for the commission of the felony, and it is not simply incidental to the intended murder, *Green* is inapplicable. This Court has since reiterated that to prove a felony-murder special circumstance allegation, the People must prove that the defendant had an independent purpose for the commission of the felony, i.e., the commission of the felony was not merely incidental to an intended murder. (*People v. Mendoza, supra*, 24 Cal.4th at p. 182; see also *People v. Marshall* (1997) 15 Cal.4th 1, 41 [arson-murder special circumstance applies to a murder in the commission of an arson, not to an arson committed in the course of a murder].) "'Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. [Citation.]'" (*People v. Mendoza, supra*, 24 Cal.4th at p. 183.) To meet this burden, the prosecution may show that that the

defendant concurrently harbored an intent to kill and an intent to commit the underlying felony. (*Id.* at pp. 183-184; *People v. Raley*, *supra*, 2 Cal.4th at p. 903; *People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609.) The task of this Court is to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded that the defendant had a purpose for committing the arson apart from the murder. (*People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Reversal of a felony-murder special circumstance does not require reversal of the judgment of death. Where the jury properly considers other valid special circumstance findings and all of the facts and circumstances underlying the murders, there is no likelihood that the jury's consideration of the mere existence of the invalidated felony-murder special circumstance tipped the balance toward death. (See, e.g., *People v. Mungia* (2008) 44 Cal.4th 1101, 1139; see also *Brown v. Sanders* (2006) 546 U.S. 212, 224 [126 S.Ct. 884, 163 L.Ed.2d 723] ["the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the 'heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor"].)

C. There Was Substantial Evidence That Appellant Had An Independent Felonious Purpose to Commit Arson

Appellant argues that there was no substantial evidence that she had "an independent felonious purpose to commit arson, or that the murders were committed in order to advance or conceal the crime of arson." (AOB 417.) Appellant ignores the substantial evidence that appellant set the fire with the intent to commit suicide, and the concurrent intent to kill her children.

Here, the evidence is sufficient to establish that appellant committed arson with "independent, albeit concurrent, goals." (*People v. Clark*, *supra*, 50 Cal.3d at p. 609.) That is, there was evidence that appellant set the fire with the goal of committing suicide, and further had the concurrent intent of killing the children. John Ament testified that the fire in appellant's home was deliberately and intentionally set, with the intent of burning down the house. (18RT 1905-1906, 1918.)

Appellant's fingerprints were found on a can of gasoline in her bedroom. (16RT 1510-1511; 25RT 3296-3297, 3319, 3320.) Appellant had talked with Scott Volk about suicide (19RT 2106-2107), and before setting the fire, she wrote a note to Scott Volk stating she could not live without him in her life and she could not "do this anymore." (19RT 2107; Peo. Exh. 20.) Thus, there was sufficient evidence from which a rational trier of fact could find that the children died in an arson fire set by appellant for an independent purpose other than causing their death. (See *People v. Raley*, *supra*, 2 Cal.4th at p. 902; *People v. Clark, supra*, 50 Cal.3d at p. 608 [arson felony-murder circumstance supported by substantial evidence where "victim died in an arson fire set by defendant for a purpose other than causing his death"].)

Appellant further argues that the trial court erred by giving the prosecutor's "misleading" instruction, refusing appellant's own "special instruction, and failing to correct the prosecutor's misstatements of the law. (AOB 420.) Appellant is incorrect. As set forth, above, the prosecution's modification was a correct statement of the law under *Clark*, *Raley*, and *Mendoza*. That is, the special circumstance of arson murder is established where the People show that that the defendant concurrently harbored an intent to kill and an intent to commit the underlying felony. (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 183-184; *People v. Raley*, *supra*, 2 Cal.4th at p. 903; *People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609.) The

modification was not misleading, but stated in plain language that concurrent intents were permissible. No reasonable juror would have been misled by the modification. (*People v. Richardson* (2008) 43 Cal.4th 959, 1025.)

Appellant further argues that "[b]y instructing the jurors to decide whether or not the arson was 'incidental' to the murder, the trial court led them to assume there was sufficient evidence in the record to support a finding that it was not incidental to the murder," thus depriving appellant of her constitutional rights under the Sixth, Eight, and Fourteenth Amendments. (AOB 422.) The instruction does no such thing. Appellant is referring to the second paragraph of CALJIC No. 8.81.17, which "does not set out a separate element of the special circumstance; it merely clarifies the scope of the requirement that the murder must have taken place 'during the commission' of a felony." (*People v. Harris* (2008) 43 Cal.4th 1269, 1299; see also *People v. Stanley* (2006) 39 Cal.4th 913, 956.) This clarification did not deprive appellant of any constitutional rights or lessen the prosecution's burden of proof, as the jury was instructed that "the truth of a special circumstance must be proved beyond a reasonable doubt." (CALJIC No. 8.83; 54RT 8367.)

Appellant contends that the trial court erred by rejecting his proposed modification to the instruction: "[i]f the sole purpose of the arson was to kill, then the special circumstance would not apply." This modification would have confused a reasonable juror, because it conflicts with the law as stated in CALJIC No. 8.81.17, "the special circumstance referred to in these instructions is not established if the arson was merely incidental to the commission of the murder." (See also *People v. Mendoza*, *supra*, 24 Cal.4th at p. 182 [to prove arson-murder special-circumstance allegation, the prosecution must show "the commission of the felony was not merely incidental to an intended murder"]; *People v. Clark*, *supra*, 50 Cal.3d at p.

609.) The modification was further confusing because there was evidence that appellant meant to kill herself, and if the jury found that appellant set the fire as a means to killing herself, then the jury might have believed, incorrectly, that the special circumstance did not apply.

Finally, appellant argues that the instructional error was not harmless under *Chapman v. California*, *supra*, 386 U.S. at p. 24 or *People v. Watson*, *supra*, 46 Cal.2d at p. 836, and therefore the true findings on the arson-murder special circumstance must be reversed. (AOB 427-428, 432.) Even assuming for the sake of argument only that the arson-murder special circumstance is reversed by this Court, reversal of the death sentence is not required.

Where the jury properly considers other valid special circumstance findings and all of the facts and circumstances underlying the murders, there is no likelihood that the jury's consideration of the mere existence of the invalidated felony-murder special circumstance tipped the balance toward death. (See, e.g., *People v. Mungia*, *supra*, 44 Cal.4th at p. 1139; see also *Brown v. Sanders*, *supra*, 546 U.S. at p. 224.) Here, the jury found true the multiple murder special circumstance allegations (§ 190.2, subd. (a)(3)) and the lying-in-wait special circumstance allegations (§ 190.2, subd. (a)(15)). Additionally, the jury was instructed to consider all of the facts and circumstances underlying the murders. (64RT 10068.) Appellant was properly sentenced to death, even if the arson-murder special circumstance is vacated. Thus, appellant's claim ultimately fails.

XV. THE TRIAL COURT DID NOT ERR IN ALLOWING VICTIM IMPACT EVIDENCE

Appellant next argues that the trial court prejudicially erred when it permitted victim impact evidence during the penalty phase that was unnecessary, excessive, irrelevant, cumulative and inflammatory. (AOB

433-479.) The trial court did not abuse its discretion and there was no error.

A. Background

Prior to the beginning of the penalty phase, defense counsel objected to the admission of victim impact evidence, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 820 [111 S.Ct. 2597, 115 L.Ed.2d 720]. (59RT 9171.) Defense counsel argued that under *Payne*, only direct family members were permitted to testify as to victim impact evidence, and Fernando Nieves did not count as immediate family because his parental rights had been terminated and never restored. Further, the children's stepmother, grandmother, aunts, and uncles did not qualify as immediate family members, nor were they percipient witnesses, as required by *Payne*. (59RT 9172-9173.)

The trial court stated that the issue was "whether the victim impact evidence is presented in a way that is so inflammatory it's going to cloud the jurors' rational decision-making process." (59RT 9175-9176.) The trial court stated that photos of the children while they were alive were "probably not inflammatory evidence," given that the jury had seen photos of the girls when they were dead, during the guilt phase. (59RT 9177.) Defense counsel argued that the prosecution's proposed victim impact witnesses, including the children's teachers, would be inflammatory and deny appellant a fair trial. (59RT 9181.) Defense counsel asked for a "definitive ruling" on the prosecution's proposed witnesses: Dave Folden, Fernando Nieves, Charlotte Nieves (David's stepmother), and the girls' school teachers. (59RT 9182.) The prosecutor stated he was also calling Minerva Serna, the children's grandmother, a principal from the Perris school system the girls formerly attended, a teacher who had taught the children for three years, and Alethea Volk. (59RT 9185-9186.)

The trial court overruled the defense objection as to Dave Folden, Fernando Nieves, and Charlotte Nieves. In particular, Fernando and Charlotte could testify as to the impact of the crimes on their son, David. (59RT 9189, 9240-9241.) The trial court ordered the prosecution to disclose any notes from interviews with the witnesses. (59RT 9191.) The prosecution ultimately stated it would not call an aunt or the school principal to testify about victim impact. (59RT 9239.) The trial court ruled against the prosecution's request to call one of the children's teachers, Alethea Volk, or a neighbor (Pat Rogers) to testify as to victim impact. (59RT 9239-9240.) (59RT 9240-9241.) The trial court further ruled that photographs of the children while they were alive were admissible. (59RT 9242.)

The following day, the prosecution brought in some photographs as exhibits. Defense counsel complained that he had not yet had an opportunity to look at them, to which the prosecution remarked, "They've been sitting here since before 9:00 o'clock." Defense counsel began examining the photographs and immediately objected to one photo collage, entitled "Memories," as biased, prejudiced, and "seeking to exhibit emotionalism rather than rhyme or reason with regards to the jury. Defense counsel also objected to the wording on the collages entitled "Fun Times Together," "Family Memories" and "In Remembrance." (60RT 9258; Peo. Exh. 98, 99, 103, 106.) The collage entitled "Memories" consisted of six photographs showing the girls while they were alive, with David, Fernando Nieves, Charlotte Nieves, and their two daughters (the half-sisters of David, Nikolet, and Rashel.) "Family Memories" consisted of 13 photographs of the girls and David, some including Fernando and Charlotte Nieves. "Fun Times Together" featured nine photographs of the girls and David, some including Dave Folden. "Remembrance" featured five photographs of Kristl and Jaqlene's bedroom at Dave Folden's home. Additionally, for

each girl there was a separate photo collage featuring their name, date of birth, date of death, and six or seven photos of the girls while they were alive. (Peo. Exh. 100, 101, 104 & 105.)

Defense counsel objected that the dates of the girls births and deaths on the collages, and the collage titles should not be "permissible." Defense counsel "strenuously" objected to "those type of statements on these exhibits." Defense counsel further objected to the "pictures themselves, unless there's some foundation laid ahead of time so we know exactly what the purpose of these pictures are for, other than to create a bias and prejudice" against appellant. (60RT 9259.)

Defense counsel also objected to a video that the prosecution intended to show, that had been edited to remove any images of appellant. Defense counsel requested the jury view the original video. (60RT 9260-9261.) The prosecution responded that they had cut the family video from 35 minutes to 13 minutes, the video was "obviously ... not skewed" and the video "speaks for itself." The prosecution further argued that "the photographs are appropriate for this stage of the trial for victim impact testimony ...." Further, defense counsel had had an opportunity to view the edited video that morning but had chosen not to see it. (60RT 9263.)

The trial court overruled defense counsel's objections to the photographs and to the video. The trial court further overruled defense counsel's request for a delay in order to view the video in connection with a transcript that the prosecutor handed over to defense counsel that morning. (60RT 9264.)

During the penalty phase, the prosecution called four witnesses: Fernando Nieves, Dave Folden, Minerva Serna, and Charlotte Nieves. Minerva Serna, the mother of Fernando Nieves and the grandmother of David, Nikolet, and Rashel Nieves, testified about the impact on her of the death of her granddaughters and the attempted murder of her grandson.

(60RT 9297.) Serna also knew Jaqlene and Kristl and loved them all very much. The children "meant more than anything in the world" to Serna, even though she could not see them often because appellant prohibited it. Serna would miss her grandchildren, she would miss their smiles and laughter. (60RT 9298.) Serna found out at the hospital that her granddaughters were dead and it felt like a knife tearing out her heart. (60RT 9299.) She last saw the children on June 28, David's birthday, when they went to visit her husband's grave. (60RT 9299-9300.)

Serna missed not being able to hold the girls' hands, walk down the street with them, eat dinner with them. She suffered every day because of the deaths of her granddaughters. Her son, Fernando, was sad; sometime they would talk about the girls and they would "just break down, literally break down." (60RT 9300-9301.) Serna was shown the collage entitled "Memories." Serna stated that the photographs depicted how she remembered the girls. (60RT 9302; Peo. Exh. 98.)

Serna identified photos of Nikolet next to David. Serna described Nikolet as "the saddest one of all" and that she "suffered the most for some reason." (60RT 9303.) Serna was then shown the collage entitled "Family Memories." One of the photographs depicted Nikolet, Rashel, David, Fernando, and Fernando's two children by Charlotte, in the pool at Serna's home. (60RT 9304; Peo. Exh. 99.) Serna described the girls' appearance at their funeral: they looked "bruised" and terrible." Serna thought "more had happened to them" but she later learned that the bruises were caused by the smoke. Serna now had a wonderful relationship with David. (60RT 9305.) Serna was asked how she felt about what happened to the children. She replied, that it was a "terrible tragedy" and that "four innocent little girls" died a "miserable death that lasted for hours and hours and hours." Defense counsel objected to this testimony as calling for a conclusion and moved to strike, but the trial court overruled the objection. Serna continued

that appellant had no heart, no feelings and "no nothing." The trial court struck this portion of her testimony, at defense counsel's request. (60RT 9307.) On cross-examination, defense counsel elicited from Serna that she believed appellant was "evil all the time" and "[f]or 18 years she pulled our strings." (60RT 9311.)

Fernando Nieves described how he came home from work on July 1, 1998, to view a television report of a fire in Santa Clarita that killed some children. Fernando looked at his wife, Charlotte, and said to her that it must be a coincidence and there was "nothing to it." As the news broadcast continued, describing the area where the fire was, Fernando was "glued to the set," and then when the television showed a picture of the van parked against the house, Fernando knew that it was his children who were killed. (60RT 9317.)

Fernando prayed that they were wrong, that his daughters were not dead, as he drove with his mother to the Henry Mayo Hospital emergency room. (60RT 9318.) At the hospital they heard the news that his daughters were dead. Serna became hysterical and Fernando felt like his life was over. Fernando begged and pleaded to see his son, but he was not allowed to see David until the detectives had spoken to him and his son. (60RT 9319.)

Fernando was finally allowed to see David at 3:00 a.m. on July 2. Fernando remained with his son until he left the hospital. Fernando described seeing the four little girls in their coffins; they looked swollen and bruised and he could not recognize them. The four little girls were innocent and did not deserve to die. If appellant was suicidal, she should have just killed herself and left the girls alone. (60RT 9320.)

Fernando described the effect of the girls' deaths on David: David was depressed and lonely, because the girls had been his best friends. David did not have any other friends. David now did not like to participate

in big groups. Sometime he would be fine, then something would remind him of what happened and he would become quiet and withdrawn. David had no enthusiasm for life. (60RT 9321.) David suffered from nightmares. David would not help Fernando build a campfire and he avoided fire. (60RT 9322.) David felt guilty that he did not disobey appellant and leave the house. There was always a cloud of sorrow around the Nieves family as a result of the girls' deaths. (60RT 9324.) Fernando was shown the collage entitled "Family Memories. Fernando described the children who were shown in the photos. (60RT 9325; Peo. Exh. 99.) When the girls died, a part of Fernando died. (60RT 9335.)

During a break in Fernando's testimony, defense counsel objected to Fernando and Serna testifying about David's feelings following the deaths of his sisters. The objection was based on hearsay, and that the testimony called for a conclusion regarding other people's feelings. The objection was overruled. (60RT 9328.) Defense counsel further objected to the pictures because he did not have an opportunity to view the photos with appellant and to ask her specific questions about the photos. Defense counsel stated he found it "difficult to cross-examine people when my client is not in a position to assist me with regards to the photographs." The prosecution countered that "counsel would have had the pictures sooner," but appellant decided not to come to court the previous Friday. The trial court overruled the defense objection. (60RT 9329.)

Fernando then testified regarding the photo collage entitled "Memories." (60RT 9331; Peo. Exh. 98.) Fernando described the people shown in the photos, including the dead girls. (60RT 9331-9333.) Fernando was shown a photo collage entitled "Nikolet Nieves" with her birth date and date of death beneath her name. There were seven photos in the collage. Fernando described one photo featuring Nikolet with Rashel, and another photo of Nikolet with Dave Folden. (60RT 9334.) Fernando

was next shown a photo collage entitled "Rashel Nieves" with her birth date and date of death beneath her name. There were six photos in the collage, including Rashel at a lake, on a motorcycle next to Fernando, and wearing roller blades. (60RT 9334-9335; Peo. Exh. 101.) Fernando testified that his daughters meant "everything" to him and "when they died, part of me died." (60RT 9335.)

On cross-examination, Fernando testified that many of the photos he had been shown had been taken by appellant. (60RT 9344.) On redirect, Fernando testified that within a month after the little girls had died, appellant served court papers on Fernando seeking to take David away from Fernando to go live with appellant's biological father in Indiana, whom David barely knew. (60RT 9364-9367; Peo. Exh. 102.)

Dave Folden testified that on July 1, 1998, he came home from work and turned on his answering machine, which had a message from the bishop at his church telling Folden he was sorry about what had happened in Santa Clarita. Folden did not know what he was talking about. He turned on the television and saw appellant coming out of the house. And then it flashed across the screen that four girls had died. (60RT 9368.) Folden paced his apartment, saying to himself "it couldn't have happened," but it was on all of the news channels. He felt empty and confused. Folden called his mother and told her what had happened. She began screaming and Folden hung up the phone. (60RT 9369.) Folden and his mother drove to Santa Clarita and talked to sheriff's deputies there. Folden found out for sure that his girls were dead. He kept hoping it was a bad dream, even to this day. The pain of losing his girls never ceased, it was with him every single day. (60RT 9370.)

When the girls were alive, appellant told them stories about Folden in order to alienate them from him. Folden figured that the girls would realize the truth when they got older, but all of that was now taken from him

because appellant killed the girls. Appellant wanted to control and manipulate everyone around her and she was still doing it. (60RT 9371.) There were 400 people at the girls' funeral, and Folden's entire plant shut down because everybody at work was there. (60RT 9372.) Folden's mother had "given up." She wanted to "go with her granddaughters." (60RT 9373.)

Folden was shown a photo collage entitled "Fun Times Together." (60RT 9376; Peo. Exh. 103.) He described the children in each of the nine photos, including photos of Folden holding Rashel and Jaqlene as babies, dancing with Nikolet, and bobbing for apples with Rashel. (60RT 9376-9377.) Folden was shown a photo collage titled "Kristl Folden" with her date of birth and date of death. Folden described each of the six photos of Kristl, taken at different times and places. (60RT 9377.) Kristl "was always looking for attention, but all the kids were. They were all starved for attention." (60RT 9378.) Folden was next shown a photo collage entitled "Jaqlene Folden" with her date of birth and date of death. Folden used to call her "my stinky-winky that had grown up to be my little tooter-scooter." (60RT 9378.) Folden was then shown a photo collage entitled "In Remembrance." (60RT 9378; Peo. Exh. 106.) The collage consisted of five photographs of Jaqlene and Kristl's bedroom in Folden's apartment, with their dolls on their beds. If Folden could talk to his girls again, he would say "One day I'll be there with you sweeties, but right now I'm stuck here." (60RT 9379.)

Following Folden's direct testimony, defense counsel objected to Folden making derogatory comments about appellant, and requested the comments be stricken. (60RT 9392.) The trial court denied the request, noting the objection was "so vague and unspecific, I have no idea what I could strike. (60RT 9392-9393.)

Charlotte Nieves testified that she was married to Fernando and thus was the stepmother of Nikolet and Rashel and "a friend to Kristl and Jaqlene." During the two years before their deaths, the girls had visited on a monthly basis and eventually on a weekly basis. (60RT 9401.) Charlotte last saw the girls the weekend before they died. (60RT 9402.) When David came to live with them after the girls died, he would not leave Charlotte's sight. He sat next to Charlotte, sitting on her lap, holding her hand. Charlotte had to tuck David in at night, assuring him that nothing would happen to him, that he would wake up alive in the morning. There was a hole in David's life left by the death of his sisters. (60RT 9405.)

Charlotte had assured David that he was not to blame. (60RT 9406.) Charlotte's daughters, Christine and Jackie, cried when they were told that their half-sisters had died. "They lost their innocence." (60RT 9408.) Christine lost her "best friend" Rashel, and Nikolet and Jackie were very close. Charlotte had seen David withdrawn and depressed. (60RT 9409.) Charlotte asked David what he would do if he could change time, and David replied "he would be there at night and make sure everybody would get out." (60RT 9412.)

Charlotte put together a videotape of the girls. (60RT 9411.) The prosecution played the 13-minute video. (61RT 9443; Peo. Exh. 107-A.) Charlotte testified that the video accurately depicted the girls as "energetic," "funny" and "full of life." (61RT 9444.) Charlotte was shown the photo collage "Family Memories," which showed a picture of Charlotte, Fernando, David, and the girls in a pool at Serna's house the weekend before the fire. (61RT 9444-9445; Peo. Exh. 99.) Charlotte's daughter, Christine, was born on July 1st, but after finding out that her half-sisters died on that day, she chose to celebrate her birthday on June 28th, the last day she saw the girls before their death. (61RT 9445.)

Over a defense objection, Charlotte described how it felt to lose a child to a natural death versus losing a child to murder. Charlotte had given birth to premature twin daughters in 1987. While Christine survived, Jessica died at the age of three months. Charlotte was able to say good-bye to Jessica, whose medical condition had gradually deteriorated until death was "better for her." On the other hand, the four girls who died had "nothing wrong with them." (61RT 9446.) Charlotte stated, "I condemn anybody who hurts and kills people," but this remark was stricken by the trial court in response to a defense objection. (61RT 9447.)

B. Applicable Law

The Eighth Amendment erects no per se bar prohibiting a capital jury from considering victim impact evidence relating to a victim's personal characteristics and impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) Victim impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 927.)

Section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically."[34] Factor (a) allows evidence and argument on the specific harm

[34] Section 190.3 states that "[i]n determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The (continued...)

caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster, supra*, 1 Cal.4th at p. 959.)

This Court has found victim impact evidence and related "victim character" evidence to be admissible as a "circumstance of the crime" under section 190.3, factor (a). (*People v. Robinson*, *supra*, 37 Cal.4th at p. 650; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *People v. Brown*, *supra*, 33 Cal.4th at pp. 396-398; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181; *People v. Edwards*, *supra*, 54 Cal.3d at pp. 832-836.) The prosecution has a "legitimate interest" in rebutting defense mitigating evidence "by introducing aggravating evidence of the harm caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so to the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Prince, supra*, 40 Cal.4th at p. 1286, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

However, victim-impact evidence need not be conditioned on rebutting defendant's mitigating evidence. "Victim-impact evidence is relevant to the penalty determination because such evidence provides the jury with an idea who the victim was and of the impact of his or her death on family and close friends. The relevance of the evidence does not depend

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(...continued)
circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true ...."

on the strength or weakness of the prosecution's case in aggravation." (*People v. Dykes* (2009) 46 Cal.4th 731, 786.)

There are limits on the permissible victim impact evidence and argument. "'The jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.'" (*People v. Robinson*, *supra*, 37 Cal.4th at pp. 650-651; see also *People v. Harris, supra*, 37 Cal.4th at p. 351.) Nonetheless, "jurors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and ... their bereaved family members.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 369.)

Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1289; see also (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 367.)

There is no bright-line rule regarding the admissibility of videotape recordings of a victim. In *People v. Dykes*, *supra*, the prosecution presented an eight-minute videotape without audio depicting the preparations for, and enjoyment of, a family trip to Disneyland, with unemotional commentary during the playing of the tape. The videotape was properly admitted because it did not "constitute a memorial or tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance or sympathy; it lasts only eight minutes and is entirely devoid of drama; and it is factual and

depicts real events ... and was not objectionable." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 785.) Still photographs or photographs in a video of the victim's grave marker or grave site is properly admitted as circumstances of the crime. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 367, citing *People v. Kelly* (2007) 42 Cal.4th 763, 797 [videotape ending with view of victim's grave marker]; *People v. Harris*, *supra*, 37 Cal.4th at p. 352 [photograph of victim's gravesite].)

C. Appellant's Argument That *Payne* Is Wrongly Decided and Should Be Overruled Should Be Rejected

Appellant, while acknowledging that *Payne v. Tennessee*, *supra*, 501 U.S. 808 is binding on this Court, argues nonetheless that *Payne* was "wrongly decided and should be overruled." (AOB 450-451.) This Court has consistently applied *Payne* in cases where victim impact evidence has been introduced. (See, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 509; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 927; *People v. Prince*, *supra*, 40 Cal.4th at p. 1286; *People v. Robinson*, *supra*, 37 Cal.4th at pp. 650-651.) Appellant's argument, relying primarily on the dissents in *Payne*, is made merely to preserve a point for future federal habeas corpus review. Her argument is without merit and must be rejected.

D. Appellant Received Sufficient Notice

Appellant contends she received insufficient notice that the prosecution intended to use victim impact evidence. (AOB 451-454.) This claim is refuted by the facts and the law. On September 7, 1999, appellant received notice, pursuant to section 190.3, that the prosecution intended to introduce victim impact evidence, to include "all documents, exhibits, photographs, video and tape recordings previously provided to defense counsel in discovery, as well as all potential listed witnesses (see attached), in addition to the facts and circumstances of the crime itself and its impact on family and friends for purposes of aggravation." (10RCT 2109-2110.)

Section 190.3 provides in relevant part:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

(*Ibid.*) The purpose of a notice of evidence in aggravation "is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty phase." (*People v. Wilson* (2005) 36 Cal.4th 309, 349 [internal quotations & citations omitted].) Informing the defense of the nature of the evidence that the prosecution intends to produce, and intent to produce witnesses not yet identified, is sufficient compliance with section 190.3. (*People v. Stitely* (2005) 35 Cal.4th 514, 562-563; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1153; *People v. Wright, supra*, 52 Cal.3d at p. 423.) It is not necessary to provide notice that witnesses who testified at the guilt phase will testify in the penalty phase. (*People v. Wilson, supra*, 36 Cal.4th at p. 350.)

The defense generally must receive notice of aggravating evidence "prior to trial," which has been defined to mean either before the case is called to trial or before the start of jury selection. In either event, notice given later in time does not require exclusion of the evidence where it is newly discovered, and the delay is not unreasonable, unexcused, or prejudicial. (*People v. Stitely, supra*, 35 Cal.4th at p. 562.) Notice of evidence in aggravation prior to commencement of jury selection is generally considered timely. The purpose of the notice provision is satisfied if the defendant has a reasonable chance to defend against the charge. (*People v. Jurado* (2006) 38 Cal.4th 72, 136.)

There was no error here. First, this claim is barred because appellant did not object that she received inadequate notice, and ask for a continuance in order to be able to cross-examine the witnesses effectively. Here, the penalty phase commenced at 9:35 a.m. on August 1, 2000. Defense counsel stated that he had not looked at the photographs of the victims, to which the prosecutor remarked, "They've been sitting here since before 9:00 o'clock." Defense counsel responded, "I have been doing other things. I wasn't here until after 9:00 o'clock." (60RT 9258.) Defense counsel did not specifically object based on lack or notice and ask for a continuance in order to be able to look at the photographs. Thus, appellant's claim of inadequate notice is barred. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Clark, supra*, 50 Cal.3d at p. 626, fn. 34.)

In fact, on September 7, 1999, the prosecution filed a notice of intent to produce victim impact evidence. This notice was filed well before the start of jury selection on April 24, 2000. Moreover, the notice informed appellant that the prosecution intended to produce evidence of the crimes' impact on family and friends. (Cf. *People v. Stitely*, *supra*, 35 Cal.4th at p. 562-563; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Wright*, *supra*, 52 Cal.3d at p. 423.) The notice did not have to inform appellant of the specific identities of the family members who would testify, although the notice did in fact name Charlotte and Fernando Nieves, and Dave Folden. (10RCT 2113.)

The only witness not named was Minerva Serna, the victims' grandmother. While defense counsel complained that he did not have sufficient opportunity to investigate and prepare to cross-examine this "eleventh-hour" witness (59RT 9167), defense counsel did in fact elicit testimony from Serna indicating that she had always disliked appellant because she was manipulative. (60RT 9311.) Appellant does not identify

what further facts she might have been able to elicit if only defense counsel had more time to investigate and prepare for cross-examination of this witness. (See AOB 454.) Thus, she cannot show prejudice. (*People v. Wilson, supra*, 36 Cal.4th at p. 357 [because defendant failed to show how he could have rebutted or impeached victim's sister's testimony had he received earlier notice, he failed to show prejudice].)

Appellant acknowledges that she received "generic notice" of the prosecution's intent to introduce photographs and videotapes as victim impact evidence, but argues this notice was inadequate to prepare defense counsel for the prosecution's "extensive visual display with over 50 carefully arranged photographs and large-print titles." (AOB 452-453.) However, so long as appellant received notice that the prosecution intended to introduce victim impact evidence and had a reasonable opportunity to respond to the evidence, she received sufficient notice. (See *People v. Stitely*, *supra*, 35 Cal.4th at pp. 562-563; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Wright*, *supra*, 52 Cal.3d at p. 423.)

The prosecution's photographs showed the victims while they were alive and also showed five photographs of Kristl and Jaqlene's bedroom in Folden's apartment. (Peo. Exh. 98-101, 103-106.) While appellant complains that the photographs amounted to a "bombard[ment]," she exaggerates. The photos were organized and mounted on eight poster boards: one for each little girl, three for photographs of the victims with other family members engaging in various family activities, and one showing Jaqlene's and Kristl's bedroom at Folden's apartment. Thirty minutes was a reasonable amount of time to view these eight poster boards. Further, appellant does not identify any other objections defense counsel might have been able to formulate if he had received more notice. Nor does appellant identify how additional time for defense counsel to consult with

her would have inured to her benefit. (See AOB 453.) Thus, she cannot show prejudice. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 357.)

Appellant relies on *People v. Roldan* (2005) 35 Cal.4th 646, 733, for the proposition that the notice must be sufficiently specific to allow the defense to investigate and respond to the evidence. (AOB 452.) However, this Court in *Roldan* held that notice that the prosecution intended to introduce evidence of the circumstances of the crime, as an aggravating factor, was inadequate to inform the defense that the prosecution intended to introduce victim impact evidence. (*People v. Roldan, supra*, 35 Cal.4th at p. 733.) Here, of course, appellant did receive notice that the prosecutor intended to present victim impact evidence from family members, photographs, and a video tape. *Roldan*, therefore, is easily distinguishable from the instant case.

Appellant also contends she was denied any opportunity to compare the edited 13-minute version of the home video with the original 35-minute tape counsel had viewed several months before. (AOB 453.) Appellant misstates the record. The record shows that defense counsel was given the opportunity to view the edited video and the video equipment was there in the courtroom (60RT 9264), but counsel chose not to use his time to view the tape. In fact, defense counsel misstated to the trial court when he stated that he had just come into court "ten minutes ago." The trial court bluntly contradicted defense counsel, stating, "It's now twelve minutes to 10:00. You came in before 9:00 o'clock, Mr. Waco, so you've been here for 50 minutes." Defense counsel had no response to the court's statement that he had been present for 50 minutes. (60RT 9263.) Moreover, at the end of the first day of the penalty trial, defense counsel was given another opportunity to view the tape before it was to be shown the following day. (60RT 9424, 9436.) Thus, the evidence shows that defense counsel had a reasonable opportunity to view a short videotape, which was a composite of the

original tape already seen, but did not avail himself of that opportunity. Appellant cannot now claim on appeal that she was denied the opportunity to view the edited tape. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Clark*, *supra*, 50 Cal.3d at p. 626, fn. 34.)

In any event, the claim lacks merit. Defense counsel had previously viewed the 35-minute video, which had been edited down to 13 minutes. (60RT 9262-9263.) Defense counsel was aware that the video depicted the victims while they were alive. This was sufficient notice to comply with section 190.3. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 562-563; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Wright*, *supra*, 52 Cal.3d at p. 423.)

In sum, this claim is barred and also lacks merit. Appellant received sufficient notice pursuant to the statute. It follows, therefore, that appellant's due process rights were also not violated.

E. The Claim That the Trial Court Inadequately Reviewed the Victim Impact Evidence Is Forfeited; in Any Event, the Trial Court Adequately Reviewed the Evidence

Appellant next contends that the trial court failed to review and assess the victim impact evidence adequately prior to admission. (AOB 455-458.) This claim is forfeited because defense counsel did not object to the admission of the evidence on this basis. Moreover, the claim fails on the merits.

The day before the penalty phase began, the prosecutors informed the court that the photographs they hoped to introduce at the penalty phase were not yet done, but they hoped to have them available for the defense to view by the following morning. (59RT 9241.) The trial court had earlier observed that photos of the children while they were alive were "probably not inflammatory evidence," given that the jury had seen photos of the girls when they were dead, during the guilt phase. (59RT 9177.) The trial court

stated, "[w]ell, if these are photographs of the children while alive, they're admissible." (59RT 9242.) The following day, the prosecutors brought in the photographs and videotape. Defense counsel objected to the photographs as displayed on the poster boards, specifically the titles on the posters, as evoking "emotionalism" on the part of the jury: "Memories" (Peo. Exh. 98), "Family Memories" (Peo. Exh. 99), "Fun Times Together" (Peo. Exh. 103), and "In Remembrance" (Peo. Exh. 106). (60RT 9258.) Defense counsel also objected to the four separate photo collages dedicated to each victim, because the posters showed the birth date and date of death for each girl. (60RT 9259; Peo. Exh. 100-101, 104-105.) Defense counsel further objected to the edited video, on the basis that it had been edited to remove any images of appellant. He did *not* argue it was overly sentimental or unduly provocative. (60RT 9260-9261.) Following further argument, the trial court overruled defense counsel's objections to the photographs and to the video. (60RT 9264.)

Defense counsel did not at any point object to the trial court's ruling on the grounds that it failed to review and adequately assess the victim impact evidence prior to admission. The failure to make clear the specific ground for objection results in a forfeiture of the claim. (Evid. Code, § 353, subd. (a).) A verdict, even in a capital case, may not be set aside for erroneous admission of evidence (even if prejudicial) absent a timely and specific objection. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Cain* (1995) 10 Cal.4th 1, 28; *People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Clark, supra*, 3 Cal.4th at pp. 127-128; *People v. Green, supra*, 27 Cal.3d at p. 22, fn. 8.)

In any event, the trial court heard defense counsel's objections to the photographs and the video, and viewed the photographs before ultimately overruling defense counsel's objections and ruling that the photographs and video were admissible. (60RT 9264.) Appellant cites *People v. Edwards,*

supra, 54 Cal.3d at p. 832, and *People v. Stitely*, *supra*, 35 Cal.4th 514, as examples of a trial court carefully examining the photographic evidence. (AOB 455.) In *Edwards,* the prosecutor sought to admit three victim photographs, and the trial court ruled that the photographs were admissible because they showed the victims as the defendant saw them. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 832.) This Court held that the photographs were properly admitted on that basis. (*Ibid.*) This Court further held that the photographs were admissible as victim impact evidence under *Payne v. Tennessee*, *supra*, 501 U.S. at p. 827 which had been decided while the appeal in *Edwards* was pending. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

This Court stated that in *Edwards* that "'trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, 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.'" (*Ibid.*, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; see also *People v. Stitely*, *supra*, 35 Cal.4th at pp. 564-565 [admission of single photo of victim with her husband proper victim impact evidence as it allowed jury to consider whether death or LWOP was appropriate punishment].)

This Court has never suggested there is a bright line rule requiring the trial court to examine victim impact evidence for a particular length of time before finding such examination "careful." Depending on the nature of the evidence, a short amount of time could suffice. Here, the photographs were mounted on eight poster boards, easily viewed by the trial court. Moreover, the only objection to the videotape was that appellant was edited out -- a

fact that was easily digested then and now. The trial court's review was sufficiently adequate.

Appellant contends that there were certain "mandatory procedures" which the trial court should have conducted prior to the admission of the videotape, including keeping detailed records of reactions to the video by jurors and spectators while the video was being played. (AOB 457, citing *People v. Prince, supra*, 40 Cal.4th at p. 1290.) This Court in *Prince* did not state that any of the procedures followed by that trial court under the circumstances in that particular case were "mandatory." Moreover, while this Court requires that the trial court conduct a careful balancing of the evidence, this Court has never held that the balancing must be stated on the record.

In the context of an Evidence Code section 352 ruling, this Court has held that "a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function ...." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1151-1152 ["'we review the ruling, not the reasoning'"].) By parity of reasoning, there is likewise no requirement for an express "balancing' on the record, where the record as a whole shows the court was aware of and performed its balancing function. The trial court here heard defense counsel's objections to the photographs and the videotape, and the prosecution's response. The court viewed the photographs, although it did not view the tape, prior to the jury viewing the evidence. Taken as a whole, the trial court was aware of its "balancing function" and carefully considered the evidence, even if it did not do so on the record. No more was required of the court. Moreover, the trial court's ruling was correct.

F. The Photographs and Videotape Were Admissible as Victim Impact Evidence

Appellant argues that victim impact evidence in this case should not have been admitted because the slain children "were not faceless, unknown strangers" "who needed to be humanized so the jury could understand the tragedy of their deaths." (AOB 458-459.)[35] This argument is without merit. There is no case supporting appellant's argument that victim impact evidence is impermissible when a parent murders her children. As the United States Supreme Court stated in *Payne v. Tennessee*, *supra*, "[a] State may legitimately conclude that evidence *about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.* There is no reason to treat such evidence differently than other relevant evidence is treated." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827, emphasis added.) Likewise, there is no reason to treat such evidence differently when the victims are the children of the defendant. While the jury during the guilt phase saw photos of the girls' bodies and heard testimony from their fathers regarding their final interactions with appellant, the guilt phase jury did not hear any evidence showing that each little girl was a unique individual, whose life and death had a tremendous impact on the surviving family members. Thus, the photographs and the videotape depicting the girls while alive was relevant to the jury's decision as to the appropriate punishment for appellant.

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[35] Appellant also argues that the evidence was irrelevant under Evidence Code section 350 and that prejudicial admission of the evidence outweighed its probative value under Evidence Code sections 352. (AOB 460, 462.) Defense counsel did not object at the trial level under Evidence Code sections 350 or 352, thus this argument is forfeited. (*People v. Mills* (2010) 48 Cal.4th 158, 194.)

Moreover, section 190.3, subdivision (a), allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victims. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-836; see also *People v. Robinson*, *supra*, 37 Cal.4th at p. 651; *People v. Brown*, *supra*, 33 Cal.4th at p. 398; *People v. Taylor*, *supra*, 26 Cal.4th at p. 1171; *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 959.) There is no authority allowing for the exclusion of victim impact evidence because the victims were the defendant's own children. Here, the deceased children's family members -- Fernando and Charlotte Nieves, Minerva Serna, and Dave Folden -- testified about the impact of the girls' deaths on their lives. Contrary to appellant's assertion (AOB 460), Fernando Nieves and Dave Folden did not testify about the impact of the girls' deaths on their lives at the guilt phase. Fernando and Charlotte also testified at length about the impact of the girls' deaths on appellant's sole surviving child, David. This evidence was properly admitted pursuant to section 190.3, subdivision (a).

Furthermore, the evidence was not so unduly prejudicial as to render the penalty phase trial fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *People v. Hamilton*, *supra*, 45 Cal.4th at p. 927.) The prosecution presented only four witnesses, eight poster boards, and one 13-minute videotape. In contrast, this Court found no error in the much larger presentation of victim impact evidence in *People v. Brady* (2010) 50 Cal.4th 547, a case involving the murder of Manhattan Beach Police Officer Martin Ganz.

> Over objection, the prosecution presented four of Officer Ganz's sisters, his fiancée, the treating physician at the hospital, two fellow officers, and his police chief testified during the penalty phase; their testimony spanned several hours over two days. They described Officer Ganz's childhood hardships, his

> lifelong desire to be a police officer, his achievements, his engagement and future plans, his death, his funeral service, and the aftereffects of his death. The jury also viewed two videotapes and numerous photographs, and received other evidence memorializing Officer Ganz's achievements.

(*Id.* at p. 573.) On appeal, the defendant contends that the trial court erred in allowing the victim impact evidence because the evidence was unduly prejudicial, inflammatory and excessive. (*Id.* at pp. 574.) This Court disagreed, noting that "[e]motional testimony is not necessarily inflammatory." (*Id.* at p. 575; citing *People v. Verdugo* (2010) 50 Cal.4th 263, 298--299 [finding no error when the victim's mother cried while testifying]; *People v. Jurado, supra*, 38 Cal.4th at pp. 132-134 [finding no error when testimony from multiple family members caused some jurors to cry].) Here, there was no indication in the record that any of the family members broke down on the witness stand during the presentation of victim impact testimony. And while defense counsel noted that some jurors had cried during the first day of testimony, this Court has found no error under similar circumstances. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 132-134.)

The eight photo montages were an aid to the jurors in appreciating the specific harm caused by appellant, and the titles on the poster boards ("In Remembrance" "Family Memories" and "Memories") were not inflammatory. The photo montage entitled "In Remembrance," which appellant calls "unprecedented" (AOB 468) merely showed five photos of the bedroom once inhabited by Jaqlene and Kristl. It was not inflammatory in the least. (Cf. *People v. Brady*, *supra,* 50 Cal.4th at pp. 579-581 [trial court did not abuse its discretion in admitting six minute videotape of Officer Ganz's funeral and memorial service, including friends and family members crying at service].)

Also, the video was only 13-minutes long. (Cf. *People v. Brady*, *supra*, 50 Cal.4th at p. 578 [noting that the two videos were ten minutes long and that this Court had "upheld the admission of longer tapes"].) Further, the video did not have any music in the background, was not narrated, and showed the victims doing such ordinary activities as cart wheeling on the lawn and in the house, playing school, eating cake, and visiting Disneyland. (Cf. *id.* at p. 579 [videotape of Officer Ganz celebrating Christmas with family "depicted a rather ordinary event," and "was not enhanced by narration, background music, or visual techniques designed to generate emotion; and it did not convey outrage or call for vengeance or sympathy"]; see also *People v. Dykes*, *supra*, 46 Cal.4th at pp. 783-785 [video of family trip to Disneyland was admissible victim impact evidence].) The video humanized the children and provided a sense of the loss suffered by their family, and it supplemented but did not duplicate their testimony. (*Ibid.*) Accordingly, the trial court did not err in allowing the victim impact evidence to be admitted.

G. Appellant's Claim That the Testimony of the Family Members Was Improperly Admitted Is Forfeited and, in Any Event, Lacks Merit

"Victim-impact evidence is relevant to the penalty determination because such evidence provides the jury with an idea who the victim was and of the impact of his or her death on family and close friends." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 786.) Here, four members of the victims' family testified about the girls' lives and the impact of the girls' deaths on their lives. Their testimony was limited, taking up only part of two days, and none of the witnesses broke down during their testimony. Their testimony was not unduly prejudicial or inflammatory.

Appellant, however, argues that the four witnesses were all impermissibly allowed to attack appellant's character during the

prosecution's case in chief, and to speculate about the night of the crime. (AOB 461-463.) Appellant cites numerous examples, none of which resulted in a timely and specific objection from defense counsel. (See 60RT 9305 [Serna testified that what appellant did was "beyond a human" and at the funeral the children looked bruised, like "more had happened to them"]; 9308 [Serna called appellant "vicious and malicious" in response to questions on cross-examination]; 9311 [Serna called appellant "evil all the time" and "pulled strings for 18 years" in response to questions during cross-examination]; 9338 [Fernando testified that appellant would not let him take the children to visit Serna]; 9344 [Fernando testified that appellant would not let him see the children unless he helped her move]; 9371 [Folden testified that appellant "wanted to control and manipulate everyone around her].) Appellant also argues that family members disparaged appellant's as a mother, but once again, defense counsel failed to interpose a timely and specific objection. (See 60RT 9303 [Serna testified that Nikolet was the "saddest one of all," "suffered" and needed a lot of attention]; 9374 [Folden testified that appellant would not let the children play in the front yard]; 9378 [Folden testified that the children were "all starved for attention"]; 9413 [Charlotte testified that when David came to live with them, "he did not know how to make a decision"].)

Appellant also failed to object to family members testifying about their own parenting and grand-parenting skills. (60RT [Serna testified she is a good mother and a good grandmother]; 9302 [Serna testified that Fernando was a "loving father"]; 9319 [Fernando testified that he "begged" to see David at the hospital after the fire]; 9323 [Fernando testified about activities he did with David and how David was treated in his home]; 9403 [Charlotte testified that children "should be your first concern"].) Moreover, when appellant did interpose a timely objection, it was not on the grounds that the testimony was irrelevant and inflammatory. (60RT

9301 [Serna testified that Fernando was "good with the children; defense objected that the evidence "goes to emotional impact of other people"]; 9365 [Fernando testified that appellant tried to move David to Indiana, so she could "control" him; defense objected based on lack of foundation and calling for a conclusion].) When defense counsel at last objected to the "anti-defendant statements given by this witness, or any other witness," and moved to strike the statements, the trial court denied the objection as "so vague and unspecific, I have no idea what I could strike, and so it is denied." (60RT 9392-9393.) Appellant's failure to raise a timely and specific objection to these instances resulted in the trial court's inability to rule on the objection; similarly, the claim is forfeited on appeal for the same reason. (See *People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Cain*, *supra*, 10 Cal.4th at p. 28; *People v. Champion*, *supra*, 9 Cal.4th at p. 918; *People v. Clark*, *supra*, 3 Cal.4th at pp. 127-128; *People v. Green*, *supra*, 27 Cal.3d at p. 22, fn. 8.)

In any event, the testimony was not unduly prejudicial or inflammatory. First, defense counsel elicited the testimony from Serna that appellant now objects to, in order to show that Serna was biased against appellant. Next, the testimony that appellant was manipulative and controlling was not unduly prejudicial or inflammatory especially compared to the circumstances of the crimes of which she had been convicted. Moreover, it surely could not be unexpected that the surviving family members would be critical of appellant. Further, the testimony about the parenting skills of Fernando, Charlotte, and Serna was brief and benign. Additionally, Serna's comments about the bruised appearances of the girls at their funeral was admissible as a circumstance of the crime. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352 ["As a circumstance of the crime, the condition of the victim's body is a factor relevant to penalty"].) There was no error such as to render the penalty phase trial

fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *People v. Hamilton*, *supra*, 45 Cal.4th at p. 927.)

Appellant further argues that family members were permitted to offer their own speculative and biased accounts of the crimes, and to opine about the proper punishment for appellant. (AOB 463-464.) Serna testified that "[n]obody should have to see four innocent little girls die such a miserable death that lasted for hours and hours and hours." Defense counsel objected that this testimony called for a conclusion and moved to strike the testimony. The trial court overruled the objection. (60RT 9307.) Appellant argues that this testimony placed the girls' "deaths in the worst possible light." (AOB 463.) To the contrary, Serna's testimony was consistent with Dr. Ribe's testimony that the girls did not die a rapid death (17RT 1806) and their injuries could have been "excruciatingly painful" if they were conscious (18RT 1853). Dr. Ribe also testified that Jaqlene's death took a period of time from 30 minutes to a few hours. (17RT 1725-1726.) David testified that when he awoke that night in the kitchen, he could hear the girls coughing and when Nikolet asked to go to the bathroom to vomit, appellant told her to vomit on the floor. (21RT 2397-2398.) From this testimony, Serna's testimony that the girls died a miserable death that lasted for hours was not conclusory, and the trial court did not err in denying the defense objection on that basis.

Appellant also argues that Fernando's testimony that if David had tried to leave the house that night, appellant would have forcibly tried to stop him, "tarnished" appellant's "character by attributing to her a level of malice and deliberateness that was based on Fernando's own anger and not on the facts of the crime." (AOB 463-464.) However, there was no objection to this comment, so this argument is forfeited. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Cain*, *supra*, 10 Cal.4th at p. 28; *People v. Champion*,

supra, 9 Cal.4th at p. 918; *People v. Clark*, *supra*, 3 Cal.4th at pp. 127-128; *People v. Green*, *supra*, 27 Cal.3d at p. 22, fn. 8.) In any event, this comment was brief, and was based on Fernando's extensive knowledge of appellant's history of overly controlling the children. Moreover, the comment was consistent with the facts of the crime, which showed that appellant deliberately murdered her children to exact revenge on the men in her life. There was no error such as to render the penalty phase trial fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *People v. Hamilton*, *supra*, 45 Cal.4th at p. 927.)

Appellant further argues that Folden's testimony made it clear that he wanted the death penalty for appellant, when he testified that "[t]his time it stops." (AOB 464, citing 60RT 9371.) Again, there was no objection to this comment, so any argument on appeal is forfeited. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732.)[36] Additionally, the comment "this time it stops" was not inflammatory and did not indicate that Folden wanted the death penalty. The comment was ambiguous; it is pure speculation to think the jury understood the comment as a call for appellant's death as opposed to her imprisonment until natural death. Further, the comment was very brief. There was no error such as to render the penalty phase trial fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *People v. Hamilton*, *supra*, 45 Cal.4th at p. 927.)

Appellant relies on several out-of state cases to further her argument that the trial court erred in allowing the victim impact testimony. (AOB 464-465.) She first cites *State v. Payne* (Idaho 2008) 199 P.3d 123, 148-

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[36] In contrast, when Charlotte testified that "I condemn somebody who hurts and kills people" (61RT 9447), the trial court sustained defense counsel's objection, struck her testimony, and admonished the jury to disregard it. (61RT 9447.)

149, 146 Idaho 548, where during victim impact testimony, witnesses described the defendant as "evil, a waste of aspirin, a sociopath, a cold-blooded killer, unremorseful, a predator, cold and calculating, not a man, not even human, selfish, a coward, a pathetic monster, a wimp and a man without a conscience. Witnesses also expressed their wishes that [the defendant] 'rot in hell,' 'burn in hell' or be tortured. One witness noted Bible passages he wished the court to consider; each passage called for death for a certain crime." (*Ibid.*) The Idaho Supreme Court reversed the death penalty, finding the testimony inadmissible and not harmless beyond a reasonable doubt. (*Id.* at pp. 149-150.) The victim impact testimony presented at appellant's penalty phase trial did not begin to approach the level of inflammatory testimony heard in *Payne*.

Appellant also cites *Conover v. State* (Okla. Cir. 1997) 933 P.2d 904, 9210-921, where during victim impact testimony, a witness stated that the victim was "'butchered like an animal'" and that two men '"butchered him,'" and *DeRosa v. Oklahoma* (Okla. 2004) 89 P.3d 1124, 1152 & fn. 138, where one witness asked the jury for a death sentence for the defendant, saying "'I ask you, the jury, for justice. Although this will not bring them back to us, it will give us some peace of mind. Our family has suffered enough because of this man. My family pleads with you to give the death penalty.'" Another witness characterized the crime as "'the horrible, heinous way in which they died'" and that one victim "'suffered pain and terror in her last moments'" and that she "'felt horror and betrayal from people that they knew and trusted.'" The witness also referred to the victims as "'helpless, knowing they were going to die....'" (*Ibid.*) Here, Folden's testimony that "this time it stops" does not come near the emotional plea for the death penalty in *DeRosa*. Likewise, Serna's testimony that the girls died a "miserable death" that lasted for "hours and

hours" does not approach the characterization of the victims' final moments in *DeRosa* or *Conover*.

Appellant argues that the "inflammatory opinions also went beyond the scope of the statutory 'circumstances of the crime' sentencing factor" in section 190.3, factor (a) and deprived appellant of a state-created liberty interest. (AOB 465-466.) Appellant also argues that section 190.3 is unconstitutionally vague and overbroad. (AOB 478-479.) Appellant did not raise these arguments below. This Court has repeatedly rejected such claims as forfeited and without merit. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 574, fn. 11; *People v. Robinson*, *supra*, 37 Cal.4th at p. 652, fn. 33.)

Appellant additionally contends the testimony was excessively lengthy and cumulative. (AOB 470.) However, the trial court trimmed the prosecution's witness list to exclude Alethea Volk, a teacher, and a neighbor. (59RT 9239-9240.) The trial court did not abuse its discretion in permitting four family members to testify on how the children's deaths affected them and David. While the testimony of the four family members did in some respects repeat information already known to the jury, such as how David felt about the loss of his sisters, this repetition comprised a comparatively small amount of their total testimony and "is not unusual when multiple witnesses testify about the same event." (*People v. Brady*, *supra*, 50 Cal.4th at p. 576 [testimony of two of Officer Ganz's fellow officers not overly cumulative].) Appellant, moreover, did not object to the testimony as cumulative, so this issue is forfeited on appeal. (*Ibid.*)

Appellant also contends that the admission of Charlotte's testimony about her dead baby "was especially egregious." (AOB 469.) Charlotte was asked if she knew how it was to lose a child and if it was "different losing a child when the child is murdered." Charlotte replied that "[t]hey are different." Over objection, Charlotte explained that there was a "huge

difference" in losing a child to natural causes versus losing a child to murder. (61RT 9445.) Charlotte had a chance to say goodbye to her infant daughter, and given the infant's grave medical condition, death was "better for her." On the other hand, "those four girls, there was nothing wrong with them. They had no medical condition. " (61RT 9446.) There was no error in allowing the jury to hear this brief testimony. Jurors are allowed to exercise sympathy for "bereaved family members" (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 369), and explaining to the jury the difference between losing a child to a natural death and losing a child to murder helped them understand the impact of the victims' deaths on Charlotte. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 786.)

Appellant, in addition, argues that it was error for the trial court to allow family members to testify about the last time they saw the victims, and about all of the holidays and memorable occasions they would never experience with the victims. (AOB 469.) Absent specific and timely objections, this issue is forfeited. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732.) Further, this testimony was "not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 786; *People v. Pollock, supra*, 32 Cal.4th at p. 1180.) The prosecution may choose to admit evidence of the specific loss suffered by the victim's family. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 238.) There was no error in admitting this testimony, as it detailed the specific loss suffered by the surviving family members.

H. Any Error Was Harmless

Even assuming the trial court erred in admitting any of the victim impact evidence, the admission of this evidence was harmless beyond a reasonable doubt. (*People v. Harris*, *supra*, 37 Cal.4th at p. 352, citing *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant argues that

"absent the improper evidence, the balance of aggravating and mitigating factors was not so overwhelming as to point irresistibly to a verdict of death." (AOB 473.) Of course, according to appellant, all of the victim impact evidence was improper and should have been excluded. (AOB 450-451, 458-460.) That is not the state of the law in California, however, but even if there were some errors in the amount of victim impact evidence or in particular statements made by family members, there can be no reasonable doubt that the jury would have returned a death verdict against appellant, who murdered her four daughters to wreak revenge on the men in her life. Appellant argues that there was evidence that she was trying to kill herself. While she may consider that a factor in mitigation, it pales next to the horrendous facts of the crime, which the jury was permitted to consider, along with the special circumstances found to be true. (§ 190.3, subd. (a).) Appellant argues that "[i]n no other case has this Court addressed the combined effects of such lengthy victim impact testimony coupled with such an extensive and prolonged display of the victims' images and voices." (AOB 474.) Not so. This Court addressed an even greater amount of victim impact evidence in *People v. Brady*, *supra*, 50 Cal.4th at pages 573-574, and found no prejudice, without even reaching a harmless-beyond-a-reasonable-doubt analysis of the evidence.

Appellant further argues that the error was prejudicial because the trial court refused to give the defense's proposed limiting instruction regarding the victim impact evidence, before the penalty phase began. (AOB 476.) The proposed instruction stated that victim impact evidence was "not the same as an aggravating circumstance" and could "be considered, if at all, only to the extent you find it is part of the circumstances of the murder conviction ...." The instruction further informed the jury that it was not to be influenced by sympathy, passion, or public opinion arising from the victim impact evidence. (21RCT 5391.)

Appellant argues that this error was prejudicial in light of comments made by Juror No. 2, during an in chambers conference held at Juror No. 2's request to discuss a scheduling issue, when the juror stated, "I was really, very respectfully, not really prepared to get the feeling that I've received today that maybe our judgment is to be based on how much people have been injured, how much people have been hurt." The trial court responded to the juror by stating that the jury would received instructions on "how to deal with the evidence." (60RT 9421.)

The following day, defense counsel renewed his request that the trial court to instruct the jury that "the victim impact evidence must be limited to a rational inquiry in the culpability of a defendant, not an emotional response to the evidence; that you may not be influenced by sympathy, passion, or public opinion arising from such victim impact evidence." The trial court denied the request. The prosecutor then asked the trial court to "make some sort of statement to the jury about victim impact evidence and its role in this case." (61RT 9438.) The trial court declined the request, remarking "[p]resumably, the jury hears evidence that's admissible. I don't have to tell them ahead of time that what you're hearing is proper and admissible." The trial court further stated that "[m]aybe they [the jurors] were just not prepared for evidence. Maybe they thought -- that one juror thought it was just going to be argument." (61RT 9439.)

The trial court did instruct the jury at the conclusion of the penalty phase with CALJIC No. 8.84.1, that the jurors were allowed to consider pity and sympathy for the defendant in determining the penalty, and were not to be influenced by bias nor prejudice against the defendant. (21RCT 5407.) The jury was further instructed that it was to consider all of the evidence it had received during any part of the trial, including the circumstances of the crime and the existence of any special circumstances found to be true. (21RCT 5407; CALJIC No. 8.85.) The jury was further

instructed that "[s]tatements made by the attorneys during the trial are not evidence" (21RCT 5409; CALJIC No. 1.02) and that the jury was to "must determine what the facts are from the evidence received during the entire trial" (21RCT 5407; CALJIC No. 8.84.1). Finally, the jury was instructed that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (21RCT 5416; CALJIC No. 8.88.)

It was not error to decline the proposed defense limiting instruction under these circumstances, because it was misleading to suggest that the jurors could not consider sympathy for the victims and their survivors. The approved pattern instructions properly guided the jurors in how to evaluate the victim impact evidence. (*People v. Tate* (2010) 49 Cal.4th 635, 708; *People v. Bramit* (2009) 46 Cal.4th 1221, 1245; *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-370; *People v. Valencia* (2008) 43 Cal.4th 268, 310; see *People v. Pollock*, *supra*, 32 Cal.4th at p. 1195.) Any error here was harmless beyond a reasonable doubt.

XVI. THE TRIAL COURT DID NOT ERR BY EXCLUDING IRRELEVANT LAY OPINION ON APPELLANT'S STATE OF MIND

Appellant next claims that the trial court committed prejudicial error by excluding relevant lay opinion on appellant's state of mind during the guilt phase, which had a prejudicial effect on the sentencing process, denying appellant her due process rights to put on a meaningful defense and resulting in an unreliable penalty under the Eighth and Fourteenth Amendments. (AOB 479-485.) Because the evidence was properly excluded, this claim fails.

A. Background

During defense counsel's cross-examination of Scott Volk, the following colloquy occurred:

Q With regards to -- did she indicate to you that because of her personal and religious beliefs she would have difficulty with an -- aborting a child?

Ms. Silverman: Objection. Calls for hearsay.

Mr. Waco: Goes to state of mind.

The Court: His understanding is irrelevant. Sustained.

By Mr. Waco: Did she tell you that she was having difficulty in making that decision because of her personal beliefs and religious beliefs?

Ms. Silverman: Objection. Hearsay.

Mr. Waco: I believe it goes to state of mind and actions thereafter.

The Court: Sustained.

By Mr. Waco: Did Sandi tell you she was -- it was easy for her to make a decision on that, or she didn't know what to do?

Ms. Silverman: Same objection.

The court: Sustained.

(23RT 2735-2736.)

During cross-examination of Fernando Nieves, the following exchange occurred:

Q Did you feel that after this -- after this fire, did you feel that Sandi lost it because of the abortion?

Ms. Silverman: I'm sorry. I didn't hear that question.

The court: Read the question back.

(record read)

[Fernando]: Lost what?

By Mr. Waco: Lost it, lost her mind?

Mr. Barshop: Objection. That calls for speculation.

The Court: You're talking about after the fire?

Mr. Waco: Yes, sir.

(24RT 3007-3008.)

The trial court then ordered the jury out of the courtroom. The trial court stated that defense counsel's question was, in effect, asking Fernando his opinion as to why appellant killed the children. (24RT 3008.) The following exchange then occurred:

> The Court: Mr. Waco, it would be incompetence of counsel to ask a witness like this about the ultimate issue in this case.
>
> Mr. Waco: I'm not asking --
>
> The Court: I'm going to not allow the witness to answer that question.
>
> Mr. Waco: I'm only asking a question concerning a statement that he made to the DCS worker at the hospital.
>
> The Court: That's not the question you're asking.
>
> Mr. Waco: All right. I will limit it to that.
>
> Mr. Barshop: I would object to that as hearsay.
>
> The Court: And it would be irrelevant. [¶] His opinion about whether -- why your client killed these children, or how she did it, or what state of mind she's in is not relevant. [¶] If the question were answered, on redirect the People could get to explain why he felt that. And just like the question you were going to ask Sergeant Ament, it's going to get into the opinion about your client's guilt. [¶] And I'm not going to let you sabotage your client and be incompetent, and then have this case reversed on appeal many years later. That is not going to happen. [¶] Your behavior throughout this case, I think, is deliberate. I agree with Mr. Barshop's analysis. You're trying to inject error into this case. You're acting like a clown half of the time with some of your questions. [¶] You know very well

that when you ask questions repeatedly asking for speculation, you're doing it deliberately, in my view. And you are trying to derail this client of yours.

Mr. Waco: I take exception to the court's feelings.

The Court: Mr. Waco, anybody that would read this transcript would have the same view that I just expressed. [¶] Let's bring back the jury.

(24RT 3009-3010.)

B. Applicable Law

Under Evidence Code section 1250, subdivision (a), evidence of a statement of the declarant's then existing state of mind is not made inadmissible by the hearsay rule when offered to prove the declarant's state of mind or the evidence is offered to prove or explain acts or conduct of the declarant. (*Ibid.*) The erroneous exclusion of evidence of a declarant's state of mind is harmless when other evidence has been admitted establishing the declarant's state of mind. (*People v. Farley* (2009) 46 Cal.4th 1053, 1104.)

Under Evidence Code section 800, a lay witness may testify as to an opinion if it is "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony." This Court reviews for an abuse of discretion a trial court's ruling that a question calls for speculation from a witness. (*People v. Marlow* (2004) 34 Cal.4th 131, 152.)

C. The Trial Court's Ruling Was Correct; Any Error Was Harmless

Appellant's argument presents two instances of the trial court excluding testimony regarding her state of mind. As to the instance involving Fernando Nieves, the trial court did not err when it refused to allow Fernando Nieves to testify as to whether he felt that appellant had

"lost her mind" because of the abortion. Fernando's opinion on whether appellant "lost her mind" would not have been "[h]elpful to a clear understanding of *his* testimony." (Evid. Code, § 800, emphasis added.) The trial court did not abuse its discretion in excluding conjectural lay opinion. (*People v. Thornton* (2007) 41 Cal.4th 391, 429.) Additionally, the trial court had a duty to control the proceedings so that defense counsel did not inject error into the proceedings by asking Fernando a question that would have permitted him to give his opinion as to why appellant murdered her children. (See § 1044; *People v. Harris*, *supra*, 37 Cal.4th at p. 347; *People v. Clark*, *supra*, 3 Cal.4th at p. 144.) Finally, the trial court was correct that Fernando's opinion as to why appellant murdered the children was irrelevant. (Evid. Code, § 350.)

As to the instance involving Scott Volk, the jury had already heard testimony from Alethea Volk that appellant had written her a letter on June 30, 1998, hours before the fire, stating, "I was right. I knew I wouldn't be able to handle terminating my pregnancy. I'm having a very hard time knowing I killed my baby. Maybe it's post-partum blues? I'm crying 24-7. I hope it gets easier soon." (20RT 2366-2367; Peo. Exh. 28.) Moreover, Debbie Wood and Rhonda Hill both testified that after the abortion, appellant was very depressed and regretted having the abortion. (30RT 3981-3982, 4049.) Appellant likewise testified that after she aborted her baby, she felt "horrible." (35RT 4793.)

Even assuming the trial court erroneously excluded Scott Volk's testimony regarding appellant's difficulty in making the decision to abort her baby, the jury heard testimony that appellant was very depressed after the abortion and felt "horrible." Thus, in light of the extensive evidence admitted regarding appellant's feelings following the abortion, any error in excluding Volk's testimony was harmless under both the *Watson* and *Chapman* standards. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1104, citing

Chapman v. California, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XVII. THE TRIAL COURT PROPERLY EXCLUDED DR. KYLE BOONE FROM TESTIFYING DURING THE PENALTY PHASE

Appellant next contends that the trial court's exclusion of Dr. Kyle Boone during the penalty phase violated her constitutional right to present mitigating evidence, and the error was not harmless beyond a reasonable doubt. In particular, appellant argues that the trial court's ruling that Dr. Boone's testimony was cumulative to Dr. Humphrey's guilt phase testimony was erroneous, given the trial court's drastic limitations on Dr. Humphrey's testimony, and given that Dr. Boone's testimony had mitigating value independent of Dr. Humphrey's guilt-phase testimony. (AOB 485-510.) There was no error here, as Dr. Boone's testimony was both cumulative and speculative.

A. Background

On August 2, 2000, during the second day of the penalty phase of the trial, prior to the prosecution resting its case-in-chief, defense counsel announced for the first time that he wanted to call Dr. Boone, a neuropsychologist, to testify "to the various testing performed by Dr. Humphrey." The prosecutor objected because Dr. Boone was not on defense counsel's witness list. (61RT 9439-9440.) Defense counsel, Mr. Waco, told the trial court that Dr. Boone had been retained by his office "very recently" and he had spoken to Dr. Boone for the first time the night before. (61RT 9440, 9527.) Defense counsel further stated that he had received the doctor's two-page report that morning, "with regards to the various testing that [appellant] had undergone." (61RT 9527.) The trial court stated that defense counsel was to hand over the report to the prosecution, and Dr. Boone could not be called until the prosecution had the opportunity to review the report and determine whether responding to

the report would cause a delay. (61RT 9528.) The trial court stated that Dr. Boone could not testify until there was a hearing as to when Dr. Boone had been appointed. (61RT 9529.)

Gregory Fisher, co-counsel for the defense, stated that he had first talked to Dr. Boone on July 21, who then received a first set of material on July 24, and the trial transcripts on July 25. The trial court asked, "[i]sn't she going to be basically saying what Dr. Humphrey said?" Mr. Fisher said "No" and made an offer of proof, including a two-page report by Dr. Boone (Def. Exh. YY1) and her curriculum vitae (Def. Exh. YY2). (61RT 9609.)

In her report, Dr. Boone evaluated Dr. Humphrey's testing of appellant, and found that Dr. Humphrey accurately concluded that appellant had "cognitive deficits in memory (especially verbal) and select executive/problem solving skills." The pattern of test scores implicated "dysfunction in the temporal lobes (especially left) and frontal lobe areas." Dr. Boone further concluded that Dr. Humphrey used incorrect norms in scoring the Color Trails Test, through no fault of her own, but Dr. Humphrey's conclusion that appellant had executive/frontal lobe dysfunction was still valid. Finally, Dr. Boone concluded that there was no evidence that appellant's responses were the product of malingering or impression management. (Def. Exh. YY1.)

Mr. Fisher further added that Dr. Boone would rehabilitate Dr. Humphrey "in terms of her competence and her integrity, as well as the scores." (61RT 9611.) Mr. Fisher argued that Dr. Boone's testimony was not cumulative to Dr. Humphrey's testimony and was not an attempt to relitigate the guilt phase. (61RT 9614.) Dr. Boone's testimony would "help explain, if not excuse, the crime." Further, her testimony was admissible as "Factor K evidence" and to show that appellant would not be a danger in prison. (61RT 9616.)

The trial court observed that there had been no evidence presented regarding future dangerousness, and did not expect there would be any such evidence presented. The court also inquired why the defense had waited "until the last minute to spring this on the People?" (61RT 9617.) Mr. Fisher denied "springing it on anybody," but the trial court noted that Dr. Humphrey had last testified in front of the jury on June 22. (61RT 9617-9618.) Mr. Fisher observed that he had "been doing a number of things ... ex parte, and the court knows what I am talking about." Under the circumstances of Dr. Humphrey "being called a liar and perjurer, and the distress she was in over all of that, we didn't think we could bring her back and that she would be a good witness at that point." (61RT 9618.) According to Mr. Fisher, it was not until after Dr. Humphrey and Dr. Brook testified that the defense realized it had to start thinking about what had to be done at the penalty phase to counter the damage done to Dr. Humphrey because she had used incorrect norms. (61RT 9619.)

Mr. Fisher estimated that Dr. Boone's testimony would take 30 to 45 minutes on direct examination. (61RT 9620.) Dr. Boone would also impeach Dr. Brook's opinions. (61RT 9623.) The prosecutor objected about the "outrageous" delay in disclosing the information about Dr. Boone. (61RT 9624.) The prosecutor pointed out that the report stated that "'[a]pparently UCLA made an error'" in transmitting the set of norms to Dr. Humphrey. The trial court interjected that it "sounds like pure speculation," and Dr. Boone could not testify to that. (61RT 9625.) The prosecutor further argued that Dr. Boone's proposed testimony was cumulative, untimely, incomplete, irrelevant, and a delaying tactic. (61RT 9626.) The trial court ruled preliminarily that Dr. Boone's testimony was cumulative, would involve the undue consumption of time, and had a limited probative value, but would issue a definitive ruling the following day. (61RT 9627.)

The following day, the trial court reiterated that Dr. Boone's testimony was cumulative and her testimony as to how Dr. Humphrey gained access to the wrong norms was "speculation on her part" and would involve the undue consumption of time. (62RT 9647-9648.)

At the close of the penalty phase, the trial court instructed the jurors that, "[i]n determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case ...." (64RT 10068; 65RT 10196.)

B. Applicable Law

The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest case, not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. However, the mitigating evidence must be relevant. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 317-318 [109 S.Ct. 2934, 106 L.Ed.2d 256]; *Mills v. Maryland* (1988) 486 U.S. 367, 374-375 [108 S.Ct. 1860, 100 L.Ed.2d 384]; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *People v. Mickey* (1991) 54 Cal.3d 612, 693; *People v. Hunter* (1989) 49 Cal.3d 957, 980.)

"[W]hile the range of constitutionally pertinent mitigation is quite broad [citation], it is not unlimited. Both the United States Supreme Court and [California Supreme Court] have made clear that the trial court retains authority to exclude as irrelevant, evidence that has no logical bearing on the defendant's character, prior record, or the circumstances of the capital offense." (*People v. Carasi, supra*, 44 Cal.4th at p. 1313, citing *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fn. 12; see also *People v. Harris, supra*, 37 Cal.4th at p. 353.) Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder

could reasonably deem to have mitigating value. (*People v. Frye, supra*, 18 Cal.4th at p. 1016.) The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Trial courts retain authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (*People v. Thornton, supra*, 41 Cal.4th at p. 454.)

At the penalty phase, the trial court does not have discretion to exclude all evidence expressly made admissible under section 190.3, factor (a) on the basis that such evidence was unduly inflammatory or lacking probative value (Evid. Code, § 352); however, the trial court retains its traditional discretion to exclude evidence admissible under factor (a) based on its form (i.e., inaccurate or cumulative). (*People v. Smith, supra*, 35 Cal.4th at p. 357; *People v. Davenport* (1995) 11 Cal.4th 1171, 1206; see also *People v. Price* (1991) 1 Cal.4th 324, 486 [trial court properly excluded defendant's letters, even though proffered as a demonstration of defendant's capacity for self-expression. The letters were cumulative, since a large volume of defendant's writings was received in evidence].)

C. The Trial Court Properly Excluded Dr. Boone's Testimony as Cumulative and Speculative

The trial court did not abuse its discretion in excluding Dr. Boone's testimony as cumulative and speculative. Dr. Humphrey had testified during the guilt phase that appellant had seizures as a young child, and her behavior was consistent with epilepsy and brain malfunction. (37RT 5147-5148.) Dr. Humphrey also testified that she believed appellant was giving her best effort during testing, and her scores on tests designed to detect malingering indicated she was not malingering. (37RT 5156, 5162-5164.) Dr. Humphrey described appellant's neuropsychological profile as "in the average range," for the most part. (37RT 5167.) Appellant did well on a number of tests of executive functioning related to the frontal lobes, but she

had difficulty on tasks related to specific areas of the frontal lobe, especially around the orbital frontal region. (37RT 5170, 5187.) Dr. Humphrey opined that appellant had brain damage to her orbital frontal region of her brain and appellant's language memory was consistently impacted. (37RT 5198.)

Dr. Boone's proffered testimony, based on her two-page report (Def. Exh. YY1), would have been cumulative to Dr. Humphrey's testimony. In her report, Dr. Boone evaluated Dr. Humphrey's testing of appellant, and found that Dr. Humphrey accurately concluded that appellant had "cognitive deficits in memory (especially verbal) and select executive/problem solving skills." The pattern of test scores implicated "dysfunction in the temporal lobes (especially left) and frontal lobe areas."

Dr. Boone opined that Dr. Humphrey's conclusion that appellant had executive/frontal lobe dysfunction was valid. Finally, Dr. Boone concluded that there was no evidence that appellant's responses were the product of malingering or impression management. (Def. Exh. YY1.) In effect, Dr. Boone's report merely seconded Dr. Humphrey's conclusions. As such, Dr. Boone's testimony was properly excluded as cumulative. (See *People v. Smith*, *supra*, 35 Cal.4th at p. 357; *People v. Brown* (2003) 31 Cal.4th 518, 576; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1206; *People v. Price*, *supra*, 1 Cal.4th at p. 486.)

Appellant argues that "Dr. Boone's testimony could not have been cumulative because Dr. Humphrey's testimony was incomplete and restricted." (AOB 505.) This is a non sequitur. Dr. Humphrey's testimony, as summarized, *supra*, opined that appellant was not malingering in her responses to the tests and that she had a particular mental dysfunction that affected her executive functioning. Dr. Boone's proffered testimony agreed with Dr. Humphrey's testimony. Even assuming Dr. Humphrey's testimony was "incomplete and restricted," Dr.

Boone's proposed testimony did not add anything that Dr. Humphrey was not able to set forth to the jury, even considering that the trial court cut off further direct examination of the doctor after it became apparent that defense counsel would not pose a proper question to her. (See 38RT 5266-5267.)

Appellant also argues that this additional cumulative evidence from Dr. Boone of her brain dysfunction was separately admissible under section 190.3, factor (k). (AOB 499-500.) Appellant reads too much into factor (k), which allows evidence of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) Factor (k) does not allow a defendant to present cumulative evidence to the jury. (*People v. Fauber* (1992) 2 Cal.4th 792, 857.) This made Dr. Boone's testimony no less cumulative of Dr. Humphrey's testimony because it too was just as relevant under factor (k). Moreover, the constitutional right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. The trial court here retained its authority to exclude cumulative evidence. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 454.)

Appellant further argues that Dr. Boone's testimony was relevant to show that she did not pose a threat of future dangerousness if she lived the rest of her life in prison. (AOB 501-503.) However, in his offer of proof, defense counsel stated that he did not intend to ask for Dr. Boone's opinion on whether appellant posed a threat of danger if she lived the rest of her life in prison. (61RT 9617.) Appellant, nonetheless, argues that a juror could conclude, after hearing Dr. Boone's testimony that appellant had a particular mental dysfunction, and that her dysfunction would arise only when faced with multiple challenges at once, a situation that she would be unlikely to face in prison. (AOB 501.) But, Dr. Humphrey's testimony was precisely that appellant had a particular mental dysfunction (37RT

5170, 5187), and thus Dr. Boone's proposed testimony would have been cumulative. Additionally, defense counsel argued to the jury that appellant would not pose a future danger in prison (64RT 10141) and the prosecutor did not contest the issue. The jury was not precluded from considering the issue of appellant's future dangerousness. The trial court did not abuse its discretion in excluding Dr. Boone's testimony.

D. Any Error in Excluding Dr. Boone's Testimony Was Harmless

In evaluating the effect of erroneously excluding mitigating evidence, reversal is required "unless the state proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Lucero* (1988) 44 Cal.3d 1006, 1032, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [applying *Chapman* standard]; *People v. Brown*, *supra*, 31 Cal.4th at p. 576 [applying reasonable possibility standard].)

Any error in excluding Dr. Boone's testimony was harmless beyond a reasonable doubt. The jury was instructed that it could consider guilt phase testimony in reaching its conclusion as to the appropriate punishment for appellant, and Dr. Humphrey testified at the guilt phase regarding appellant's neuropsychological deficiencies. Dr. Boone's proposed testimony was cumulative of Dr. Humphrey's testimony. Moreover, the facts of appellant's crimes provided powerful aggravating evidence.

Appellant, in a malicious, misguided effort at personal revenge, lured her children into the kitchen under the pretext of a slumber party, set fire to the house, and then refused to allow her children to leave the kitchen when they woke up coughing and nauseous. Balanced against this evidence was mitigating evidence that appellant had some neuropsychological deficits, was mistreated by her own mother, and was (except for murdering them) a good mother to her own children. The circumstances of appellant's

offenses -- the murder of her four daughters -- was sufficiently grave that the exclusion of Dr. Boone's testimony was harmless beyond a reasonable doubt.

Appellant argues that her case is like *People v. Lucero*, *supra*, 44 Cal.3d at p. 1032, were this Court found the trial court improperly excluded expert testimony about a defendant's psychological disorder. (AOB 509.) However, the defendant in *Lucero* presented a much stronger case in mitigation than did appellant: Lucero "offered a substantial showing in mitigation," including having suffered "a deprived and harrowing childhood, a traumatic military experience, and a serious mental illness." (*Lucero*, *supra*, 44 Cal.3d at pp. 1024-1026,1032.) Appellant did not suffer through any similar types of setbacks or debilitating conditions: her childhood was not perfect, but was hardly "deprived and harrowing"; she had no traumatic military experience; and the evidence she presented did not establish that she suffered from a "serious mental illness." It is also important to know that the jury *rejected* the mental health defense experts' testimony offered at the guilt phase when the jury returned its guilty verdicts. In light of this undisputed fact, it is inconceivable that the jury would have been persuaded to any significant degree by the cumulative testimony of Dr. Boone so as to return an LWOP verdict. Thus, any error here in excluding Dr. Boone's testimony was harmless beyond a reasonable doubt.

XVIII. APPELLANT WAS NOT PREVENTED FROM PRESENTING A DEFENSE EVEN THOUGH THE TRIAL COURT EXCLUDED SOME LAY TESTIMONY DURING THE PENALTY PHASE; THE PROSECUTION DID NOT COMMIT MISCONDUCT IN ITS CROSS-EXAMINATION OF SHIRLEY DRISKELL

Appellant next argues that the trial court committed prejudicial error when it excluded additional relevant mitigating evidence from lay witnesses during the penalty phase, while permitting the prosecution to

commit misconduct in its cross-examination of Shirley Driskell. (AOB 511-545.) Appellant, however, was not prevented from presenting a defense, even though the trial court did exclude some lay testimony. Even assuming error, it was harmless. Moreover, the prosecutor did not commit misconduct.

A. Background

During the penalty phase, the defense presented the testimony of appellant's family, friends and acquaintances, as summarized here:

Shirley Driskell

Shirley Driskell went to high school with appellant and Fernando Nieves. (61RT 9473-9474.) Driskell also knew appellant's mother, Delores. Driskell lived with appellant and Delores for about a year when she was 15, so she observed the relationship between appellant and Delores. (61RT 9474-9475, 9478.) Delores never approved of appellant; nothing appellant did was good enough for Delores. Delores was verbally abusive and regularly called appellant a "stupid bitch." Delores criticized appellant's friends and restricted appellant from seeing her friends. (61RT 9475.) Appellant had to dress and groom herself according to Delores's standards. Delores criticized appellant's grades: even if appellant brought home a paper with an "A" grade, Delores would find something to criticize about the paper. If appellant brought home a report card with a grade of "B," Delores would scold her for not making an "A." (61RT 9476.) Delores also hit appellant in the head with her fist and pushed appellant around. (61RT 9476-9477.) Driskell saw lumps and bumps on appellant's head. (61RT 9477.)

Driskell considered appellant "like a sister" and kept in touch with appellant and her children over the years (61RT 9479.) Driskell, who had two children of her own, actually "sought lessons" from appellant on disciplining children. Appellant advised Driskell to be consistent and not to

discipline her children "out of anger." Driskell considered appellant to be "a very good mother." (61RT 9473, 9480.) Appellant fed her children and kept them well-groomed. (61RT 9480-9481.) Appellant took the children to the zoo, the park, the movies and the beach. (61RT 9481-9482.) Appellant seemed loving towards her children. Driskell observed the children hugging and kissing appellant. (61RT 9482.)

Driskell stayed with appellant for three weeks in 1997 and observed the children using the telephone and playing outside. (61RT 9487, 9489.) In the event of her death, Driskell had wanted appellant to raise her children, because appellant was the best person Driskell knew to raise her children. (61RT 9491.) Driskell considered appellant a good human being. (61RT 9493.) Driskell further testified that appellant's presence in her life was of value to her. (61RT 9542-9543.)

Tammy Pearce

Tammy Pearce met appellant through church in 1990. (61RT 9505-9506.) Appellant attended church regularly and she was a Cub Scout troop committee chairperson. Appellant's children were always "beautifully groomed, healthy, happy." The children were also very loving, polite, and affectionate. (61RT 9506.) Appellant always treated her children fairly and she was a "very good example" of a "good mother." Appellant disciplined her children "with love." Pearce never saw appellant physically abusing her children. (61RT 9507.) Appellant was in church every Sunday sitting in the front pew with her children. The children were active in the church. (61RT 9508.) Appellant and her children gave each other love and affection. (61RT 9510.)

Henry Thompson

Henry Thompson, a former sergeant in the San Diego Police reserve, had known appellant for 22 years, beginning when appellant and his daughter, Shirley Driskell, went to high school together. (61RT 9547-

9548.) Thompson observed that Delores kept appellant in the house as a form of discipline. (61RT 9549.) Appellant kept in touch with Thompson over the years, sending him birthday cards, Father's Day cards and Christmas cards. Appellant still sends Thompson birthday cards from jail. (61RT 9550.)

Thompson saw appellant with her children. Her children were clean and well-behaved. Appellant would do "practically anything for those children." Thompson never saw appellant strike her children. (61RT 9552.) Appellant was a very loving and caring parent. (61RT 9553.)

Lynn Taylor Jones

Lynn Taylor Jones, a bishop in the Mormon Church, became acquainted with appellant in 1991, through the church. Appellant was active in the church's scouting program. (61RT 9580-9581.) Appellant was a positive influence through her church activities. Jones also became acquainted with appellant's children through church activities. Appellant and her children regularly attended Sunday services, but Dave Folden rarely attended services. (61RT 9581-9582.) Appellant's home and children were neat and clean. The children were well-mannered and got along well with appellant. (61RT 9583.) Appellant had a considerate and caring nature. (61RT 9586.) Appellant's children seemed to be warm and loving towards appellant, and vice versa. (61RT 9587-9588.) The Mormon Church taught that abortion was only allowed in the case of rape, incest, or to save the life of the mother. (61RT 9586.)

Carl Hall

Carl Hall testified that he had known and been friends with appellant since they were about 14 or 15 years old. Appellant had "been there" for Hall when he needed her and she had "been an inspiration" to Hall. Hall also met Fernando when they were both approximately 11 years old. (62RT 9651-9652.) Hall knew appellant and Fernando after they became a

couple in high school, but then he drifted away from them until around 1996. (62RT 9652.) Hall then got together with Fernando and Charlotte and their children, and appellant and her children, in Las Vegas. (62RT 9654.) Appellant kept in touch with Hall through the years via e-mails and letters, including yearly newsletters regarding her and her children. (62RT 9655.) Appellant contacted Hall when he was in Kuwait on military duty. Appellant helped Hall through that situation. (62RT 9656.) During the three years before the fire, Hall would see appellant and her children three or four times a year. Appellant had a warm and loving relationship with her children. (62RT 9656-9657.) Appellant used "timeouts" to discipline the children, rather than physical violence. She was always a caring and nurturing mother. The children were allowed to go outside and play. (62RT 9658.) Hall had seen the children in a play area right off of the kitchen. The area was strewn with pillows and toys. There was also a television and a VCR player in the area. (62RT 9659.) Appellant was not the type of person to harm to her children. (62RT 9667.) Appellant had been instrumental in helping Hall raise his children. (62RT 9668.)

Leona Frey

Lenora Frey, appellant's aunt, testified that appellant lived next door to her until the age of eight. Frey, the sister of appellant's mother, Delores, described Delores as a domineering woman who regularly "smacked" and yelled at her children. Delores would not allow the children out. (62RT 9681.) Delores was rude to the children and fed them a lot of cold hot dogs and cold cereal. Frey babysat the children a lot and would take them out in the yard. (62RT 9682.) Frey wrote and telephoned appellant after she moved away with her mother. Frey attended appellant's wedding to Fernando. Appellant only visited Frey a couple of times with her children, because Frey lived in Indiana and appellant lived in California. However, Frey visited appellant in California around eight or 10 times over the years.

(62RT 9683.) Appellant was a very caring mother who always kept her children involved in outside activities like boy scouts and gymnastics. (62RT 9685.) Frey's son would play outside and ride bikes with appellant's son. At the house in Perris, the children would watch movies at night on the floor in the kitchen/den combination. (62RT 9686.)

Frey considered appellant a "person of value." Frey hoped that appellant would end up somewhere where she could be of help to other mothers "in trouble with depression and whatever." Appellant was a smart and caring woman. Frey hoped something good could come out of "all of this." (62RT 9687.)

On redirect examination, Frey testified that appellant did not deserve to be put to death or be put with hardened criminals. Appellant was not a "hard criminal." She was very depressed and needed help. (62RT 9721.)

Cindy Hall

Cindy Hall, the wife of Carl Hall, knew appellant through her husband since 1991. (62RT 9723-9724.) She considered appellant a good and caring mother who did not physically abuse her children. (62RT 9725.) Appellant's children sometimes watched television and would fall asleep on the floor in the family room. (62RT 972609727.)

Albert Lucia

Albert Lucia, appellant's stepfather, testified that appellant's mother mistreated appellant, slapped her, and accused her of trying to get attention by holding her breath until she passed out. (62RT 9749-9750.) Appellant was not like her mother when it came to raising her own children. Appellant's life was centered around her children. (62RT 9751.) Lucia considered appellant to be a loving person. (62RT 9753.)

Shannon North

Shannon North was a childhood friend of appellant. She considered appellant her best friend and part of her family. Appellant was a good and

caring person. North renewed her friendship with appellant in 1990 and got to know appellant's children. (63RT 9855.) Appellant was a good mother and her children loved her. Appellant wanted to be a police officer. (63RT 9856.) Appellant home-schooled her children. She "taught them good things." Appellant lived for her children. (63RT 9857.) The children were involved in scouting and church activities. North valued appellant as a person; appellant was "always there" for North. (63RT 9858.)

Tricia Mulder

Tricia Mulder was appellant's best friend when they lived in Perris. Perris was "terrible" and Mulder hated living there. She did not feel safe sending her children to school there. (63RT 9867.) Appellant helped Mulder stay in her marriage, learn to love her stepchildren, and learn to deal with her husband's ex-wife. Appellant was dedicated to her children and she taught Mulder to fight for her own children. (63RT 9868.) Appellant's children "were always beautifully dressed" and would sit in the front row at church. (63RT 9869.) Appellant taught Mulder how to bleach clothes. (63RT 9870.) Appellant would call Mulder and remind her to bring her stepson to cub scout meetings. Appellant and Mulder took their children to the lake and park. (63RT 9871.) Appellant was devoted to her children and she took the role of mother very seriously. (63RT 9873.) Mulder would ask appellant's advice on how to discipline children, and she would follow appellant's advice. (63RT 9874.)

Leila Mrotzek

Leila Mrotzek, the Protestant chaplain at Twin Towers Correctional Facility, testified that she counseled appellant and that appellant attended church services and Bible studies. Mrotzek saw appellant about once a week. (63RT 9884, 9886.) Appellant had completed three series of Bible correspondence courses. (63RT 9887.) Mrotzek believed appellant was sincerely religious. Appellant experienced repentance and remorse "over

this tragedy that has come into her life." Appellant desired to better her life, especially in relationship to her son. (63RT 9888.) Appellant prayed for her son and asked Mrotzek to pray for her son. (63RT 9889.)

B. Applicable Law

The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest case, not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. However, the mitigating evidence must be relevant. (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 317-318; *Mills v. Maryland*, *supra*, 486 U.S. at pp. 374-375; *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-5; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *People v. Mickey*, *supra*, 54 Cal.3d at p. 693; *People v. Hunter*, *supra*, 49 Cal.3d at p. 980.)

"[W]hile the range of constitutionally pertinent mitigation is quite broad [citation], it is not unlimited. Both the United States Supreme Court and [California Supreme Court] have made clear that the trial court retains authority to exclude as irrelevant, evidence that has no logical bearing on the defendant's character, prior record, or the circumstances of the capital offense." (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1313; see also *People v. Harris*, *supra*, 37 Cal.4th at p. 353.) Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. (*People v. Frye*, *supra*, 18 Cal.4th at p. 1016.) The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Trial courts retain authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.)

The trial court determines the relevancy of mitigating evidence and retains discretion to exclude evidence where its probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1145.) "[T]he [trial] court [has] the authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. [Citation.] '[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' [Citation.] Indeed, 'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.' [Citation.]" (*People v. Harris*, *supra*, 37 Cal.4th at p. 353.) Evidence that is irrelevant or incompetent is inadmissible in a penalty phase. (*People v. Gay* (2008) 42 Cal.4th 1195, 1220.)

The impact of a defendant's execution on his or her family or close friends may not be considered as mitigating evidence. (*People v. Bennett* (2009) 45 Cal.4th 577, 601-603.) In *People v. Ochoa*, *supra*, 19 Cal.4th at page 456, this Court explained "it is a defendant's background and character, and "not the distress of his or her family," that is relevant under section 190.3. This Court distinguished between "evidence that [a defendant] is loved by family members or others, and that these individuals want him or her to live ... [and evidence about] whether the defendant's family deserves to suffer the pain of having a family member executed." (*Ibid.*) "The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it 'believes that the impact of the execution would be devastating to other members of the defendant's family.'" (*People v. Bennett*, *supra*, 45 Cal.4th at p. 601.)

A witness's personal philosophical opposition to the death penalty is relevant to his or her credibility and a proper subject for cross-examination. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 606.) In *People v. Heishman* (1988) 45 Cal.3d 147, 194, this Court held that the defendant's ex-wife should have been allowed to answer a question as to whether she thought he deserved the death penalty, "since the answer would have exemplified the feelings held toward defendant by a person with whom he had had a significant relationship."

C. Appellant Was Not Denied Her Right to Present a Meaningful Defense

Appellant argues that the trial court's errors in excluding relevant character evidence extended to her right to present a meaningful defense. In particular, appellant argues that the prosecutor was able to present bad character evidence that appellant was controlling, manipulative, and vindictive, but she was not able to present evidence of contrary behaviors. (AOB 534-536.) Appellant cites a portion of the direct examination of Shirley Driskell, when defense counsel asked her whether appellant was concerned about the safety of her neighborhood. The prosecutor objected that the question asked for hearsay, and the trial court sustained the objection. (61RT 9486.)

Defense counsel also asked Driskell if she had observed that appellant wanted her children to stay in the immediate neighborhood of the house. The prosecutor objected that the question called for hearsay and/or speculation. The trial court sustained the objection. (61RT 9487.) As for Tammy Pearce, defense counsel asked, "If you can tell the jury your description of Sandi as a person, as a mother, what would you say?" The trial court sustained the prosecution's objections on the grounds that the question was irrelevant, speculative, and argumentative. (61RT 9514.)

The trial court's rulings were correct and did not deny appellant her right to present a meaningful defense. The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.) As set forth previously, in part A, *supra*, appellant presented evidence from numerous family and friends that she had a warm and loving relationship with her children, she was considered a good mother, and that she was valued by her friends. There was no error, and even assuming there was, it was harmless for the reasons stated below.

D. Any Improper Exclusion of Penalty Phase Evidence Was Harmless

1. Appellant's character for nonviolence

Appellant contends that the trial court improperly excluded relevant mitigating character testimony regarding appellant's character for nonviolence. (AOB 530-531.) Appellant presents the following examples: (1) Tammy Pearce was asked, "Can you envision in your knowledge of Sandi and her relationship with the children her doing anything to harm them, let alone kill them?" The trial court sustained objections to the question as irrelevant, calling for speculation, and argumentative." (61RT 9512.) (2) Henry Thompson was asked, "Would the Sandi that you know kill or do harm to her children?" The trial court sustained objections to the question as irrelevant, calling for speculation, conclusory, and argumentative. The trial court further observed that "it would fly in the face of the jury's verdict in this case." (61RT 9579.) (3) Cindy Hall was asked whether appellant was "the type of person that would have the character to do violent harm to her children?" The trial court sustained an objection based on lack of relevancy. Ms. Hall was then asked whether she had a "personal opinion with regards to [appellant's] character for violence toward her children, or the lack thereof?" The trial court again sustained an

objection based on lack of relevance. (61RT 9730.) (4) Shannon North was asked about appellant's "character for being a peaceful person as opposed to being an aggressive or violent person"; the trial court sustained objections to the question as irrelevant and speculative. Ms. North was also asked if "[t]he person you knew as [appellant], would she do harm to her children?" The trial court again sustained objections based on lack of relevance, calling for speculation, and argumentative. (63RT 9859.) (5) Tricia Mulder was asked whether she had an opinion regarding appellant's character as a peaceful or peace-loving person, as opposed to an assaultive or aggressive person. The trial court sustained objections based on irrelevancy, speculative, and calling for a conclusion. (63RT 9873.) (6) Finally, when Chaplain Mrotzek was asked whether appellant "has the character to be of help to people even within the prison system, the trial court sustained an objection that the question called for speculation. (63RT 9892.)

While it is true that the trial court did not allow these character witnesses to offer their opinions as to appellant's character for non-violence and helpfulness, the jury was allowed to consider other forms of evidence presented during the guilt phase that presented appellant's positive character traits to the jury. For instance, Debbie Wood testified at the guilt phase that appellant was a caring, involved mother, and her children were well-behaved. (30RT 3967.) Appellant and her children were very involved in the church. (30RT 3966.) Appellant did not yell, scream, or hit her kids. (30RT 3973.) Appellant was pursuing a career in law enforcement. (30RT 3973.) Rhonda Hill testified that appellant was an excellent and loving mother. Appellant's children were not isolated and they participated in church activities. (30RT 4034-4035.)

During the penalty phase, the jury heard testimony from Shirley Driskell that appellant was loving to her children and was a very good

mother. (61RT 9473, 9480, 9482.) Driskell considered appellant a good human being (61RT 9493) and appellant's presence in her life was of value to her. (61RT 9542-9543.) Tammy Pearce testified that appellant was a "very good example" of a 'good mother." Appellant disciplined her children "with love." Pearce never saw appellant physically abusing her children. (61RT 9507.) Henry Thompson testified that appellant was a very loving and caring parent and he never saw her strike her children. (61RT 9552.) Bishop Jones testified that appellant had a considerate and caring nature, and appellant and her children shared a warm and loving relationship. (61RT 9586-9588.)

Carl Hall testified that appellant had a warm and loving relationship with her children, she did not use physical violence to discipline her children, and she was not the type of person to harm her children. (62RT 9656-9658, 9667.) Lenora Frey testified that appellant was a very caring mother who always kept her children involved in outside activities like boy scouts and gymnastics. (62RT 9685.) Frey considered appellant a "person of value" and hoped appellant would end up somewhere where she could be of help to other mothers "in trouble with depression and whatever." Appellant was a smart and caring woman. (62RT 9687.) Appellant was not a "hard criminal"; she was very depressed and needed help. (62RT 9721.)

Cindy Hall testified that appellant was a good and caring mother who did not physically abuse her children. (62RT 9725.) Al Lucia testified that appellant was a loving person whose life had been centered around her children. (62RT 9751, 9753.) Shannon North testified that appellant was a good and caring person, a good mother, and her children loved her. Appellant wanted to be a police officer. (63RT 9855-9856.) North valued appellant as a person; appellant was "always there" for North. (63RT 9858.) Tricia Mulder testified that appellant was devoted to her children

and she took the role of mother very seriously. (63RT 9873-9874.) Chaplain Mrotzek testified that appellant had experienced repentance and remorse "over this tragedy that has come into her life." Appellant desired to better her life, especially in relationship to her son. (63RT 9888.)

Thus, even though the jurors did not hear opinion testimony about appellant's general character for nonviolence, they heard specific testimony that she had been nonviolent towards her children until the night of the murders, that she had tried to become a police officer, that she was depressed at the time of the crimes, and that her life had value to her friends and family. The jury had a complete picture of appellant, based on all of the evidence received at the guilt and penalty phase. Therefore, any error in excluding the opinion testimony of lay witnesses to the effect that appellant had a characteristic for nonviolence, was harmless. (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1032, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [applying *Chapman* standard]; *People v. Brown*, *supra*, 31 Cal.4th at p. 576 [applying reasonable possibility standard].)

2. Appellant's State of Mind at the Time of the Crime

Appellant next contends that the trial court improperly excluded mitigating evidence relevant to her state of mind at the time of the offense. (AOB 531-533.) Appellant presents the following examples: (1) the trial court sustained hearsay objections every time counsel attempted to ask Driskell and Thompson about their knowledge of how appellant was reacting to her pregnancy and the subsequent abortion. Defense counsel stated that the evidence was offered to show appellant's state of mind. (61RT 9488-9489, 9556, see also 9574.) (2) the trial court also prevented North and Mulder from discussing appellant's attitude about abortion. (63RT 9857-9858, 9872.) Appellant contends that these ruling prevented

the defense from shedding light on appellant's state of mind during the critical period of time surrounding her decision to have an abortion.

As with the trial court's ruling that prevented character witnesses from offering their opinions as to appellant's character for non-violence and helpfulness, the jury here was likewise allowed to consider other forms of evidence presented during the guilt and penalty phase that presented appellant's state of mind. During the guilt phase prosecution case-in-chief, Nurse Collins testified that she spoke to appellant in the emergency room after the fire, and appellant stated she was depressed about the abortion. (20RT 2284-2285.) Appellant wrote a letter to Alethea Volk, postmarked June 29, 1998, expressing her sense of betrayal and abandonment. Appellant further wrote that she had aborted her pregnancy on June 25, Thursday afternoon, and that prior to that, she had felt suicidal on Wednesday night. (20RT 2361; Peo. Exh. 27.) Alethea received another letter from appellant dated June 30, 1998, expressing appellant's extreme distress with having aborted her baby. (20RT 2366-2367; Peo. Exh. 20.) The significance of this testimony cannot be underestimated since it was admitted in light of the undisputed central fact that appellant *tried to commit suicide.*

During the guilt phase defense case-in-chief, Debbie Wood testified that the Mormon Church was against abortion and appellant had been looking forward to the birth of her child. (30RT 3975, 3980.) After the abortion, appellant was very sad and depressed; she regretted the abortion. (30RT 3981-3982.) Just a few hours before the fire, appellant told Wood she was depressed about the abortion, money and her failure to find police work. (30RT 3991.) Rhonda Hill testified that appellant talked to her about the pregnancy prior to the abortion. (30RT 4045.) Appellant was confused and depressed about the pregnancy. (30RT 4046.) After the abortion, appellant was very depressed and regretted having done it. (30RT

4049.) Appellant testified that having an abortion was against her beliefs, but she decided to do it after creating an abortion "pros and cons" list. Afterwards, she felt "horrible." (35RT 4785-4787, 4793.)

During the penalty phase, Bishop Jones testified that the Mormon Church teaches that abortion is only acceptable in cases of rape, incest, or to save the life of the child. (61RT 9586.)

Thus, even though the jurors did not hear from penalty phase witnesses about their knowledge of how appellant reacted to her pregnancy and subsequent abortion, they heard specific testimony during the guilt phase that she had conflicting feelings about the pregnancy, ultimately decided to get an abortion, and then felt very depressed and upset afterwards. On this subject, the jury had a complete picture of appellant, based on all of the evidence received at the guilt and penalty phase. Thus, any error in excluding penalty phase testimony on this topic was harmless. (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1032, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [applying *Chapman* standard]; *People v. Brown*, *supra*, 31 Cal.4th at p. 576 [applying reasonable possibility standard].)

3. Chaplain Mrotzek's Personal Views about the Death Penalty

Appellant next contends that the trial court improperly prevented Chaplain Mrotzek from answering questions pertaining to her credibility, including a question about her personal views on the death penalty and whether she frequently testifies for inmates. (AOB 536-540; see 63RT 9892 [trial court sustained relevancy objection to question how often Mrotzek testified for inmates]; 63RT 9894 [on redirect, defense counsel asked Mrotzek if she believed in the death penalty; trial court sustained objection based on relevancy and exceeding the scope of cross].)

While it is true that a witness's personal philosophical opposition to the death penalty is relevant to his or her credibility and a proper subject for examination (*People v. Bennett*, *supra*, 45 Cal.4th at p. 606; *People v. Heishman*, *supra*, 45 Cal.3d at p. 194), Chaplain Mrotzek's credibility was never at issue. The prosecutor's cross-examination of her was brief and was concerned with appellant's ability to complete the analytical portion of the Bible study course. (63RT 9893.) During closing argument, the prosecutor did not argue that she lacked credibility; rather, the prosecutor argued that Mrotzek's testimony showed that appellant was intelligent and had analytical skills. (64RT 10109.) Thus, any error was harmless. (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1032 see also *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [applying *Chapman* standard]; *People v. Brown*, *supra*, 31 Cal.4th at p. 576 [applying reasonable possibility standard].)

E. The Prosecutor Did Not Commit Misconduct When Cross-Examining Shirley Driskell

Appellant objects to the following cross-examination of Shirley Driskell, on the grounds of prosecutorial misconduct for suggesting that appellant committed perjury (AOB 542-543):

> [The prosecutor] Do you believe the defendant was telling you the truth [about her relationship with her children]?
>
> A Yes.
>
> Q Would it change your opinion about that if I were to tell you that the defendant took the witness stand and committed perjury and lied?
>
> A No.
>
> Q So the fact that she committed perjury, took the oath, swore to tell the truth and lied would not change your opinion about the defendant telling the truth to you? [¶] Is that what you're saying?

Mr. Waco: Objection to the form of the question, your honor.

The Court: Overruled.

The Witness: Does that mean I still answer it?

The Court: It's overruled means you can answer it.

The Witness: I'm sorry. Say it again. I am sorry.

The court: Read the question back.

(record read.)

The Witness: Yes.

Mr. Waco: Objection to the form of specificity of what the district attorney is alluding to.

The Court: Overruled.

(61RT 9499.)

Defense counsel did not object to the prosecutor's questions on the ground of prosecutorial misconduct and request the jury be admonished, or show that an admonitory comment would not have cured the harm. (*People v. Collins* (2010) 49 Cal.4th 175, 206; *People v. Lopez*, *supra*, 42 Cal.4th at p. 966; *People v. Alfaro*, *supra*, 41 Cal.4th 1277, 1328.) This Court has held: "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instruction the harmful effect upon the minds of the jury." [Citation.]' [Citation.]" (*People v. Cox*, *supra*, 53 Cal.3d at p. 682.) Appellant's prosecutorial misconduct claim has been forfeited.

In any event, the claim lacks merit. A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a

denial of due process.'" (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181; see *People v. Cash*, *supra*, 28 Cal.4th at p. 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye*, *supra*, 18 Cal.4th at p. 969.)

Here, the prosecutor did not commit misconduct because the questions regarding whether Driskell's opinion would change if she knew that appellant lied and committed perjury were based on the evidence and designed to show that the witness was biased. First, the questions were not improper without actual proof that the prosecutor was proceeding in bad faith. (Cf. *People v. Sandoval* (1992) 4 Cal.4th 155, 182-183 [defense failed to support its accusation with any evidence that prosecutor's question was in bad faith].)

Appellant testified on cross-examination that she did not recall sending the note to Dave Folden that said "Now you don't have to support any of us." She further testified that what was written in the letter ("fuck you") was not her "normal way of talking." She did not use "obscenities" in her normal way of talking or writing. (35RT 4930.) In rebuttal, the prosecution presented evidence that Sergeant Taylor recovered from appellant's bedroom some cards with pager codes on them. (46RT 6949.) One of the pager codes used the phrase "fuck you." (46RT 6950.) Further, appellant told Debbie Wood on June 30th that she did not "give a fuck anymore." (46RT 6947.) There was no prosecutorial misconduct here because the questions were based on the evidence and not asked in bad faith.

Moreover, even assuming the prosecutor committed misconduct, it was harmless. That is, it is not reasonably probable that a result more favorable to appellant would have been reached absent the misconduct or that the misconduct so infected the trial with unfairness as to make the

resulting conviction a denial of due process in violation of the federal Constitution. (*People v. Wallace*, *supra,* 44 Cal.4th at p. 1071.) Contrary to appellant's argument (AOB 545), the jury did not decide on the death penalty because appellant lied about using bad language. The questioning was brief and on a tangential issue concerning whether appellant used bad language. The jury was already aware that appellant's testimony that she never used obscenities was a lie, whether or not she had been convicted of perjury. It is therefore not reasonably probable that the jury would have rendered a favorable verdict in the absence of the misconduct, or that appellant was denied due process under the federal Constitution. (*People v. Wallace, supra,* 44 Cal.4th at p. 1071.)

XIX. THE TRIAL COURT PROPERLY CONTROLLED THE PROCEEDINGS DURING THE TESTIMONY OF THE DEFENSE'S PENALTY PHASE MENTAL HEALTH EXPERT

Appellant next claims that the trial court prejudicially interfered with, and undermined, the testimony of the only mental health expert to testify for appellant at the penalty phase, Dr. Robert Suiter. (AOB 545-569.) The trial court did not prejudicially interfere with Dr. Suiter's testimony.

A. Background

Dave Folden testified during the penalty phase as a victim impact witness. (60RT 9368-9371.) In particular, he testified that when the girls were alive, appellant told them stories about him in order to alienate them from him. Folden had hoped that the girls would realize the truth when they got older, but all of that was now taken from him because appellant killed the girls. Appellant wanted to control and manipulate everyone around her and she was still doing it. (60RT 9371.) During cross-examination, Folden testified over a prosecution objection that it was not true that he had acknowledged to Dr. Suiter and others that appellant was a good mother who instilled good values in the children. He also denied that

he had never complained to Dr. Suiter and others about appellant's relationship with the children. (60RT 9395.)

In a proceeding held outside the presence of the jury, the prosecutor stated that he objected to Dr. Suiter testifying regarding his evaluation of Folden and the children, conducted in 1997 during divorce proceedings between Folden and appellant. The prosecutor asserted that any statements made by Folden and the children were privileged. Defense counsel argued that Folden had put in issue his feelings with regards to the children and appellant as a mother. The trial court asked for an offer of proof as to what Dr. Suiter would say about Folden. Defense counsel stated that he expected to elicit from Dr. Suiter that Folden thought appellant was a good mother. (62RT 9639-9640.) The prosecutor objected that the testimony would be hearsay, but the trial court stated, "[i]t is hearsay, but it's probably reliable because it was given to an expert." (62RT 9641.) The trial court ruled that Dr. Suiter could testify about "his findings and what he based it upon," but he would not be allowed to testify about "privileged information" such as Folden's "parental abilities" or other issues that Folden had not put in issue. (62RT 9642.)

Dr. Suiter, a forensic psychologist, testified that he was appointed by a family law court to evaluate appellant, Folden, and the children in 1997 for child custody purposes. Dr. Suiter initially interviewed appellant and Folden jointly, then individually. Dr. Suiter also interviewed each child individually and also saw all five children in an interaction with each of the parents. (62RT 9757, 9759-9760, 9769.)[37] The purpose of the interviews was for Dr. Suiter to make recommendations to the court regarding the

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[37] Dr. Suiter prepared a report of his assessment of the family for purposes of child custody. The report was marked for identification as ZZ-2, but defense counsel did not move it into evidence. (62RT 9821; 63RT 9907.)

custody and visitation of the five children. When Dr. Suiter began the evaluation, the only issue pertained to the visitation schedule. However, during the course of the evaluation, Folden indicated he wanted custody of the two younger girls who were his biological children. (62RT 9762.)

Dr. Suiter found appellant to be reasonably open and honest regarding difficult childhood experiences, her past depression, and her use of psychotropic medications. (62RT 9764.) In Dr. Suiter's opinion, appellant felt very positive about her children and loved them. Appellant wanted to continue to be the primary caretaker of her children. (62RT 9768.) Appellant had insight and judgment in regards to her children. Her opinions regarding Folden "were very strongly negative and for which there was inadequate support." (62RT 9769.)

Based on psychological testing, Dr. Suiter considered appellant a "needy" and "dependent-type person." (62RT 9770.) Dr. Suiter never received any information from the children that appellant was abusive towards them or that she was anything but a caring and loving mother. The children were polite and well-mannered. (62RT 9772.) He could not find any evidence that the children were "coached" in their responses. Dr. Suiter concluded that the children should live with appellant. This conclusion was based on his "overall evaluation." Over a hearsay objection by the prosecution, Dr. Suiter further testified that his opinion was "based on many letters from outside sources" to the effect that appellant was a "good and caring mother." (62RT 9773.)

Dr. Suiter acknowledged that the MMPIs that he administered in the course of his child custody evaluations tended to be "skewed" because of the nature of the proceedings: that is, people in child custody disputes attempt "to present themselves in as favorable a light as possible." (62RT 9774-9775.) In evaluating appellant, Dr. Suiter asked the children about her disciplinary measures. The children's responses were consistent with

appellant's response that she used "behavioral techniques with her children as opposed to physically disciplining the children." (62RT 9777-9778.)

During cross-examination by the prosecutor, Dr. Suiter was questioned about the MMPI test he administered to appellant in 1997. Dr. Suiter was asked if the results of the test were invalid and Dr. Suiter replied that it was "most likely invalid." However, Dr. Suiter would not describe appellant's responses as "faking"; rather, it was a "naive attempt for the person to present themselves favorably to deny that they have any even minor faults or weaknesses, which in my experience is stereotypic of individuals seen for this kind of evaluation." (62RT 9779.) Dr. Suiter would not use the term "faking good" for the type of individual who was perhaps fooling him or herself into believe they were answering the questions correctly. (62RT 9780.)

Dr. Suiter was asked if he had heard of Dr. Alex Caldwell. Dr. Suiter replied that he had. The prosecutor then asked if it was a "fair statement" to describe Dr. Caldwell as "[o]ne of the world-wide experts on the MMPI." When Dr. Suiter stated he did not know, the trial court asked Dr. Suiter how he would describe Dr. Caldwell. Dr. Suiter replied that Dr. Caldwell was "very well-known in the psychological community in terms of MMPI interpretations, computer-generated MMPI interpretations." The prosecutor then asked Dr. Suiter if he agreed with Dr. Caldwell's report indicating that appellant had been "malingering" on the 1997 MMPI test. (62RT 9781.)

When Dr. Suiter stated that he did not recall seeing the word "malingering" in Dr. Caldwell's report, the trial court asked whether Dr. Caldwell's report used a "substitute for that word, as far as how he characterized the results you administered?" (62RT 9781-9782.) Dr. Suiter responded, "Well I would characterize it as I have, your honor. And in my view of Dr. Caldwell's report, he characterized it similarly, although he

includes phrases such as 'overly moralistic' ...." The trial court then asked if there was anything in Dr. Caldwell's report in rescoring the 1997 MMPI-2 test that was inconsistent with Dr. Suiter's findings. Dr. Suiter responded, "I would say yes, your honor." (62RT 9782.)

The following colloquy between the prosecutor and Dr. Suiter then occurred:

> Q By Mr. Barshop: Would it affect your opinion regarding the defendant's impression management of you or of others if I were to tell you that she told Dr. Lorie Humphrey that her grades were A to C in elementary school, and lower in high school?
>
> Mr. Waco: Objection. Calls for speculation and conclusion now.
>
> The Court: Sustained. [¶] He's here to talk about what happened in 1997.
>
> Mr. Barshop: May I be heard?
>
> The Court: Well, you don't have a crystal ball, do you?
>
> The Witness: Certainly not, your honor.
>
> The Court: All right. [¶] Now, you're aware that defendant has been convicted of four counts of murder in the first degree, and this is a penalty phase of the trial.
>
> Do you understand that?
>
> The Witness: Yes, your honor.
>
> The Court: Knowing that now, you would probably want to change your opinion made back in 1997, wouldn't you, if you could do it?
>
> The Witness: No, your honor.
>
> The Court: You wouldn't?

> The Witness: No, your honor. My opinion was based upon the data that I had. And based upon the data I had, I stand by that.

(62RT 9786-9787.)

During further cross-examination, Dr. Suiter was asked if he was worried about being sued by Dave Folden for recommending appellant get custody of the children. Dr. Suiter replied, at length, that he "had no crystal ball" and given the data he had at the time, he was "confident" of his recommendation. Dr. Suiter further testified that "[t]here was not even any appreciable complaint about [appellant] on the part of Mr. Folden." (62RT 9807.) The prosecutor moved to strike this testimony as nonresponsive, but the trial court overruled the objection. (62RT 9807-9808.)

B. Applicable Law

The failure to object to judicial comments or questions on the grounds of judicial misconduct or bias results in forfeiture of the claim on appeal. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 531.) "[A] trial judge need not sit like 'a bump on a log' throughout the trial. He has an active responsibility to insure that issues are clearly presented to the jury." (*United States v. Pisani*, *supra*, 773 F.2d at p. 403.) "[T]he trial court may question a witness in order to elicit additional information or clarify confusing testimony." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 531.)

> We "evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury." [Citation.] "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made. [Citation.]" [Citation.]

(*People v. Sanders*, *supra,* 11 Cal.4th at pp. 531-532.)

C. The Issue Is Forfeited, and, in Any Event, the Trial Court's Comments Were Reasonable

Appellant contends that Judge Wiatt "stepped into the role of prosecutor" during his questioning of Dr. Suiter. (AOB 546; see also AOB 564.) However, because there was no objection on state or federal grounds by defense counsel to the trial court's questioning of Dr. Suiter, the issue is forfeited on appeal. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 531.) In any event, there was no judicial bias here. The trial court initially sustained a defense objection to the prosecutor's question regarding whether Dr. Suiter had heard that appellant told Dr. Humphrey her grades were low in high school, on the basis that the question called for speculation and a conclusion. The trial court then admonished the prosecutor that Dr Suiter was "here to talk about what happened in 1997." It was only when the prosecutor asked to be heard further on the subject, that the trial court questioned Dr. Suiter, asking him if he would want to change his opinion made in 1997, to which Dr. Suiter reasonably replied, "My opinion was based on the data that I had [in 1997]. And based upon the data I had, I stand by that." (62RT 9787.) The exchange was brief, neutral, non-inflammatory, clarified Dr. Suiter's testimony, and did not deprive appellant of her right to trial by jury. (*People v. Sanders*, *supra,* 11 Cal.4th at pp. 531-532.)

Appellant also argues that the trial court erroneously ruled that Dr. Suiter could not testify as to prior statements by Folden or appellant's children because the communications were privileged. (AOB 558, citing 62RT 9642, 9764, 9771-9772.) There was no error. Defense counsel asked Dr. Suiter whether Folden ever said anything negative about appellant's parenting. The prosecutor objected, citing hearsay and lack of relevancy. The trial court sustained the objections, then asked Dr. Suiter, "[w]ould that also be privileged information, what Mr. Folden told you in the context of

the proceedings ...?" Dr. Suiter told the court that information regarding what Folden told him would "normally be privileged" but "as I am here under subpoena ... I would have to defer to you regarding the issue of the confidentiality." (62RT 9763-9764.)

Under California Rule of Court, Rule 5.220(h) (former rule 1257.3), Dr. Suiter, as a court-appointed child custody evaluator, was required to protect the confidentiality of the parties and the children, and not release information "except as authorized by the court or statute." Because confidentiality is required in the child custody evaluation system, the trial court did not abuse its discretion in finding the information here was privileged. (See Fam. Code, § 3111 [child custody evaluation report shall be confidential]; Super. Ct. L.A. County, Local Rules, rule 14.20(b)(1) [providing for confidentiality in child custody evaluation proceedings].) While appellant points to Evidence Code sections 1017 and 1010, subdivision (b), which taken together provides that there is no privilege for court-appointed psychologists (AOB 558-559), these are general statutes which must yield to those specific sections addressing child custody evaluations. (See *Simpson v. Cranston* (1961) 56 Cal.2d 63, 69 ["a special statute dealing expressly with a particular subject controls and takes precedence over a general statute covering the same subject"]; *In re Williamson* (1954) 43 Cal.2d 651, 654 [stating that between the general statute prohibiting conspiracies to "commit any crimes" in Pen. Code section 182, and the specific statute in section 7030 of the Business and Professions Code, which deals with the specific crime of conspiring to violate certain licensing provisions, "the latter clearly is a specific enactment which controls the former one"].)

Appellant argues that Dr. Suiter was not permitted to give relevant mitigating testimony that impeached Folden's earlier disparaging comments about appellant. (AOB 561.) This argument is without merit.

The trial court permitted Dr. Suiter to testify, over the prosecution's objection and motion to strike, that in 1997 Folden had no "appreciable complaint" about appellant's parenting skills. (62RT 9807-9808.) Dr. Suiter further testified that "[t]here were no allegations made to me by Mr. Folden that the children were at any risk" of being harmed by appellant. Folden's only "significant complaint" about appellant was that she reintroduced her older children to their biological father, thus distancing them from Folden. (62RT 9808.) This testimony, which the trial court permitted the jury to hear, served to impeach Folden's earlier disparaging comments about appellant.

Appellant also argues that Dr. Suiter was not permitted to give relevant mitigating evidence about abuse appellant suffered as a child. (AOB 561.) This argument is likewise without merit. Dr. Suiter testified that appellant was reasonably open and honest regarding difficult childhood experiences, her past depression, and her use of psychotropic medications. (62RT 9764.) Dr. Suiter also testified that appellant told him that her mother was physically abusive and would scream and yell at her. (62RT 9809.) This testimony, permitted by the trial court, allowed the jury to hear about the abuse that appellant suffered as a child.

Appellant further argues that the trial court erred by refusing to permit Dr. Suiter to explain why he disagreed with Dr. Caldwell's analysis of the 1997 MMPI results. (AOB 563.) Out of the presence of the jury, defense counsel asked the trial court for permission to question Dr. Suiter as to "why he believes that the Caldwell report does not reflect his opinion and doesn't find that of any value." The trial court responded that Dr. Suiter had not seen the Caldwell report "until just a few days ago, and he is not going to change his opinion about his evaluation back in 1997." The trial court further stated that "any further questions on that are not necessary,

and the probative value is outweighed by the undue consumption of time." (62RT 9822.)

The trial court did not abuse its discretion in this regard. The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Even at the penalty phase, the trial court retains authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.) Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

Here, Dr. Suiter had already explained that he would not change his testimony regarding the results of appellant's 1997 MMPI-2 test, based on Dr. Suiter's rescoring of the same test. He further testified that in his view, Dr. Caldwell's report characterized appellant "similarly," but that some of Dr. Caldwell's scoring was 'inconsistent" with Dr. Suiter's findings. (62RT 9782.) Appellant does not adequately explain how further questioning of Dr. Suiter regarding the inconsistencies between his 1997 report and Dr. Caldwell's rescoring of the same would bear on appellant's character. Dr. Suiter explained that he did not believe that appellant was "faking good"; in his opinion, appellant was naively trying to present herself in the best light possible in an attempt to secure custody of all of her children. Any further testimony on the subject would have been unduly time consuming without any particular probative value.

In any event, even assuming the trial court erred, any error was harmless under either the state or federal harmless error standard. The trial court's questioning of Dr. Suiter was brief and served to clarify his testimony regarding his MMPI-2 scores, Dr. Caldwell's rescoring, and Dr.

Suiter's ultimate child custody recommendation in 1997. Dr. Suiter was also permitted to testify that appellant was physically and emotionally abused as a child by her mother, that appellant loved her children, and that her children viewed appellant as a caring and loving mother. Further, Dr. Suiter ultimately testified that in 1997 Folden had no "appreciable complaint" about appellant's parenting skills. (62RT 9807-9808.) In light of the testimony Dr. Suiter ultimately gave at the penalty phase, it is not reasonably probable that the jury would have reached a more favorable verdict but for the trial court's controlling of the proceedings in regards to the questioning of Dr. Suiter. Any error here was harmless. (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1032 see also *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [applying *Chapman* standard]; *People v. Brown*, *supra*, 31 Cal.4th at p. 576 [applying reasonable possibility standard].)

XX. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE CLOSING ARGUMENT

Appellant next contends that the prosecutor committed misconduct during the penalty phase closing argument, requiring reversal of the death sentence, when she stated that she would be "satisfied" if appellant was sentenced to death. (AOB 569-574.) Respondent disagrees, as the comment, taken in context, was based on the evidence.

A. Background

During closing arguments at the penalty phase, the prosecutor argued as follows:

> Retribution is an appropriate goal for the most horrendous crimes. And the death penalty is the best punishment for the worst offenses. [¶] And doesn't the horror of those crimes deserve the ultimate punishment? [¶] I will be satisfied and justice will be done if you show [appellant] again the same mercy that she showed to her own children.

(64RT 10122.) Defense counsel objected that the comment that "she would be satisfied" was "totally irrelevant." The trial court overruled the objection. (*Ibid.*) Defense counsel again objected, outside of the presence of the jury, arguing that the prosecutor's personal opinion was "totally irrelevant." Defense counsel asked the trial court to admonish the jury that the prosecutor's personal opinion was "totally irrelevant." (64RT 10130.) The trial court responded that it did not see "anything improper in the prosecutor's argument the way it was given in context," and denied the defense's request the jury be admonished. (64RT 10130-10131.)

B. Applicable Law

A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects "'the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Arguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384 [108 L. Ed. 2d 316, 110 S. Ct. 1190]; see also *People v. Mendoza* (2007) 42 Cal.App.4th 686, 704 [citing *Boyde*].)

"We have held that it is improper for the prosecutor to state his personal belief regarding either defendant's guilt or the appropriateness of the death penalty, *based on facts not in evidence*." (*People v. Ghent* (1987)

43 Cal.3d 739, 772 (emphasis in original, citing *People v. Bandhauer* (1967) 66 Cal.2d 524, 529; see also *People v. Rundle*, *supra*, 43 Cal.4th at p. 191 [same].) This Court noted that in *Bandhauer*:

> the prosecutor emphasized that during his many years of practice he had seen some "pretty depraved characters" and that defendant was the worst. In contrast, in the present case, the prosecutor's remarks did not suggest that he possessed information, not formally in evidence, which would make death an appropriate remedy for defendant. The prosecutor's argument for the death penalty was based solely on the facts of record. Nonetheless, in future cases prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant.

(*People v. Ghent*, *supra*, 43 Cal.3d at p. 772.)

"[T]he federal Constitution does not require (and the state Constitution does not permit) the reversal of a criminal conviction unless the misconduct deprived defendant of a fair trial or resulted in a miscarriage of justice." (*People v. Hinton* (2006) 37 Cal.4th 839, 865, citing *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

C. The Prosecutor's Arguments Were Based Solely on Facts in the Record

Here, the prosecutor's short statement did not imply that she based her feelings on facts not in evidence. Thus, her statement could not unduly inflame the passions of the jury against appellant. (See *People v. Ghent*, *supra*, 43 Cal.3d at p. 772.) Additionally, the prosecutor's reference to her own feelings was brief and she did not belabor the point. (64RT 10122.) Moreover, the trial court instructed the jurors that they were not to be influenced by bias or prejudice against appellant (64RT 10067) and that the statements of the attorneys were not evidence (64RT 10071). Jurors are presumed to follow instructions. (*People v. Thompson* (2010) 49 Cal.4th 79, 138; *People v. Yeoman* (2003) 31 Cal.4th 93, 138-139.) Because the prosecutor's statements were part of her argument, they were likely given

less weight than the instructions given by the court. (See *People v. Mendoza*, *supra*, 42 Cal.4th at p. 704.) Finally, given the brevity of the remark, the trial court's instructions, and the weight of the aggravating evidence, appellant was not deprived of a fair penalty phase trial, nor was there a miscarriage of justice requiring reversal of the death verdict. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 865; *People v. Bolton*, *supra*, 23 Cal.3d at p. 214.)

XXI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FACTOR (K) EVIDENCE

Appellant next argues that the trial court improperly instructed the jury to disregard multiple factor (k) factors, and thus precluded the jury from giving full and meaningful consideration to all mitigating evidence, warranting reversal of the death sentence. (AOB 575-592.) Respondent disagrees. The trial court properly instructed the jury.

A. Background

Prior to the commencement of penalty phase arguments, the trial court instructed the jury with CALJIC No. 8.85, which provided in relevant part:

> In determining what penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter -- except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> [¶] (a) the circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true.
>
> [¶] .... [¶]
>
> (k) any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less

than death, whether or not related to the offense for which she is on trial.

(64RT 10068, 10070; 21RCT 5407-5408.)

During his penalty phase closing argument, defense counsel argued as follows:

> The state gives you a list of things to consider. If a majority of those things are aggravation, you can consider the death penalty, but you don't have to give it. [¶] If only one factor in mitigation in your own personal mind is sufficient not to execute somebody, then that can outweigh all the others. [¶] In our case, I believe we have many factors of mitigation, that they far outweigh any aggravation at all.
>
> ¶ .... ¶
>
> But [appellant] was programmed from youth. Programmed by a mother to eventually fail. Lingering doubt. [¶] Someday we may have a test, scientific test, to tell us what was the state of Sandi's mind and what it is now, and what it was on that day in question. I wish I had one here for you today. But there will always be a lingering doubt on what her state of mind really was. And that is another fact of mitigation in the K category of other factors. [¶] Sympathy and pity for a broken and tortured soul. I have no problem with that. She [*sic*] not a despot. She is not a person seeking out like a predator on the street. No. That is another factor in mitigation. [¶] The stress and depression she was in from the guilt of the abortion is also another factor under K in mitigation. [¶] Her personal background and the manner and method which she was brought up by her mother, or lack of being brought up, is also a factor to consider in mitigation.
>
> Mr. Barshop: I am going to object. It's a misstatement of the law.
>
> The Court: The statement is a misstatement. The jury will disregard it.
>
> Mr. Waco: She did the best she could with what tools she had. She lived a productive life. [¶] The district attorney says to watch out; Mr. Waco [is] going to seek to understand and

have compassion. I have no problem with that. [¶] Mercy alone is probably man's highest attribute in life, and that is also for you to consider in mitigation. [¶] The law says it's not even weighing factors. One factor, one factor alone, whether it be mercy, whether it be sympathy, whether it be lingering doubt, whether it be a thing that she had in her background, any of these factors on their own, based on your own individual personal judgment, is enough. [¶] And the law also says -- the district attorney kind of flew over it very quickly -- that the acts of aggravation or the factors of aggravation have to be so substantial as to outweigh any mitigation. [¶] Now, it's true it doesn't say beyond any reasonable doubt, but they have to be so substantial as to outweigh. [¶] Now, the scales of justice were fixed in this case. It was set up this way in a chart. It wasn't the reality of this case. It wasn't the reality of life. [¶] Even in this other chart, the worst of the worst. They forget that at the top of the heap we have people who torture and maim, stranglers on the streets, child molesters who kill, rapists, robbers on the street, burglars who break in our homes and kill people. Cop killers and serial killers. People that kill for financial gain. People that kill for hire. [¶] Those are people without moral conscience. Those are people who maybe should be subject to possible death penalty. [¶] But even there the state doesn't say it's death automatically. Even there the state says you have an option, a consideration. [¶] But the state does not favor the death penalty in any way. Maybe if Sandi was a homicidal maniac killing kids in the street, or an assassin for hire, for greed, or a predator or a robber or a rapist of people on the street. [¶] But even, like I said, in those cases the state does not favor the death penalty. [¶] Our law is strange, strange indeed. We do have four deaths here. But you can have multiple deaths in killing by drunk driver, the killing of three, four, five, six people. They don't get the death penalty.

Ms. Silverman: I am going to object. That's improper argument.

The Court: Sustained. [¶] The jury will disregard it.

Mr. Waco: Sandi did not cause the deaths of her children out of hate or ill will or a general willingness to do evil to her children. She had none of these qualities. She lost faith and hope in life. [¶] But why now, why here, why Sandi Nieves?

You seek death because she's a nobody? Seek death because she's poor? Or she has a Hispanic surname?

Ms. Silverman: I am going to object. That's all improper argument.

The Court: Wait. [¶] Sustained. The jury will disregard the last two points.

(64RT 10160-10166.)

Defense counsel continued arguing, asking the jury for mercy and compassion for appellant. (64RT 10168-10171.) The trial court asked the juror to go back to the jury room, and the following colloquy transpired:

The Court: The jurors have left the courtroom. [¶] Is there anything else before the court reads the remaining instructions?

Ms. Silverman: Your honor, I believe that the defense has misstated the law as to how the jury is to weigh the factors. [¶] Counsel indicated stress, lingering doubt, sympathy, pity, defendant's background, compassion, mercy -- all of those are separate factors, and that's what he said, that they were factors that the jury could consider under Factor K. [¶] The jury needs to be instructed that they can only count each factor one time. You can't count Factor K six times just because the defense attorney told them so.

Mr. Waco: I believe I stated the law accurately.

Ms. Silverman: He misstated the law.

Mr. Waco: It was the district attorney that misstated the law and gave her personal opinion.

Ms. Silverman: Counsel's entire argument was testimony.

The Court: Mr. Waco, you gave your personal opinion so many times, and attacked the integrity of the prosecutors. There wasn't objection to it. But had there been, it would have been sustained. [¶] Well, I am going to need to get -- see the exact language you're referring to before I fashion an instruction. [¶]

What I think I'll do is not give them the instructions now. I can order them back tomorrow at 9:00 a.m. or perhaps 9:30, and I'll just give them the instructions then.

Ms. Silverman: Then the People have no further argument, if the court is going to instruct on that.

The Court: Well, I don't know whether I will instruct, because I am not quite -- there was no objection at the time, so --

Ms. Silverman: There was.

The Court: There was?

Mr. Barshop: Yes. And the court sustained it.

The Court: And I told the jury to disregard it?

Ms. Silverman: That was after he said it the third time.

Mr. Waco: The district attorney is misconstruing.

The Court: Well, Mr. Waco, what I am going to do is I will order the jury back tomorrow at -- I will make it 9:00 o'clock. I will order counsel here at 8:30; assuming I can get a -- I can get a quick print out of what was said, hopefully, and we'll consider it then. [¶] Let's buzz the jury in.

Mr. Waco: If the court does any further instruction, I would respectfully ask for further argument by the defense counsel.

The Court: Well, you would certainly have the last word, Mr. Waco, if there is any further argument.

Mr. Waco: If there is any further jury instruction by the court or admonition to the jury.

The court: No. I'm not going to give you any further argument absent a showing of good cause. [¶] If it's simply an instruction to correct something wrong that you did, you're not going to argue further.

(64RT 10172-10174.) The trial court advised counsel to be prepared to cite any supporting cases the following day. (64RT 10175.)

The following day, the following discussion occurred:

The Court: I think the issue is, as I understand Miss Silverman and Mr. Barshop's objection, is there's only one Factor K. And I think the People's position is Mr. Waco is trying to convert mitigating evidence that falls under Factor K, each single item of evidence into a separate factor.

Ms. Silverman: Correct.

The Court: I think that's the gist of their argument.

Mr. Barshop: To double count or triple count or quadruple count.

The Court: That's an interesting concept, because at one point in Mr. Waco's argument he suggested it's like a numerical weighing process, which it is not.

Mr. Waco: But each factor -- for example, in K, according to the law, you can put in 100 different factors in Factor K.

The Court: You're identifying them as factors. They're not factors. They're pieces of evidence that might establish that Factor K has more weight than some of the other factors.

Mr. Waco: Well, it's my understanding --

The Court: The only other factor that can be used by the People in this case is basically A.

Ms. Silverman: Right.

The Court: That's it.

Mr. Waco: That's their problem.

The Court: The circumstances of the crime.

Mr. Waco: That's their problem, not mine.

The Court: But, Mr. Waco, I don't think you see the argument. [¶] The argument is you're trying to establish that there are hundreds of factors in mitigation when there's evidence to suggest, perhaps from your viewpoint, that Factor K is a

mitigating factor because all of the evidence is there to support it. [¶] But you're setting up, you know, all the little bits and pieces of evidence as separate mitigating factors.

Mr. Waco: And they are.

The Court: Which is not the law.

Mr. Waco: They can consider any one factor to outweigh the others. But each of these --

The Court: Here again, you're mixing apples and oranges. You're mixing the evidence with factors.

Mr. Waco: Well, I believe that's -- speaking of factors, as such --

The Court: Let's not get off of this subject. [¶] The only reason we're here today early is to address the People's objection, and asking the court to further instruct the jury. [¶] ... [¶] That's the only thing we're here today for initially. And until we finish that, we're not going to talk about anything else. [¶] .... [¶]

Mr. Waco: The People's suggestion is in error. [¶] I believe the *Skipper* case *versus South Carolina*, 476 U.S. 1, and *Ettings [sic] versus Oklahoma*, 455 U.S. 104, as well as, of course, Amendments 8 and 14; and the *Easley* case ... 34 Cal.3d 858 -- all indicate that it's an open-ended factor list. For example, in *Easley* they say that "any mitigating evidence of the defendant's character or record, which he or she offers constitutes" -- it's phrased as an open-ended, catchall provision--

Ms. Silverman: That's not the issue.

The Court: That's not the issue, Mr. Waco.

Ms. Silverman: That's not --

The Court: The evidence has been received. It's the way you are trying to transform the evidence and every single bit of evidence into a separate mitigating factor.

Mr. Waco: They are separate things that they can consider. The jury can consider whatever weight they want.

The Court: Mr. Waco, I've heard enough from you on this issue.

Mr. Waco: All right.

The Court: It goes nowhere with you.

Mr. Waco: Well, I think it goes to the point, but the court will make whatever ruling it wants.

The Court: No, the court will not make whatever ruling it wants. [¶] The court will make the appropriate ruling based upon the law, Mr. Waco. [¶] Look, Mr. Waco, yesterday in your argument you said some things that there was no objection to, but they were so clearly beyond the pale of appropriateness. [¶] Page 10150, line 13, you say: "heck, if we bring back the kids, maybe Sandi would quickly change her mind and give her life herself. I think she would." [¶] That comment I think was totally inappropriate. It's expressing your -- you're testifying as to what you think your client would do.

Mr. Waco: It's okay for the district attorney to say "I believe she deserves the death penalty."

The Court: That's a completely different statement. You're saying that if she were given the opportunity, she would kill herself.

Mr. Waco: Here is one that the court sustained I believe the court was in error on.

The Court: Don't you interrupt me, Mr. Waco.

Mr. Waco: Sorry.

The Court: The other comment you made, 10166. To this there was an objection. [¶] "Our law is strange, strange indeed. We do have four deaths here. But you can have multiple deaths in killing by drunk driver, killing of four, five, six people. They don't get the death penalty." [¶] The reason they don't get the death penalty, in most cases at most it's a murder of the second degree. [¶] And what you're basically saying is you have a disagreement with the law. And you can't do that in your argument. You can't challenge the law. [¶] I have instructed the jury they must follow the law.

[¶] ... [¶]

The Court: [¶] .... [¶] Perhaps one of the more outrageous statements, 10159, line 6. [¶] "You may think you've not heard all the evidence in this case. Well, you heard as much as you're going to hear. And as for me, I don't have a black robe and I don't have a gavel." [¶] That is an expression by you, Mr. Waco, that there's more evidence out there that they did not hear.

Mr. Waco: The court is putting two thoughts together. Those are two separate things, your honor.

[¶] .... [¶]

The Court: It's all in the same sentence. All in the same thought. [¶] The implication is to the jury that "you haven't heard all of the evidence because there's more evidence out there," which is untrue. It's improper argument. [¶] I'm going to instruct the jury that there is no other evidence in this case, they've heard it all, and any suggestion to the contrary, they'll disregard.

Mr. Waco: I respectfully object to that.

The Court: You object to that? [¶] Isn't that a correct statement of the law?

Mr. Waco: The court, by its own jury instructions, now is basically attacking defense counsel.

The Court: No. I'm not going to identify who said it. Perhaps I should. [¶] Why don't you explain to me what you meant by "you may think you've not heard all the evidence in this case."

Mr. Waco: I'm talking about the penalty phase here. Maybe there's more witnesses to go. I'm not talking about the guilt phase. The guilt phase is gone.

[¶] .... [¶]

The Court: Is there a different rule for penalty phase and guilt phase as to arguing your belief that there's more evidence out there? I mean, if the prosecutors got up and said "I wish we

could tell you all the things we know about this defendant," that would be reversible error. [¶] But it's okay for you to do it? Mr. Waco: What about my suggestion as a factor that said that her personal background and the manner in which she was brought up was a factor to consider? [¶] The district attorney objected and the court sustained it, and that is a direct violation of the U.S. Supreme Court rules.

(65RT 10178-10185.) The discussion continued:

Mr. Waco: There's no limitation in K, the number of points of consideration. They're not listed one through K.

[¶] .... [¶]

The Court: That's the problem. It's your choice of language. [¶] .... [¶] Mr. Waco, if you choose to articulate something in an inappropriate way using inappropriate language and the objection is sustained, and you can't figure it out at the time, then you're stuck with that, as is your client. [¶] .... [¶] There are certain ways to frame things and there are certain ways not to frame them. [¶] If you choose to frame them in the wrong way -- look, I sustained the objection because it's correct. You were making an effort to create all these factors, and "factor" has a unique meaning here, and you were trying to convert evidence into separate factors.

Mr. Waco: They are separate considerations.

The court: They're circumstances.

(65RT 10188.)

The trial court stated it would instruct the jury with CALJIC No. 8.85, the first paragraph of which read "'in determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable.'" (65RT 10189-10190.) The prosecution requested a supplemental instruction advising the jurors "they can't count factor K six times, as counsel would have them do." (65RT

10190.) Defense counsel argued that "they're trying to diminish counsel's argument with words when, in fact, they have a right to consider various aspects and weigh them accordingly." (65RT 10190.) The discussion continued:

> The Court: The People's argument is not what you say. And I don't know why you can't get this in your head, Mr. Waco. There's a difference when you use the word "factor" as opposed to "evidence" or "circumstance." [¶] "Factor" is a word of art in the instruction and under the law. There is but one factor K, and the way your argument was is you have multiple factor K's. [¶] That's what you said. It's wrong. And I am going to clear it up for the jury. And if that's the language you chose to use, that is your error.

(65RT 10190-10191.)

The trial court instructed the jury as follows:

> Yesterday during argument there was a reference made by Mr. Waco with regard to factor K; that there were numerous factor K's, words to that effect. [¶] The instruction that I read to you at the beginning yesterday, which is 8.84.1 (sic), ... , it talks about, in part -- I'm not going to reread the entire instruction, but I'll read you the first paragraph.
>
> (reading:)
>
> In determining which penalty is to be imposed on the defendant, you should consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable.
>
> The law talks about a factor is one of the factors listed in the law, and the factors are a part of that instruction. They are factors A through K. [¶] Any suggestion that there are more than one factor K factors here is wrong. [¶] There's a lot of evidence perhaps that could be considered as a circumstance under factor K, but that doesn't transform each piece of evidence into a separate factor. [¶] So, for example, when Mr. Waco argued her personal background and the manner and method which she was brought up by her mother, or lack of being brought up, is also a factor to consider in mitigation -- it is

certainly evidence you can consider in mitigation, but it's not a separate factor K factor. [¶] I mean, it's a consideration that is important, that needs to be remembered by you. You can consider that as evidence under that factor, or for any other purpose you want to consider it for, but it's a separate factor. [¶] There was also some reference by Mr. Waco or some suggestion that you had not heard all of the evidence, implying there is more evidence. [¶] That's inappropriate, and you have heard all of the evidence that you're entitled to hear in this penalty phase and also at the guilt phase. So you'll disregard that part.

(65RT 10195-10197.)

The trial court immediately thereafter gave the jury concluding instructions, including CALJIC No. 8.88, which stated in relevant part:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life

without parole. [¶] It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(65RT 10201-10203.)

B. Applicable Law

In assessing an instruction to determine whether the jury was adequately guided under the Eighth or Fourteenth Amendment, the court must look to whether it is reasonably likely the jury understood the instruction and correctly applied it. (*People v. Maury* (2003) 30 Cal.4th 342, 443; see *Boyde v. California*, *supra*, 494 U.S. at p. 380 [test is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of mitigating evidence].) In determining whether there is a reasonable likelihood that the trial court's instruction to the jury misled the jurors as to the scope of their sentencing discretion or responsibility, the reviewing court must considering the totality of instructions and arguments. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1062; *People v. Champion*, *supra*, 9 Cal.4th at p. 946; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 693-694.)

"As we have made clear, factor (k) is adequate for informing the jury that it may take account of any extenuating circumstance, and there is no need to further instruct the jury on specific mitigating circumstances. [Citation.] It is generally the task of defense counsel in its closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty phase evidence or circumstances should be considered extenuating under factor (k)." (*People v. Vieira, supra*, 35 Cal.4th at pp. 299-300.)

"[W]e observe that the trial court in the instant case instructed the jury pursuant to section 190.3, factor (k) (factor (k)) as reflected in CALJIC No.

8.85, which provided the jury wide latitude to consider any extenuating circumstance in determining penalty. [Citations.].)" (*People v. Carter, supra*, 36 Cal.4th at p. 1279.) "This court has interpreted section 190.3 factor (k), which CALJIC No. 8.85, factor (k) incorporates, as allow[ing] the jury to consider a virtually unlimited range of mitigating circumstances. [Citations.] The jury was thus 'not reasonably likely to have [been] misled ... into believing that its consideration of mitigating circumstances somehow was limited.' [Citations.].)" (*People v. San Nicholas, supra*, 34 Cal.4th at pp. 673-674.) "[W]e assume the jury followed the instruction on section 190.3, factor (k)." (*People v. Weaver* (2001) 26 Cal.4th 876, 986.)

C. The Trial Court Properly Instructed the Jury; It Was Not Reasonably Likely That the Jury Was Misled

The trial court did not err in instructing the jurors to disregard defense counsel's argument "that there were numerous K's" for them to consider. (65RT 10195.) It is error to invite a jury to double count a factor in aggravation or mitigation. (See *People v. Ramos* (2004) 34 Cal.4th 494, 531; *People v. Ayala* (2000) 24 Cal.4th 243, 289.) This is precisely what defense counsel was doing: inviting the jurors to double and triple count a factor. (See 65RT 10163-10164 ["And that is another fact of mitigation in the K category of other factors .... That is another factor in mitigation ... also another factor under K in mitigation ... also a factor to consider in mitigation"].) Appellant argues that the court's instruction "forced the jury to view the mitigating evidence through [an] artificial filter that undercut its impact." (AOB 580.) Appellant overstates the case. The trial court specifically told the jurors they could consider appellant's personal background and the manner in which her mother raised her as mitigating evidence, "but it's not a separate factor K factor." (65RT 10196.) Given the totality of the instructions given by the court, including CALJIC Nos. 8.85 and 8.88, it is not reasonably likely that the jury was misled by the trial

court's instruction to disregard defense counsel's argument that there were "numerous K's." (See *People v. Brasure*, *supra*, 42 Cal.4th at p. 1062; *People v. Champion*, *supra*, 9 Cal.4th at p. 946; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 693-694.) Appellant further suggests that the trial court erred by instructing the jury that defense counsel had inappropriately argued that the jury had not heard all of the evidence. (AOB 589; see 64RT 10159; 65RT 10197.) The instruction was correct, however. Just as it would be misconduct for the prosecutor to suggest that the jury had not heard all of the evidence (see *People v. Kaurish, supra*, 52 Cal.3d at p. 683), likewise defense counsel may not argue that the jury has not heard all of the evidence. Appellant's argument must be rejected.

XXII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING THE DISCOVERY SANCTION INSTRUCTION

Appellant next claims that the trial court prejudicially erred when it invited the jury to consider as a basis for the death sentence the discovery violations attributed to her. (AOB 593-604.)[38] To the contrary, the trial court did not abuse its discretion, and any error here was harmless.

A. Background

On July 26, 2000, the day the jury began guilt phase deliberations, defense counsel served on the prosecution five requests for prepaid transportation for witnesses Tricia Mulder, Shirley Driskell, Lenora Frey, Cindy Hall and Al Lucia. The prosecutor stated that he had "never heard of" three of the names, had "no information about them whatsoever," and requested witness statements in the possession of the defense. (57RT 8955;

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[38] Appellant incorporates the argument she made at pages 327 through 353 of the opening brief concerning the "defects and constitutional flaws in the former version of CALJIC No. 2.28 and the discovery violation instructions given in the guilt phase." (AOB 599.) Respondent likewise incorporates its responses to this claim, at Argument XI, *supra*.

see 20RCT 5090-5094.) Defense counsel conceded that the prosecutor had "a right to appropriate statements," but then countered with his own request for names, addresses, and phone number of the prosecution's prospective witnesses. The trial court reminded the defense of its April 11th discovery order "basically tracking what is in the Penal Code." The trial court asked defense counsel if he had any witness statements from the witnesses for whom he was seeking prepayment. When defense counsel indicated he did have witness statements, the trial court asked for his "rationale for not providing them sooner." Defense counsel indicated his belief that he was not required to provide penalty phase discovery until that stage was reached. (57RT 8956.)

The trial court cited defense counsel to *People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th 1229, which held that section 1054 applied to penalty phase evidence in capital prosecutions, "and discovery should normally be made 30 days prior to the commencement of the guilt phase of the trial." (57RT 8957; see *People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1238.) Defense counsel stated, "I did hear of that case." (57RT 8957.)

The trial court ordered defense counsel to provide the prosecution "within ten minutes with the witness statements of all the people that are on this list and the other people that you intend to call." (57RT 8958.) Defense counsel stated that he could not comply with that order within 10 minutes, because he did not want his paralegal rushed to "put a few things together" and as a result to omit "some other innocuous documents" and then be accused by the court of "deliberately hiding the ball." The trial court warned defense counsel that he could be faced with "additional sanctions for not complying with the discovery order in this case." (57RT 8959.)

Defense counsel stated that he would be able to comply with the April 11th discovery order "if I have the time tomorrow." The trial court stated its belief that defense counsel was being "disingenuous" and warned that "if you've hidden the ball on discovery, the court will include sanctions of not allowing the witness to testify and anything less than that, including monetary sanctions or contempt of court." (57RT 8960; see also 8992 [trial court observes, "it seems to me perhaps Mr. Waco is deliberately setting up another error. By not disclosing the evidence, he runs the risk of the court imposing some sanctions"].)

Defense counsel again complained that the prosecution had not disclosed "any statements of any of the People's witnesses, or their names or addresses or phone numbers." The prosecutor flatly denied defense counsel's allegation, stating that he had disclosed that he would be calling Fernando and Charlotte Nieves, and Dave Folden, and that there were no statements to disclose. (57RT 8961, 8963.) The trial court ordered defense counsel to disclose the names of penalty phase defense witnesses. Defense counsel disclosed the following names: Duke Thompson, Shirley Driskell, Cindy Hall, Lynn Jones, Debbie Wood, Rhonda Hill, Shannon North, Tammy Pearce, Trisha Mulder, Lenora Frey, Dr. Robert Suiter, Dr. Kaser-Boyd, Al and Penny Lucia, and Lilia Mrotzek. (57RT 8995-8996.) The prosecutor stated he had statements from Debbie Wood and Rhonda Hill, and had the reports of Dr. Suiter and Dr. Kaser-Boyd. (57RT 8997.)

The next day, July 27, 2000, the jury returned guilty verdicts against appellant. (58RT 9026-9031.) Thereafter, defense counsel turned over witness statements of Pearce (dated July 23, 1998), Driskell (dated September 3, 1998), North (dated September 18, 1998), Mulder (dated October 25, 1999 and July 13, 2000), Frey (dated November 2, 1998, October 6, 1998, and June 4, 1999), Cindy Hall (undated), and certificates from Set Free Prison Ministries (various dates, front page dated June 17,

1999). (58RT 9040-9041.) The trial court ordered a hearing on possible discovery violations for the following day. (58RT 9042-9043.) When defense counsel inquired as to what discovery violations were to be discussed, the trial court responded that some of the documents defense counsel had disclosed that day "go back ... more than a year." (58RT 9044.)

On July 28, 2000, appellant refused to leave her cell and the trial court order her extraction. (58RT 9048.) The trial court notified defense counsel in court that it would not impose monetary sanctions against defense counsel, even though the court believed that defense counsel had violated a lawful discovery order. The trial court stated, in light of having previously imposed eight monetary sanctions, "It doesn't seem that monetary sanctions are effective in controlling Mr. Waco's behavior in the courtroom." (58RT 9049.) Thereafter, defense counsel informed the court and the prosecution that he intended to call Cindy Hall's husband, Carl Hall, as a witness. (58RT 9052.) Defense counsel turned over to the prosecution notes from two interviews with Carl Hall, dated July 15, 1998 and updated December 21, 1998, and an undated letter from Carl Hall to defense counsel. (58RT 9053, 9064.) The trial court ordered a further hearing on possible sanctions "when the defendant is present." (58RT 9057.) Appellant was present later that afternoon, at 1:40 p.m., at which time a hearing on sanctions was held. The prosecutor stated that he was not asking for the sanction of exclusion, but was seeking monetary sanctions for late disclosure of witness statements. (58RT 9059-9060, 9064.)

The trial court asked defense counsel why Mulder's October 25th statement had not been disclosed to the prosecution "immediately upon its receipt." (58RT 9066.) Defense counsel responded that he was relying on the PET scan evidence as "enough to avoid any death penalty" and once that evidence was excluded he realized he would have to "scurry around"

and contact other potential witnesses. (58RT 9067-9068.) Defense counsel stated, "there was never any intent to hide anything from the prosecution. There was only a question as to who would actually be needed." (58RT 9070.)

The trial court stated, "I don't accept your statement that you expected the PET scan to be ruled admissible at the penalty phase, because the court had already ruled it inadmissible [at the guilt phase] under *Kelly-Frye* and [Evidence Code] section 352 grounds." (58RT 9078; see also 9084 [court would not accept defense counsel's argument that he did not intend to call Mulder "because you were banking on the court admitting PET scan evidence"].) The trial court asked the prosecutors whether they had been aware of the "existence" of Mulder, North, Pearce, and Driskell prior to July 27, 2000, to which Ms. Silverman replied, "Never heard those names before." (58RT 9088.) Following further argument, the trial court ruled that it would not exclude the evidence or impose monetary sanctions, but would instruct the jury with CALJIC No. 2.28 "and let the jury consider the untimely disclosure for whatever purpose they want to consider it for." (58RT 9125.)

Subsequently, on August 4, 2000, after the defense rested its penalty phase case, the trial court and the parties discussed jury instructions. The trial court noted that it was omitting CALJIC No. 2.28, because it was not "necessary." (63RT 9910.) The prosecution requested that the instruction be added, because "[t]hat is our only other sanction that we're asking for, other than the monetary sanctions ...." Defense counsel objected, "on the ground that I didn't delay anything." The trial court disagreed, finding the discovery violation "was done willfully." (63RT 9911.) The trial court further found that the delayed disclosure was done "to gain a tactical advantage." (63RT 9912.)

The jury was instructed as follows with a modified version of CALJIC No. 2.28:

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time, and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence.

Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately.

In this case, the defendant failed to timely disclose the following evidence:

> 1. The name and address of witnesses Lelia Mrotzek and Lynn Jones.
>
> 2. The name and address and statements of witnesses Shirley Driskell, Cindy Hall, Carl Hall, Shannon North, Tammy Pearce and Tricia Mulder.
>
> Although the defendant's failure to timely disclose evidence was without lawful justification, the court has under the law permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. [¶] However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial, or subject matters already established by other credible evidence.

(64RT 10078-10079.)

B. Applicable Law

The relevant discovery statutory provisions have previously been set forth in Argument XI.B., *supra*. Further, "the reciprocal discovery provisions contemplate both guilt and penalty phase disclosure ordinarily

would occur at least 30 days prior to commencement of the trial on *guilt* issues." (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1238, italics in original.) The decision whether to give a sanction instruction for failure to provide discovery is addressed to the sound discretion of the trial court. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 299; *People v. Lamb*, *supra*, 136 Cal.App.4th at p. 581.)

In *People v. Riggs*, *supra*, 44 Cal.4th at page 308, this Court stated that a discovery violation instruction is appropriate even if the nondisclosure did not have an "actual effect on the other party's ability to respond." (*Ibid.*) "Whether or not the prosecution was actually impaired by the attempt to conceal the evidence would not change the circumstance that defendant tried to inhibit the prosecution's efforts. In other words, while not constituting evidence of the defendant's consciousness of his or her own guilt, the fact of a discovery violation might properly be viewed by the jury as evidence of the defendant's consciousness of the lack of credibility of the evidence that has been presented on his or her behalf." (*Ibid.*)

C. The Trial Court Did Not Abuse Its Discretion; Any Error Was Harmless

The trial court did not abuse its discretion in giving the jury the sanction instruction. Defense counsel did not disclose the names of the penalty phase defense witnesses until the day that the jury began its guilt phase deliberations, even though he was aware of this Court's decision in *Mitchell*, which required that penalty phase discovery be disclosed 30 days prior to the commencement of the guilt phase of trial. (57RT 8955-8956, 8957.) Further, defense counsel did not disclose witness statements until the following day (58RT 9040-9041.) In the face of this deliberate failure to disclose discovery in a timely manner, the trial court did not abuse its

discretion in giving the sanction instruction. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 299; *People v. Lamb*, *supra*, 136 Cal.App.4th at p. 581.)

Appellant argues that the trial court's findings against defense counsel, particularly that his representations were not worthy of belief and that he willfully violated his discovery obligations, were "undermined by the court's pervasive bias against" appellant and Mr. Waco. (AOB 599.) Respondent disagrees. Given Mr. Waco's acknowledgment that he was aware of *Mitchell*, his representation that he believed that he was not required to provide penalty phase discovery until that stage was reached lacked credibility. (See 57RT 8956.) Further, defense counsel's representation that he did not disclose the names of the witnesses because he believed that the PET scan evidence would be admissible at the penalty phase likewise lacked credibility, given that the trial court had already ruled at the guilt phase that the PET scan evidence was inadmissible, and at no point had the trial court ever indicated a willingness to reconsider its ruling. (See 58RT 9078.)

Appellant further argues that the sanction instruction was erroneously given because "there was no prejudice to the prosecution or its case." (AOB 599.) This argument must be rejected in light of *People v. Riggs*, *supra*, 44 Cal.4th at page 308, where this Court stated that a discovery violation instruction is appropriate even if the nondisclosure did not have an "actual effect on the other party's ability to respond." (*Ibid.*)

Appellant also argues that imputing any discovery violations to appellant was wrong because "there is nothing in this record to show [appellant] had anything to do with them." (AOB 600.) As respondent demonstrated in Argument XI, C., *supra*, it is not necessary for this Court to address the problems with CALJIC No. 2.28, because there is no reasonable probability that an outcome more beneficial to appellant would have been achieved in the absence of the instruction (see *People v. Watson,*

supra, 46 Cal.2d at p. 836) and any federal constitutional error was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24). (*People v. Riggs, supra*, 44 Cal.4th at p. 311.)

Appellant argues that the use of CALJIC No. 2.28 constituted structural error requiring automatic reversal, because the error defied harmless error analysis. (AOB 603.) However, in *Riggs*, this Court analyzed any error in giving CALJIC No. 2.28 under both state and federal harmless error standards. (*People v. Riggs, supra*, 44 Cal.4th at p. 311, citing *People v. Bell*, *supra*, 118 Cal.App.4th at p. 257 and *People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 944.) Here, any error was harmless. The prosecutor did not rely on the discovery sanction when arguing to the jury that death was the appropriate penalty for appellant (Cf. *People v. Riggs*, *supra*, 44 Cal.4th at p. 311 [any error in giving CALJIC No. 2.28 was harmless because "reliance on the instruction regarding the discovery violation was but a small part of the prosecution's devastating arguments"].) Additionally, as set forth previously, given the grievous facts of appellant's crimes against her own children, any error in giving the modified version of CALJIC No. 2.28 was harmless under either the state or federal standard.

XXIII. THE DEATH PENALTY IS NOT DISPROPORTIONATE TO APPELLANT'S INDIVIDUAL CULPABILITY

Appellant next contends that the death penalty is disproportionate to her individual culpability, in violation of the Eighth Amendment and the California Constitution, Art. 1, Section 17. While appellant acknowledges that this Court has previously held that proportionality analysis is not required, appellant nonetheless asks this Court to conduct an intracase proportionality analysis in this case, in the "interests of justice." (AOB 605-609.) Respondent submits that this claim must be rejected, based on this Court's past precedents.

"Neither the state nor the federal Constitution requires comparison of [appellant's] sentence with the sentences of others." (*People v. Gamache* (2010) 48 Cal.4th 347, 407.) "[I]ntracase proportionality review is not constitutionally compelled ...." (*Ibid.*) Additionally, there is nothing about appellant's death sentence that is so disproportionate to her personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." (*People v. Hughes* (2002) 27 Cal.4th 287, 406; see also *People v. Padilla* (1995) 11 Cal.4th 891, 961-962; *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

In *Padilla*, this Court observed that even though the defendant might not be among the most heinous of murderers and his crimes may not be as abominable as some of the others this Court had reviewed, based upon the facts presented this Court could not conclude that the sentence he received was "disproportionate to defendant's 'personal responsibility and moral guilt.'" (*Padilla, supra*, 11 Cal. 4th at p. 962, some internal quote marks omitted.) Here, on the other hand, appellant is easily among the most heinous of murderers, and her crimes are surely as abominable as any this Court has considered. Appellant orchestrated a "slumber party" in the kitchen of her home, in order to set fire to her house and kill her children in a final act of vengeance upon the men in her life, particularly Dave Folden. Her children awoke, coughing and begging to be allowed to get up and get out of the smoke-filled house, but appellant would not allow it. She even told one of her daughters to vomit on the floor, rather than allowing the little girl to get up and use the bathroom. The note she wrote to Folden prior to setting the fire were surely as cold and calculating as any a mother could write: "Fuck you, now you won't have to support any of us." There were no circumstances in appellant's life that could excuse or mitigate the horrendous act of murdering her four daughters: indeed, but for the grace of

God, she would have murdered her son, as well. This Court should reject this claim.

XXIV. THERE WAS NO CUMULATIVE ERROR

Appellant next claims that the trial court's cumulative errors require reversal of the convictions and penalty. (AOB 609-610.) As respondent has demonstrated, there was no trial error reversible by itself, and any errors that did occur, viewed collectively, did not constitute a constitutional deprivation. Contrary to appellant's argument, she received a fair trial. (*People v. Taylor* (2010) 48 Cal.4th 574, 663; *People v. Thornton, supra*, 41 Cal.4th at p. 470.)

XXV. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION OR INTERNATIONAL LAW

Appellant raises several federal constitutional challenges to California's death penalty law that she acknowledges have been repeatedly rejected by this Court. (AOB 611-625.) She raises the following claims in "an abbreviated fashion": (1) Section 190.2 is impermissibly broad (AOB 612-613); (2) Section 190.3, factor (a), allows for arbitrary and capricious application of the death penalty (AOB 613-614); (3) CALJIC No. 8.88 and the use of the phrase "so substantial" caused the penalty determination to turn on an impermissibly vague and ambiguous standard (AOB 614-615); (4) The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by appellant's jury (AOB 615); (5) The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the death penalty (AOB 615-617); (6) The death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt (AOB 617-620); (7) California law violates the Sixth, Eighth, and Fourteenth Amendments by

failing to require that the jury base any death sentence on written findings regarding aggravating factors (AOB 620-623); (8) The death verdict was not premised on unanimous jury findings (AOB 623-624); (9) Some burden of proof is required, or the jury should have been instructed that there was no burden of proof (AOB 624); (10) California's use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (AOB 625).

This Court has repeatedly rejected appellant's constitutional challenges to California's death penalty, finding as follows: First, "California's death penalty statute adequately narrows the class of death-eligible offenders." (*People v. Martinez, supra*, 47 Cal.4th at p. 967 (*Martinez*); see also *People v. Watson* (2008) 43 Cal.4th 652, 703 (*Watson*); *People v. Perry* (2006) 38 Cal.4th 302, 322.) Second, section 190.3, factor (a), which permits the jury to consider circumstances of the crime, does not result in the arbitrary or capricious imposition of death. (*Martinez, supra*, 47 Cal.4th at p. 967; *People v. Hamilton, supra*, 45 Cal.4th at p. 960 (*Hamilton*); *Watson, supra*, 43 Cal.4th at p. 703.) Third, this Court has repeatedly rejected the instant challenge to CALJIC No. 8.88. (*People v. Taylor, supra*, 48 Cal.4th at p. 658; *People v. Ochoa, supra*, 26 Cal.4th at p. 452.) Fourth, California's death penalty law contains adequate safeguards. "The use of restrictive adjectives, such as 'extreme' and 'substantial,' in the statute's list of potential mitigating factors does not render it unconstitutional." (*Martinez, supra*, 47 Cal.4th at p. 968; see *Watson, supra*, 43 Cal.4th at p. 704.) The statute and the instruction based upon the statute directing the jury to consider "whether or not" mitigating facts are present, are consistent with the Eighth and Fourteenth Amendments. (*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

The law "does not require that the jury achieve unanimity as to aggravating circumstances or that it be given burden of proof or standard of

proof instructions for finding the existence of aggravating factors, finding that aggravating factors outweigh mitigating factors, or finding that death is the appropriate penalty." (*Martinez, supra*, 47 Cal.4th at p. 967; *Hamilton, supra*, 45 Cal.4th at p. 960; see also *People v. Welch* (1999) 20 Cal.4th 701, 767, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 81 ["Unlike the determination of guilt, 'the sentencing function is inherently moral and normative, not factual' [citation] and thus 'not susceptible to a burden-of-proof quantification'"].) The United States Supreme Court rulings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], or their progeny, have not affected the foregoing conclusions. (*Martinez, supra*, 47 Cal.4th at p. 967, citing *People v. Bunyard* (2009) 45 Cal.4th 836, 858.) Written findings are also not required safeguards. (*Martinez, supra*, 47 Cal.4th at p. 967; *Hamilton, supra*, 45 Cal.4th at p. 960; *People v. Cook, supra*, 39 Cal.4th at p. 619.) Likewise, "[t]here is no constitutional obligation to instruct the jury to identify which factors are aggravating and which are mitigating, or to instruct the jury to restrict its consideration of evidence in this regard." (*Martinez, supra*, 47 Cal.4th at p. 967; see *Hamilton, supra*, 45 Cal.4th at p. 961.) The trial court also need not instruct the jury that it must unanimously find true any particular aggravating factor. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 299; *People v. Gutierrez* (2009) 45 Cal.4th 789, 829.) Finally, California's use of the death penalty does not violate international law or norms, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*People v. Butler* (2009) 46 Cal.4th 847, 885; *People v. Gutierrez, supra*, 45 Cal.4th at p. 834; *People v. Panah, supra*, 35 Cal.4th at pp. 500-501; see also *People v. Hoyos* (2007) 41

Cal.4th 872, 925 [California's death penalty does not violate international law because international law does not prohibit death sentences rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Mendoza, supra*, 42 Cal.4th at p. 708 [California's death penalty does not violate international norms of humanity and decency]; *People v. Perry, supra*, 38 Cal.4th at p. 322 [death penalty does not violate international law because the penalty is imposed only for the most serious offenders]; *People v. Brown, supra*, 33 Cal.4th at pp. 403-404 [same].)

XXVI. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS AT THE RESTITUTION HEARING

Appellant next contends that the trial court violated her rights at the restitution hearing, because she was not present during the hearing. (AOB 627-635.) Appellant has forfeited this claim, and in any event, her due process rights were not violated.

A. Background

Appellant was sentenced on October 6, 2000. (66RT 10334.) However, the court neglected to impose a restitution fine at that time, even though the abstract of judgment states that appellant was ordered that day to pay a $10,000 restitution fine pursuant to section 1202.4, subdivision (b). (Cf. 66RT 10404 and 22RCT 5629.) However, on October 10, 2000, the trial court ordered appellant to pay $10,000 pursuant to section 1202.4, subdivision (b). Appellant was not present in court that day because she was a miss-out. Counsel for appellant was present in court, however, and asked to be heard on the matter of restitution. He did not ask for a continuance so that appellant could be present at the hearing. (66RT 10404-10405.) The amount, if any, of actual victim restitution was to be determined by the court on December 1, 2000. (66RT 10405; 22RCT 5641.) The trial court asked defense counsel if he wanted to be heard as to

the restitution fund fine. Defense counsel argued that appellant had no assets of her own. (66RT 10406.) The trial court stated that the restitution fund fine was "non-discretionary. The court must impose it absent really exceptional circumstances." Counsel asked the basis of the court's $10,000 amount, as opposed to the $200 minimum. The trial court responded, "The 200 is the minimum, and the 10,000 is the maximum, and that is [the] general way of calculating. It's $200 for every year of confinement. (66RT 10407.) The trial court stated that, having heard counsel argument, the $10,000 fine pursuant to section 1202.4, would stand. (66RT 10408.) Counsel did not object to the hearing being conducted in appellant's absence.

Appellant was not present at the direct victim restitution hearing held on December 1, 2000, but defense counsel was present. (67RT 10410.) Defense counsel objected to the imposition of any direct victim restitution. He argued that "the so-called victims, as listed, were reimbursed by the insurance company." (67RT 10420-104212.) The court ordered appellant to provide restitution, pursuant to section 1202.4, subdivision (f), to the State Board of Control as follows: (1) $10,890 for David Nieves; (2) $450 for Jacqueline Nieves; (3) Christine Nieves, in an amount to be determined; (4) $900 for Fernando Nieves; (5) Charlotte Nieves, in an amount to be determined; (6) Dave Folden, in an amount to be determined; (7) Kristl Folden, $2,914.58; (8) Nikolet Folden, $2,922.58; (9) Rashel Folden, $2,922.58; (10) Jaqlene Folden, $3,580.25. The trial court further ordered that "[a]ny insurance monies received by beneficiaries of life insurance policies have no bearing on the amount that is to be paid to the State Board of Control." (67RT 10423.) Counsel did not object to the hearing being conducted in appellant's absence.

B. Applicable Law

Section 1202.4, subdivision (b) provides that in every case where a person is convicted of a crime, the court shall impose a restitution fine, "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).) "The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony ...." (§ 1202.4, subd. (b)(1).) In setting the fine, the trial court "may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).) Subdivision (d) provides:

> In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar ($200) or one hundred-dollar ($100) minimum, the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.

(§ 1202.4, subd. (d).)

Direct victim restitution is required under section 1202.4, subdivision (f). If the amount of loss cannot be ascertained at the time of sentencing,

the trial court shall determine the amount at another time. (*Ibid.*; see also § 1202.46.) "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).)

> "As a constitutional matter, a criminal defendant accused of a felony has the right to be present at every critical stage of the trial. [Citation.] The right derives from the confrontation clause of the Sixth Amendment to the federal Constitution and the due process clauses of the Fifth and Fourteenth Amendments, and article I, section 15 of the California Constitution." [Citation.] A critical stage of the trial is one in which a defendant's "'absence might frustrate the fairness of the proceedings' [citation] or 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge' [Citation]." [Citation.]

(*People v. Rundle*, *supra*, 43 Cal.4th 76, 177.) In *Rundle*, this Court held that ex parte meetings between the trial court and defense counsel concerning a juror's alleged statement, at which defendant was not present, were not critical stages of the trial for constitutional purposes. (*Id.* at p. 178.) Likewise, "the presence requirement under sections 977 and 1043 is similar to that of the constitutional provisions: under the statutes, a defendant '"'is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him .... [Citation.]" [Citation.]' [Citations.]" (*People v. Rundle, supra,* 43 Cal.4th at pp. 178-179.) This Court in *Rundle* held that the defendant had not "established a violation of the statutes -- his personal presence at the in camera hearings did not bear a reasonable, substantial relation to his opportunity to defend the charges against him." (*Id.* at p. 179.)

"[A] hearing on an amount of restitution ... is part and parcel of the sentencing process." (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.) However, the scope of a defendant's due process rights at a restitution

hearing is "very limited." (*Id.* at p. 86.) "The requirements of due process are met if a defendant is afforded an opportunity to present evidence on his ability to pay." (*People v. Campbell* (2004) 21 Cal.App.4th 825, 831; see also *People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550 ["A defendant must be afforded a reasonable opportunity to be heard on the issue of restitution"].)

C. Trial Counsel's Failure to Object to Appellant's Absence from the Restitution Hearings Forfeits Any Claim, and in Any Event, Her Absence Does Not Compel Reversal

Here, while appellant had a statutory right to be present at the direct victim restitution hearing, the deprivation does not compel reversal of the restitution order. Whether she had a statutory right to be present during the restitution fund hearing, is another question. Without a doubt, the matter should have been decided at the sentencing hearing, for which appellant was present. The trial court, however, neglected to impose the mandatory fine at that time. However, any rights appellant had to be present at either hearing were forfeited by counsel's failure to object to her absence on October 10th and December 1st. (See *People v. Prosser* (2007) 157 Cal.App.4th 682, 689 [objections not raised at a restitution hearing are forfeited]; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396 [same].) Additionally, counsel was present at both hearings, and made appropriate arguments to the court regarding appellant's inability to pay the $10,000 fine, and disputing the payment of direct victim restitution. Appellant does not offer any additional arguments that she could have personally made. Thus, appellant cannot show a due process violation (*People v. Campbell*, *supra*, 21 Cal.App.4th at p. 831; see also *People v. Sandoval*, *supra*, 206 Cal.App.3d at p. 1550) or prejudice due to her absence from the hearings (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Wilen* (2008) 165 Cal.App.4th 270, 290).

Further, appellant's argument that the trial court imposed restitution without making appropriate findings regarding appellant's ability to pay is, likewise, forfeited due to counsel's failure to object on that basis. (See *People v. Prosser, supra*, 157 Cal.App.4th 682, 689; *People v. Whisenand, supra,* 37 Cal.App.4th at pp. 1395-1396.) Moreover, defense counsel argued that appellant did not have any assets of her own with which to pay the restitution fine. (66RT 10406.) Section 1202.4, subdivision (d), requires the trial court to "consider" the "defendant's inability to pay," but the defendant has the burden of demonstrating her inability to pay and "[e]xpress findings by the court as to the factors bearing on the amount of the fine shall not be required." (See also *People v. Avila* (2009) 46 Cal.4th 680, 729.) Here, the court considered, and rejected, appellant's argument without making any express findings, as is proper under the current statute. No remand is required and this claim must be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of death.

Dated: February 25, 2011

Respectfully submitted,

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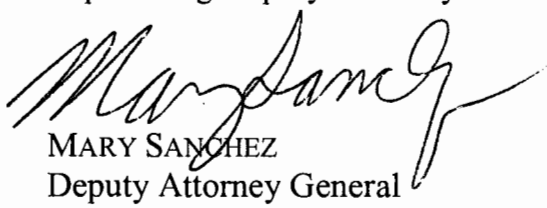

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 130,237 words.

Dated: February 25, 2011

KAMALA D. HARRIS
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DECLARATION OF SERVICE

Case Name: ***People v. Sandi Dawn Nieves***
No.: **S092410**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 25, 2011, I served the attached **Respondent's Brief (Volume 2 of 2)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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To be delivered to
Hon. Ronald S. Coen, Judge

On February 25, 2011, I caused thirteen (13) copies of the **Respondent's Brief** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, California 94102-4797 by **Federal Express Overnight Service**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2011, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

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