IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. SANDI DAWN NIEVES, Appellant.	Case No. S092410 Los Angeles Superior Court No. PA030589-01

ON AUTOMATIC APPEAL FROM A JUDGMENT
AND SENTENCE OF DEATH

Los Angeles County Superior Court

Hon. L. Jeffrey Wiatt, Judge Presiding

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

In this brief, appellant Sandi Nieves replies to contentions of the Attorney General that we believe necessitate a response in order to present the issues fully to this Court. However, Nieves does not reply to arguments that are adequately addressed in the opening brief. The failure to address any particular argument, sub-argument or assertion by the Attorney General, or to repeat any particular point made in the opening brief, is not intended as a concession, abandonment or waiver of an argument. See People v. Hill (1992) 3 Cal.4th 959, 995 n. 3.

The arguments are numbered to correspond to the headings in appellant's opening brief. Defendant is sometimes referred to as "Sandi Nieves," in part to distinguish her from other members of the Nieves family who testified at trial.[1]

Sandi Nieves was entitled to have the jury make a fair and unbiased determination of the crucial mens rea issues at her guilt phase trial and she was entitled to an opportunity to make a meaningful and complete case in mitigation at the penalty phase.

ARGUMENT

III. JUDICIAL MISCONDUCT

A. Introduction

The Supreme Court recently stressed in a simple per curiam opinion that "[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be

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[1] The Attorney General is referred to from time to time as "she," with reference to the Office of the Attorney General. "She" is not meant personally to refer to the author of the respondent's brief.

conducted with dignity and respect." Wellons v. Hall (2010) __U.S.__, 130 S.Ct. 727, 728.

The Attorney General's response to appellant's detailed and comprehensive catalogue of cumulative and pervasive instances of judicial misconduct is to blame Judge Wiatt's conduct, temperament, aggressive disparagement of the defendant and her counsel on Howard Waco, the defense attorney. Although the Attorney General attempts to portray Judge Wiatt as a neutral umpire trying to keep order and call balls and strikes during a long running trial (RB 125), the record shows a very different jurist.

As one commentator recently noted: "One sign of possible trouble is quantitative. When the judge comes to dominate the transcript, something is probably amiss." Siegel, When Judges Want to Get in the Game: Lessons from Another Court, Litigation (A.B.A., Winter 2009) Vol. 35, No. 2 at 2. Practically any page of reporter's transcript of the trial that includes colloquy with Waco—or any other attorney from the Los Angeles County Public Defenders office—shows an intemperate, impatient, sarcastic and biased jurist wielding his authority to disparage the defense, bolster the prosecution, and hamstring defendant's case. Judge Wiatt was without a doubt personally embroiled in this case.

In order to change the subject and deflect attention away from Judge Wiatt, the Attorney General focuses on Howard Waco. But whatever failings Waco may have had as a capital defense attorney did not excuse Judge Wiatt from his obligation to provide and ensure a fair trial that comported with defendant's right to due process of law, the right to present a defense, the right to cross-examine witnesses, and the right to be treated with dignity.

Implicitly recognizing the weakness of her excuses for Judge Wiatt, the Attorney General resorts to hyperbole and exaggeration. With references to two pretrial statements, she accuses Waco of an "undeclared war on the judiciary." RB 126. She accuses Waco of "relentlessly" attempting to inject error into the case. RB 131. She says he "had nothing to lose." RB 73-74. And, she contends the defendant's case was "hopeless," intimating that the trial was essentially unnecessary. RB 75.

Repetitively, the Attorney General lifts out of context a remark Waco made to Judge Wiatt that he "would rather be called an incompetent counsel than have my client get the death penalty." RB 73; 34RT 4690:12-13. She tries to use this snippet as an admission by Waco that he was acting incompetently and he did not care about the formality or niceties of trial practice—that he would sabotage the trial because his defense was hopeless. In fact, when the quote is examined in context, it is not an admission or a statement of defiance. 34RT 8680:17-4691:13. It is a plaintive plea by Waco that the court grant a mistrial due to the judge's animosity toward him. If the court believed Waco was acting incompetently, as Judge Wiatt had repeatedly said on the record, it could have granted a mistrial for that reason.[2] A more appropriate reading of the transcript gives credence to Waco's own mid-trial summation of what an

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[2] The "I'd rather be called incompetent" statement was made by Waco during the course of a lengthy discussion concerning a defense motion for mistrial and a prosecution motion to limit the testimony of defense mental health experts. By Mr. Waco: "If I am not doing the job right and you feel that way, and you certainly suggested it before, then grant a mistrial for incompetence of counsel, you know. I would rather be called an incompetent counsel than have my client get the death penalty." 34RT 4689:9-4690:9.

abusive and biased judge, such as Judge Wiatt, will do to even the most seasoned defense counsel.[3] As

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[3] Mr. Waco: I would, in all due respect -- I guess I have to say this. It seems to me rather obvious that your honor, for whatever reason, is unduly angry at myself, and apparently Miss Towery [deputy public defender who appeared at sanctions hearings] as well. I mean, the evidence of its demeanor this morning and on previous days is extremely hostile, and the vehemence and entire demeanor of the court, I don't know.

The Court: My demeanor is -- there is no vehemence in my demeanor, Mr. Waco. I am stating facts. With regards to what I said about Miss Towery and you misrepresenting to the court; in fact, lying about there not being a discovery order, that's the facts. You do not dispute that. You do not dispute -- nor can you dispute now, now that you've seen the order, now that you've perhaps read the transcript of that date and seen at page 530 et seq that there was a discussion about the order, to which you had no objection.

Mr. Waco: I had no time during the recess to look at such a page, your honor. But the point I am trying to make is simply that the demeanor of the court, let alone the words, is of such a nature that it becomes obvious to me, and it was during the trial when the court banged its gavel in the case right from the beginning.

The Court: Now, Mr. Waco, your comments are stricken. They are not evidence. I have not banged my gavel from the beginning of this case.

Mr. Waco: In the middle of the testimony early on the court banged its gavel when I was examining one of the witnesses, and throughout the trial the court's accusations and total demeanor indicate to me that the court seems to have a personal vendetta against myself, and maybe the entire defense team. And because of that, I reluctantly, respectfully ask for a mistrial, because I no longer feel that the court can look at these motions independently and give an independent evaluation.

The whole tenor of the court's rulings and the way it denies

(continued...)

Waco attempted to defend himself against charges he was purposely injecting error into the case and attempting to use inadmissible hearsay, and after a joint attack from the two prosecutors and lectures from the judge,

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[3](...continued)
the defense an opportunity to respond, whether it be in cross-examining witnesses or in motions being filed, and throughout the entirety of the case seems to be extremely one-sided, and my client is not getting a fair trial.

I mean, that's my basic job. The court is obligated -- it's obliged to be fair and independent to assure Mrs. Nieves a fair trial and due process of law, and if the court looks within its own soul, it seems to me that your feelings towards me personally and the defense team has taken such a tenor, such a flavor, such an attitude that the court can no longer look at these things in a fair and independent way and make its rulings accordingly, instead of having a bias.

. . . .

Mr. Waco: I assume the court is denying my motion for a mistrial?

The Court: It is denying it. And I am denying categorically that I am being unfair to your client, or I have some animosity towards you and your client.

Mr. Waco, I have ruled on objections in this case. Sometimes I have ruled in your favor. Most of the time I have ruled against you because frankly, a lot of your questions are improper. They sought to get before the jury inadmissible evidence.

Some of your -- look, you're not going to be able to profit from your behavior in this courtroom. If you've misbehaved in a way with regard to how you ask questions, or how you deal with discovery, or how you misrepresent certain things to the court and allowed representations to be made by Miss Towery without correcting them, when you do things like that, I mean, the court cannot blind itself to that.

Your motion for mistrial is denied.

34RT 4681:6-4685:5.

defense counsel finally said: "[W]ell, you know, it gets to the point, you know, it's -- it hurts too much to cry, and all you can do is sort of sit here and almost grin and bear it as best one can, and let the chips fall where they may." 34RT 4724:27-4725:2.

While the Attorney General explicitly points to Waco for Judge Wiatt's conduct, she cannot point to Waco for the persistent and pervasive pattern of bias and disparagement that permeates the trial. At best, Judge Wiatt, like any judge, could be permitted a few isolated instances of intemperate behavior and harsh words. But that is not this case. "[E]ven assuming arguendo that the evidence was clear and convincing, disrespect on the part of the public defender cannot serve to justify [a judge's] injudicious response." McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 538.

The reason appellant's opening brief includes over 100 pages on the issue of judicial misconduct is because Judge Wiatt's conduct was not typical of a California judge—and his misconduct was "severe and pervasive." People v. Sturm (2006) 37 Cal.4th 1218, 1230. Although the judge's misconduct was extensive, it was also exceedingly rare. Compare People v. Grier (2007) 41 Cal.4th 555, 614. Waco simply can not convincingly be used as the excuse for Judge Wiatt's misconduct.

For example:

• How can Waco be blamed for Judge Wiatt calling defense expert neuropsychologist Dr. Lorie Humphrey "a liar"? 39RT 5572:3-5.

• How can Waco be blamed for Judge Wiatt calling defense expert Dr. Philip Ney a "liar"? 46RT 7004:26-7006:4; 51RT 7738:14-7739:28.

• How can Waco be blamed for Judge Wiatt insinuating that defense consultant and prospective expert witness, Dr. Nancy-Kaiser Boyd, was also

a liar? 36RT 5012:18-22 ("I don't have a lot of confidence in her declarations under oath.").

• How can Waco be blamed for Judge Wiatt threatening to have Dr. Ney arrested by the Canadian police when he had patient appointments in Victoria, Canada that conflicted with trial scheduling? 42RT 6208:11-20 ("This court proceeding is going to take precedence over his personal life."); 6213:1-6214:6 ("If he doesn't come back and he's ordered back, I'll issue a warrant for his arrest. And I'm sure the Canadian authorities will cooperate.").

• How can Waco be blamed for Judge Wiatt telling the prosecutors they might want to have someone from the Attorney General's office present while Dr. Humphrey testified because she was a perjurer? 39RT 5517:6-17 ("If she wants to get back on the stand, you may want to have somebody from the Office of the Attorney General here. You probably would have a conflict in prosecuting her. Maybe not. But it's clear to me that she's perjured herself.").

• How can Waco be blamed for Judge Wiatt belittlingly telling Dr. Humphrey "call your babysitters and dog sitters and everybody else, and tell them we'll be here as late as it takes"? 39RT 5503:26-5504:1. Or, for the judge threateningly accusing her of lying and then, for good measure, chastising her for walking through the well of the courtroom. 39RT 5558:8-10.

• How can Waco be blamed for Judge Wiatt threatening to have Dr. Gordon Plotkin taken off the Los Angeles County Superior Court expert panel? 53RT 8119 ("Now, if you have some problem with me, or if you have some problem being an expert on our panel, let me know, and I will contact the head of the panel and I will have you taken off. But I don't want

you arguing with the court in front of the jury, and when the jury comes in here I am going to tell them that. Bring in the jury.").

• How can Waco be blamed for Judge Wiatt threatening defense penalty phase witness Carl Hall with contempt of court, five days in jail, up to $1,000 or monetary sanctions of up to $1,500 (62RT 9660:25-27) when Hall was not aware of limitations on his testimony set by the court?

• How can Waco be blamed for Judge Wiatt calling Terri Towery, another Los Angeles County Public Defender and head of its appellate unit, a liar? 34RT 4668:11-17 ("That was a lie. Miss Towery lied to the court saying there was no such order.").

• How can Waco be blamed for Judge Wiatt unnecessarily ordering the defendant to look at pictures of her dead children to the point that she almost vomited in the courtroom because the judge would not allow her to compose herself? 35RT 4933:20-4934:2.

• How can Waco be blamed for Judge Wiatt's meeting with the prosecutors and two prosecution experts ex parte, allowing the experts to address the judge ex parte, giving the prosecution legal advice, and never telling the defense that the ex parte meeting occurred? 36RT 5017-5026; 39RT 5497-5500.

• How can Waco be blamed for Judge Wiatt's bias and disparagement of the entire Los Angeles County Public Defender's office[4] and the judge's observation that he wasn't sure Waco even had "a cause"?[5]

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[4] "It may seem strange to your office, Mr. Waco, but maybe following the law might seem strange to your office, because that's the only way you can explain it." 65RT 10407:5-8.

[5] "I think you are not being helpful to your cause, if you have a

(continued...)

• How can Waco be blamed for Judge Wiatt doing internet research on Dr. Ney and doing internet research to help the prosecution undermine Dr. Plotkin? 41RT 5846:1-5848:25; 41RT 5873:13-18; 52RT 8008:13-8009:19.

• How can Waco be blamed for Judge Wiatt allowing the prosecution to argue with defense witnesses, to lecture defense witnesses, and to make tandem objections, while condemning the defense continually when it tried to explain the basis for some of its objections? See AOB section III.C.5.

• How can Waco be blamed for Judge Wiatt's statement that there was not a shred of evidence of brain abnormality (57RT 8967-70, 58RT 9077-78, 83), when tests showed otherwise?[6]

• How can Waco be blamed for Judge Wiatt turning to defense expert Dr. Robert Suiter in front of the jury during the penalty phase and saying to Suiter "you would probably want to change your opinion made back in 1997," regarding child custody, "wouldn't you, if you could do it?"[7]

The only answer provided by the Attorney General is the broad insinuation that the witnesses and the defendant took their clues from Waco,

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[5](...continued)
cause." 22RT 2581:16-18.

[6] See 31RT 4212:17-20 (Dr. Gold testified, "History suggested some brain disorder. PET scan confirmed it. Neurological testing confirmed it, and those three pieces fit together very well." See also 33RT 4453:3-4454:9 (Dr. Mandelkern said the PET scan showed "significant abnormalities" in Nieves's brain function, which were "quite significant, quite severe, unambiguous."), 4456:16 ("This is far from a normal scan."), 4573:8-23 (Dr. Gold's testimony); Exh. EE at 3-4 (Dr. Gold's report); 37RT 5148:1-11, 5149:2-16 (Dr. Humphrey's testimony).

[7] See 62RT 9786:23-9787:6; AOB Part XXI.

that the judge's conduct and comments should be overlooked because Waco did not properly make contemporaneous objections, and that this was a long trial.[8]

Waco was challenging Judge Wiatt throughout the trial. But he was required to do so in order to assure that he would preserve defendant's claim of judicial misconduct and to protect his client's rights. "As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on that ground at trial." Sturm, 37 Cal.4th at 1236; see also People v. Melton (1988) 44 Cal.3d 713, 753. A rule of appellate review that requires an objection to the trial court's conduct under most circumstances invites antagonism between court and counsel.

Indeed, the Attorney General's brief in this case seizes every opportunity to catch and point out any instance in which Waco failed to challenge Judge Wiatt, claiming that Waco forfeited defendant's claims of judicial misconduct when he did not antagonize Judge Wiatt by objecting. "Dealing with a biased judge in trial is as difficult a challenge as can be faced by defense counsel. A trial before a biased judge precludes 'that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of the court, counsel and jury.'" Sevilla, Protecting the Client, the Case

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[8] Although the court of appeal's action is not controlling, the Attorney General fails to address or otherwise explain why the court issued Palma notices mid-trial indicating an intention to reverse without oral argument each of the sanctions imposed by Judge Wiatt against Waco. The court of appeal could have simply denied the interlocutory writ petitions, but instead took each of them seriously enough that it issued the Palma notices. Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171. See AOB 78-84, nn. 26, 29, 30, 32, 34, 35, 37.

and Yourself from an Unruly Jurist, The Champion (Aug. 28, 2004) at 32, quoting Offutt v. United States (1954) 348 U.S. 11, 17.

To Waco's credit, he sufficiently preserved defendant's objections and put Judge Wiatt on notice. However, the Attorney General has cast Waco as the villain for doing his job.

The Attorney General suggests that finding Judge Wiatt's conduct severe and pervasive would grant a "green light" to defense attorneys "in capital cases to wreak havoc in the courtroom." RB 75. Surely, this Court's 2006 decision in Sturm did not have such an effect on defense counsel in capital cases. Instead, Sturm and this case can serve to guard against biased, intemperate, and impatient judges who cannot control themselves or the proceedings when faced with emotionally charged facts and zealous advocates. Judge Wiatt was displaying "prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal cases." United States v. Marzano (2nd Cir. 1945) 149 F.2d 923 (Hand, L.).

The behavior shown by the record in this case is extreme by any standard. Reversal is therefore very unlikely to have any effect on trial practice in capital cases, but it will assure the defendant a fair trial. See Caperton v. A.T. Massey Coal Co. (2009) 556 U.S. 868, 887-888 (prior standards set in extreme cases did not open the floodgates to judicial recusal motions).

B. There is No Invited Error

The Attorney General devotes many pages in an attempt to show "Judge Wiatt was not the problem here." RB 75. She claims the "contentious atmosphere during trial" was "precipitated by Mr. Waco's

relentless gamesmanship." RB 74. Her theme is a qualified one: that Waco's behavior "seemed designed to inject error into this case." Id. (emphasis added). She uses the term "inject error" very loosely.

The invited error doctrine is generally applied as a form of estoppel to prevent an appellant from taking a position in the trial court and then challenging it on appeal. See People v. Tate (2010) 49 Cal.4th 635, 694; People v. Wickersham (1982) 32 Cal.3d 307, 330, disapproved on another ground by People v. Barton (1995) 12 Cal.4th 186, 201 ("The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest."). Here, the doctrine of invited error is inapplicable: Waco did not cause Judge Wiatt to loose control of himself or cause Judge Wiatt to be biased against the defendant and defense witnesses.[9]

C. The Attorney General's Recitation of "Background Events" Is Not Legal Argument

The Attorney General's recitation of the "background events," which goes on for numerous pages (RB 75-121), is not argument. It is a recitation of her characterization of Howard Waco's conduct versus Judge Wiatt's conduct. To the extent she implies that Judge Wiatt made correct rulings in every instance cited or that his conduct was justified by statute or other substantive law, she has waived the points that are not supported by legal

[9] The Respondent's Brief cites to several uncertified transcripts to make the point that contentiousness started before Judge Wiatt was involved. RB 75. The incidents and quotes are taken from volumes of the clerk's transcript that were not part of the certified record. The volumes and page numbers cited, that is 7CT 2086-2088, 2090, and 9CT 2668, do not match the record as certified and filed in this Court. The certified transcript is cited by both parties as RCT. See RB 1, n. 2.

authority. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.[citations.]' (9 Witkin, Cal. Procedure, (3d ed. 1985) Appeal, § 479, p. 469... .)" People v. Hovarter (2008) 44 Cal.4th 983, 1029 (rejecting international law challenge to death penalty for inadequate briefing), citing People v. Stanley (1995) 10 Cal.4th 764, 793 (it is not the Court's role to find a theory supportive of a party's position in the statement of facts when there is no argument). Further, it is difficult to respond to almost 50 pages of briefing when it is unclear that respondent is doing anything more than giving her gloss on the proceedings.

D. Howard Waco Did Not Cause Judge Wiatt's Misconduct

Although the Attorney General has attempted to characterize the proceedings with her gloss and advanced a wholesale attack on Howard Waco, we will address some of the points she makes in order to show the context of examples she has relied on.

When the Attorney General contends "Judge Wiatt came into this case with the highest regard for Mr. Waco," she fails to capture the acerbic context of the quote she lifts from the record. RB 75-76. On March 2, 2000, Judge Wiatt was speaking to Mr. Barshop, one of the prosecutors, and to Mr. Waco. They were discussing trial scheduling and the length of the trial. The quote used by the Attorney General is taken from the portion of the colloquy with the lawyers in which Judge Wiatt is chiding them as superb lawyers and then adding "I am sure you are not going to want to disappoint the jury." 7RT 247:21-22. In other words, Judge Wiatt was hardly praising Howard Waco. The judge was simply saying what he would tell the jury for the purpose of holding the attorneys to a high standard.

The Attorney General faults Waco for filing "many motions for mistrial." RB 77. Had Waco not filed these motions, the Attorney General would now be contending that Waco had acquiesced and forfeited defendant's rights.

The first motion for mistrial cited (RB 77) was made during a respectful discussion among the judge, the two prosecutors, and Waco, regarding whether a particular alternate juror should have been dismissed for cause because she had made up her mind. 17RT 1657:25-1661:3. See 17RT 1657:25-1658:5 (Mr. Waco: "My biggest concern is I guess I would prefer, if I have a choice -- wasn't it the last alternate, the one that said that she believed that my client was guilty because of what she read? Wasn't that the last alternate? The Court: Yes. Mr. Waco: So I would -- I am trying to avoid her at all costs.").

"A juror's prejudgment of the case without hearing the evidence constitutes good cause to doubt his or her ability to perform the juror's duty and justifies discharge from the jury." People v. Clark (2011) 52 Cal.4th 856, 971. A trial court is obligated to grant a mistrial when there is a chance a defendant's right to fair trial has been or will be irreparably damaged. See People v. Bolden (2002) 29 Cal.4th 515, 555. A defense attorney has an obligation to protect his client's rights to a fair trial. In California, an attorney "has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling." Gallagher v. Municipal Court (1948) 31 Cal.2d 784, 796. "A fair trial is the product of the contributions of the judge and of all participating attorneys." Cooper v. Superior Court (1961) 55 Cal.2d 291, 301.

There was nothing wrong with Waco moving for a mistrial on the ground the alternate juror should have been excused. The alternate was

about to take a seat on the jury. The trial court and counsel had agreed to excuse Juror No. 4 for medical reasons, and had drawn the previously challenged alternate juror's name to replace her. That is when Waco made the motion–because he was about to have a biased juror on the panel. Ultimately, Juror 4 was not replaced—her condition had improved—but at the time of the mistrial motion, Waco had reason to believe his client was about to be denied her right to an impartial jury. 17RT 1655-1662.

The next mistrial motion cited was made after the district attorney asked a prosecution medical examiner whether the victim children suffered pain. RB 77; 17RT 1806:1-19, 18RT 1826:18-1828:3. Waco challenged the statement as speculative, but also moved in the alternative to strike the medical examiner's statement. 18RT 1827:1-5. Although the objection was made belatedly, there is certainly nothing wrong with trying.

The Attorney General complains because Waco made a third motion for mistrial, this time on the ground the prosecution failed to turn over the medical examiner's notes prior to his testimony as required by the mutual discovery statute, Pen. Code § 1054.3. RB 77. See 19RT 1991:22-1996:5. Waco explained the grounds, cited two cases, and made the motion in the alternative to a motion to strike the medical examiner's testimony. Again, there is nothing wrong with Waco attempting to protect his client and attempting to hold the prosecution to the same rigorous standard of disclosure that was being used against the defense.

Next, the Attorney General contends Waco should be faulted because he asked the 911 dispatcher, Katherine Castorino, to explain what she meant when she said Sandi Nieves's call to 911 sounded like a "5150." RB 77; 16RT 1486:27-1489:5. Judge Wiatt shut down the cross-examination. Here is what was said. Waco was not disrespectful in any way:

> The Court: This is a 911 operator. You're not going to be able to get into her understanding of the law or her opinion on your client's state of mind, and that's where you're going with this. She was called for the purpose of authenticating a tape.
>
> Mr. Waco: That's fine. But I can cross-examine her with regards to that tape and what she said on that tape and what she felt on that -- with regards to that tape.
>
> The Court: No.
>
> Mr. Waco: That is cross-examination.
>
> The Court: No, that's not relevant. Her interpretation of the tape has no relevance in this case. She is not an expert that can get into that.
>
> Mr. Waco: Her interpretation of the call and what she did with the call and why she reacted to the call, that's what I am asking her about.
>
> The Court: It's not relevant as to whether she turned it over to the paramedics so they could dispatch somebody.

16RT 1489:7-1490:1.

Whether Waco was right or wrong on the merits, he certainly can not be faulted for doing his job and respectfully arguing defendant's position to the court when the 911 tape was introduced into evidence. Exh. 1-A (tape recording), showed Castorino said she was "not sure what she's got there, sounds like she might be a 5150." Exh. 1-B at 5:23-24 (transcript).[10] Waco did not deserve to have his cross-examination completely shut down because he tried to clarify what Castorino meant when she said "5150." 16RT 1491:20-1492:2, 1493:8-14. Inexplicably, Judge Wiatt then allowed the prosecutor to use Castorino to attack Waco in the jury's presence, despite the irrelevancy of the prosecutor's questions.

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[10] This referred to Welfare & Institutions Code § 5150, the section covering persons who may be a threat to themselves or others.

Q. [By the prosecutor] And when you were contacted by counsel, did you feel harassed by him?

A. Yes, I did.

Mr. Waco: Objection to attacking counsel in this particular manner, your honor.

The Court: It's overruled. Can you use the podium, Mr. Barshop?

Mr. Barshop: Yes.

Q. Why did you feel harassed?

Mr. Waco: What relevancy does it have to go with the charges against my client?

The Court: No speaking objections.

Mr. Waco: I object, your honor.

The Court: On what ground?

Mr. Waco: It has nothing to do with relevancy to this case.

The Court: Your objection is overruled.

16RT 1492:12-28.

The Attorney General next states that Waco was admonished outside the presence of the jury for asking witness Benjamin Dibene argumentative questions. RB 78. In fact, Waco was also admonished in the presence of the jury with the judge taking over questioning and asking essentially the same question in an argumentative way, without really expecting an answer. 16RT 1695:12-1696:3.[11]

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[11] Q. [By Mr. Waco]. And so if someone were parking their car for the evening at 9:00, 10:00, 11:00, 12:00 o'clock, you wouldn't know where they were parked. And if they used the car in the morning to bring their kids to school, you wouldn't see where they drove it off from, because you would not be there on any given date or time; is (continued...)

With regard to questioning of Greg Lewison (RB 78), Judge Wiatt sustained a series of objections. Whether the rulings were or were not within the court's discretion does not matter. What does matter is Judge Wiatt's response when Waco asked: "Is it the manner in which I'm asking the question? I'm trying to abide by the court's rule." 17RT 1712:26-27. The judge—who had previously proclaimed a high standard for propriety in the courtroom and banned speaking objections—responded by ridiculing and disparaging Waco in the jury's presence:

> It's a ridiculous question, Mr. Waco. If he's 43 miles away in Inglewood, there's no way he can see what is going on in his neighborhood. Maybe in comic books or the movies or something, but not in the real world.

17RT 1713:1-4.

The Attorney General claims Waco "attempted to show David [Nieves] a copy of a calendar, without first showing the document to the prosecution." RB 81. The claim appears to be that Waco deserved the

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[11](...continued)
that a correct statement?

Mr. Barshop: It's been asked and answered.

The Court: Sustained. And it's really argument. He can't see what he can't see. I mean, I think it's clear. Let me ask this question, and tell me if I'm wrong. You're not at your home outside looking at traffic 24 hours a day, 365 days a year; is that correct?

The Witness: That's correct, your honor.

The Court: When you're there and look you will see things, and when you're not there you will not see things?

The Witness: That's correct, your honor.

The Court: I think that's all that really needs to be said, Mr. Waco.

admonishment, "You don't listen do you?" Id. In proper context the transcript shows that the district attorney gave a copy of the calender to Waco. 21RT 2451:18-19. After the judge told Waco to show it to the prosecutors, Waco answered, "I understand. I believe the district attorney has it." 21RT 2451:23-24. Judge Wiatt immediately said, "don't talk, except to ask a question." 21RT 2451:25-26. Waco then asked it he could use a copy, since the district attorney had the original. This was followed by Judge Wiatt's "you don't listen" comment. 21RT 2452:2-8. At most, Waco committed a good faith minor transgression that hardly called for belittlement in the presence of the jury.

Whether Sandi Nieves had backed her van up to the garage door in order to block it was an issue going to intent. David Nieves was the prosecution's star witness. Nonetheless, as the Attorney General points out (RB 82), Judge Wiatt sustained his own objection out of sheer impatience when Waco persisted in cross-examining David about which side of the driveway David would usually exit the van after driving with his mother. 21RT 2528:26-2529:2. Later, as the Attorney General points out (RB 82), the jury was admonished that what Waco and the other lawyers said was not evidence. 21RT 2543:1-6. Here is what prompted this admonition: Waco courteously said, "The district attorney has seen this before. I would like to approach the witness." Id.

The Attorney General correctly recognizes that Judge Wiatt accused Waco of lying when Waco argued outside the jury's presence that he should be allowed to challenge Fernando Nieves's credibility by asking Fernando about fraudulent insurance documents and theft of some tools. RB 83; 23RT 2860:15-2862:4. See 23RT 2848:1-15. What the Attorney General left out of her statement of "backgound" is Judge Wiatt's gratuitous

disparagement and antagonistic insult to Waco: "I don't believe they're asked in good faith. I think you're lying to me. You don't know the difference, that's what I think." 23RT 2862:8-10.

The questions were arguably proper. "Evidence bearing on the issue of credibility of witnesses comes within the basic rule that all relevant evidence is admissible, except as specifically provided by statute." Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1357. Evidence of prior misconduct is permissible to support or attack the credibility of a witness. People v. Kennedy (2005) 36 Cal.4th 595, 620, disapproved on other grounds by People v. Williams (2010) 49 Cal.4th 405; Evid. Code. § 1101, subd. (c). "Misconduct involving moral turpitude may suggest a willingness to lie." People v. Wheeler (1992) 4 Cal.4th 284, 295.

Waco's attempt to cross examine Fernando Nieves regarding dishonesty and fraudulent conduct was certainly an appropriate effort inasmuch as the prosecution used Fernando's testimony to claim Sandi Nieves misled her landlord by misrepresenting her relationship with Fernando and then used that argument to claim she was a manipulator. See 54RT 8442:6-25 (prosecution's guilt phase closing); 55RT 5538:14-5539:28 (defense guilt phase closing); 56RT 8762:2-16 (prosecution guilt phase rebuttal closing).

The Attorney General points out that Judge Wiatt ruled Waco had asked witness Wesley Grose a question in violation of an Evidence Code § 402 ruling. RB 85. While this is true, it is important to point out that the judge gratuitously told the jury Waco violated an order even though the prosecution did not object on that ground. See 26RT 3378:15-22 ("By Mr. Waco: Has it been your experience in dealing with the sheriff's department that their habit and custom is to ask you for your honest opinion about

things? Mr. Barshop: Objection. It's irrelevant. The Court: Sustained. And it's in violation of the court's order at the 402 hearing. So get onto something else, Mr. Waco.").

In reciting the fact that Judge Wiatt struck comments by Waco, the Attorney General points out Judge Wiatt's hyper vigilance. For example, on page 86 of respondent's brief, the Attorney General says, "Judge Wiatt struck more comments by Mr. Waco in the presence of the jury. (26RT 3478)." Here is what Waco said:

> Mr. Waco: I would like to approach to see if he has the same document that I provided. That's the same one.
>
> The Court: What you just said will be stricken, Mr. Waco.

26RT 3478:9-13.

The Attorney General refers to Judge Wiatt calling Terri Towery a liar. Towery was the public defender who represented Waco during the sanctions hearings. RB 90. The respondent's brief says Judge Wiatt accused Towery of lying about the existence of a discovery order. Id. The Attorney General notably does not provide any citation to an order. Here is what Ms. Towery actually said to Judge Wiatt in the course of the sanctions hearing where Judge Wiatt claims she lied.

> Ms. Towery: In that event, I would like to be heard briefly with respect to the sanctions order that the court has indicated that it will be imposing under Code of Civil Procedure section 177.5.
>
> First, that statute requires a violation of a lawful court order by its terms.
>
> It's unclear that this court has issued a discovery order in this case which Mr. Waco is now being sanctioned for violating.
>
> The statute also requires notice and an opportunity to be heard. And I would ask that the court provide notice of the lawful

court order that is the basis for the sanctions order in this case.

The Court: Anything else?

Ms. Towery: Well, once the court provides notice of that lawful order, then we obviously would like to have an opportunity to review it and make further arguments.

It's difficult to argue in a vacuum when there doesn't seem to be an order that Mr. Waco has violated.

The Court: So your position is Mr. Waco is unaware of his obligations regarding discovery?

Ms. Towery: No, your honor. My position is the statute requires by its terms a violation of a lawful court order. And that's what the statute says.

The Court: Perhaps I'll just proceed by way of contempt then, because that's one of the sanctions in the Penal Code. Would you prefer I proceed in that manner?

Ms. Towery: No, I would not. But I don't think we're here today to discuss contempt. The court indicated it was not going to impose that sanction, and indicated its intention to proceed by way of 177.5.

I'm present and prepared to argue that issue. And that's my first argument, is that there is no lawful court order that Mr. Waco is accused of violating that I have been able to locate.

Perhaps the court is aware of one.

The Court: The lawful court order is in the Penal Code. That it's Mr. Waco's obligation, which is an affirmative obligation, to provide discovery.

31RT 4158:3-4159:17 (emphasis added).[12] An order was not attached to any order to show cause. Ms. Towery carefully said she was not able to locate

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[12] The minute orders cited in respondent's brief (RB 90) show that Waco was given a court order three days later. 18RCT 4606, 4636; 34RT 4644:17-27.

an order and she asked the court if it was aware of one. Judge Wiatt, substituted "the Penal Code" for an order, and then used this as the basis for repeatedly referring to deputy public defender, Terri Towery, as a "liar."

Although the respondent's brief says Diana Barrows, the doctor who performed the abortion, contacted the prosecution to complain about Waco pressuring her (RB 91), the transcript shows that this was hearsay through Ms. Silverman, one of the prosecutors. 35RT 4765:23-4767:4. Since there was no hearing on this hearsay statement from Ms. Silverman and Dr. Barrows was not asked about Waco's contact with her when she testified at trial, using Barrows's contacting the prosecution as "context" is a one-sided view of what actually occurred, if anything.

The Attorney General points out that Judge Wiatt warned Dr. Humphrey for mentioning the PET scan, which was subject to an in limine order. RB 92. However, what is cited is an innocuous interchange brought on by Ms. Silverman after Humphrey explicitly testified she could not talk about Dr. Gold's work. 37RT 5230:16-5231:20.[13] In fact, Humphrey's fleeting mention of the PET scan after being asked directly about Dr. Gold's report was brought out on cross-examination by Ms. Silverman. Further, the remark directly answered Silverman's question. It was also so innocuous that it would have gone past the jury if Judge Wiatt had not immediately sent the jury out of the courtroom and called attention to the nominal mention of the PET scan by admonishing the jurors.

> Q. By Ms. Silverman: Did you review Dr. Gold's report in this case?
>
> A. I've been told the jury can't hear about Dr. Gold's work.

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[13] See Exh. EE; 10RCT 2257 (Confidential), 2597 (Confidential).

Q. Well, I am asking you, did you notice that he found no problems with verbal fluency?

A. Dr. Gold didn't measure verbal fluency.

Q. Okay.

A. Are we talking about Michael Gold, the neurologist, that did the neuro imaging?

Q. Yes.

A. He didn't measure verbal fluency.

Q. Okay.

A. That would be the neuropsychologist that gives those tests.

Q. Okay.

A. He did the pet scan.

The Court: All right. I am going to ask the jurors to go back into the jury deliberating room. You are not to form or express any opinion about the case. Don't speak to anyone. The entire last answer is stricken. You will not consider it for any purpose.

37RT 5230:25-5231:20. When, as a result, Waco tried to defend Dr. Humphrey from, in Judge Wiatt's words, "contempt of court, a violation of a lawful court order, or monetary sanctions," Waco was rudely told, "Mr. Waco, you don't have any standing in this proceeding at this point." 37RT 5232:8-11. See 37RT 5233:8-19.

The Attorney General says Dr. Humphrey "conceded she had withheld information." RB 92. "Withheld" implies an intentional act. In fact, Humphrey denied an intention to deceive, and said "it didn't occur to me that part of that [the information upon which she based her opinion] were all of the norms. I've never seen that done." 38RT 5294:1-5, 21-23. When prosecutor Silverman pressed the point, by asking the argumentative

question, "Do you understand really the seriousness of this case–," Waco was fined $1,050 for making a speaking objection. He had objected to "lecturing by the district attorney." 38RT 5295:7-19; 5296:5-5297:13.

Next, as the Attorney General recognizes, Judge Wiatt interrupted Humphrey's testimony and "wanted to excuse Dr. Humphrey and have Dr. Brook [the prosecution's rebuttal expert] testify out of order." RB 93. And, as the Attorney General also admits, the judge told Waco he would limit the cross-examination of Brook. Id.; 38RT 5433:8-5434:12. Then when Judge Wiatt introduced Brook to the jury, the judge said Brook is "the expert that was appointed by the court at the request of the prosecution." 38RT 5364:12-14. This gratuitous introduction further advanced the impression that the court and prosecution were working together.[14]

As Waco was cross-examining Brook, he was attempting to bring out the absolutely critical point that whatever mistake Dr. Humphrey had made in analyzing the data was consequentially immaterial.[15] See 40RT 5612:3-5613:9. But the judge broke up the cross-examination and, as the Attorney General points out, Judge Wiatt imposed sanctions in the jury's presence, further defeating any effect the cross-examination might have had. Although the Attorney General glosses over this incident (RB 94), here is what occurred:

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[14] The Attorney General concedes Judge Wiatt then met with the prosecutors and Dr. Hirsch [the prosecution's expert consultant] "in camera ex parte," without notifying the defense. RB 93; 39RT 5497:2-14.

[15] The effect of Dr. Humphrey's use of older norms is debatable at best. In fact, if she had relied on the correct norms, they would have shown Sandi Nieves to be even more abnormal than Dr. Humphrey's results disclosed. 39RT 5572:23-5573:1. See 40RT 5609:4-27, 5611:18-25 (Dr. Brook testifies that norms in the manual would have led to the same result).

Q. [By Mr. Waco]: You had indicated that the -- Dr. Humphrey, you have no problem with her score of six; right? She had six out of 15, versus six out of 16?

A: [By Dr. Brook]: I believe so.

Q. And I would like you, with the court's permission, to put down "six out of 15, 6/15" on that piece of paper there.

Ms. Silverman: Objection. Relevance.

The Court: Sustained.

By Mr. Waco:

Q. If Dr. Humphrey had made -- say put down the maximum score of, let's say, even a lower score than 15. Let's say six out of 12, it would have made Mrs. Nieves look like she got half of them right?

A. It would be inaccurate information.

Q. But it would make it look like she got half of them right; is that correct, sir?

A. You're talking about impression management, and that's not what psychological testing is about. Psychological testing is about accuracy.

Mr. Waco: I'm asking the witness to answer the question.

The Court: Mr. Waco, you violated the court's rule about no speaking objections. I am imposing monetary sanctions against you.

40RT 5614:17-5615:13.

This interchange resulted in monetary sanctions of $1,100 payable within four days. 40RT 5617:18-20.

The Attorney General next describes interactions with Dr. Phillip Ney, the physician defense expert. As the Attorney General recognizes, the judge told the jury that "there would be a break so that Judge Wiatt could determine whether the defense had committed a discovery violation." RB

95. See 41RT 5866:17-5868:14. At the urging of the district attorney, instead of waiting to determine all the facts, the judge told the jurors the defense might have been at fault for inconveniencing them. 41RT 5868:1-10. Again, the judge brought a procedural issue that was irrelevant to defendant's guilt or innocence directly before the jury. At least for purposes of maintaining jury impartiality, the court could have presented the circumstances of delay in a manner that did not denigrate the defendant. Later in a subsequent hearing an angry Judge Wiatt tried to excuse his conduct by saying to John Brock, an attorney in the Public Defender's office, that he "did not hear an objection" at the time. 45RT 6839:12-13, 6841:17-28. See RB 101.

The Attorney General points out that Judge Wiatt imposed sanctions because Waco made a gratuitous comment during cross-examination of Dr. Diana Barrows, the physician who had performed the abortion. RB 101. Here is what caused Judge Wiatt to truncate the cross-examination, dismiss the jury, and impose sanctions:

> Q. [By Mr. Waco] : Well, I assume you're doing it to get paid, though, aren't you?
>
> A. That's one of my motivations. That's not the only motivation.
>
> Q. I'm not saying anything is wrong with the motivation.
>
> The Court: I am going to ask the jury to go back into the jury room.

46RT 6887:12-17.[16]

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[16] Waco tried to explain that his statement was meant as a lead in to a question.

(continued...)

The Attorney General notes that "Mr. Waco's request for a hearing and to be represented by counsel was granted." RB 101. She fails to note, however, that the hearing was set for 8:30 a.m. the next morning. 46RT 6889:26-6890:18 ("We'll have the hearing tomorrow morning, and we'll have the hearing at 8:30. [¶] If you want Mr. Brock, who is in the audience, or Mr. Fisher, who is in the audience, or the other several people in the courtroom to make a phone call and have your attorney here, they can do it now.").

By this point, as both the opening brief and respondent's brief make clear, Waco was so beaten down by the court that he was losing his composure and was clearly stumbling, an effect that undermined his representation. For example, Waco was admonished in the jury's presence for shaking his head and laughing, although he denied doing so. RB 104; 48RT 7316:7-17. (Ms. Silverman, the prosecutor, however, was not admonished when she aligned herself with the judge and made her own

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[16](...continued)

> Mr. Waco: I respectfully -- your honor, I tried to give a statement there that was part of an intended question until I got broken into, as such. And I wanted to tell the witness in a statement -- in a question form "do you understand that wasn't -- that my question to you had nothing to do with challenging your motivation." So it was going to be in the nature of a question. And I led into it by making the statement, and I was going to follow it by a more definitive question. But it was not a chastisement of the witness in any way. It was not intended to be a gratuitous statement. It was intended to be part of an ongoing question series, and I was going to follow it up. It was not intended to make a gratuitous comment.

46RT 6889:3-18.

gratuitous comment. 48RT 7316:11.)

But Waco was not the only one to lose his composure due to the pervasive atmosphere in the courtroom. Silverman was later accused of laughing at Waco. 48RT 7350:18-22. Although she admitted to it, Judge Wiatt claimed not to have heard her. 48RT 7351:1-7353:6 (Ms. Silverman: "Well, I did think it was humorous that the doctor indicated he thought that's what counsel was talking about when the court has indicated to Mr. Waco several times now what the correct terminology is, and counsel still refuses to use it."). See also RB 109, 110; 53RT 8058:11-12 (By Mr. Barshop: "I admit, I laughed yesterday in open court, but the situation was completely different."), 8059:1-4 (By the Court to Mr. Waco: "[Y]our representations that Mr. Barshop was laughing in a situation that was akin to yours is false. It didn't happen. I didn't see it."), 8118:27-8119:6 (Mr. Waco: "And I also would like to state for the record that throughout the entire examination of Dr. Plotkin, Miss Silverman has been smirking and nodding her head, and making all sorts of faces in front of the jury. The court: That's not true. Not true.").

The cross-accusations of "tit for tat" set the stage for Judge Wiatt to turn on Waco and blame him for the deterioration of the trial. 53RT 8059:5-8061:23; RB 109. See 53RT 8060:18-23 ("Mr. Waco: Well, I respect Mr. Barshop acknowledging doing the laughing as such, and I appreciate his integrity with regards to that. But I--no, with all due respect, I object to the court's characterization of my conduct during this trial. This trial has been very difficult.").

As the opening and respondent's briefs show, the penalty phase was no better. By that time, Sandi Nieves was refusing to leave her cell to come to court. Wielding the power at his command, Judge Wiatt ordered that the

Sheriff's Department use, "[a]ll necessary means to bring her to court forthwith, including a cell extraction." 59RT 9047:5-7; RT 113.

The judge continued to disparage, admonish, and limit defense counsel, culminating in the judge's accusation that Waco was "acting like a clown." See RB 111-118; 61RT 9469:2. And, as the Attorney General notes, the judge further denigrated Dr. Ney, claiming Ney "clearly lied."RB 113. See also 58RT 9080:5-7, 23-28 (By the Court: "His demeanor while testifying was atrocious. He has such a clear bias, interest, and other motive in this case that his testimony is totally lacking in credibility. Mr. Waco: May I respond? The Court: There's no need for you to respond.").

What the respondent's brief does show in its recitation of "backgound" (RB 75) is that for reasons that will likely never be known, Judge Wiatt saw the defendant, defense witnesses, defense experts, and the defendant's lawyer, Howard Waco, and his lawyer, Terri Towery, as conspirators. But, as we will demonstrate in the next section, it is the court that is obligated to provide a fair trial. Shortcomings and judicial misconduct cannot be blamed on the defendant, her attorneys, witnesses, and experts.

E. The Judge Committed Misconduct

1. Internet Searches

The Attorney General cites a single case out of the Second Circuit for the proposition that internet searches for evidence by the judge during trial are permissible. RB 124. See United States v. Bari (2d Cir. 2010) 599 F.3d 176, 181.

Bari is far different than this case. In this case, Judge Wiatt looked up information about Dr. Ney, gave it to the prosecution, and personally cross-examined Ney on it. 41RT 5846:1-5848:25, 5873:13-18. He also

looked up information in connection with Dr. Plotkin's testimony during the defense guilt phase rebuttal. 52RT 8008:13-8009:19.

Bari holds that a federal defendant's supervised release revocation hearing (similar to California parole) was not prejudicially compromised when a judge did a "google" search to confirm the judge's intuition about a fact not subject to reasonable dispute. Further, as a matter of law, Bari applied "relaxed evidentiary constraints" to the revocation proceeding, finding that such proceedings are not subject to ordinary rules of evidence. Id. at 179. The Second Circuit held that an internet search was permissible to verify facts subject to judicial notice. Id. at 180. This is a far cry from what Judge Wiatt did.

Judge Wiatt looked for evidence regarding particular witnesses, used the evidence in an adversarial way, and brought that evidence into the trial. More specifically, he did so as to particular defense witnesses. There is nothing in the record suggesting that Judge Wiatt did research as to any prosecution witness. As Judge Learned Hand once wrote: "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." Marzano, 149 F.2d at 926.

The Attorney General cannot say that Judge Wiatt's conduct and cross-examination of defendant's experts failed to alter or influence the prosecution's tactics or decisions. Bari does not support the Attorney General's position that the internet searches were inconsequential and not misconduct.

2. The Judge Was Biased

The Attorney General claims Howard Waco had an "undeclared war on the judiciary" and argues Judge Wiatt was merely "trying to control the proceedings." RB 125-126. No doubt Judge Wiatt was trying to control the

proceedings. The issue is how he went about it and the degree to which he injected his own bias into the process.

The Attorney General relies, in part, on People v. Chong (1999) 76 Cal.App.4th 232, contending Judge Wiatt was well within his prerogatives to control the proceedings as he did. Reliance on Chong is mistaken inasmuch as Maureen Kallins, the defense attorney in the Chong case, was admonished by the trial judge repeatedly for unprofessional conduct, disrespectful attitude toward the judge and opposing counsel, disobedience to court rulings, inappropriate comments in front of the jury and repeated interruptions of proceedings. Id. at 235. Kallins was "rude,""boisterous," and "disrespectful." Id. at 237.

The court of appeal noted the judge was the one trying to maintain a modicum of civility. Id. at 236. But Kallins accused the judge of "being a 'bald-face li[ar].'" Id. at 237. The court of appeal noted the trial court's comments "did not discredit the defense theory or create an impression that the court was allying itself with the prosecution." Id. at 244. The court of appeal concluded that in its members' collective years of practicing law, "we have never seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law." Id. at 245. Howard Waco was no Maureen Kallins.[17]

She was exceptionally unprofessional and provocative. Whatever failings Waco may have had, he was not intentionally rude, he did not

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[17] Records of the State Bar of California show Kallins has been suspended from the practice of law. The hearing officer's decision shows she engaged in repeated acts of disruptive conduct. See http://members.calbar.ca.gov/fal/Member/Detail/950389 (accessed on July 10, 2012).

interrupt the proceedings, he did not challenge the judge in front of the jury, and he did not disparage anyone.[18] Chong is not on point.

Arguing the cold record is silent as to the judge's actual tone, the Attorney General attempts to neutralize Judge Wiatt's recurrent and pervasive intemperate remarks directed to the defense. RB 127. The argument might be persuasive in the case of scattered instances of sharp comments by a trial judge directed at a defense attorney (see, e.g., People v. Abel (2012) 53 Cal.4th 891, 913-920), but in this case the judge's conduct pervades the entire transcript and the entire trial. Pointing to isolated, selected instances where the judge admonished Howard Waco does not neutralize Judge Wiatt's pervasive misconduct. What defense lawyer could withstand a five month trial in Judge Wiatt's courtroom when the judge's bias was so severe? In short, in his effort to maintain control, Judge Wiatt lost control. He made himself an active participant on the side of the prosecution. He allowed his bias to turn the jurors against the defendant.

3. Disparagement of Defense Witnesses

The Attorney General asserts Judge Wiatt did not threaten defense expert Dr. Lorie Humphrey. First, she contends that the point is forfeited "because it was not raised below." RB 134. Objecting to Judge Wiatt's conduct toward Dr. Lorie Humphrey would have been entirely futile given

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[18] There is some evidence in the record that Waco was perceived as laughing on a few occasions. No hearing was ever held with respect to these instances. So it is impossible to say whether he laughed out of nervousness, inappropriateness, or intentionally. In any event, prosecutors Silverman and Barshop also admitted laughing on occasion during the course of the trial. 48RT 7351:1-7353:6; 53RT 8118:27-8119:6. On a single occasion outside the jury's presence Waco also said the district attorney was a "cheerleader" for the court and "backslapping." 37RT 5053:25-5055:11.

his intense and untempered feelings toward her. See 38RT 5319:26-28 ("If you do it [talking over the prosecutor] again, I am going to impose sanctions against you for violating a lawful court order.")[19]; 39RT 5572:4-5 ("she is just an out-and-out liar, Mr. Waco); 39RT 5573:12-15 ("If she wants to get back on the stand, you may want to have somebody from the office of the Attorney General here. You probably would have a conflict in prosecuting her. Maybe not. But it's clear to me that she's perjured herself.").

When defense counsel said he disagreed with the judge's characterization, Waco was accused by Judge Wiatt of being "an advocate." 39RT 5573:19-21 ("Well, you are an advocate. It's clear to me from what I heard, Mr. Waco. Maybe you can't see the forest for the trees.").[20]

First, no objection would have made any difference. "The suggestion that the petitioner or his counsel should have interrupted the judge in the middle of his remarks to object is, on this record, not a basis to ground a waiver of the petitioner's rights." Webb v. Texas (1972) 409 U.S. 95, 97. See Sturm, 37 Cal.4th at 1237.

Second, Waco did object to the judge's perjury threat. He immediately said he disagreed with the judge's accusation of perjury. 39RT

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[19] The judge refused to delay the proceedings for even a few minutes to allow Dr. Humphrey to assist defense counsel as the prosecution expert, Dr. Brook, was attacking Humphrey's earlier testimony. 38RT 5381:13-23 ("I am not going to delay for her.").

[20] Ms. Silverman, the prosecutor, was not called an "advocate" when she said: "This is a witness who clearly, I believe, has misrepresented and lied in a court of law, and should not be allowed to resume the stand knowing that." 39RT 5573:8-10.

5573:18.[21] Waco later told the judge that Humphrey and the defense were dissuaded from bringing her back for further testimony. 61RT 9618:22-9619:1.

Third, Judge Wiatt addressed Dr. Humphrey directly, in court, and threatened her:

> The Court: You're under oath, Dr. Humphrey.
>
> Q. By Ms. Silverman: Do you understand that?
>
> The Court: If you're not sure, you can say that. But if you specifically deny that and it's not true, you have a problem.

39RT 5523:2-11. Therefore, the Attorney General is wrong when she argues Humphrey was not in the courtroom and that Webb v. Texas, 409 U.S. 95, is inapplicable. RB 134.

Although Humphrey was out of the courtroom when Judge Wiatt specifically referred to a perjury prosecution, this is immaterial. The judge

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[21] It is important to note that the whole topic of perjury was based on Dr. Humphrey's confusion in connection with norms used in scoring a single one of many neuropsychological tests she administered to Sandi Nieves. Reversing the norms, as she admitted she did, would not have made any material difference to her opinion. See AOB 94, n.46. Further, the confusion in use of the norms was brought out by the prosecution during cross-examination. 37RT 5221:26-27, 5303:24-5305:10. Confusion and inadvertence are far different than intentional lying.

If confusing a set of norms, which did not make any difference any way, constitutes perjury, then every time a witness is impeached by cross-examination he or she would be guilty of perjury. California law and California jury instructions recognize that sometimes witnesses are mistaken. "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited." CALJIC 2.21.1 (2012). See CALCRIM 226 (2011)("Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not.").

had already threatened her directly. And, the judge's message to Waco was loud and clear. Judge Wiatt wanted Dr. Humphrey to know about it. He expressly said, "maybe someone wants to advise her of her right to have an attorney present." 39RT 5574:2-3. Even this threat was misconduct. See People v. Hill (1998) 17 Cal.4th 800, 834-836 (holding that conveying threats of a perjury prosecution to a defense witness's mother did not insulate the prosecutor from findings of "egregious misconduct").

In this case, Judge Wiatt did not make his comments during an in camera proceeding. Nor did he make similar comments to other witnesses. He singled out Dr. Humphrey. He expected his comments would be conveyed to Dr. Humphrey and would be considered by her "if she wants to get back on the stand." 39RT 5573:12-13.

Finally, the Attorney General argues that "calling someone a liar is not misconduct if it is a truthful statement." RB 135. She does not cite any authority for this proposition, let alone authority applicable to an ongoing jury trial when the accused liar has not even been represented by counsel or had a due process hearing. The Attorney General's assertion that Humphrey was a liar is based on Dr. Brooks's hearsay testimony about a telephone conversation Brooks had had with a Dr. Paul Satz about the color trails testing norms – to which defense counsel clearly and repeatedly objected. RB 135; 40RT 5708:22-5711:10. Furthermore, the accuracy of this statement is undermined by the judge's repeated use of the term liar in connection with the defense. Waco was a "liar." Terri Towery, Waco's lawyer, was a "liar." Dr. Phillip Ney was a "liar." Humphrey was a "liar."

The Attorney General contends Waco and Dr. Ney were both considering disobeying the judge's order that Dr. Ney appear in court at 10:00 a.m. on July 5. Therefore, she asserts Judge Wiatt's comments toward

Dr. Ney and his threat to engage the Canandian police were warranted. RB 136-137. She bases this assertion on the fact Waco wanted to discuss the scheduling with Dr. Ney, that "both Mr. Waco and Dr. Ney persisted in arguing the point, and that Dr. Ney stated he was seeking legal advice." Id. Arguing a point and a witness seeking legal advice can hardly excuse intemperate comments and threats from a judge.

Further, Dr. Ney had a very compelling reason for trying to reschedule–he had patients in Canada scheduled for July 4 and merely asked the judge to accommodate him by scheduling his testimony for 11:30 a.m., instead of 10:00 a.m. on July 5 in order that he could fly from Vancouver on the fifth. 42RT 6211:8-6212:18. See 42RT 6212:6-10 ("Mr. Waco: I would respectfully ask that the court give him an opportunity -- The Court: No. Mr. Waco: -- to come and go on the same day. The Court: No. He'll have to be here at 10 a.m.").

Next, the Attorney General asserts defendant forfeited her misconduct claim when counsel failed to object to Judge Wiatt informing the prosecutor how best to impeach Dr. Ney and impliedly indicating that Dr. Ney was lying. RB 137; 42RT 6096:7-12. However, "this court has repeatedly stated that a trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness." Sturm, 37 Cal.4th at 1238. Citing People v. Sanders (1995) 11 Cal.4th 475, 531, the Attorney General attempts to isolate Judge Wiatt's comment from the tenor and ongoing treatment of Dr. Ney—and the defense—by Judge Wiatt.

First, Judge Wiatt's conduct here cannot be easily separated and compartmentalized from his overall treatment of the defense. This is not a free standing claim of judicial misconduct. Second, given Judge Wiatt's

pervasive hostility to Ney, Waco, the defendant, and the defense, it is highly likely any objection would have been futile and most likely would have made matters worse. See Sturm, 37 Cal.4th at 1237 ("Given the evident hostility between the trial judge and defense counsel during the penalty phase, it would also be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal.").

In her defense of Judge Wiatt's treatment of Dr. Gordon Plotkin, the Attorney General contends Waco persisted in asking questions about CPK levels despite an insufficient offer of proof. RB 138-139. She cites to pages 7873-78 of the record. However, those pages show that Judge Wiatt, in fact, overruled many of the prosecution's CPK objections and hardly ruled consistently. 52RT 7373:11-7878:23 (five objections overruled, eight objections sustained).

When Judge Wiatt took over the questioning of Dr. Plotkin following the judge's lunchtime internet research, he gratuitously interjected himself into the proceedings–on the side of the prosecution. 52RT 8008:13-8009:19 ("The Court: Didn't you see that when you were online that all do you have do is log on and become a user and you can order the articles online? Did you see that?").[22] "A trial judge may not, however, in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness." McCartney, 12 Cal.3d at 533. Again, the Attorney General contends that counsel should

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[22] Despite the judge's purported concern about argumentative questions, the judge was clearly lecturing the witness here. He was not asking a question or looking for an answer.

have objected to the judge's conduct. Again, this is not an isolated, compartmentalized issue. Any objection more than likely would have been futile and would have resulted in further disparagement, turmoil, and indignities.

The Attorney General contends Judge Wiatt's comments to Dr. Plotkin—asking why Dr. Plotkin had taken the appointment as defendant's rebuttal expert, and Dr. Plotkin's response—notably were not stricken from the record "as they might otherwise have been by a judge who was as biased as appellant claims here." RB 140. But the reason Dr. Plotkin's remark—"I believe that the defense experts have been suggested as liars to begin with, and had I known that, I wouldn't have taken on the personal insults the way I have"—were not stricken was because Dr. Plotkin was not making an ad hominem comment. He had been asked a direct question by prosecutor Barshop. Dr. Plotkin directly answered Barshop's question: "Why would you not have taken the appointment if you knew what you know now?" 53RT 8105:17-25. The Attorney General is grasping to defend the judge's conduct, crediting Judge Wiatt because he did not strike an unobjectionable question or its direct answer.

Additionally, the Attorney General defends Judge Wiatt's efforts to intimidate Dr. Plotkin by threatening to have him taken off the Los Angeles County expert panel as a mere example of exercising reasonable control of the proceedings, which did not show any bias. She says Plotkin "appeared to be mirroring Mr. Waco's example." RB 140. Again, she tries to blame Waco and conjures up a conspiracy of witnesses, all orchestrated by Waco. She has no proof and there is nothing in the record to support an inference that Dr. Plotkin, an expert called into the case during the last stage of the guilt phase, would jeopardize his professional standing or reputation to

mirror any purported improper conduct by Waco or to assist defendant, Sandi Nieves, in any improper way. Further, Waco did object to Judge Wiatt admonishing the witness outside the presence of the jury and subsequently lecturing the jury about Dr. Plotkin's conduct. See 53RT 8119:21-8121:1.

The Attorney General contends that lay witness Carl Hall was a "recalcitrant witness who was determined to do things his way in the courtroom – much like Mr. Waco." RB 141. But the portions of the record cited, 62RT 9653-9658, do not support her position. They show that Hall was an unsophisticated layperson anxious to answer questions. There is no indication of purposeful defiance warranting a threat of jail. In fact, Hall expressly stated that he was very "nervous," a statement the respondent's brief completely ignores. 62RT 9667:3-4.[23]

The Attorney General has no concrete answer to why it was proper for Judge Wiatt to make a spectacle of the defendant in front of the jury by forcing her to look directly at the photographs of her dead children. RB 141. First, the Attorney General claims this was part of necessary cross-examination because defendant testified she did not remember stepping

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[23] Had Judge Wiatt shown a modicum of judicial temperament and patience, he could have explained the process to Carl Hall and likely calmed him to the point that direct and cross-examination would have gone smoothly. Instead, the judge acted intemperately and the situation escalated, as it had with Dr. Humphrey, Dr. Ney, and Dr. Plotkin.

Compare California Code of Judicial Ethics (2008) Canon 3.B.(4)("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control.").

over her children. But parading the photographs before the jury and forcing defendant to look at them was simply a form of rhetorical argument. Having the defendant look at the photographs did not bring out any new facts inasmuch as the photographs were self explanatory. Judge Wiatt was hardly controlling the proceedings when for no compelling reason he humiliated the defendant to the point of almost vomiting. The Attorney General provides no legal support for the judge's conduct. All she can muster is the refrain that Sandi Nieves like the other defenses witnesses "apparently [took] her cues from Mr. Waco." RB 141.

Most importantly, the judge shifted the jury's focus to the emotionally charged and inflammatory struggle between the defendant and the judge. See 35RT 4932:19-25 ("The Witness: I don't remember stepping over my kids. I don't remember any of it. Q. By Ms. Silverman: Ma'am, showing you People's 3 for identification, if you could turn around and look at the photographs behind you, please? A. If it's of my children, I'm not. The Court: Put it in front of her then."). When Waco asked for "a couple minutes for the witness to compose herself?" The judge immediately answered, "no." 35RT 4933:28-4934:2.

The judge's conduct was indefensible and it violated the defendant's right to a fair trial under the Eighth and Fourteenth Amendments to the United States Constitution. Deck v. Missouri (2005) 544 U.S. 622, 630; Holbrook v. Flynn (1986) 475 U.S. 560, 571. See AOB 110, n.56.

4. Disparate Treatment of the Defense

Starting at page 142 of respondent's brief, the Attorney General repeats her general themes that Waco was at fault, that the judge was merely exercising control of the proceedings, that defendant forfeited her rights and should die because she failed to object contemporaneously to

every single instance of misconduct, and that Judge Wiatt made the correct decision every time he ruled. Because much of this is repetitive, we will not respond to every contention. We will rely on our expansive presentation in Appellant's Opening Brief.

However, the litany of pervasive disparate treatment of the defense and defense witnesses certainly shows a repeated bias. A reasonable person, including the jurors, would surely perceive that Judge Wiatt routinely favored the prosecution when he made a discretionary ruling.

One argument warrants a reply.

The Attorney General argues Judge Wiatt acted properly when he met with the prosecutors and their experts, Dr. Hirsch, ex parte on two occasions, and Dr. Brooks, on one occasion. RB 149-153; see June 20, 2000 RT 5018-5026. She fails to explain why the judge could lawfully meet with a prosecution witness ex parte, in chambers, and accept unsworn testimony for the proposition that potential defense witness, Dr. Nancy Kaser-Boyd, had committed "perjury" and "attempted apparently to be untruthful to a court in this county" in another case. Id. at 5019:10-15; 5020:27-28.[24] The Attorney General offers no legal support for the judge's conduct. She fails to justify the ex parte meetings, which included multiple topics. Instead she claims the judge acted properly because Penal Code § 1054.7 permits in

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[24] There was no showing whatsoever that the alleged perjury claim was ever adjudicated. Nor was there any presentation of Dr. Kaser-Boyd's explanation or defense to this claim because she was not present when it was made. It was, however, a slur on the defense presented in private to the judge in the presence of two prosecution witnesses. See June 20, 2000 RT 5018:9-13, Indeed, Dr. Hirsch the prosecution's principal expert consultant— and someone who, from his testimony, had opposed Dr. Kaser-Boyd before—did much of the talking in chambers. Id. at 5019:26-5022:10.

camera showings of good cause to exclude items from reciprocal discovery. RB 151.

The Attorney General is mistaken. First, it is practically axiomatic that items used solely for impeachment purposes—such as the allegations and transcripts the prosecution intended to use to cross-examine Dr. Kaser-Boyd—do not have to be disclosed in advance of cross-examination. See Evid. Code § 769 ("In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.").

The prosecutor never should have sought the ex parte meeting, let alone brought her experts with her. "Judges are supposed to get their evidence from the testimony and exhibits, not private chats. The judge should have refused to hear the ex parte communication." Cf. Ludwig v. Astrue (9th Cir. 2012) 681 F.3d 1047, 1051-52. Judge Wiatt, however, was sufficiently pliant with the prosecution that he not only entertained the prosecution team, but he also gave them legal advice. June 20, 2000 RT 5022:17-19 ("You may want to look at the case of People v. Tillis, [1998] 18 Cal.4th 284. I don't know if you are aware of that."). See also id. at 5023:11-12.

Second, section 1054.7, relied upon by the Attorney General, does not even come close to this situation of two ex parte in camera proceedings. Section 1054.7 permits an in camera showing "for the denial or regulation of disclosures, or any portion of that showing, to be made in camera." However, such proceedings require "good cause." "'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." Id. Despite the Attorney General's argument to the contrary, there is no loss or destruction that could have occurred because the impeachment evidence was in the possession and control of the prosecution. Compare People v. Superior Court (Alvarado) (2000) 23 Cal.4th 1121(threats or possible danger).

The Attorney General argues the ex parte meeting was harmless because Kaser-Boyd never testified. RB 153. However, she misses the point. Defendant is not claiming that harm flows directly from Judge Wiatt's ex parte meetings with the prosecutors and two of their experts. Defendant submits that these meetings, together with the judge's other misconduct, show a pervasive pattern of differential treatment, bias in favor of the prosecution, and injudicious acts, that undermine confidence in the integrity and fairness of the trial, and affected the judge's handling of the proceedings. Again, the Attorney General is ignoring the forest through the trees, attempting to cordon off multiple instances of misconduct by claiming each isolated incident is harmless standing alone.

The Attorney General cites People v. Jennings (1991) 53 Cal.3d 334, 383-384, contending this case is similar with respect to harmless error. RB 153. However, Jennings did not involve a pervasive challenge to a judge's conduct covering an entire trial. Further, the defendant in Jennings was informed of the ex parte meeting at issue, but failed to object until after the verdict. In this case, the defendant was never informed that Judge Wiatt had met secretly with the prosecutors and two witnesses. See RB 149, n.15.

F. A Fair Trial in a Fair Tribunal is the Hallmark of Justice

California law requires a fair trial before a fair judge in every court proceeding, but particularly when the irrevocable death of a human being is at stake. Sturm, 37 Cal.4th 1218, citing People v. Zammora (1944) 66

Cal.App.2d 166, 210. The Sixth, Eighth and Fourteenth Amendments to the United States Constitution require a "fair trial in a fair tribunal," In Re Murchison (1955) 349 U.S. 133, 136, "before a judge with no actual bias against the defendant or interest in the outcome of [her] particular case." Bracy v. Gramley (1997) 520 U.S. 899, 904-05. See AOB 49-52.

The Attorney General contends, however, that a fair trial for Sandi Nieves was completely unnecessary because the "blame rests squarely on appellant and the capital crimes she committed." RB 154. She then accepts the evidence admitted at trial by Judge Wiatt and claims it was overwhelming. RB 155. Essentially, she says that a fair trial simply did not matter – because the crimes were so bad and the proof was in her view so strong.

First, the Attorney General completely ignores the structural error that flows from Judge Wiatt's pervasive bias and misconduct. The denial of a fair trial by a fair judge is a structural error that requires per se reversal. "Some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California (1967) 386 U.S. 18, 23. "The right to an impartial adjudicator, be it judge or jury, is such a right." Id. at 23, n. 8. "Because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply." Gray v. Mississippi (1987) 481 U.S. 648, 668. See Tumey v. Ohio (1927) 273 U.S. 510; People v. Mahoney (1927) 201 Cal. 618.

Under California law, when "the appearance of judicial bias and unfairness colors the entire record," reversal is required. Hernandez v. Paicius (2003) 109 Cal.App.4th 452, 461. When, as in this case, judicial misconduct is so severe, reversal is required as a matter of due process

"even if actual bias is not demonstrated, [because] the probability of bias on the part of a judge is so great as to become 'constitutionally intolerable.'" People v. Freeman (2010) 47 Cal.4th 993, 1001, citing Caperton, 556 U.S. at 881.

Second, even if the Chapman standard did apply, the Attorney General has failed to carry her burden of demonstrating that the judge's pervasive bias and misconduct was harmless. She relies on the evidence put on by the prosecution, but she entirely fails to acknowledge the fact that Judge Wiatt controlled what evidence was omitted, what evidence was excluded, and that Judge Wiatt disparaged the defense, the defendant, defense witnesses, and patently restricted the case that the defendant was able to present. Skewing the presentation of evidence in this way can hardly constitute harmless error.

With respect to the penalty phase, no matter how strong the prosecution case may or may not have been, there was still room for mitigation evidence and consideration of mitigating factors, especially under the circumstances here in which a woman with no prior criminal record, who was shown to otherwise care and love her children, committed a desperate act without, as even Judge Wiatt acknowledged, any propensity for future dangerousness. See 65RT 10368:2427 (no prior violent activity and no prior felonies); 10373:17-19 (court finds defendant likely to be a model prisoner).

A fair trial before a fair judge, allowing the jury to consider mitigation without bias and disparagement by the judge, likely would have resulted in a sentence less than death.

Sandi Nieves was denied her Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial before a fair judge. Bracy, 520 U.S. at 904;

Mayberry v. Pennsylvania (1971) 400 U.S. 455, 466; Gray, 481 U.S. at 668; Withrow v. Larkin (1975) 421 U.S. 35, 46; In Re Murchison, 349 U.S. 133; Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 287.

IV. JURY VOIR DIRE

A. Introduction

The Attorney General does not dispute that the emotionally-charged facts of this case created a heightened risk for bias among prospective jurors. In the Attorney General's words: "capital sentencing juries grant children special consideration." RB 73. She admits, that regardless of the evidence and mitigation, "'A sizeable majority of jurors would be more likely to impose death if the victim was a child.'" Id., quoting Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think? (1998) 98 Colum. L.Rev. 1538, 1556.

Cases involving a single child victim are emotionally charged. See People v. Box (2000) 23 Cal.4th 1153, 1179, disapproved on other grounds by People v. Martinez (2010) 47 Cal.4th 911 ("it is difficult to imagine a prospective juror not having a strong emotional reaction to a three-year-old's murder") (emphasis in original). Here, the facts involved four dead children. Moreover, the accused killer was the children's own mother. As we submitted in the opening brief, if ever a case required a cautious approach to selecting a fair and impartial jury, this was such a case. AOB 147-148. See Gardner v. Florida (1977) 430 U.S. 349, 357-358 ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

The Attorney General does not acknowledge that the heightened risk of bias required an especially careful and thorough voir dire. Instead, the

Attorney General attempts to downplay the trial court's inadequate, unfair, and slanted approach to voir dire in this case. She claims defendant invited the trial court's error and failed properly to object to the deficient juror questionnaire, ignoring defendant's exhaustive efforts to move the court to ask proper and essential death qualification questions. The Attorney General glosses over the trial court's glaring omission from the questionnaire of a direct question about the critical fact that the victims were children. She defends the trial court's questionnaire even though the prosecution, at trial, had no objection to defendant's proposed questions on the issue.

The Attorney General's selective citations to the record paint an inaccurate image of how the trial court conducted oral voir dire. The record shows the process was prejudicially inadequate. It shows the trial court provided jurors with a confusing and incomplete questionnaire. It discloses a rushed oral voir dire. It shows the court restricted follow up questions and deliberately avoided asking jurors directly if they would automatically vote for death of a defendant convicted of murdering children.

The trial court's error violated defendant's Fifth, Sixth, Eighth and Fourteenth Amendment and California Constitution Article 1, §§ 15, 16, 17, 24, and 29 rights to due process of the law, a fair and impartial jury, and a fair and reliable guilt and sentencing verdict. See Rosales-Lopez v. United States (1981) 451 U.S. 182, 188; Ham v. South Carolina (1973) 409 U.S. 524, 527. Reversal is required here because the voir dire was "so inadequate ... that the resulting trial was fundamentally unfair." People v. Holt (1997) 15 Cal.4th 619, 661.

B. The Deficient Questionnaire

Voir dire in this case was not the collaborative process the Attorney

General depicts. See RB 170. The trial court insisted on using its own juror questionnaire. 6RT 185:14, 20-24. It ignored defendant's submission of a proposed questionnaire. Id. Although the court indicated it would consider input from the parties (6RT 185:25-186:2; 7RT 197:21-27; 208:5-12), when defendant submitted questions directly addressing murder of children, the trial court rejected them. 10RT 552:16-18.

1. The Doctrine of Invited Error Does Not Apply

The Attorney General asserts that defendant's claim of a deficient questionnaire is forfeited under the doctrine of invited error. RB 170-171. The doctrine does not apply here.

Invited error requires defense counsel deliberately to induce the trial court to err. See People v. Coffman (2004) 34 Cal.4th 1, 49; People v. Wickersham (1982) 32 Cal.3d 307, 335, disapproved on other grounds in People v. Barton (1995) 12 Cal.4th 186, 201. "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." Id. Here, the trial court did not make its erroneous decisions at the request of the defendant.

The Attorney General stakes her contention on defense counsel's statements that his client would be better off with no questionnaire, rather than the court's questionnaire. She argues this constituted invited error. RB 171-172.

"[C]ounsel's statements must be placed into context" to determine whether invited error occurred. People v. Cooper (1991) 53 Cal.3d 771, 828. Here, defense counsel was reiterating his objection to the questionnaire — contending that no questionnaire would be better than this one. See 7RT

250:25-28 ("after looking it over, I am willing to take my chances without any questionnaire whatsoever"). In fact, he explained the seriousness of the problem with the questions on the questionnaire proposed by the court when counsel stated "these questionnaires sometimes might make the case worse and prejudice the case rather than be helpful." 8RT 323:6-8. He was not conceding that the questionnaire was acceptable, or that he was waiving anything. In other words, a random selection of jurors would likely be better for the defendant than a panel screened with this questionnaire.

Moreover, the trial court did develop and give a questionnaire to the prospective jurors. Defense counsel did not succeed in convincing the court to discard the questionnaire. In fact, the court explicitly refused to rule in defendant's favor. See 10RT 552:16-18 (trial court rejected defense counsel's request to include questions specifically addressing juror's reactions to the fact the victims in this case were children).

There was no invited error.

2. Defense Counsel Diligently Sought Proper Death Qualification Questions

The Attorney General further contends defendant's claim is forfeited because defense counsel failed to object to the questionnaire. RB 172-173. The Attorney General's argument is misleading.

The record reveals defendant diligently pursued expanding or revising the questionnaire to include questions specifically addressed to the critical fact the charges involved the death of multiple children.[25] First, on January 5, 2000, defendant submitted a proposed amendment to the court's

[25] See, in particular, proposed question No. 65: "Would you vote for the death penalty if the victims were children, no matter what the mitigating circumstances were? 10RCT 224.

questionnaire to include such questions. 10RCT 2230-35. Second, at the March 10, 2000 pretrial conference, defendant voiced concern that a "prefatory comment" mentioning the victim children still lacked a direct question on whether a juror would follow the law if the evidence showed the murder of multiple children. 7RT 288:10-14. Third, defendant objected to the questionnaire on the grounds it would not assist in picking a jury. 8RT 312:4-7. Fourth, during the March 23, 2000 pretrial conference defendant again argued for a direct question concerning whether a prospective juror would automatically vote for death if a person killed two or more children. 8RT 344:23-345:26. Fifth, on March 29, 2000, defendant filed another written request that the court add to the questionnaire questions specifically directed at the issue of child victims. 11RCT 2529.

The Attorney General takes out of context defense counsel's statement during the pretrial conference on April 11, 2000, that he was "perfectly happy" with the language referring to the victims' ages in the preamble to the death qualification questions. See RB 173; 10RT 549:21-22. Defense counsel did not acquiesce in lieu of direct questions specifically addressing juror impartiality if the evidence showed the murder of multiple children. In his very next sentence at the pretrial conference, defense counsel referred the court back to the questions he had submitted, noting the prosecutor had already agreed to the language. 10RT 549:23-550:3 ("I went over it with him, and he was satisfied that they were properly stated and an accurate statement of law ...").

Once the prospective jurors had completed the questionnaires, defense counsel continued to voice dissatisfaction with the questionnaire. He complained to the trial court that, with the exception of question 60 regarding jurors' thoughts on how often the death penalty is used, the

questionnaire was not eliciting any meaningful answers. 11RT 748:7-9. Defense counsel submitted written follow up questions to 31 of the 77 prospective jurors specifically asking whether they would vote for death if the facts showed the defendant committed multiple murder and the victims were children.[26] These follow up questions were never asked. He also persistently attempted to ask similar questions during oral voir dire, but the trial court consistently shut him down. See, e.g., 12RT 896:25-27 (juror 0300); 911:13-28 (juror 8595); 945:28-254:6 (juror 7166); 954:15-962:2 (juror 3801).

Defendant expressly objected to the questionnaire and repeatedly sought to expand the questions in order to uncover bias specific to the central facts of this case. Recent cases in which this Court has held defendants forfeited their claims do not involve defendants taking similar measures. Compare, e.g., People v. Foster (2011) 50 Cal.4th 1301, 1324 (defendant forfeited his claim of inadequate voir dire because he did not object to the manner in which voir dire was conducted nor complain about the trial court's questionnaire); People v. Taylor (2010) 48 Cal.4th 574, 608 (defendant forfeited his claim of inadequate voir dire "because his counsel failed to suggest followup questions ... or otherwise complain about the adequacy of the trial court's voir dire"); People v. Rogers (2009) 46 Cal.4th 1136, 1149 (defendant forfeited his claim of inadequate voir dire because he "neither objected to the questionnaire used, nor proposed any modifications of additional questionnaire inquiries").

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[26] See 12RCT 2674, 2693, 2715, 2774, 2834, 2895; 13RCT 3038, 3057, 3098-99, 3118; 14RCT 3139, 3158, 3197, 3218, 3239, 3280, 3301, 3326, 3365, 3447; 15RCT 3531, 3551, 3698-99, 3719; 16RCT 3781, 3821, 3859, 3879, 3900, 3920, 3997.

Despite defense counsel's persistence, no question in the final version of the questionnaire asked prospective jurors directly whether he or she would vote automatically for the death penalty in the case of a mother who killed her four little girls. See 12RCT 2666-2669. The question was critical because this is a crime scenario which "could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." People v. Cash (2002) 28 Cal.4th 703, 721. As addressed in the next section, such questioning was necessary to ensure appellant's right to an impartial jury.

3. Excluding Questions Pertaining to Multiple Child Victims Denied Sandi Nieves a Fair and Impartial Jury

The Attorney General quotes the trial court's purported intention to include input from the parties in its jury questionnaire. RB 158-159. But she does not deny that the trial court repeatedly refused to include defense counsel's suggested questions on the critical fact that the victims in this case were children. RB 158 (quoting the trial court, 8RT 287:15-16: "I am going to use my questions, period.").

In defending the trial court's actions, the Attorney General is taking a different position than the prosecution at trial. The prosecutors had no objection to defendant's proposed questions regarding the child murders. 10RT 549:23-550:3. In fact, the prosecution's own proposed questionnaire included a direct question as to whether a prospective juror would automatically vote for death in the case of someone convicted of murdering a child. 10RCT 2273-75 (question No. 97).

The Attorney General suggests that the court's factual preamble in the jury questionnaire fixed any problem, i.e., that the factual preamble, in combination with question 67 (the automatic death question), "was

sufficient to ferret out any potential bias in favor of death, including bias arising out of the revelation that the victims were four young children." RB 177. But question 67 did not ask a potential juror whether the fact of multiple child victims would invariably lead to a vote for death, but asked only whether the juror had views about capital punishment itself that would invariably lead to a vote for death. The court apparently believed that asking jurors whether the fact of multiple child victims meant the juror would invariably vote for death regardless of the mitigating evidence would have been improper (see AOB 175, n.87 [voir dire inquiry must be limited to views about capital punishment in the abstract]), and so the court presumably did not think it was asking jurors whether multiple child victims meant the juror would invariably vote for death. Further, there is no basis for believing the jurors thought they were being asked how multiple child victims might affect their view of the appropriate penalty and there is no way to know whether or not "a juror who would automatically vote to impose the death penalty on a defendant who had [murdered multiple children] was empanelled and acted on those views." Cash, 28 Cal.4th at 723.

The Attorney General now contends defendant sought to ask questions so overly specific that they invited a prospective juror to prejudge the case and improperly educated the jurors as to the facts of the case. RB 177. The Attorney General's argument makes no sense in light of the fact the trial court had already provided prospective jurors with a "Statement of Charges." 11RCT 2579-80. This document informed the reader that the victims in this case "ranged in age, at the time of the alleged incident, from age five to age fourteen" and that they were the accused's own children. Id. The court had already made the prospective jurors aware of these basic, but

tragic and disturbing facts. As human beings, they were likely having an emotional reaction to this information. Proper inquiry into the subject was required to determine whether their individual reactions translated into bias. See Coffman, 34 Cal.4th at 47 ("either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias"); Cash, 28 Cal.4th at 720 ("A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried.")(citing People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005)).

This Court has included child victims in the short list of facts so inflammatory as to require inquiry during voir dire. See People v. Tate (2010) 49 Cal.4th 635, 658 (no specific voir dire required because facts involved "'no prior murders, no sensational sex crimes, no child victims, no torture'") (quoting People v. Roldan (2005) 35 Cal.4th 646, 694, overruled on other grounds, People v. Doolin (2009) 45 Cal.4th 390, 421, n. 22). Other courts agree. See, e.g., State v. Clark (Mo. 1998) 981 S.W.2d 143, 147 ("A case involving a child victim can implicate personal bias and disqualify prospective jurors.").

In People v. Burgener (2003) 29 Cal.4th 833, 866, cited by the Attorney General (RB 169), defense counsel sought to ask questions which included a detailed account of some of the facts and a list of the defendant's prior crimes, amounting to "a summary of the aggravating or mitigating evidence." Id. at 865. Here, on the other hand, defense counsel never sought to provide details or a summary of the evidence. He sought to inquire simply whether the fact this case involved the death of multiple children would "'cause some jurors invariably to vote for the death penalty.'" See People v. Carasi (2008) 44 Cal.4th 1263, 1286 (quoting Cash, 28 Cal.4th at

721) (emphasis in Carasi). Defense counsel did not seek to ask anything more specific than other courts commonly ask prospective jurors when the facts include a child victim. See e.g., People v. Earp (1999) 20 Cal.4th 826, 855 (questionnaire asked jurors whether the allegations of "sexual misconduct involving the death of a child" would adversely affect their "impartiality in deciding defendant's guilt or sentence").

Because of the heightened risk of bias in capital cases involving child victims, this Court has endorsed an "exhaustive examination of the issue." People v. Alfaro (2007) 41 Cal.4th 1277, 1312. The Attorney General contends that the court's "prefatory comment" about the children's ages was sufficient. RB 172-173. But merely mentioning the ages of the victims in the preamble to death qualifying questions was ineffective. In order to avoid asking the question directly, the trial court put the fact the victims were children outside of the actual questions.

Tellingly, the questionnaire did not elicit responses specifically addressing the fact the victims were children. Out of 77 questionnaires returned by prospective jurors, only one prospective juror mentioned children in the written responses to the death qualification questions, numbers 64-67. 14RCT 3320 (juror 2214).[27] By comparison, during the voir dire in Alfaro, 41 Cal.4th at 1312, for example, "numerous prospective jurors revealed that the victim's young age [of nine] would prevent their

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[27] Additionally, juror 6372 responded to question 56—a general question about whether personal, religious, philosophical, or other beliefs would make it difficult or impossible to sit as a juror—with the following: "I have no sympathy or tolerance for any persons who harm children, elderly people especially - they cannot defend themselves in anyway." 14RCT 3279. Juror 6372 did not mention children in her answers to the death qualification questions.

serving as fair and impartial jurors." See also Box, 23 Cal.4th at 1179 (after asking entire jury panel whether they could set aside their emotions despite the fact that the case involved a dead three-year-old child, the trial court questioned several jurors in chambers "regarding their strong emotional reaction to a case involving a small child's murder").

The record here shows the trial court's confusing and compound questions buried the fact the victims were children. As submitted in the opening brief, the Judicial Council's Judicial Administrative Standards provide guidance to courts formulating jury questionnaires. This sets forth principles that the trial court in this case did not follow. AOB 169-174. The Attorney General complains we cite to the Judicial Council's model questionnaire as amended in 2004 and 2006, after the trial in this case occurred. RB 173. But we explained in the opening brief that the model questionnaire is relevant for comparison purposes and for its recognition of the necessity to achieve fairness in a case such as this one. AOB 170.

Unlike the trial court's questionnaire, the model death qualification questions use straightforward language. The trial court, on the other hand, employed convoluted legalese. See AOB 171. The court inquired solely about the potential of the jurors' "views ... concerning capital punishment" – not about the impact of fact the victims were children. See 12RCT 2669.

Even though this model questionnaire was not available at the time of trial, this Court had made it clear that "[t]rial court judges should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner." Holt, 15 Cal.4th at 661. The Attorney General does not contend the trial court followed any Judicial Council standards. Instead, she quotes the trial court's statement that the questions it

used had been "'tested and proven in reported decisions.'" RB 173. But the trial court did not cite and the Attorney General does not cite any specific authority in support of the trial court's assertion.

In fact, the Attorney General does not deny that the trial court's questions were compound and confusing. RB 173-174. Instead, she simply argues the trial court cleared up confusion with jurors 5013, 1791, 2214, 5090 and 8821 during oral voir dire. RB 174-176. The extensive question and answer exchanges with these jurors—recited at length by the Attorney General—only confirm that the confusing questionnaire required oral voir dire to elicit effective responses from prospective jurors. Without proper oral voir dire of all the prospective jurors, it is impossible to know with certainty which were confused. Unfortunately, as discussed in the following section, the trial court did not allow adequate oral voir dire.

C. Denial of Effective Oral Voir Dire

The trial court conducted the entire death qualification voir dire in less than two full court days. AOB 158-159. The trial court did not proceed with the care and caution the Attorney General tries to portray in her description of the process. See RB 176-177. Instead, the court hurried through, summarily rejecting defense counsel's general follow up questions for all jurors on the issue of multiple child victims. It also rejected defense counsel's follow up questions on the same issue submitted in response to specific questionnaires. And the court repeatedly cut defense counsel off when he attempted to inquire orally. See AOB 188.

A party cannot uncover a juror's bias if the trial court does not allow inquiry into those areas where jurors harbor bias. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States (1950) 339 U.S. 162, 171-172.

"[W]here an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Wainwright v. Witt (1985) 469 U.S. 412, 423. "It is then the trial judge's duty to determine whether the challenge is proper." Id.

Oral voir dire is critical to uncovering bias. "Unless a juror makes it clear that he or she is unwilling to set aside his or her beliefs and follow the law, a trial court may not dismiss a juror under Witt/Witherspoon[[28]] based only on answers provided on a juror questionnaire." People v. Booker (2011) 51 Cal.4th 141, 158. Here, the trial court limited oral voir dire, putting defense counsel "in an impossible position." People v. Bittaker (1989) 48 Cal.3d 1046, 1084. Even if counsel had reason to believe a juror was disqualified, he could not prove it "without further questions designed to elicit a clear and unambiguous response." Id.

The Attorney General argues defendant was not prejudiced by the trial court's inadequate voir dire because those instances in which the trial court cut off defense counsel's oral questions were "exceptions." RB 181. Not coincidently, these so-called "exceptions" consistently involved defense counsel's attempts to question jurors about their views on imposing the death penalty automatically in the case of the multiple murder of child victims. See, e.g., 12RT 892:7-9 (juror 0300 ["Mr. Waco: May I ask a couple of follow up in that regard? The Court: No."]); 908:22-23 (juror 8595 [The Court: Mr. Waco, I will interrupt you at this point."]); 948:19-22 (juror 7166 [Mr. Waco: Well, he may believe this is the crime for a death

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[28] Wainwright v. Witt (1985) 469 U.S. 412; Witherspoon v. Illinois (1968) 391 U.S. 510.

penalty per se. The Court: We're not going to get into the facts of this case. That's not appropriate."]).

The list of prospective jurors the Attorney General puts forth as examples of proper follow up oral voir dire is misleading. See RB 177-178. It includes jurors 3801 and 8318. These are the two jurors who we pointed out in the opening brief gave facially equivocal assurances of their ability to apply the law. See AOB 181-184. The trial court originally appeared to allow defense counsel to ask these jurors questions concerning child victims. 12RT 957:17-958:3; 978:5-11. However, the trial court cut counsel off, conducted the questioning of the jurors itself, and prevented further follow up.

After juror 3801 responded she "would try" to be impartial (12RT 981:16-21), defense counsel specifically requested the opportunity to ask juror 3801 follow up questions about whether this potential juror would consider life without parole in light of her experience working with children. The court stated it had "heard enough." Then it denied defense counsel's challenge for cause. 12RT 961:18-962:2.

In the case of juror 8318, her answers included the following statements about her ability to put aside her bias: "I don't know. I don't know how else to say it. I could sit here and say: okay, fine, I will listen to everything and I have no opinions at all, but that would not be true." 12RT 981:12-15. She also answered: "I think it would be very difficult. But you know, I could try. I mean, you know, that's the best I can say." 12RT 981:16-20. The trial court sent the juror out of the room after she gave these answers, conducting no further inquiry. 12RT 981:21-22. It then denied the defendant's challenge for cause. 12RT 972:27.

This Court has held a prospective juror is qualified to serve on a jury

only if he "affirmatively declares that he can and will act impartially." Bittaker, 48 Cal.3d at 1090. A declaration that he will try to be impartial, but doubts that he can succeed, is insufficient." Id. The trial court denied defendant's challenges for cause as to these two jurors without "a sufficiently critical assessment of [the] prospective jurors' assurances of impartiality." Skilling v. United States (2010) __ U.S. __ , 130 S.Ct. 2896, 2959 (Sotomayor, J., concurring in part and dissenting in part) (noting the trial court's voir dire was deficient in part because the court "declined to dismiss for cause any prospective juror who ultimately gave a clear assurance of impartiality, no matter how much equivocation preceded it" and "on a number of occasions accepted declarations of impartiality that were equivocal on their face").[29]

The Attorney General's list of purported examples of adequate follow up questioning also includes jurors 6707, 6964, 7166 and 8595. RB 177-178. The record with regard to jurors 6707 and 8595 shows the trial court cut off defense counsel. It prevented further questions to explore whether the jurors had a bias. And it denied defense counsel's challenge for cause. 12RT 886:1-891:8, 894:19-900:20 (juror 6707); 12RT 877:7-879:19;

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[29] The Attorney General argues the trial court properly denied defendant's challenge for cause of jurors 3801 and 8318 because its evaluation of a prospective juror's state of mind is binding on this Court, citing People v. Mendoza (2000) 24 Cal.4th 130, 169, and People v. Cunningham (2001) 25 Cal.4th 926, 975. However, none of the jurors at issue in Mendoza or Cunningham stated anything as uncertain as juror 8318's statement that she "could try"they would only "try" to be impartial. For example, when the juror in Mendoza was asked if she would always vote for life without the possibility of parole "no matter what kind of case it was," she unambiguously answered, "that's right." Mendoza, 24 Cal.4th at 169.

908:15-911:4 (juror 8595).

When defense counsel asked for the opportunity to ask juror 6964 additional questions, the trial court replied, "I don't think it's necessary." 13RT 1050:2-4. Defense counsel requested further follow up questions for juror 7166 about whether his response, "the punishment should fit the crime" (13RCT 3130), meant he would vote for death automatically in a case involving four murders. The court replied, "I am not going to make that inquiry."[30] 12RT:950:17. Even when the prosecution tried to ask prospective jurors its written follow up questions, the court responded: "If I haven't asked them, I don't think they need to be asked." 12RT 900:18-19.

Cases in which this Court has found voir dire adequate to uncover bias serve as a helpful comparison. Notably, these cases involve comprehensive questionnaires and either unlimited oral voir dire or at least the chance to ask follow up questions. See, e.g., Foster, 50 Cal.4th at 1324 (voir dire not inadequate because "[t]he trial court examined the prospective jurors through the comprehensive questionnaire ... and afforded defendant unlimited voir dire."); Rogers, 46 Cal.4th at 1150 (defendant allowed to submit questions for inclusion in the jury questionnaire, ask questions

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[30] Respondent twice quotes the trial court's comment agreeing with the juror response that defense counsel sought to clarify. As the court put it, "[t]he law is the punishment should fit the crime. That's the whole purpose of the death penalty law, isn't it?" 12RT 948; quoted at RB 165, 178. Read literally, the judge's comment is only half correct. Both as a matter of statutory law and constitutional imperative, a capital sentencer must consider not only the crime but any aspects of a defendant's background, character or physical or mental condition that the defendant offers in mitigation. Pen. Code § 190.3, par. 1; Lockett v. Ohio (1978) 438 U.S. 586, 604. The judge presumably understood this. To know whether the juror did, or whether the juror might have felt that the multiple child-murder invariably required a death sentence, required further questioning.

during the oral examination, and bring "to the court's attention specific questionnaire responses warranting additional exploration"); People v. Carter (2005) 36 Cal.4th 1215, 1251-1252 (voir dire process took eight court days with each side allowed to propose general questions and request follow up questions of specific jurors); Holt, 15 Cal.4th at 661 ("Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias ...").

The opinion in Alfaro, 41 Cal.4th at 1312, is especially instructive because the facts in that case involved a child victim. This Court held the voir was adequate because it included "extensive questioning" and "defense counsel was permitted to question prospective jurors regarding the circumstance that the victim was a child even when the prospective juror had not declared that such information might lead to bias."

In Skilling, 130 S.Ct. at 2919, n.22, the Supreme Court held that the voir dire was adequate because the jurors filled out "a comprehensive questionnaire drafted in large part by Skilling" and "the District Court gave Skilling's counsel relatively free rein to ask venire members about their responses on the questionnaire." Here, the trial court afforded no such opportunities to defendant.

D. The Error Was Not Harmless

The Attorney General relies on Bittaker, 48 Cal.3d at 1086, to argue error committed by the trial court during voir dire does not require reversal. RB 181. Reliance on Bittaker is misplaced. First, Bittaker did not involve the denial of voir dire on a critical fact likely to invoke strong emotions and bias. Second, in Bittaker, this Court simply abandoned a per se rule to avoid reversals in the case of trivial errors. 48 Cal.3d at 1085-1086. Because the error was not trivial in this case and the trial court's actions "affected

defendant's right to a fair and impartial jury," reversal is required. See id.

The Attorney General argues we have not shown the defendant was prejudiced because "'defendant did not claim that any juror was incompetent, or was not impartial.'" RB 181, quoting Bittaker, 48 Cal.3d at 1087. Contrary to the Attorney General's argument, defendant is not required to point the finger at a particular sitting juror. Without adequate voir dire it is "impossible ... to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant" who is convicted of killing multiple children. See Cash, 28 Cal.4th at 723 (noting the defendant could not identify a particular biased juror, but nonetheless reversing the penalty because the inadequate voir dire "created a risk" that the jury included a juror who would automatically vote to impose the death penalty).

Similarly, the trial court's error was not harmless simply because the defendant did not exhaust all her peremptory challenges. See AOB 189-190; People v. Bolden (2002) 29 Cal.4th 515, 537-538 ("Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire."). Inadequate voir dire "impairs the defendant's right to exercise peremptory challenges," Rosales-Lopez, 451 U.S. at 188, making it impossible to measure prejudice by their exhaustion.

Without the ability adequately to ask questions, Sandi Nieves was unable to uncover bias and therefore unable intelligently to exercise challenges for cause or peremptory challenges. As a result, there is no way to know whether her jury was impartial and fair. Morgan v. Illinois (1992)

504 U.S. 719, 729 ("part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors").

The inadequate voir dire in this case violated defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 7, 15, 16, 17, 24, and 29 of the California Constitution. Without a fair and impartial jury, Nieves could not have received a fair and reliable guilt and sentencing verdict. Duncan v. Louisiana (1968) 391 U.S. 145, 155-156 (The Sixth Amendment jury guarantee "reflect[s] a profound judgment about the way in which law should be enforced and justice administered. ... Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."). See also Rosales-Lopez , 451 U.S. at 188; Ham, 409 U.S. at 527.

This Court must reverse the guilt verdict and sentence of death because viewing the voir dire record as a whole, the voir dire was so inadequate "that the resulting trial was fundamentally unfair." People v. Stewart (2004) 33 Cal.4th 425, 458 (citing Holt, 15 Cal.4th at 661).

Even if this Court finds that the trial court's error does not require reversal of the judgment of guilt, the error compels reversal of the defendant's death sentence. People v. Pearson (2012) 53 Cal.4th 306, 333 (denial of the defendant's right under the Sixth and Fourteenth Amendments to an impartial jury required "automatic reversal of the defendant's death sentence") (emphasis in original). See also Johnson v. Mississippi (1981) 486 U.S. 578, 584 ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the

determination that death is the appropriate punishment'" in any capital case."). Where, as here, "the 'inadequacy of voir dire' leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." Morgan, 504 U.S. at 739.

V. ACCESS TO EVIDENCE REGARDING THE ONLY EYEWITNESS TO THE FIRE

The Attorney General does not deny David Nieves was the prosecution's star witness. In fact, the Attorney General admits "[t]he most damaging evidence came from [Sandi Nieves's] surviving son." RB 154.

As set forth in the opening brief, the trial court's refusal to enforce subpoenas for psychiatric records and witnesses critical to impeaching David Nieves, the prosecution's only eye witness to the fire, violated Sandi Nieves's Sixth and Fourteenth Amendment rights. AOB 193-209. Specifically, the trial court erroneously ruled that Fernando Nieves, David's father and Sandi Nieves's ex-husband, had not waived the psychotherapist-patient privilege between David Nieves and the counselors he saw at the Alpha Treatment Center, Drs. Alan Jacobs and Debra Wheatley. AOB 198-200. The trial court also prejudicially sustained the privilege claimed by Department of Children and Family Services (DCFS) employees even after the juvenile court had ruled no privilege existed. AOB 202–203.

In response, the Attorney General contends the trial court properly ruled Fernando Nieves had not waived the privilege claimed on David's behalf. RB 192-194. She denies Fernando Nieves had a conflict of interest and ignores the fact Sandi Nieves was "innocent until proven guilty." At the time of trial, Sandi Nieves retained her parental rights.

The Attorney General does not deny the juvenile court's ruling

confirmed Sandi Nieves could have access to the DCFS records as well as the Alpha Treatment Center records. However, she incorrectly asserts Sandi Nieves eventually received these documents but was unable to point to any specific inconsistent statements by David. RB 192 n.19, 194.

The record shows despite the juvenile court's ruling, the trial court continued to allow Dr. Jacobs, Dr. Wheatley, and the DCFS witnesses to stand behind a privilege which was waived. Contrary to the Attorney General's assertion, defendant never gained access to these witnesses or the records she sought.

A. The Trial Court's Ruling that Privilege Applied Was Error

A patient waives privilege if, without coercion, he or she discloses or consents to another's disclosing a significant part of a confidential communication. Evid. Code § 912(a), Assuming, without conceding, Fernando Nieves was a holder of the psychotherapist-patient privilege on behalf of David Nieves, he waived that privilege under § 912(a) when he had Dr. Jacobs write a letter to the Riverside County Superior Court in support of his efforts to seek legal guardianship of David. See AOB 198-200. The Attorney General argues the communication did not waive privilege because it "was reasonably necessary for the accomplishment of the purpose for which Dr. Jacobs was consulted." RB 189-190. The Attorney General is wrong for several reasons.

First, Evidence Code § 912(d) provides:

> A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual

> assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

(Emphasis added.) Here, Dr. Jacobs did not submit his letter to the Riverside court in confidence. Jacobs addressed the letter to the Superior Court of California, and opened the letter with "To Whom It May Concern." 10RCT 2301. He did not mark the letter as confidential or subject to privilege. After submitting the letter to the court, it foreseeably fell into the hands of everyone involved in the custody proceedings concerning David Nieves, including his mother, Sandi Nieves. See Welf. & Inst. Code § 827(a)(1)(A-P)(list of those with access to juvenile case file, including but not limited to minor's parents, court personnel, attorneys, etc.).

Second, Dr. Jacobs did not submit a letter to the Riverside court in the course of accomplishing the purpose for which he was consulted. Fernando Nieves and his family met with Drs. Jacobs and Wheatley "for family therapy." 9RT 439:27-440:1. Fernando Nieves testified, "We went to see them so they could help us cope with the experience from July of '98." Id. He expressly denied consulting the doctors for the purpose of providing the court information in support of his guardianship claim. 9RT 439:21-24. However, he admitted Dr. Jacobs' letter was intended to assist his efforts to seek guardianship. 9RT 440:28-441:9. Therefore, Jacobs's letter to the court does not fall under § 912(d) because Jacobs did not submit it with the purpose of furthering the treatment or diagnosis of David Nieves. Compare, e.g., Blue Cross v. Superior Court (1976) 61 Cal.App.3d 798, 801 (no waiver of the privilege when a doctor sends confidential patient information to the insurer because "disclosure to accomplish payment is reasonably necessary to achieve the consultation's diagnostic and treatment

purposes").[31]

Third, the authorities relied on by the Attorney General do not support her argument that disclosure was reasonably necessary in this case. See RB 187-188, 190. In Rudnick v. Superior Court (1974) 11 Cal.3d 924, this Court noted that if a doctor revealed confidential patient information about adverse drug reactions to the drug manufacturer to obtain assistance in using the drug to treat the patient, then no waiver has occurred. Similarly, no waiver occurred in Roberts v. Superior Court (1973) 9 Cal.3d 330, 341, because the facts involved the mere exchange, in the normal course of medical treatment, of a psychotherapist's records concerning a patient, among treating physicians. Neither of these situations are analogous to a therapist disclosing to a court of law details about the progress of his patient. See 10RCT 2301 (Dr. Jacobs states in his letter, inter alia, "David's maturation is progressing within normal limits"). Unlike Fernando Nieves, the privilege holder in these cases had "not evidenced an abandonment of secrecy." Rudnick, 11 Cal.3d at 931. Here, Jacobs submitted the letter to the Riverside County court in support of Fernando Nieves' custody claim, not

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[31] The Comment to § 912(d) provides other examples of the narrow class of situations the Legislature intended subdivision (d) to address. The examples include: 1) "where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client," 2) "a physician's or psychotherapist's keeping of confidential records necessary to diagnose or treat a patient, such as confidential hospital records . . . even though other authorized persons have access to the records," or 3) "the patient's presentation of a physician's prescription to a registered pharmacist." Evid. Code § 912 (Comment, subd. (d)).

to further David Nieves' therapy.[32]

The waiver in this case is similar to In re Clergy Cases I (2010) 188 Cal.App.4th 1224, involving individual friars who had voluntarily disclosed psychiatric reports to their religious order. The order used the reports "to make personnel decisions and to arrange for treatment so the Individual Friars could continue their ministry on behalf of the Franciscans." Id. at 1241. The court held no privilege existed because the psychological records were not disclosed to the Franciscans for diagnostic and treatment purposes. Id. Similarly, the Riverside County Superior Court was "not involved in rendering psychotherapy treatment" to David Nieves, nor was it "involved in the diagnostic process or in facilitating the therapist in diagnosing or treating" David Nieves. See id.

In the opening brief, we listed California and federal decisions that have held the disclosure of privileged communications in a previous court proceeding waives the privilege for later proceedings. AOB 199 (citing,

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[32] The Attorney General's reliance on State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, and In re Lifschutz (1970) 2 Cal.3d 415, is similarly unhelpful. See RB 188. The State Comp. Ins. Fund opinion addressed whether an inadvertent disclosure of privileged documents constituted a waiver of the attorney-client privilege. Nothing in the record in this case indicates Dr. Jacobs inadvertently communicated to the Riverside County court. The Attorney General cites In re Lifschutz (1970) 2 Cal.3d 415, 430, for the proposition that a mere admission of the existence of a psychotherapist/patient relationship does not constitute a waiver. RB 188.

In the letter at issue here, Dr. Jacobs disclosed more than the existence of the therapist-patient relationship when he discussed how David was "integrating easily and quickly into the family unit," "progressing through the grieving process," and how in his opinion a change in David's placement with the family would be "contraindicated" in terms of David's progress. 10RCT 2301.

inter alia, People v. Superior Court (Broderick) (1991) 231 Cal.App.3d 584, 590; People v. Garaux (1973) 34 Cal.App.3d 611, 612-613; Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co. (8th Cir. 1987) 819 F.2d 1471, 1479). In response, the Attorney General contends -- without citing authority in support – Dr. Jacobs's letter was "nontestimonial," and thus "nothing like sworn testimony given in court." RB 190.

The United States Supreme Court has noted that whether a statement is sworn or unsworn does not determine whether the statement is testimonial, at least for Confrontation Clause analysis. Bullcoming v. New Mexico (2011) __ U.S. __, 131 S.Ct. 2705, 2717. In the criminal context, the Court has considered documents to be "testimonial" if prepared for use in court. Melendez-Diaz v. Massachusetts (2009) 557 U.S. 305, 129 S.Ct. 2527, 2538. In this case Dr. Jacobs specifically addressed his letter to the superior court. Furthermore, in custody matters courts commonly admit letters such as Dr. Jacobs' into evidence. See, e.g., In re Marriage of Purnel (1997) 52 Cal.App.4th 527, 532 (letter received into evidence from a doctor reporting results of her counseling and including a recommendation concerning custody and visitation).

The Attorney General also contends that even if privilege was waived with respect to communications to Dr. Jacobs, the waiver would not apply to his colleague Dr. Wheatley. RB 190. However, the record does not indicate David Nieves met separately with Wheatley. Jacobs and Wheatley worked together at the Alpha Treatment Center. 9RT 429:8-14. Fernando Nieves testified the family went to see both doctors for the purpose of family therapy. 9RT 439:25-440:1. Nothing in the Attorney General's brief shows Wheatley was absent during the same therapy sessions in which Jacobs was present. The letter to the Riverside superior court waived

privilege as to the whole Alpha Treatment Center file, including Dr. Wheatley's contributions.

B. Fernando Nieves Could Not Properly Assert Privilege

As a threshold matter, defendant did not forfeit her challenge to Fernando Nieves as the holder of the privilege. The Attorney General argues defendant failed to raise the issue in the trial court. See RB 192-193. She is wrong. During the March 28, 2000 pretrial hearing, defense counsel began to question Fernando Nieves about his status as the holder of privilege related to David Nieves. However, the trial court sustained a relevance objection and instructed counsel not to inquire further. 9RT 433:9-23. Defense counsel pointed out to the trial court that defendant was still David Nieves's parent. 11RT 618:21-27. Her parental rights to records related to her son had not been terminated. See Fam. Code § 3025 (access to child's records shall not be denied to a parent even if not child's custodial parent). "There is no 'Go to jail, lose your child' rule in California." In re S.D. (2002) 99 Cal.App.4th 1068, 1077.

As the opening brief demonstrates, Fernando Nieves had a conflict of interest and the trial court erred in allowing him to assert privilege on behalf of David Nieves. AOB 205-206. Contrary to the Attorney General's argument, a conflict of interest can prevent a parent from asserting privilege as well as waiving it on a child's behalf. See In re Troy D. (1989) 215 Cal.App.3d 889, 900 (mother whose interests conflicted with son could not claim privilege and prevent disclosure of son's records)(cited with approval in People v. Superior Court (Humberto S.) (2008) 43 Cal.4th 737, 753).

Fernando Nieves and his wife, Charlotte Nieves, were prosecution witnesses hostile toward the defendant. See generally 60RT 9316-67 (Fernando Nieves penalty phase testimony depicting defendant as vindictive

and manipulative); 60RT 9413:6-11 (Charlotte Nieves' penalty phase testimony criticizing defendant's treatment of David Nieves). Part of the motivation for seeking David Nieves' records was the susceptibility of his testimony, as a minor, to the undue influence of Fernando and Charlotte Nieves, with whom he was living. See 10RCT 2289. Fernando Nieves had an interest in preventing disclosure of David's records separate from David's privacy interests.

Even if the trial court had found Sandi Nieves had a conflict of interest with David, then it should have appointed an attorney to represent David Nieves or at least a guardian ad litem to litigate the issue of access to the Alpha Treatment Center records. See AOB 204-206 (citing Humberto S., 43 Cal.4th at 752, and Williams v. Superior Court (2007) 147 Cal.App.4th 36, 48). Instead, the trial court improperly allowed the prosecution, over objection, to represent the interests of David Nieves, its star witness. 9RT 434:14-19. See Ensoniq Corp. v. Superior Court (1998) 65 Cal.App.4th 1537, 1552 (district attorney cannot represent private interests, only the "interests of the People"). Even the prosecutor suggested the court appoint David his own attorney. 9RT 434:24-27. The court refused. 9RT 434:28-435:1.

The trial court erred when it refused to consider Sandi Nieves's parental rights, failed to appoint David Nieves independent counsel, and allowed Fernando Nieves to assert privilege on David's behalf.

C. Critical Witnesses Hid Behind a Non-Existent Privilege

The Attorney General argues the trial court properly instructed defense counsel to file a petition in the juvenile court for the release of records pertaining to David Nieves. RB 192. But the Attorney General does not offer any support for the trial court's decision to ignore defense counsel

when he returned with a signed order from the juvenile court. On June 13, 2000, defense counsel explained Judge Terry B. Friedman of the Superior Court, Juvenile Division, had granted defendant's petition and found no privilege applied to records of the Alpha Treatment Center or DCFS. 32RT 4449:11-23. Defense counsel presented Judge Wiatt the signed order as Exhibit JJ "for the court's consideration." 32RT 4449:25. The trial court instructed counsel to file the document. 32RT 4450:4.

But the trial court simply never returned to the issue. It stood by its ruling that the DCFS witnesses had "already come and gone." 32RT 4448:16. The court stated defendant had not made a sufficient offer of proof when the witnesses had been present in court: "You just said there were inconsistencies. You didn't say what the inconsistencies were." 32RT 4448:17-22. The trial court would not accept defense counsel's explanation that he had presented the court with the potential testimony of the DCFS employees, which was all he could without having access to the documents he sought. 32RT 4448:24-4449:4. The trial court put defense counsel in the impossible position of making a precise offer of proof without first having access to the records which could expose inconsistencies.

D. The Trial Court's Error Violated The Sixth and Fourteenth Amendment Right to Compulsory Process, Confrontation, and Due Process

The Attorney General acknowledges that under People v. Hammon (1997) 15 Cal.4th 1117, 1128, a criminal defendant retains her right to discovery by a subpoena duces tecum of third party records when the information is not privileged. RB 191 n.18. But the Attorney General avoids responding to defendant's constitutional challenge to the trial court's refusal to enforce her subpoenas. Instead, the Attorney General relies on People v.

Letner (2010) 50 Cal.4th 99, 138 n.1 (which in turn quotes People v. Boyer (2006) 38 Cal.4th 412, 441), for the proposition that arguments with a mere "constitutional gloss" do not require discussion. See RB 191. This characterization of appellate constitutional claims has no place here because defendant properly and timely raised her constitutional rights in the trial court. See, e.g., 10RCT 2291-92 (arguing Sixth Amendment rights in defendant's motion for access to David Nieves' psychiatric records); 9RT 478:20-25 (arguing due process violation in connection to the Jacobs/Wheatley subpoenas); 11RT 623:8-9 (arguing due process required making the DCFS witnesses available in court).

The Attorney General also mischaracterizes defendant's due process claim. See RB 191 n.17 (referring to the due process argument as "vague" and "unfocused"). As we explained in the opening brief, defendant had a right, under the Sixth and Fourteenth Amendments to have access to third party records containing evidence material to defendant's case. See AOB 201-203; Crane v. Kentucky (1986) 476 U.S. 683, 690 ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")(internal citations omitted); accord Holmes v. South Carolina (2006) 547 U.S. 319, 324. For example, under Pennsylvania v. Ritchie (1987) 480 U.S. 39, 58-60, due process required the trial court to conduct an in camera review before summarily denying defendant access to purportedly privileged records. Here, the trial court refused any such protection of defendant's due process rights. See 9RT 444:28-445:5 (defense counsel urged the trial court to consider, in the very least, an in camera review of records related to David Nieves).

Sandi Nieves's constitutional right to a fair trial included the right to "compulsory process to obtain defense witnesses" and "the opportunity to cross-examine witnesses for the prosecution." Perry v. New Hampshire (2012) __U.S.__, 132 S.Ct. 716, 720. Just as the prosecution had a right to subpoena witnesses against her, Sandi Nieves had a right to have access to materials and to call witnesses relevant to her defense. Wardius v. Oregon (1973) 412 U.S. 470, 474 (noting that the Due Process Clause speaks "to the balance of forces between the accused and his accuser," and holding that there "must be a two-way street" as between the prosecution and the defense). The trial court violated these rights when it refused to enforce the defense subpoenas for the records and witnesses critical to Sandi Nieves's ability to conduct a meaningful cross-examination of the prosecution's star witness, David Nieves.

E. The Error Was Not Harmless

The trial court's error was not harmless under Chapman, 386 U.S. at 24.

The Attorney General states the defendant eventually received the records she sought but still could not point to any specific prior inconsistent statements with which she could have impeached David Nieves. RB 194. In support, the Attorney General cites to defendant's motion for a new trial. RB 187, 192 n.19, 194 (citing 22RCT 5570). However, in her new trial moving papers, defendant did not state she eventually obtained all the records she sought. She referred only to the pretrial hearing during which Fernando Nieves testified and the trial court upheld the psychotherapist-

patient privilege. See 22RCT 5570 (citing Vol. 9, pp. 415-519).[33] The motion simply argued Fernando Nieves had been able to introduce Dr. Jacobs's letter during court proceedings to obtain custody, and that the letter was based on David Nieves's statements made to Drs. Jacobs and Wheatley in the course of his therapy. Id. The motion stressed that in her criminal trial, defendant was not allowed access to these witnesses in order to elicit statements made by David Nieves and the doctors' opinions for impeachment purposes and to "lessen victim impact." Id. Although arguably confusing, nowhere in defense counsel's motion did he state he actually received the records he sought from Jacobs and Wheatley.

Under Chapman, the trial court's error requires reversal. But as we showed in the opening brief (AOB 208-209), even if the guilty verdict is not reversed, the death sentence must be reversed. The trial court's error has rendered the sentence unreliable under the Eighth Amendment. See Woodson v. North Carolina (1976) 428 U.S. 280, 305.

VI. FAILURE TO SUBMIT TO MENTAL EXAMINATION

Verdin v. Superior Court (2008) 43 Cal.4th 1096, 1116 holds that a "trial court's order granting the prosecution access to [a defendant] for purposes of having an expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes or any other statute, nor is it mandated by the United States Constitution."

After Verdin was decided, Penal Code § 1054.3 was amended to provide express authority for court orders authorizing such examinations. The amendment was not in effect when this case was tried in 2000. The

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[33] The motion for a new trial mistakenly stated that the pretrial hearing reported in Vol. 9 took place May 28, 2000. In fact, the hearing took place March 28, 2000. See 9RT 414.

amendment does not apply. Verdin is retroactive and governs this case. People v. Gonzales (2011) 51 Cal.4th 894, 927; People v. Wallace (2008) 44 Cal.4th 1032, 1087.

Despite the fact Evidence Code § 730 was never mentioned by the trial court or counsel as a basis for discovery from the defendant. Nonetheless, the Attorney General seizes on § 730 as the alternative statutory authority for the trial court's order in this case and for the prosecutor's subsequent remarks in closing argument. She bases this on the conclusion to the Verdin opinion. Verdin indicated the prosecution would be free after remand in the underlying case to seek a prospective order for examination of the defendant using Evidence Code § 730. Verdin, 43 Cal.4th at 1117.

A principal problem with the Attorney General's argument is that the prosecution before and during trial never once relied on Evidence Code § 730 as the statutory predicate for ordering the defendant to submit to a mental examination. Anticipating the opinion in Verdin, defendant objected to submission to a mental examination by prosecution experts on the ground that Penal Code § 1054.3 did not authorize a mental examination. 11RCT 2572, 2575. The record shows that despite multiple discussions of the issue, and defense counsel's willingness to compromise, the prosecution never relied on any authority in Evidence Code § 730. 10RT 553:4-567;26; 29RT 3585:4-3607:17; 37RT 3782:9-3910:2, 3925:1-3926:4; 30RT 3951:3-3952:4.

The trial court never relied on, or mentioned, Evidence Code § 730 in all the discussions of whether, when, and under what conditions the defendant would need to submit to examination by the prosecution. Furthermore, the Evidence Code § 730 appointments of experts in the

record were all issued ex parte, without giving the defendant an opportunity to be present or to be heard. And, by their terms, the § 730 orders that the trial court issued only set out the scope of the expert appointments and the authorization for payment of the experts. The Attorney General has not even shown that Evidence Code § 730 orders were ever served on, or received by, the defendant during the trial court proceedings. They can not be the basis for compelled examination of the defendant.

Unlike Gonzales, 51 Cal.4th at 928, in which the defendant failed to argue in the trial court that the prosecutor's request for a mental examination was precluded by the discovery statutes, defendant in this case did argue below that there was no authority to require her to submit to examination by the prosecution's experts. Further, unlike Gonzales, the prosecutor never made an alternative argument below that § 730 authorized the examination and the trial court never mentioned this section in its discussions with counsel. Therefore, this Court cannot assume, as it did in Gonzales, the trial court would have resorted to § 730. The prosecution never alternatively asked the court to do so.

In addition, in this case the trial court erroneously, but expressly stated that no legal authority is needed to compel a defendant to submit to a mental examination "because it's so obvious on its face." 51RT 7765:19. The notion that the trial court would have substituted § 730 for its erroneous position that no authority was needed would be speculative and require rewriting the record.

The § 730 orders did not provide any basis for the court's admonition to the jury that "when the defendant submits their mental state as an issue in this case, the defendant must submit to an examination by the

prosecution experts without condition." 38RT 5485:9-15.[34]

A. The Section 730 Orders Were Not Directed to the Defendant

Review of the Evidence Code § 730 order to Dr. Hirsch and the orders to prosecution rebuttal experts Drs. Brook, Amos, and Sadoff shows the orders were not directed to the defendant at all. For example, the order for Dr. Sadoff's appointment was made during sealed proceedings that were not disclosed to defendant until the record was prepared for appeal. See 24RT 2926-2932 (sealed).

The § 730 orders in the record only authorize the scope of the experts' work and their payment as court appointed experts. See e.g. 10RCT 2337 (Dr. Hirsch: "granted permission to perform face-to-face interview of the Defendant" as part of scope of work).[35] The orders appointing Drs. Brook, Amos, and Sadoff do not mention "face to face" interviews of the defendant, but merely "granted permission to perform face to face interviews with witnesses." (Emphasis added.) These orders did not mention Sandi Nieves. See 11RCT 2530-2531, 2557, 18RCT 4471.

The declarations signed and filed by deputy district attorney Barshop in support of the § 730 appointments do not mention Sandi Nieves, but only

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[34] The Attorney General contends that defendant forfeited her right to challenge the § 730 orders by failing to object on that basis below. RB 199. However, the Attorney General fails to note that § 730 was never invoked for the purpose of requiring defendant to submit to an examination. Therefore, there was nothing to object to. Further, the prosecution never served or gave notice to the defendant of the court orders, let alone the ex parte requests for appointment, including the order for Dr. Sadoff's appointment, which was under seal.

[35] As far as we can tell, there is no declaration in the record indicating what the prosecution presented to the trial court in support of appointment of Dr. Hirsch.

sought appointment "to assist the prosecution in analyzing test results as well as assist in the preparation for the anticipated defense expert testimony." The declarations did not seek orders to interview the defendant or directing the defendant to submit to unconditional interviews with prosecution experts. 11RCT 2532, 2559, 18RCT 4473.

The Evidence Code § 730 orders in this case, on this record, are not sufficient authorization to compel the defendant to submit to examination by Drs. Hirsch, Brook, Amos, and Sadoff, and to allow the prosecution to disclose before the jury and comment on defendant's failure to submit. If the § 730 orders on this record were sufficient, then the opinion in Verdin would be meaningless. There is nothing in the record to suggest that the prosecution experts were selected by the court or were anything other than prosecution- selected experts. Although the Legislature subsequently amended Penal Code § 1054.3 to authorize such orders, the statutory authority did not exist at the time of trial.

Accordingly, there was no authority for the trial court to order defendant to submit to examination by the prosecution experts without conditions or for the prosecution and court's subsequent comments to the jury. People v. Clark (2011) 52 Cal.4th 856, 940 (trial court erred "by permitting comment on defendant's refusal to be questioned by Dr. Missett"); Wallace, 44 Cal.4th at 1087 ("admission of Dr. Terrell's testimony regarding defendant's refusal to cooperate with the court-ordered psychiatric examination was also error").

B. The Prosecution Cannot Take Advantage of the Lawful Assertion of the Right Not Be Examined

Despite the Attorney General's argument to the contrary (RB 199-200), defendant is on solid ground because as we pointed out in the

Opening brief, California law does not permit the prosecution to take advantage of a defendant's lawful assertion of a statutory protection against giving information to the prosecution. AOB 220-222 and nn. 98, 99; See People v. Coddington (2000) 23 Cal.4th 529, 604-605 (establishing the principle that adverse comment on choices protected by statute are improper). Federal law does not allow the court to lessen the burden of proof by giving the defendant a mark of guilt. Holbrook v. Flynn (1986) 475 U.S. 560, 571.

The trial court affirmatively condemned the defendant by telling the jury outright that Sandi Nieves had violated the law when she refused to submit to examination by defense experts. The court explicitly told the jury "that was not forthcoming in this case." 38RT 5485:9-15. Then when counsel attempted to inquire of a prosecution expert witness whether it might make a difference to know Sandi Nieves agreed to an examination as long as a defense expert was present to observe it, the court punctuated its earlier statement by sustaining a prosecutorial objection and telling defense counsel to "get into some other area." Id. The court later overruled defendant's objection to its remarks. 39RT 5575:20-5577:11.

The Attorney General concedes that the court's final instruction to the jury that "the weight and significance of any concealment ... are matters for your consideration," did not put any limit on how the jury could use the refusal to submit to unconditional examination by prosecution experts in its consideration of guilt, special circumstances, or the appropriate penalty. RB 200; 20RCT 5114; 53RT 8382:23-25. Compare, former CALJIC 2.06; CALCRIM 371; see AOB 223-224 and nn.100, 101. The Attorney General says "this omission was made up for by other, correct instructions," but she

fails to cite to any relevant instructions in the record. RB 200.[36] She simply says there was no prejudice, but does not cite to anything in the record to support her position. Id.

The unfairness and prejudicial impact was heightened by the trial court's unwillingness to instruct or allow defense counsel to explore with prosecution witnesses or otherwise convey to the jury that the defense was willing to cooperate with the prosecution's request for examinations as long as a defense expert was permitted to observe the examinations as they were conducted. 35CT 4918-19, 4955; 29RT 3783:21-24; 38RT 5485:3-15. Defense counsel's desire to protect his client in this way was in no sense an "attempt to conceal evidence" and the jury should not have been permitted, let alone encouraged to view it in that way.

This was all the more unfair given that counsel's position was an entirely reasonable one. Counsel was correct that the discovery statutes did not authorize compelled examination by prosecution experts (Verdin, supra), and neither the trial court nor the prosecution suggested Evidence Code § 730 as a possible basis for such compelled examinations. Even if they had done so, counsel could reasonably have doubted that § 730 authorized compelled examinations for the purpose of assisting a prosecutor's investigation of a defendant's mens rea defense. That § 730 could be used in this way was not suggested by any case law pre-dating this

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[36] The Attorney General's citation of People v. Sedeno (1974) 10 Cal.3d 703, 721 does not support her position in this context. Sedeno held that failure to give a lesser included offense instruction is not prejudicial when other proper instructions were given and the jury verdict necessarily shows the lesser included offense was rejected. Sedeno has nothing to do with an open ended instruction that allows the jury to consider concealment any way it might choose.

Court's opinion in Verdin. Counsel's reasonable understanding of the law should not have been turned upside down to undermine the credibility of his client and her defense.

C. The Decision to Refuse an Unconditional Examination Was Not Made by the Defendant

As we pointed out in the opening brief, the refusal to submit to examination by prosecution experts was a legal decision made by defense counsel. Instead, the trial court and the prosecutor expressly put the onus on the defendant personally by telling the jury she had refused. The Attorney General's response is to say that "[t]here 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." RB 200. This argument makes little sense. Surely this Court would not encourage a rule that requires a client to contradict his or her counsel in court, on the record, in order to show disagreement with his or her defense. Such a rule would undercut the attorney-client relationship, lead to conflict between lawyers and their clients, and lead to chaos in criminal court proceedings. Furthermore, defendant is not a lawyer. She was represented by counsel. She should not be expected to understand fully the legal consequences of her counsel's decisions. Understandably, the Attorney General does not cite any support for her position.

D. The Court's Orders, Instruction to the Jury, and Prosecutorial Comments Were Prejudicial

After hearing the court tell them defendant was essentially a cheater who failed to abide by court orders, a reasonable juror would undoubtedly look upon the defendant with disfavor. Carter v. Kentucky (1981) 450 U.S. 288, 302 n.20 (noting that "'[t]he influence of the trial judge on the jury is

necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling'")(quoting Starr v. United States (1894) 153 U.S. 614, 626)); Bollenbach v. United States (1946) 326 U.S. 607, 612 (noting that jurors are "ever watchful of the words that fall" from the judge); United States v. Blanchard (7th Cir. 2008) 542 F.3d 1133, 1151 (noting that the "magnitude of [the judge's] influence is difficult to overstate").

The prosecution made matters worse by taking full advantage of the trial court's instruction. First, the prosecutor repeated the trial court's instruction to the jury in closing argument. 56RT 8805:24-8806:4 ("In this case, the court gave you an instruction back on June 22nd of this year about the defendant's refusal to be evaluated by any of the independent experts appointed for the prosecution. And that once a defendant admits their mental state as an issue in a case, such as this case, the defendant has to submit to an examination by the prosecution experts without any conditions, and he told you that that was not forthcoming in this case."). The prosecutor went on to say that this refusal could by taken into account by the jury in assessing the credibility of defendant's experts, in determining the validity of defendant's defenses, and in determining the validity of what defendant told her experts, and to consider it as an attempt to conceal evidence against herself. Id. at 8806:5-18.

By this time, the jurors must have viewed the defendant with the "unmistakable mark of guilt." Holbrook, 475 U.S. at 5. This plainly lessened the evidentiary burden the prosecution needed to meet in order to prove guilt and to prove that the special circumstances were true. See AOB 223-224.

The trial court's erroneous order that Sandi Nieves submit to

unconditional examination by defense experts, the court's instruction to the jury that she had personally refused, and the prosecutor's closing argument to the jury that as a result of Nieves's refusal the jury could discount her experts, discount her defense, and consider the refusal as an attempt to conceal evidence, were manifestly prejudicial. The fact the trial court failed to instruct the jury that Nieves's refusal was not sufficient to convict made the prejudice even stronger.

Indeed, the prosecution recognized the trial court's extreme position and tried to put a limit on how the jury could treat the evidence of refusal by proposing its own instruction, which the trial court rejected. It would have said refusal alone is not enough to convict. See 19RCT 4753 (prosecution's proposed instruction); 52RT 7768:10-7770:3.[37]

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[37] The defense did object to the prosecution's instruction. In context it did so based on the factual predicate in the prosecution's version because Nieves had not entirely refused to be examined. She wanted to compromise by imposing conditions on the examination.

The defendant did not object to the limiting language in the prosecution's proposed instruction, which said,"such refusal is not in itself sufficient to prove the existence of any required mental state or specific intent element, and its weight and significance, if any, are for you to decide." 19RCT 4753 (prosecution proposed instruction).

The defense clearly objected to the facts assumed in the instruction. See 51RT 7768:12-13 ("I believe that's a fraud upon the jury and not an accurate statement of the facts."). The first paragraph stated: "If you find that the defendant willfully refused to undergo a mental and physical examination as ordered by this Court with an independent Psychiatrist, Psychologist, Neuropsychologist, Neurologist, or Epileptologist appointed for the Prosecution, you may consider such evidence or refusal as consciousness of the existence of any required mental state or specific intent element of the crimes charged." 19RCT 4753.

The opening brief demonstrates the practical prejudicial effect. See AOB 224-228. Because the Attorney General has only submitted a one page summary response, we will not repeat the showing made in the opening brief.

The Attorney General rests her short argument on the contention Dr. Brook did not agree with defense expert Dr. Lorie Humphrey's assessment of defendant's cognitive impairment and did not rely on defendant's refusal to be examined for his expert opinion. RB 201. Likewise, she contends, Drs. Brook, Amos, and Sadoff did not rely on Nieves's refusal. Id.

First, if the defendant's refusal was as unimportant to Drs. Brook, Amos, and Sadoff as the Attorney General now contends on appeal, why did the prosecution ask each and every one of them on direct examination in front of the jury whether Sandi Nieves refused to submit to mental examinations by them? See 38RT 5375:13-5376:11 (Dr. Brook); 47RT 7066:2-7067:12 (Dr. Sadoff); 48RT 7273:1-9 (Dr. Amos); see also 53RT 8215:22-8216:2 (Dr. Plotkin). Is the Attorney General now contending that the effort to examine Nieves was all a charade or irrelevant because the examinations were not necessary to the prosecution experts' opinions? See RB 201.

Second, what is important is not whether the prosecution experts relied on the refusal in forming their adverse opinions, but the fact that the refusal was brought before the jury through direct examination of the experts, through the trial court's instruction, and through the prosecutor's closing argument. Highlighting and exploiting the refusal allowed this issue to be used effectively to complement the prosecution and prosecution experts' theme that Sandi Nieves was a faker who had manipulated her children, her own mental health experts, and likely was trying to manipulate

the jury. See 54RT 8442:4-8443:4 (prosecution closing: "she's a manipulator," "impression management the thing the defendant does best"); 54RT 8459.18-20 ("And we've heard that from Dr. Caldwell, another person who talks about how she lies, how she manipulates."); 56RT 8775:25-27 ("What are you left with? Malingering, lying, faking, manipulating. That's her."); 57RT 8845:14-17 ("We have proven in this case through various pieces of evidence, through various witnesses, she's a manipulator. She is a faker. She is a liar."); 57RT 8846:8-10 ("The defendant, when she got up on the stand, she tried to manipulate you. She engaged in impression management."); 57RT 8854:9 ("Again, manipulation, lies."); 57RT 8856:7 ("And then, of course, manipulating you [the] jury.").

Recent opinions of this Court finding that unauthorized discovery orders for examination of defendants were not prejudicial do not undermine defendant's claim of prejudice in this case. In Clark, 52 Cal.4th 937-942, the Court focused on whether the prosecution experts' opinions were based on the unauthorized examination of the defendant. The Court concluded that the opinions would have been the same whether or not the experts had interviewed the defendant. Id. at 941. Regarding one expert who did not interview the defendant, the Court found that the failure of the defendant to submit to examination had no bearing on the expert's opinion. Id. Clark therefore addresses the prejudice from the experts' opinion, not as in this case, the prejudice from the broadcast to the jury that defendant failed to abide by a court order and the prosecutor's use of that position to maintain that she was a manipulator.

In Gonzales, the trial court relied on non-statutory law for the authority to issue an order compelling examination. This Court found the

order was not prejudicial because the prosecution had alternatively asked for an order under § 730. 51 Cal.4th at 927-28. In this case, as we have shown, the § 730 orders were not sought to compel defendant's examination, were not served on her, and were not cited by the prosecution or the court as the basis for the court's order. Further, in Gonzales the trial court only instructed that the refusal could be considered when weighing the opinion of defense experts – not that it could be considered in weighing all the evidence against the defendant, as in this case. Id. at 926.

In Wallace, this Court found that a prosecution expert's mention of the defendant's refusal to submit to an unauthorized mental examination was inconsequential. 44 Cal.4th at 1087. The evidence of the prosecution expert was cumulative to that of other experts. The expert did not rely on defendant's refusal in formulating his adverse opinion. Wallace does not address the type of exploitation of the unauthorized order that occurred in this case or the fact that the evidence of defendant's refusal to abide by the unauthorized order could be used by the jury for any purpose, including condemning the defendant to death.

Separately, and cumulatively in addition to the trial court's disparagement of the defendant and her attorney, and its CALJIC 2.28 instruction with regard to discovery violations, the erroneous order and its aftermath had a devastating effect. As a practical matter, as the consequences of the order unfolded, there was little possibility the jury would not see the defendant marked with guilt. The defendant's mental state at the time of the crimes was the whole basis for her defense. It was central to her plea for life imprisonment rather than death.

The theme that Sandi Nieves was a manipulator was brought home by the prosecution's exploitation of the refusal to submit to an unlawful

court order. The whole point of the prosecution's exploitation of the refusal was to show that the defendant is generally dishonest, a manipulator, and conceals evidence. See e.g. 64RT 10107:10-11 ("Her actions were vengeful. They were manipulative, and they were calculating."); 64RT 10115:9-12 ("And we heard that the defendant has a history of manipulating people. Don't let her manipulate you now through tears into sympathy which is not warranted by the facts of this case."); 64RT 10118:15-18 ("She was still trying to punish, still trying to control, and still trying to manipulate within one month of the death of her four children.")

The theme was a powerful means to argue Sandi Nieves is more deserving of death than someone without these qualities. However, the exploitation of the refusal to submit introduced an impermissible factor in the balance between life and death. See Zant v. Stephens (1983) 462 U.S. 862, 879, 885 (capital sentence must not be based on considerations that are constitutionally impermissible).

Therefore, separately, and cumulatively, there is a reasonable possibility the jury would have rendered different verdicts at the guilt and penalty phases if the jury had not been informed in the manner that occurred at this trial that defendant failed to submit to examination by the prosecution. See People v. Brown (1988) 46 Cal.3d 432,448; Chapman, 386 U.S. at 24.

VII. RESTRICTION ON DEFENSE EXPERT TESTIMONY

A. Restrictions Based on Penal Code §§ 28 and 29

1. The "Psycho Fire"

Del Winters was defendant's arson expert. He testified that Los Angeles City Arson, where he had previously worked, had categories for types of arson fires, including insurance fraud, pyromaniac, compulsion set

fires, crime cover-up fires, vanity fires, and spite fires. When the motive was "obscure" they would be put into a category of "psycho fire." 29RT 3864:7-3865:5. The trial court sua sponte struck the reference to psycho fire on the ground that it went to intent and the "ultimate issue" in the case and it was irrelevant. Over a defense objection, the court instructed the jury to disregard "that it's a psycho category fire." 30RT 3927:16-3929:11, 3954:12-24.

The Attorney General argues the court did not abuse its discretion when it struck Winter's category for the fire. RB 204. She claims this was a backdoor effort to have Winter, an arson specialist, testify "whether appellant had formed a specific mental state." Id. However, Winter was categorizing a fire, not the defendant. He was using the parlance of Los Angeles arson investigators, concluding that the motive was "obscure." The Attorney General's defense of the trial court offers no clue as to how a fire category somehow violates the prohibitions of Penal Code §§ 28 and 29 against expert testimony addressing whether a defendant, because of mental disease, defect or disorder, lacked the capacity to form or did or did not form a required mental state at the time of the alleged offense. Inasmuch as Winter explained the basis for his use of the term "psycho," that is, because the motive was obscure, this was hardly a psychological diagnosis.[38]

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[38] The Attorney General's reliance on People v. Vieira (2005) 35 Cal.4th 264, 292, is not helpful. RB 204. In Vieira, the Court held there was no error when a former sheriff's deputy was prohibited from testifying that a defendant had a mental illness that would have raised a doubt whether the defendant committed first degree murder. This is far different from testifying about a fire category in general. Further, Vieira precluded the testimony because the former deputy was not qualified to give an opinion on mental status. Here, the former arson investigator was certainly qualified

(continued...)

The Attorney General does not even attempt to defend the trial court's exclusion on relevance grounds. She offers one sentence contending the error, if any, was not prejudicial because it did not result in a miscarriage of justice. RB 206. The Attorney General misses the point.

First, there is a federal issue here. Sandi Nieves was deprived of a meaningful opportunity to present a defense when the court interpreted Penal Code §§ 28 and 29 so broadly that they prohibit an arson expert from testifying about a fire category generally used by Los Angeles fire investigators. See Crane v. Kentucky (1986) 475 U.S. 683, 690; Chambers v. Mississippi (1973) 410 U.S. 284, 302. The trial court's lack of evenhandedness in applying Penal Code §§ 28 and 29 served to further undermine appellant's right to due process and a fair trial. Wardius v. Oregon (1973) 412 U.S. 470, 474. See 44RT 6503:7-6504:4 (prosecution expert permitted, over defense objection, to testify fire was set with intent to burn down the entire structure).

Second, while the error standing alone likely did not necessarily lead to the verdict of guilt, the trial court's hypersensivity to the word "psycho," and its effort to shut down the defense likely had a cumulative effect on the jury, discounting Sandi Nieves's principal defense to the charges against her – that she was in a dissociative state and did not actually form the intent necessary for first degree murder.

The trial court essentially told the jurors very early in the guilt phase that anything related to psycho issues was off limits and should not be considered by them. From then on, the jurors likely viewed the defense in

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[38](...continued)
to categorize a fire, which is all he did.

that light regardless of the evidence that followed. The trial court's hyperactive and misguided vigilance was not harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

2. Mental Health Experts

With regard to the defense mental health experts, the Attorney General notes that the trial court "sustained most of the prosecution's objections based on the question going to the 'ultimate issue.'" RB 211. That may have been the stated ground for the trial court's rulings, but the Attorney General ignores that it was not a ground that applied to the great bulk of the evidence excluded. The court, for example, precluded Dr. Ney from testifying whether the defendant did or did not attempt suicide. See AOB 236; 40RT 5747:17-5749:8, 42RT 6027:16-27. This was not testimony prohibited by Penal Code §§ 28 and 29 because it addressed the defendant's motive and action, not a mental disease, defect, or disorder. The preclusion of questions to Dr. Ney pertaining to epilepsy and serotonin syndrome likewise did not directly address the "ultimate issue" in the case, but instead described Sandi Nieves's medical condition. 40RT 5757:1-5760:19, 42RT 6085:17-24.

The preclusion of testimony regarding "dissociation symptoms," a reduced ability to cope under stress and depression was erroneous because the questions did not offer an opinion on the ultimate issue. 40RT 5767:17-5770:4, 5782:16-28, 5788:814, 5792:23-5793:4, 5800:7-16, 43RT 6283:8-17. Instead, these questions would have allowed the jury to consider and draw inferences to reach its own conclusion. Compare People v. San Nicolas (2004) 34 Cal.4th 614, 661, 662 (most background opinion regarding affect of defendant's condition in the abstract, personality characteristics, effects of alcohol, and mental condition on the day of the

crime, was admitted).

Moreover, as we pointed out in the opening brief, the trial court treated the prosecution experts differently. AOB 238-239. Prosecution expert John DeHaan was allowed to say the fire was set by someone intending to burn down the entire structure. 44RT 6503:7-6504:4. Dr. Amos, a prosecution expert, was allowed to testify that defendant's acts were "inconsistent with any organic or neurological dissociation." 48RT 7316-7318:22. Dr. Sadoff, testifying for the prosecution, said defendant's "behavior would be goal-oriented, intentional, and purposeful." Further, he testified it showed "deliberation, purpose, and intent." 47RT 7084:25-26, 7085:1-5, 20-22, 25-26.

The Penal Code precludes testimony "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 crimes charged." Pen. Code § 29. Notably, the trial court did not step in and put a halt to this line of testimony which was based on the prosecutor's hypothetical questions that included the words "intentional and purposeful." 47RT 7084:22-29.

The Attorney General does not offer any reason why prosecution experts were allowed to testify about defendant's mental state, her purpose, and intent, but defense experts were not even able to testify in full about defendant's medical condition in order to provide context to evaluate the opinions bearing on the verdict.

As we pointed out in the opening brief, the error tipped the balance in favor of conviction. AOB 242. See Parle v. Runnells (9th Cir. 2007) 505 F.3d 922, 933. It was therefore not harmless beyond a reasonable doubt. See Krulewitch v. United States (1949) 336 U.S. 440, 445.

B. Restrictions Based on Out of Court Statements of the Defendant and Her Family

The trial court put a blanket restriction on any expert testimony that relied on out of court statements of the defendant or her family. A principal reason for the court's restriction was due to defense counsel's resistance to having her submit to an unconditional examination by the prosecution experts. See 34RT 4733. The premise was simply wrong. Nieves was not obligated to submit to examination by prosecution experts because Penal Code § 1054.3 did not require such discovery at the time of trial. See AOB 209-228 and Part VI of this brief; Verdin v. Superior Court (2008) 43 Cal.4th 1096. The Attorney General does not comment on this false premise.

Moreover, the Attorney General fails to cite any specific case law or opinions of this Court that support the trial court's unnecessary and unreasonable position in this case. The trial court simply assumed that what the defendant told the experts was unreliable unless it was tested under cross examination. But why was it necessarily all unreliable? Is it because she was on trial, although presumed innocent?

The trial court had less drastic means of controlling the evidence from the experts without decimating the defense. "Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." People v. Montiel (1993) 5 Cal.4th 877, 919. The Attorney General ignores our argument that the trial court could have been selective about excluding particular items of evidence, instead of using a blunderbuss approach that would handcuff the defense. She also ignores the fact that the court could have used limiting instructions to address underlying hearsay

testimony and its consideration by the jury. And she ignores the fact the trial court refused to even permit the defense experts to come in and testify as to why they, as mental health experts, believed that the out of court statements they were relying upon, from appellant or family members, were credible, whether because they were mutually reinforcing, internally consistent, consistent with known patterns of family or emotional dysfunction, or otherwise.

Instead, the Attorney General points to bits and pieces of expert opinion that were admitted after defendant testified and Al and Penny Lucia testified. RB 216-217. She then lists a few opinions that were given based on the handful of facts testified to by defendant and the Lucias. She asserts in one sentence that the court's exercise of discretion was therefore not prejudicial 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." RB 218.

It is easy enough for the Attorney General to assert summarily that the trial court's restrictions on expert testimony nonetheless allowed the defendant to put on a full and complete defense. Counsel cannot elicit from a client on the witness stand all the detailed information and symptoms that a skilled mental health professional can elicit in multiple interviews in a confidential setting. But one sentence in an answering brief cannot possibly be sufficient to meet the test required by Chapman, 386 U.S. at 24, which puts the burden on the state to show harmlessness beyond a reasonable doubt for guilt and penalty phase review. One sentence is insufficient to meet the burden of People v. Brown (1988) 46 Cal.3d 432 for penalty phase review.

The primary defense, that defendant was unconscious and did not

have the required mens rea for either first degree murder or the special circumstances, was dramatically undercut. Dr. Nancy Kaser-Boyd, who had spent 25 hours interviewing the defendant (29RT 3781:21-24, 3869:5-7), had written a lengthy report (10RCT 2529a (confidential)), and had translated her notes upon order of the trial judge, had nothing left to say because practically all her opinions were based on interviews with Sandi Nieves and her family. Without any psychological history and Kaser-Boyd's interviews to back up her opinions, Dr. Humphrey was restricted to reporting on tests she had administered and scored. Dr. Ney had to rely on medical history. See AOB 244-246.

To top off the prejudice, the trial court explicitly told the jury "there is no evidence of an altered state in the record in this case." 47RT 7169:10-12.

The Attorney General has failed to show the error was harmless beyond a reasonable doubt.

VIII. EXCLUSION OF THE PET SCAN AT THE GUILT AND PENALTY PHASES

The trial court blind sided the defense by holding a Kelly-Frye hearing on the admissibility of the positron emission tomography (PET) scan without proper notice or time for defense counsel to prepare adequately. The test showed abnormally diminished activity in certain areas of defendant's brain. The results would have corroborated the opinions of the defense experts and provided a basis for sympathy. However, the trial court had already pre-judged the issue prior to the hearing. As a result, it erroneously and prejudicially prevented defendant from presenting the PET scan evidence at both the guilt and penalty phases of her capital trial. See AOB 249-269.

The Attorney General attempts to justify the trial court's ruling to exclude the PET scan. See RB 218-233. She focuses only on the prosecution experts' testimony that the PET scan was not helpful to making a diagnosis. Id. But the record shows defendant did not seek to introduce the PET scan for this purpose. The Attorney General completely ignores the inconvenient fact that both parties' experts agreed that PET scans are widely accepted as an important tool for corroborating a known diagnosis – the very reason defendant sought to introduce the evidence here.

The Attorney General also defends the trial court's unfair Kelly-Frye hearing. See RB 233-234. However, she provides no reasonable explanation for the trial court's arbitrary denial of a continuance that would have allowed the defendant to prepare adequately.

Finally, the Attorney General argues that excluding the PET scan evidence was harmless at both the guilt and penalty phase. RB 235-238. She ignores the critical role the scan would have served at the guilt and penalty phase as scientific corroboration of defendant's expert witnesses.

Excluding the PET scan evidence from both the guilt and penalty phases of the capital trial violated Sandi Nieves's constitutional rights to due process, the opportunity to present a meaningful penalty phase defense, and a reliable sentence. Holmes v. South Carolina (2006) 547 U.S. 319, 324-329; Crane v. Kentucky (1986) 476 U.S. 683, 690 (same); Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 305.

A. The PET Scan Was Admissible

The Attorney General argues the PET scan was inadmissible under People v. Kelly (1976) 17 Cal.3d 24, based on the testimony of the prosecution's experts Drs. Edward Amos and Helen Mayberg. RB 231-232.

However, as we explained in the opening brief, the fact the prosecution's experts disagreed with defense experts does not make scientific evidence inadmissible. AOB 259-260. Defendant needed to show only "general acceptance" of PET scan evidence among the scientific community, not "'absolute unanimity of views in the scientific community.'" People v. Venegas (1998) 18 Cal.4th 47, 85, quoting People v. Guerra (1984) 37 Cal.3d 385, 418.

Moreover, the prosecution and defense experts agreed on the usefulness of the PET scan in the areas relevant to this case. Both Drs. Amos and Mayberg agreed PET scans are "accepted within the scientific community in order to corroborate a known diagnosis." 33RT 4466:18-21; 31RT 4303:26-4304:1. Here, defendant sought to introduce the PET scan for the purpose of corroborating the testimony of defense experts. Contrary to the Attorney General's assertions, defendant did not seek to introduce the PET scan as the basis for a psychiatric disorder diagnosis or any other diagnosis for that matter. See RB 231-232. Defense counsel explained defendant sought to introduce the PET scan specifically to corroborate the testimony and reports of Drs. Humphrey and Ney. 33RT 4628:22-4629:10. See also Motion for Reconsideration of Kelly-Frye Ruling, 19RCT 4701 (explaining defendant sought introduction of the PET scan as "corroborative evidence of the findings of the experts," in particular, the brain injury identified by Dr. Lorie Humphrey).

Any disagreement between the experts as to the methodology used in the PET scan of defendant went to the weight of the evidence and was not a proper ground for excluding it. See AOB 259-260 (citing People v. Fierro (1991) 1 Cal.4th 173, 214). See also People v. Cook (2007) 40 Cal.4th 1334, 1345 ("mere variations in technique or procedure go to the weight of

the evidence, not its admissibility"). The trial court should have allowed jurors to hear the evidence and make the determination for themselves as to how much weight or significance to assign to it.

The Attorney General further contends the PET scan was inadmissible on relevancy grounds based on "overwhelming evidence of the general uselessness of the PET scan evidence here." RB 235. But defendant did not seek to introduce the PET scan for the purposes the Attorney General lists as problematic. Defendant did not seek to use the PET scan to date a brain injury, to make a diagnosis, or to explain past behavior. See id. As stated above, defendant sought to introduce the PET scan to corroborate testimony of her expert witnesses that the she had impaired brain function and had likely suffered trauma to the head. The brain abnormality apparent in the PET Scan was also consistent with other evidence of epilepsy. 31RT 4214:7-9. The PET scan was relevant because it "had a tendency in reason to prove a disputed fact bearing on a material issue." People v. Alvarez (1996) 14 Cal.4th 155, 215.

B. The Trial Court's Process For Determining the Admissibility Was Fundamentally Unfair

As we explained in the opening brief (AOB 260), if this Court finds the defense did not establish the admissibility of the PET scan evidence or that the trial court's exclusion was otherwise justified, then any insufficiency in the defense showing is a result of the fundamentally unfair process surrounding the Kelly-Frye hearing.

First, the testimony during the Kelly-Frye hearing had no impact on the trial court's ruling on the issue. The court had already prejudged the outcome of the hearing before it started. The court revealed on the record it had already conducted its own independent research and had come to the

conclusion it was "junk science" that did not "withstand the rigors of the Kelly-Frye rule." 31RT 4145:16-23. See AOB 250. Compare United States v. Montgomery (8th Cir. 2011) 635 F.3d 1074, 1090 ("'[t]here is also no question that the PET scan is scientifically reliable for measuring brain function.'").

The Attorney General does not respond to our showing in the opening brief that the trial court prejudged the Kelly-Frye issue. She does not address the trial court's inappropriate independent research. She ignores the record showing that the court stated its conclusions before hearing any testimony or argument from the parties.

Second, the trial court refused to provide defendant sufficient time to adequately prepare for the Kelly-Frye hearing. Defendant had provided the prosecution with the PET scan related discovery on March 10, 2000. 11RCT 2434, 2439. Almost three months later, on June 5, 2000, the prosecution sprung its oral request for a Kelly-Frye hearing. 31RT 4145:7-13. The trial court refused to allow defense counsel to check the availability of his expert witnesses before scheduling the hearing for the following week, on June 12, 2000. 31RT 4145:24-27, 4146:6-7. When defendant submitted a written motion requesting more time to prepare, the court refused. 18RCT 4530; 31RT 4535-36. Even the Attorney General concedes that the "trial court may not exercise its discretion over continuances so as to deprive the defense of a reasonable opportunity to prepare." RB 233. See People v. Fuiava (2012) 53 Cal.4th 622, 650; People v. Doolin (2009) 45 Cal.4th 390, 450. Here, the trial court's refusal was so arbitrary that it violated her constitutionally protected due process rights. People v. Beames (2007) 40 Cal.4th 907, 921. See Morris v. Slappy (1983) 461 U.S. 1, 11-12 ; Ungar v. Sarafite (1964) 376 U.S. 575, 589-90.

The Attorney General argues the trial court acted within its discretion when it refused defendant a continuance to prepare for the Kelly-Frye hearing. RB 233. But she does not provide any reasonable explanation for the trial court's unfair scheduling. The trial court certainly had little problem understanding and acceding to the prosecution's request for a mid-trial two week continuance to prepare to cross examine the defendant's experts. 27RT 3578:11-3581:8; 30RT 3955:19-25, 3962:22-25, 4112:23-4113:10.

The trial court refused to consider the availability of defense witnesses. The Attorney General suggests defense counsel had failed to check with his experts. See RB 233. But how could he have known their availability without prior notice? The prosecution had not noticed a hearing on the issue or filed any written motion despite having had the discovery on the PET scan for months. See AOB 249-250.

"The rationale behind California's discovery statute is that neither side should be allowed to engage in, or be subjected to, a trial by ambush." People v. Bell (2004) 118 Cal.App.4th 249, 256, citing In re Littlefield (1993) 5 Cal.4th 122, 131. Here, the prosecution ambushed defendant. She did not have time to prepare properly for the hearing. Defendant explained that she did not have time "to research the relevant issues, read the relevant materials, locate witnesses, read and consider the prosecution's written motion and attachments and generally prepare to examine the prosecution witnesses at the Kelly-Frye hearing." 19RCT 4698.

The Attorney General contends defendant must have had sufficient time to prepare because she had three witnesses testify during the Kelly-Frye hearing. RB 233-234. However, defense counsel explained at the hearing that he was able to obtain only those experts who were available at

the last minute. He was unable to secure the testimony of the medical experts he wanted to have testify because they were from the east coast and unavailable on such short notice. 31RT 4283:26-4284:6. The lack of notice was especially prejudicial to defendant in light of the prosecution's use of Dr. Helen Mayberg. The prosecution sprung the Kelly-Frye hearing on the defendant at a time suitable to Dr. Mayberg, who traveled from Toronto, Canada. 31RT 4293:9.

Furthermore, the trial court, without prior notice, allowed the prosecution to expand its challenge to the PET scan evidence beyond the question of admissibility under Kelly to include an attack on the procedures used in the specific test performed on Sandi Nieves. See AOB 263-266. The Attorney General asserts defendant was able to respond adequately to the prosecution's attack. RB 234. But she does not address our showing in the opening brief that the trial court expressly refused defendant the opportunity to call Dr. Brian King. See AOB 266; 32RT 4438:26-4439:27, 4445:9-14. Dr. King personally performed the scan. Defense counsel explained he needed Dr. King to rebut the prosecution's challenge to the methodology used in the specific scan of defendant's brain. 33RT 4603:12-16. Dr. King could have testified that he performed the scan properly and in accordance with all standard procedures. The trial court's refusal was arbitrary. See 33RT 4607:4-5.

In light of the trial court having prejudged the issue and the unfair process surrounding the Kelly-Frye hearing, defendant never had a fair chance to make her case for admissibility.

C. Exclusion of the PET Scan At the Guilt Phase Was Prejudicial

The Attorney General argues the exclusion of the PET scan during the guilt phase was harmless. See RB 235-236. First, she argues even if the

court admitted the evidence, the prosecution's experts would have convinced the jury the scan was meaningless. Her argument assumes improperly that the jury would find the prosecution witnesses more credible. This is gross speculation. Credibility determinations are exclusively for the jury. People v. Jones (1990) 51 Cal.3d 294, 314; Evid. Code § 312(b) ("the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses"). An appellate court does not weigh witness credibility. See Huitt v. Southern California Gas Co. (2010) 188 Cal.App.4th 1586, 1597 ("We will not substitute our evaluations of a witness's credibility for that of the trier of fact."), citing People v. Koontz (2002) 27 Cal.4th 1041, 1078.

Second, the Attorney General argues the exclusion of the PET scan was inconsequential in light of other evidence the trial court admitted. RB 236. She cites Dr. Humphrey's testimony that defendant showed deficiencies in the "orbital frontal region of the brain," and Dr. Ney's testimony about symptoms of epilepsy. RB 236. This testimony is precisely the information defendant needed to corroborate.

Dr. Humphrey and Dr. Ney's testimony was critical to the guilt phase defense that defendant lacked the required mens rea for first degree murder and the lying-in-wait and arson special circumstances. Bolstering Humphrey and Ney's testimony was especially important in light of the prosecution's attack on their credibility. See, e.g., 56RT 8770:10-16 (prosecution accused Dr. Humphrey of lying during its guilt phase closing); 38RT 5377:20-5380:10, 5382:19-25, 5383:6-20, 5391:1 (prosecution's expert Dr. Robert Brook testified Dr. Humphrey's conclusions were invalid); 56RT 8806:19-8807:10 (prosecution argued during guilt phase closing that Dr. Ney lacked credibility: "You can look at the fact of the

non-existence of any evidence to support his opinions."). In determining the credibility of a witness, the trial court should have allowed the jury to consider "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing. " See Evid. Code § 780.

Further, the PET scan evidence would have been especially effective to counter the prosecution's running theme that Sandi Nieves was manipulative and dishonest, and that any mental impairments defense testing may have shown or defense experts may have discerned were based on impression management or faking. See, e.g., 30RT 5423:10-13, 5727:11-15 (prosecution expert Dr. Brook testifying that defendant engaged in "impression management" and that her test results were "more indicative of malingering than of organic brain damage"); 44RT 6593:20-21, 26-27 (prosecution expert Dr. Caldwell testifying defendant had "clearly set out to try to look bad on the [MMPI-2] test"). Whatever the jurors might have been led to suspect about diagnoses or test results based on information or answers provided by defendant, the PET scan images clearly were not something she could manipulate or influence. They provided entirely objective evidence of diminished brain functioning.

The trial court's arbitrary exclusion of the PET scan evidence violated Sandi Nieves's Sixth and Fourteenth Amendment rights to due process, a fair trial, and a fair opportunity to present a defense. Holmes, 547 U.S. at 324-329; Crane, 476 U.S. at 690. The trial court's one-sided approach to the Kelly-Frye hearing violated "the balance of forces between the accused and his accuser" required by the Due Process Clause. See Wardius v. Oregon (1973) 412 U.S. 470, 474. The trial court's error was not harmless under Chapman, 386 U.S. at 24 because corroboration of the testifying experts was critical to the defense. As a result, the conviction and

special circumstance findings must be reversed.

D. Exclusion of the PET Scan At the Penalty Phase Was Prejudicial

As we explained in sections A and C above, the PET scan evidence here corroborated critical defense expert testimony that defendant suffered damage to the orbital frontal region of her brain. Evidence of impaired mental functioning is inherently mitigating. Tennard v. Dretke (2004) 542 U.S. 274, 287. "[I]t is not reasonable to discount" the effect on a jury or sentencing judge of evidence about a defendant's brain abnormality and cognitive defects. Porter v. McCollum (2009) __ U.S. __, 130 S.Ct. 447, 454-55. The PET scan, coupled with evidence of traumatic brain injury earlier in her life, could have led at least one juror to have found a basis for sympathy and mercy. See AOB 268-269; People v. Hinton (2006) 37 Cal.4th 839, 912 ("sympathy and compassion were legitimate factors for [the jury's] consideration and ... either alone could justify a sentence of life imprisonment without the possibility of parole").

The Attorney General concedes that courts have repeatedly admitted PET scan evidence during the penalty phase of capital trials in California. RB 237. However, she wrongly states that the admission of such evidence all post-dated the trial in this case. See id. The penalty phase in this case began on August 1, 2000. 21RCT 5269; 60RT 9266. The jury returned the death verdict on August 9, 2000. 21RCT 5422; 65RT 10217. The trials in the cases the Attorney General cites all took place before 2000. See People v. Martinez (2010) 47 Cal.4th 911, 917 (trial conducted in 1998); People v. Leonard (2007) 40 Cal.4th 1370, 1412 (trial conducted in 1995); People v. Smith (2005) 35 Cal.4th 334, 343 (penalty phase trial held after defendant pled guilty in October 1991); see also Appellant's Opening Brief filed in

People v. Kraft (2000) 23 Cal.4th 978, Case No. SO13187 (penalty phase testimony commenced on June 5, 1989).

In fact, the Attorney General fails to defend the exclusion of the PET scan from the penalty phase on the ground it was inadmissible under Kelly. Instead, she argues the trial court properly excluded it under Evidence Code § 352 because "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." RB 237 (citing 57RT 8988). But she does not cite to any case in which the trial court properly excluded under § 352 mitigating evidence of mental impairment during the penalty phase of a capital trial. The lack of authority is unsurprising because when a death sentence is at stake, no barrier "whether statutory, instructional, evidentiary, or otherwise" may preclude a jury from considering relevant mitigating evidence. People v. Mickey (1991) 54 Cal.3d 612, 693. "'[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.'" Tennard, 542 U.S. at 285 (quoting Payne v. Tennessee (1991) 501 U.S. 808, 822.

The Attorney General relies solely on People v. Guerra (2006) 37 Cal.4th 1067, 1145. In Guerra, this Court upheld the trial court's exclusion during the penalty phase of a photograph of the defendant's horse and three children. The evidence was cumulative because the jury had already had seen other pictures of the defendant's family and heard testimony that the defendant would ride his horse to deliver medications to people in his Guatemalan village. Id. Excluding penalty phase mental impairment evidence is not the same as excluding cumulative and collateral photographs. See Ake v. Oklahoma (1985) 470 U.S. 68 (defendant's constitutional right to a defense includes a defense based on mental

condition as a mitigating factor).

The Attorney General contends that the fact the juries in the cases previously listed—in which PET scan evidence was admitted—all returned death sentences somehow proves the evidence serves no mitigating purpose. See RB 238. First, her argument ignores the constitutional requirement of an individualized penalty determination. Lockett v. Ohio (1978) 438 U.S. 586, 606 (the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors in capital cases); People v. Cowan (2010) 50 Cal.4th 401, 499 ("The purpose of the penalty phase is to enable the jury to make an individualized determination of the appropriate penalty based on the character of the defendant and the circumstances of the crime.")(emphasis added). The juries in each of the cases listed by the Attorney General presumably made an individualized sentencing decisions based on the specific aggravating and mitigating evidence before them. It is not possible, based on the results in those cases, to generalize about the mitigating value of PET scan evidence.[39]

Second, she overlooks the fundamental principle that a capital defendant may introduce for the jury's consideration any relevant mitigating evidence. See Penry v. Lynaugh (1989) 492 U.S. 302, 318. The jury "must be allowed not only to consider such evidence, or to have such evidence

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[39] Further, while the cases listed by the Attorney General were all cases in which a jury returned a death verdict after hearing PET scan evidence, there may be just as many or more cases in which juries, after the presentation of PET scan evidence, returned a verdict of life without parole. It is difficult to know, because appellate opinions in such cases are often not published, and, more importantly, such opinions generally do not describe the penalty phase evidence, since such evidence is no longer relevant. A life sentence having been imposed, the issues on appeal relate to the guilt phase verdicts.

before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." Brewer v. Quarterman (2007) 550 U.S. 286, 296.

The fact that another jury in another case had before it PET scan evidence and nonetheless voted for the death penalty has no significance as to the issue here: whether the PET scan in this case could have led one juror to vote for a sentence less than death for Sandi Nieves. We note that in Kraft, for example, the jury convicted the defendant of the murder of 16 people, sodomy, and mayhem. 23 Cal.4th 978. During the penalty phase, the prosecution presented evidence that defendant had committed an uncharged sexual assault against a 13 year old boy and eight additional murders in Oregon and Michigan. Id. at 1021. In another example, the prosecution's penalty phase evidence in Martinez included a long list of the defendant's prior crimes, evidence jail authorities had caught him in possession of a knife, and testimony that he had a history of disciplinary problems while in custody as well as gang affiliation. 47 Cal.4th at 928-931, 937-938.

Although nothing comparable exists in Sandi Nieves's background, the Attorney General nonetheless argues "the aggravating evidence in this case was overwhelming." See RB 238. Here, the prosecution in the penalty phase trial did not present any evidence Sandi Nieves had a criminal record. It did not produce any evidence that she would pose a threat of future dangerousness or would not adjust well to life in prison. If admitted during the penalty phase, the PET scan evidence would have added weight to Sandi Nieves's penalty phase defense that her particular mental impairment meant she was unable to cope in the face of multiple problems and high levels of stress. This information could have led at least one juror to be more sympathetic and find that life imprisonment was a more appropriate

punishment.

The Attorney General has failed under Chapman, 386 U.S. at 24, to demonstrate beyond a reasonable doubt that the error in excluding the PET scan evidence from the penalty phase was harmless. The trial court's error, when considered separately and in conjunction with the trial court's erroneous exclusion of the expert testimony of Dr. Kyle Boone and its severe limitation of other mitigating evidence during the penalty phase, requires reversal of the death sentence. See AOB, Parts XIX and XX, and Parts XIX and XX, infra.

Similarly, reversal of the death sentence is required because there was a reasonable possibility that the exclusion of the PET scan evidence alone and in combination with the court's other penalty phase errors, affected the verdict. See People v. Gay (2008) 42 Cal.4th 1195, 1223.

IX. POACHING OF DR. ALEX CALDWELL

In the opening brief, we challenge the trial court's decision to allow the prosecution to poach the services of Dr. Alex B. Caldwell, Ph.D., an expert earlier consulted by the defense. AOB 271-303. The trial court's ruling was error because at the time of the side-switching by Caldwell 1) defendant reasonably believed she had a confidential relationship with Caldwell; and 2) she had already provided him with confidential information protected by the attorney-client privilege, attorney work product, and the privilege against self-incrimination. See Rhodes v. Du Pront De Nemours and Co. (S.D.W.Va. 2008) 558 F.Supp.2d 660, 667; Wang Laboratories, Inc. v. Toshiba Corp. (E.D. Va. 1991) 762 F.Supp. 1246, 1248.

In response, the Attorney General contends the prosecution was free to retain Dr. Caldwell as an expert witness. RB 238-250. She argues that,

during the testimony of defense expert Dr. Lorie Humphrey, defendant waived privilege related to the confidential information shared with Caldwell. Id.

However, this was not a case in which the prosecution simply called a defense expert as a rebuttal witness after other experts testified to having relied on his report. The record shows the prosecution sought and secured the appointment of Caldwell before any mental health expert testified for the defendant. 18RCT 4527-28; 37RT 5116:13-15. The trial court appointed Caldwell to serve as an expert witness and consultant to the prosecution. In other words, the trial court assigned Caldwell to the prosecution's legal team after Caldwell had already accessed confidential information from the defendant. Moreover, the record shows Dr. Humphrey's testimony did not waive privilege. She never testified she relied on Caldwell's report. She only mentioned his report in response to cross-examination. 38RT 5332:15-5333:4.

By allowing Caldwell to switch sides, the trial court gave the prosecution "undue advantage of their adversary's industry and efforts." See Code Civ. Pro. § 2018.020 (policy statement behind California's work product statutes). The trial court's refusal to disqualify Caldwell violated Sandi Nieves's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to due process, a fair trial, protections against self-incrimination, effective assistance of a mental health expert in preparing her capital defense, the opportunity to put on a complete defense, and a reliable determination of guilt and penalty.

A. Defendant Did Not Waive Privilege

The Attorney General argues defendant waived during the testimony of Dr. Humphrey all privileges that had previously protected the

confidential information defendant had shared with Dr. Caldwell. RB 247-248. She contends the waiver occurred when Humphrey responded to cross-examination pertaining to confidential defense consultant Dr. Nancy Kaser-Boyd's report, which had included the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) scored by Caldwell. RB 247-248 (citing 38RT 5332-5346, 5347).

First, the Attorney General misconstrues the time line of events relevant to the improper appointment of Caldwell to the prosecution team. Kaser-Boyd first enlisted the services of Caldwell in February 2000. She sent him defendant's answers to the MMPI-2 for his interpretation. Exh. 85A; 34RT 4746:1-20. On June 2, 2000, the prosecution successfully sought the appointment of the same Dr. Caldwell "to assist the prosecution by analyzing test results and testifying as to his findings." 18RCT 4528 (declaration of prosecutor Kenneth Barshop in support of the appointment of Caldwell under Evid. Code § 730).

On June 14, 2000, defendant moved to disqualify Caldwell as a prosecution expert and prevent him from working further with the prosecution. 18RCT 4572. On June 20, 2000, the court denied the motion and ruled the prosecution could use Caldwell as its own expert and consultant. 36RT 5013:14-16. Humphrey did not testify until June 21, 2000, the day after the court's ruling on the Caldwell issue. 37RT 5116:13-15.

Second, Dr. Humphrey could not have waived privilege. The Attorney General points to no opinions in Humphrey's testimony formed in reliance on either the Caldwell or Kaser-Boyd reports.[40] Statements not

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[40] Humphrey relied on standardized neurological tests. 37RT 5138:4-10. She interviewed Sandi Nieves and individuals who knew her. She also (continued...)

subject to privilege are those "relied upon in forming opinions to which the expert testified when called as the defendant's own witness." People v. Coleman (1989) 48 Cal.3d 112, 151-152. Furthermore, Evidence Code § 804(a) states: "If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement." It follows, therefore, that if an expert does not testify as to opinions based on another person's report, § 804(a) does not apply.

In fact, when the prosecution asked Humphrey whether she discussed or analyzed specific findings from Caldwell's report in her own report, she answered "no." 38RT 5332:28-5333:4. The prosecution asked Humphrey about a test administered by Dr. Kaser-Boyd, but defense counsel objected before Humphrey answered. The prosecutor then changed her question even though the court had overruled the objection. 38RT 5347:18-5348:18. Defendant did not waive privilege at any point.

In support of her argument that defendant somehow waived privilege, the Attorney General relies on People v. Combs (2004) 34 Cal.4th 821. RB 247-248. In Combs, a psychiatrist, Dr. Oshrin, was serving as a confidential expert appointed to assist defense counsel in developing mental defenses to capital charges. Id. at 863. After examining the defendant, he authored a report unfavorable to the defense. His opinions contradicted other defense mental impairment evidence. Id. Although he never testified on behalf of the defendant, the prosecution called him as a rebuttal witness.

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[40](...continued)
reviewed police records and correspondence written by Sandi Nieves. 37RT 5142:13-5143:13. She also spoke with Dr. Kaser-Boyd. Id.

On appeal, defendant challenged the prosecution's use of a defense psychiatrist as a rebuttal witness. This Court held Combs had forfeited his appellate claim. Id. at 863-864.

Unlike this case, Combs had asserted only his psychotherapist-patient privilege at trial. He raised for his first time on appeal his attorney-client and work-product privileges and his Fifth Amendment privilege against self-incrimination. Id. Here, defendant sufficiently preserved her challenge to the appointment of Caldwell. See 18RCT 4572 (motion to vacate appointment of Dr. Caldwell: "Dr. Caldwell is a member of the 'defense team' whose findings and opinions are protected under the Fifth Amendment, the Sixth Amendment, the attorney-client privilege, the psychotherapist-patient privilege, and attorney work product."); see also 44RT 6459:4-9.

The remainder of the opinion in Combs regarding privilege is dicta. Even so, the facts in Combs differ entirely from the poaching that took place here. In Combs, before the prosecution called Dr. Oshrin as a witness, another defense expert, Dr. Cornella, first testified about Dr. Oshrin's report during guilt phase direct-examination. Id. at 862. When the prosecution cross-examined Dr. Cornella about the report, Combs did not object. Id. Next, during penalty phase direct-examination, Dr. Cornella and another defense expert, Dr. Fisher, testified they relied on Dr. Oshrin's report in support of their own conclusions. Id. at 863. Dr. Cornella even read two paragraphs of Oshrin's report into the record and defense counsel provided copies of the excerpt to the jury. Id. Again, Combs did not object when the prosecution used the report to cross-examine the defense experts. Id. Combs opened the door to Dr. Oshrin's report, waiving any privilege.

Here, on the other hand, defendant did not open the door. She did not

ask Humphrey about the Caldwell or Kaser-Boyd reports during direct-examination. She objected when the prosecution began to cross-examine Humphrey about Caldwell's report. 38RT 5332:15-25. Unlike the experts in Combs who testified they had relied on Dr. Oshrin's report, Humphrey did not give opinions based on information from the Caldwell or Kaser-Boyd reports.

The Attorney General further contends defendant waived privilege by placing her mental state in issue. RB 248. In support, the Attorney General cites Combs and People v. Clark (1990) 50 Cal.3d 583. As we have shown, the facts in Combs bear no resemblance to the side-switching in this case. Furthermore, Combs indicates that, by putting his mental state in issue, the defendant in that case only waived his psychotherapy-patient privilege and privilege against self-incrimination. 34 Cal.4th at 864. "The attorney-client privilege continues to protect a defendant's statements to a defense psychiatrist even if the defendant tenders a mental defense." People v. Ledesma (2006) 39 Cal.4th 641, 690. See also People v. Lines (1975) 13 Cal.3d 500, 514) ("[T]here is no statutory client-litigant exception to the attorney-client privilege."). In fact, Clark reaffirms that even if a defendant's statements to a confidential consulting mental health expert are for some reason no longer confidential under the psychotherapist-patient privilege, the attorney-client privilege still applies. 50 Cal.3d at 621.[41] Even

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[41] The Attorney General's pin cites to Clark (1990) 50 Cal.3d 583 appear incorrect. She cites to pages 1005, 1007-1008, indicating she intended to cite People v. Clark (1993) 5 Cal.4th 950. See RB 248. The facts in that case differ from the present case and are more similar to the waiver that occurred in Combs. The defendant in Clark made incriminating statements to his confidential defense expert. The statements were not

(continued...)

if this Court finds defendant waived the psychotherapist-patient privilege by tendering the issue of her mental condition, the defendant's statements made to a confidential expert mental health consultant are still protected.

The Attorney General has failed to show defendant waived privilege.

B. Caldwell Was Appointed an Expert Witness and Consultant

The Attorney General contends side switching did not occur. RB 249. But the record shows the prosecution retained Caldwell not merely as a rebuttal witness, but as a consulting expert "to assist the prosecution" and "to provide expert testimony regarding interpretation of the MMPI-2." 18RCT 4527 (June 6, 2000 order appointing Dr. Caldwell).

Before Caldwell ever testified, prosecution expert Dr. Barry Hirsch testified he was the member of the prosecution team who had enlisted Caldwell's assistance. He asked Caldwell to interpret Sandi Nieves' MMPI-2 answers from 1997 not previously submitted by Dr. Kaser-Boyd (who had only submitted the 1999 MMPI-2 answers). 36RT 4987:14-4989:4. Dr. Caldwell generated a narrative evaluation for the prosecution which had not existed previously. Id. Hirsch also testified: "There were multiple reasons why I suggested the appointment of Dr. Caldwell." 36RT 5003:15-16. Hirsch said Caldwell had given him (and therefore the prosecution) "general opinions" (36RT 5004:10).

The Attorney General argues. Caldwell could not have "switched sides" because defendant never formally retained him. RB 249. But that is not the proper test. To determine whether disqualification is appropriate,

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[41](...continued)
privileged not simply because he had placed his mental state at issue, but because the expert had testified during a pretrial hearing and revealed the defendant's statements. Id. at 1008.

"[t]he emphasis ... is not on whether the expert was retained per se but whether there was a relationship that would permit the litigant reasonably to expect that any communications would be maintained in confidence." Hewlett-Packard Co. V. EMC Corp. (N.D. Cal. 2004) 330 F.Supp.2d 1087, 1093. As we explained in the opening brief (AOB 287), courts must consider (1) whether it was objectively reasonable for the first party to believe that a confidential relationship existed; and (2) whether the first party actually disclosed confidential information to the expert. Rhodes, 558 F.Supp.2d at 667 (citing Wang Labs., 762 F.Supp. at 1248).

1. The Confidential Relationship

Defendant's expectation that communications with Dr. Caldwell would remain confidential was reasonable. See AOB 272-273. Defendant supplied Caldwell with her confidential answers to the questions on the MMPI-2 in preparation for her defense at trial. She received a confidential assessment and interpretation of her answers from Caldwell in return. The defense paid Caldwell for his services. 36RT 4957:1-11, 4987:6-11. All communications with. Caldwell went through defendant's confidential expert consultant, Dr. Kaser-Boyd. Also, defendant received formal assurances of confidentiality from Caldwell. Exh. 85A at 6. All of these factors weighed in favor of disqualification. See Rhodes, 558 F.Supp.2d at 667; Hewlett-Packard Co., 330 F.Supp.2d at 1093.

Importantly, defendant submitted to the trial court in support of her motion to disqualify Caldwell a declaration from Dr. Kaser-Boyd. See 18RCT 4643. Kaser-Boyd explained her expectation of confidentiality after having consulted with Caldwell through the exchange of the MMPI-2 information and during their in-person meeting. Id.

The prosecution did not submit a sworn statement or testimony under

oath from Dr. Caldwell to contradict or rebut Kaser-Boyd's declaration that she relied on representations this was a confidential consultation and that she personally told Caldwell that "the MMPI 2 report which his service produced created some important questions for me and [I] indicated I would call him to discuss this further." 18RCT 4643, ¶ 2. She did not call him because he had turned an become an expert for the prosecution. Id. Caldwell never denied any of the facts in Kaser-Boyd's declaration. In fact, defense counsel requested the opportunity to question Caldwell during his testimony as to the services he provided Kaser-Boyd and his contact with her in connection to the same case. The court denied these requests. 45RT 6647:6-11. It simply accepted the unsworn arguments of the prosecutors. When defense counsel repeatedly requested an Evidence Code § 402 hearing pertaining to Caldwell's testimony, the court again refused. 44RT 6462:16-22; 45RT 6702:19.

Instead of considering Dr. Kaser-Boyd's declaration, the trial court inexplicably and improperly relied on testimony it procured itself from the prosecution's consulting expert, Dr. Hirsch. 36RT4968-5008. The trial court improperly and over objection asked Hirsch, a psychologist, to opine on the legal question of whether the MMPI-2 answers and corresponding report were subject to privilege. 36RT 4982:21-4983:10.

"The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." Downer v. Bramet (1984) 152 Cal.App.3d 837, 841; accord Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1445. See also Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1178 ("There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law."); Communications Satellite Corp. v.

Franchise Tax Bd. (1984) 156 Cal.App.3d 726, 747 ("An expert witness may not properly testify on questions of law or the interpretation of a statute.").

Dr. Hirsch's opinion was irrelevant and did not serve to contradict defendant's reasonable belief her relationship with Caldwell was confidential.

2. The Information Given to Caldwell Was Confidential

The Attorney General does not dispute that the relationship with Caldwell was confidential and protected by privilege. She simply argues that defendant waived privilege. But as set forth in the opening brief, the information defendant and Caldwell shared was also protected work product. AOB 295. The Attorney General does not address or explain how the trial court could have properly allowed an expert who had access to defendant's confidential attorney-work product to switch sides and consult for the prosecution.

C. The Prosecution Had an Alternative to Caldwell

The Attorney General argues disqualifying Caldwell from testifying for the prosecution would have been "fundamentally unfair" because only National Computer Systems (NCS) and Caldwell Reports were licensed to generate computerized scoring of the MMPI-2. RB 250. On the contrary, the fact Dr. Caldwell was not uniquely qualified supported disqualification. See Refining Co. v. Boudreaux M/V (5th Cir. 1996) 85 F.3d 1178, 1183 (when a party moves to disqualify an expert, courts may consider whether another expert is available and whether the opposing party had time to hire him or her before trial); Cordy v. Sherwin-Williams Co. (D.N.J. 1994) 156 F.R.D. 575, 582 (disqualifying expert and reasoning that "there is no evidence of anything unique about [the expert's] services" or that the other

side was unable to secure another expert).

The Attorney General speculates that the defendant would have sought to prevent the prosecution from using either of the two computerized scoring services. See RB 250. The record shows defendant had no objection to the prosecution using NCS. 36RT 4997:27-4998:1. Whether Dr. Kaser-Boyd originally sent the MMPI-2 data to both Caldwell Reports and NCS is irrelevant. Dr. Hirsch admitted he knew from her report that Kaser-Boyd had relied on the narrative interpretation from Caldwell as opposed to NCS. In fact, Hirsch said that Kaser-Boyd's reliance on Caldwell's report was one of the reasons he sought Caldwell as a prosecution witness in the first place. 36RT 5003:3-8.

The prosecution had a viable alternative to using Caldwell. It chose not to use NCS and instead poached the services of Caldwell from defendant after Caldwell had already obtained confidential information from defendant.

As a result of the trial court's error—denying defendant's motion for disqualification—Dr. Caldwell was able to sell his opinion to the highest bidder. See County of Los Angeles v. Superior Court (Hernandez) (1990) 222 Cal.App.3d 647, 657-658 (a designated expert subsequently withdrawn should not be able to "sell" his or her opinions to the highest bidder). The court signed the order appointing Dr. Caldwell and approved a rate of $450 an hour and payment up to $10,000. 18RCT 4527. As explained in the opening brief, defendant had difficulty securing funding for an expert psychologist at a mere $150 per hour. AOB 131-132.

Had this been a civil case, no court would tolerate one side poaching an expert simply because it offered him more money than the other side. See Hernandez, 222 Cal.App.3d at 657-658. Certainly no exception should

exist here.

D. The Error Was Not Harmless as to Guilt or Penalty

The Attorney General does not acknowledge that the trial court's error here implicated Sandi Nieves's constitutional rights as an indigent capital defendant. In addition to interfering with her due process right to put forward a meaningful defense, allowing Dr. Caldwell to switch sides violated defendant's Fifth Amendment right against self-incrimination. Estelle v. Smith (1981) 451 U.S. 454, 462; AOB 297-300. The trial court's ruling also violated her Sixth and Fourteenth Amendment right to effective assistance of counsel. This includes the right to the aid and advice of experts. See Ake v. Oklahoma (1985) 470 U.S. 68; Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319 ("[C]ourt-ordered defense services may be required in order to assure a defendant his constitutional right not only to counsel, but to the effective assistance of counsel."); AOB 299-300.

In the opening brief, we showed the detrimental effect Dr. Caldwell's testimony had during the guilt phase of Sandi Nieves's trial. See AOB 300-302. The prosecution used Caldwell to depict Sandi Nieves as lying, vindictive, self-centered and prone to using drastic and violent methods to attempt suicide. See 44RT 6593:20-27; 6598:9–6599:11; 54RT 8459:18-26; 56RT 8776:7-12. We also showed the prosecution continued to rely on Caldwell's testimony during the penalty phase. AOB 302-303. During the penalty phase closing argument, the prosecution relied on Caldwell's testimony to argue defendant was not depressed and that she did not deserve any sympathy. 64RT 10114:14-17. After stealing Dr. Caldwell from the defense, the prosecution used his impressive credentials to undermine the only penalty phase defense mental health expert that testified for the defendant, Dr. Robert Suiter. 64RT 10117:5-9 (disparaging Dr.

Suiter's credentials as compared to Dr. Caldwell's).

The Attorney General does not dispute the damage inflicted by Caldwell's testimony or its powerful effect on both the guilt verdict and the sentencing decision in this case.

The trial court's error was therefore not harmless under Chapman, 386 U.S. at 24. As a result, the conviction must be reversed.

Even if this Court does not reverse the conviction based on the unfair side-switching of Dr. Caldwell, it must still reverse the sentence. Because the trial court's ruling violated defendant's right against self-incrimination and her rights to due process and a fair trial, her sentence is not reliable. Zant v. Stephens (1983) 462 U.S. 862, 879; Estelle, 451 U.S. at 462; Gardner v. Florida (1977) 430 U.S. 349.

X. CELEBRITY STATUS OF DR. JOHN DEHAAN

If not for Judge Wiatt, the jury would never have known the prosecution's arson expert, Dr. John Dehaan, was a television star. The prosecution called Dr. Dehaan to rebut the testimony of defense arson expert Del Winter. The prosecutor asked Dr. Dehaan questions about his background and qualifications as an arson expert, but not about his television appearances. Judge Wiatt took it upon himself to make sure the jury knew about Dehaan's celebrity status.

As set forth in the opening brief, Judge Wiatt, once again stepped out of the role of judge and into the role of advocate. In doing so, he bestowed the court's imprimatur upon the credibility of Dr. Dehaan and bolstered the weight of his testimony. AOB 305-311.

The Attorney General characterizes this claim as "pure hyperbole." RB 253. She denies Judge Wiatt glamorized Dr. Dehaan. She also argues the judge's questions were harmless in light of the general instructions he

gave at the close of evidence and the strength of the prosecution's evidence. RB 254.

The record shows Judge Wiatt unilaterally elicited information from Dr. Dehaan about his celebrity status that would not have otherwise come into evidence. He gave the prosecution's expert witness an opportunity to elaborate further on his credentials beyond the information elicited by the parties. In other words, Judge Wiatt took sides. His questions "create[d] the impression that the court was allied with the prosecution." See People v. Cook (2006) 39 Cal.4th 566, 598; People v. Monterroso (2004) 34 Cal.4th 743, 784. His actions prejudicially tipped the scale in favor of the prosecution's version of the evidence surrounding the fire in this case.

"The Supreme Court has long established that the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge." People v. Freeman (2010) 47 Cal.4th 993, 1000 (quoting Larson v. Palmateer (9th Cir. 2008) 515 F.3d 1057, 1067). Judge Wiatt violated Sandi Nieves's right to a fair trial by an impartial judge. The Attorney General has failed to meet her burden to show "beyond a reasonable doubt" that Judge Wiatt's actions "did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. Therefore, reversal is required.

A. The Inappropriate and Biased Questions

The Attorney General argues Judge Wiatt's questioning of Dehaan was "within the bounds of propriety" and "neutrally phrased." RB 253. However, the record shows Judge Wiatt's questions to Dehaan were not neutral. Unprompted by the parties, he asked Dehaan whether he had ever been featured on television for his expertise. 44RT 6569:2-10. Judge Wiatt unilaterally introduced. Dehaan's celebrity status—a quality inherently attributed to those who appear on television—into the trial.

As we explained in the opening brief, reference to a witness's prominence in television inevitably bolsters his credibility in the eyes of a jury. AOB 309. The impact of celebrity status on credibility is well-known. It is not hyperbole. See, e.g., Coopman and Lull, Public Speaking: The Evolving Art (2011) page 179 ("The effectiveness of celebrity testimony stems from the person's stature ... . That is, audiences find the celebrity testimony compelling because of the person's fame or star power, not the person's knowledge about the topic."); Baum and Henkel, Marketing Your Clinical Practice: Ethically, Effectively, Economically (2004) page 240 ("In our society, media exposure, in both the electronic and print media, creates an image of credibility and expertise."); Van Yoder, Get Slightly Famous: Become a Celebrity in Your Field and Attract More Business with Less Effort (2003) page 120 ("Celebrity Status: The more you appear on radio and television programs, the more you'll be seen as a celebrity, which will boost your brand and reputation. [¶] Enhanced Credibility: People who appear on radio and television are seen as leaders in their industry.").

The Attorney General contends Judge Wiatt's questions were "designed to clarify the evidence without favoring either side." RB 254. But she does not and cannot explain how. That Dehaan had appeared multiple times as an expert on TV and was about to do so again did not clarify any evidence before the jury. The facts in People v. Hawkins, quoted at length by the Attorney General (RB 252-253), serve as a helpful comparison. See People v. Hawkins (1995) 10 Cal.4th 920, 946-948, overruled in part in on other grounds in People v. Blakeley (2000) 23 Cal.4th 82, 89. In Hawkins, defense counsel cross-examined a ballistics expert about a scholarly article written by Alfred Biasotti. The article challenged the reliability of the practice of ballistic identification. Id. After the conclusion of redirect-

examination and recross-examination, the trial judge asked the witness further questions about the impact of the Biasotti article on his conclusions. See, e.g., id. at 946-947 (the judge asked whether the expert's ballistic identification ""was weakened any degree by having been reminded today of Mr. Biasotti's concerns about how a statistical model might lend an even additional dimension to your field?""). This Court found the trial judge's questioning of the witness had not transcended the "bounds of propriety" because its "role was one of clarification rather than advocacy." Id. at 948.

Judge Wiatt's interjection here went well beyond the clarifying questions in Hawkins. The trial judge in Hawkins did not introduce unilaterally the Biasotti article. The judge did not delve into a separate area of inquiry to further explore the expert's credibility. The Hawkins trial judge simply followed up on a line of questioning initiated by the parties. Here, on the other hand, Judge Wiatt went so far as to introduce evidence in support of Dr. Dehaan's credibility that would not have been known to the jury. He acted as an advocate and not an impartial judge. See Cook, 39 Cal.4th at 597 ("The court may not ... assume the role of either the prosecution or of the defense."); People v. Carlucci (1979) 23 Cal.3d 249, 258 (same).

Furthermore, Judge Wiatt drew the jury's attention to Dehaan's television appearances two more times. At the end of court, two days in a row, he admonished the jury not to watch the Fox Channel because one of the witnesses would be appearing. 44RT 6634:5-12; 45RT 6681:19-26. The Attorney General asserts Judge Wiatt's admonitions to the jury were harmless because he did not mention. Dehaan by name. RB 254. The Attorney General underestimates the intelligence of the jury. The same day Judge Wiatt informed the jury Dehaan appears regularly on television, he

told the jury "one of the witnesses who has testified in this case" will appear tomorrow night on the Fox Channel at 9:00 p.m. 44RT 6634:5-12. It is inconceivable the jurors believed Judge Wiatt was referring to some other witness.

B. The Interference Was Not Harmless

In the opening brief, we explain Dehaan and defense arson expert Del Winter provided opposite opinions about the nature of the fire, how it started, and the intent of the person who set it. AOB 310. Winter testified the intent of the person who set the fire was unclear. He testified the evidence showed only a small amount of gasoline was used. Whoever set the fire did not pour it on the many combustible items readily available throughout the house. 29RT 3808:20-22, 3863:12-15, 3809:18-23, 3811:5-7. Dehaan, on the other hand, testified the person who set the fire used significant quantities of gasoline with a clear intent to destroy the house. 44RT 6503:19-21.

The credibility of Dehaan versus Winter was a disputed issue. During cross-examination, the prosecution attempted, unsuccessfully, to elicit from Winter praise for Dehaan as the preeminent authority on arson investigations. See 29RT 3834:1-10.[42] Judge Wiatt's interjection

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[42] Q And have you been trained by Dr. John Dehaan?

A I know Dr. Dehaan, and I am not sure that I actually received any direct training from him, but I may have.

Q Have you read his books?

A Yes.

Q He's one of the foremost experts on arson investigations in the country?

(continued...)

rehabilitated Dehaan's image for the jury. Because a jury is "ever ready to accept any intimation from the court as to what their verdict should be." People v. Zammora (1944) 66 Cal.App.2d 166, 209, the jury here would not have missed Judge Wiatt's endorsement of Dehaan's opinion over Winter's.

The Attorney General argues Judge Wiatt lessened the problematic impact of his comments by instructing the jury pursuant to CALJIC 17.30. RB 254. Specifically, Judge Wiatt instructed the jury that it should not base its conclusions on questions asked by the trial judge. 57RT 8939:27-8940:9. However, his general instruction did not directly address the improper questions to Dehaan. Also, the judge did not give this general instruction until after the close of evidence. The instruction was insufficient to undo the harm caused by the court's public endorsement of the prosecution's expert.

Powell v. Galaza (9th Cir. 2003) 328 F.3d 558 is instructive here. In that case, the trial judge improperly commented mid-trial on the defendant's testimony. Id. at 563-564. The Ninth Circuit held the general instruction to the jury to disregard the judge's comments and come to its own conclusions was inadequate. It did not cure the harm caused by the judge's earlier statement. Id. at 565. The court stated, "[t]he trial judge's later instruction-delivered four days after the damaging instruction at issue-did not explicitly refer to his earlier statement or otherwise alert the jury to the connection." Id. Here, Judge Wiatt's improper questioning of Dehaan occurred on July 6, 2000. See 44RT 6569. He provided the same general instruction as in Powell to the jury on July 26, 2000, 20 days after Dehaan's testimony. See

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[42](...continued)

A Well, with all due respect, no, I don't think he is.

57RT 8939-40.

The court of appeal decision in People v. Lynch (1943) 60 Cal.App.2d 133 is also helpful here. Like Judge Wiatt, the trial judge in Lynch had improperly interjected himself into the proceedings in support of the credibility of an expert witness. Id. at 144. The court of appeal found it was "vain to attempt to do away with the prejudicial effect of such assertions upon the part of the court" by giving an instruction similar to CALJIC 17.30. Lynch, 60 Cal.App.2d at 144-145.[43] Furthermore, the atmosphere of bias that permeated every stage of Sandi Nieves's trial meant that no instruction or admonishment to the jury could have undone the prejudicial effect of Judge Wiatt's actions. See AOB, Part III, and Part III, supra (arguing Judge Wiatt's misconduct, bias, and prejudice against Sandi Nieves resulted in an unfair trial).

The Attorney General also argues Judge Wiatt's interference during the testimony of Dr. Dehaan was harmless because defendant's "intent in starting the fire [was] apparent to the jury even absent the court's questions." RB 254. In support, she points only to the note Sandi Nieves allegedly wrote to her ex-husband David Folden. Id. The note stated, "Now you don't have to support any of us. Fuck You." Exh. 36-B. But the prosecution did not rest its case on the note. The meaning of the note was highly disputed. The evidence showed that enclosed with the note defendant

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[43] The Attorney General's attempt to distinguish Lynch fails. See RB 254. Judge Wiatt fed the information about Dr. Dehaan's television appearances to the jury, then brought it back to their attention twice. Like the trial judge in Lynch, Judge Wiatt's actions "amounted to an attempt upon the part of the court to testify as to the competency of the witness as an expert." Lynch, 60 Cal.App.2d at 144.

had sent back to Folden the adoption annulment papers. See Exh. 36-C. Defense counsel argued the jury could make the reasonable inference that defendant intended the note to refer to the annulment, not impending death. 55RT 8615:11-8616:13. Moreover, if the note was sufficient to prove intent, the prosecution would not have called Dr. Dehaan to testify in the first place.

Because Judge Wiatt violated Sandi Nieves's constitutional right to a fair trial, the Attorney General here has the burden to show his actions were harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. Reversal is required because she has not met her burden.

Under California law, reversal is required if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson (1956) 46 Cal.2d 818. Under Watson, this Court examines "the errors made in the context of the entire record to determine if reversal is required." People v. Hill (2011) 191 Cal.App.4th 1104, 1140. Judge Wiatt's biased questioning of Dehaan, when considered separately and cumulatively with other errors and Judge Wiatt's misconduct throughout the trial, requires reversal.

XI. EXPERT TESTIMONY ABOUT VERACITY

The prosecution pressed defense expert Dr. Gordon Plotkin during cross-examination to give an opinion whether another defense witness, Albert Lucia, was telling the truth. The prosecution used this line of improper questions as a deceptive device for arguing its case to the jury. This was misconduct. Defense counsel objected. But the trial court allowed the prosecution to continue this line of questioning. See AOB 313-320.

The Attorney General does not deny that an expert witness may not express his or her opinion about another witness's credibility. See RB 254-

255. But she contends defendant's claim fails because it is forfeited. In the alternative, she argues the claim lacks merit because "[t]he prosecutor here did not ask Dr. Plotkin if he believed Albert Lucia was truthful." RB 262. The Attorney General also claims any error was harmless. RB 263-264.

First, defendant's timely and repeated objections to the prosecutor's improper questions sufficiently preserved the issue for appeal. Second, asking about Plotkin's "opinion regarding Mr. Lucia's veracity and perhaps his credibility" (52RT 7972:11-13) and whether "it would be like flipping a coin as to whether you wish to believe Mr. Lucia" (52RT 7973:11-13) was no different from asking Plotkin whether he thought Lucia was truthful. The Attorney General's argument is nonsensical.

Finally, the record shows the misconduct was not harmless. Plotkin and other defense experts' testimony relied on Lucia's description of Sandi Nieves's history of childhood seizures. An attack on Lucia's credibility was an attack on the defense of unconsciousness. The prosecution's use of deceptive and reprehensible methods to intentionally elicit inadmissible testimony so "infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright (1986) 477 U.S. 168, 181.

A. The Misconduct Claim Was Not Forfeited

Defendant's objections to the prosecutor's improper questions sufficiently preserved the issue for appeal. Defendant objected to the prosecutor's questions on the grounds they assumed facts not in evidence, misstated the evidence, and mischaracterized the evidence. 52RT 7971:16-21; 7972:14-20. The prosecutor's question, "What if that individual, Mr. Lucia, was coached as to what to say?" was an improper hypothetical. It suggested to the jury that there was evidence that Lucia had been coached,

when in fact, there was no such evidence in the record. See United States v. Williams (1992) 504 U.S. 36, 60-61 (recognizing that misstating the facts during cross-examination and assuming prejudicial facts not in evidence are among "the kinds of improper tactics that overzealous or misguided prosecutors have adopted in judicial proceedings"); People v. Young (2005) 34 Cal.4th 1149, 1186 ("[A] prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed.").

The prosecutor then questioned Plotkin about whether he was aware Lucia had testified twice before the jury and once outside the presence of the jury, and whether that knowledge would affect Plotkin's opinion about Lucia's veracity and credibility. 52RT 7972:2-19. Defendant's objection that the questions mischaracterized the evidence was appropriate given the prosecution's insinuation that these facts somehow suggested Lucia lacked credibility. See People v. Redd (2010) 48 Cal.4th 691, 740 (a prosecutor may not comment on the credibility of a witness based on facts outside the record); People v. Turner (2004) 34 Cal.4th 406, 433 (same).

Defendant's objections adequately preserved the misconduct claim because she brought the impropriety of the prosecutor's line of questioning to the court's attention. Young, 34 Cal.4th at 1186 (defendant preserved his misconduct claim even though "he did not request an assignment of misconduct or an admonition that the jury disregard the impropriety" because his objection "gave the trial court an opportunity to correct the asserted abuse").

Even if this Court finds the objections were not specific enough, the misconduct claim is not forfeited because "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." People v. Hill (1998) 17 Cal.4th 800,

820. In addition, the trial court immediately overruled defendant's objections and moved on. Defense counsel had no opportunity to request an admonition. Id.

B. The Prosecution's Questions Constituted Misconduct

The prosecution's questions were plainly improper. The law is well-settled that an expert witness may not express his or her opinion regarding witness credibility. People v. Curl (2009) 46 Cal.4th 339, 359 (an expert witness's opinion about the credibility of a witness is inadmissible). See also United States v. Moran (9th Cir. 2007) 493 F.3d 1002, 1009 ("It is misconduct for a prosecutor to elicit comments on the veracity of witnesses."). Credibility determinations are reserved for the jury. Young, 34 Cal.4th at 1181 (the jury is "the sole judge of the credibility of witnesses") People v. Jones (1990) 51 Cal.3d 294, 314 (it is the "exclusive province of the ... jury to determine the credibility of a witness"). Credibility assessments are not sufficiently beyond common experience. People v. Coffman (2004) 34 Cal.4th 1, 82; People v. Melton (1988) 44 Cal.3d 713, 744.

The Attorney General asserts the prosecutor's questions here were not the same as if he had asked Dr. Plotkin whether he thought Lucia was telling the truth. RB 262-263 (citing Coffman, 34 Cal.4th at 81-82). Her argument is specious. The prosecutor asked Plotkin whether the information that Lucia had testified twice would affect his "opinion regarding Mr. Lucia's veracity and perhaps his credibility in the information that you have evaluated from him?" 52RT 7971:16-7972:13. He then asked Plotkin whether 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?" 52RT 7973:11-13. The fact the prosecutor here did not phrase his questions

identically to the improper question in Coffman ("Do you believe Coffman was telling you the truth during your interviews?"), is of no consequence.

The Attorney General wrongly compares the prosecutor's conduct here to the cross-examination of the expert witness in People v. Alfaro (2007) 41 Cal.4th 1277, 1328. See RB 263. She suggests that the expert in Alfaro properly testified as to whether "his opinion would change if he became aware that the defendant had malingered." Id. This is not what happened in Alfaro. Rather, the prosecutor in Alfaro "was entitled to question [the expert] concerning the circumstances surrounding the testing, including the various meanings of the term "probable fake bad." 41 Cal.4th at 1326. Alfaro expressly did not hold that presenting "evidence of the 'probable fake bad' notation for the truth of the matter asserted (that is, to establish that defendant was malingering)" was proper. Id.

The Attorney General attempts to place the blame for the prosecution's conduct on defense counsel. See RB 263. She argues the questions about the possibility Lucia "had been coached" were proper given that Lucia testified twice. She asserts Lucia had to come back and testified a second time because defense counsel had failed to ask him about Sandi Nieves's seizure history the first time. Id. She ignores the fact defense counsel made an appropriate offer of proof as to why he needed to recall Lucia. 35RT 4851:23-4852:2; 4937:25-4938:1. The Attorney General's insinuation, without support from the record, that the prosecutor had good cause to question whether Lucia "had been coached" is a distraction. Why or whose fault it was that Lucia had to return to testify a second time has no bearing whatsoever on the propriety of asking Plotkin to comment on Lucia's credibility.

As we showed in the opening brief, the prosecution used the cross-

examination of Dr. Plotkin in an argumentative and inappropriate manner to elicit inadmissible testimony. AOB 316-318. The method was "deceptive and reprehensible," constituting misconduct. People v. Wallace (2008) 44 Cal.4th 1032, 1070; People v. Lopez (2008) 42 Cal.4th 960, 965-966. Under California law, a prosecutor's deceptive and reprehensible methods are misconduct "even when those actions do not result in a fundamentally unfair trial." Id. But here the prosecution's misconduct infected the trial with such "unfairness as to make the resulting conviction a denial of due process." See Darden, 477 U.S. at 169, 181.

C. The Misconduct Was Not Harmless

The misconduct here violated Sandi Nieves's constitutional rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments. See Darden, 477 U.S. at 169, 181. In the opening brief, we showed that the misconduct requires reversal because it was not harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. See AOB 318-320. Dr. Plotkin provided testimony crucial to Sandi Nieves's defense that she was unconscious at the time of the events relevant to the alleged crimes and therefore lacked the mens rea required for a conviction. Id. He, as well as other experts, relied on Al Lucia's account of Sandi Nieves's history of seizures. Lucia's credibility was therefore central to Sandi Nieves's defense.

The Attorney General contends the misconduct was harmless because the defense evidence Sandi Nieves suffered a seizure disorder was sufficiently rebutted by prosecution expert Dr. Edward Amos. See RB 264. Amos opined that Nieves's records did not show she had a seizure disorder. Id.

In fact, when Plotkin was asked about Lucia's veracity, Plotkin was

testifying during the defense surrebuttal, rebutting the testimony of Dr. Amos. See 48RT 7376-7444. Plotkin testified after Dr. Amos. 48RT 7268-7358.

More importantly, the fact that Drs. Amos and Plotkin came to opposing conclusions underscores the importance of Lucia's credibility. "[W]hen there is a conflict between scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence." Rolland v. Porterfield (1920) 183 Cal. 466, 469. Whether the jury was going to give more weight to Dr. Amos's testimony versus Dr. Plotkin's depended heavily on whether it believed Lucia's testimony. As the court instructed the jury, an expert's opinion "is only as good as the facts and reasons on which it is based." 54RT 8386: 13-14; CALJIC 2.80. But for the attack on Lucia's credibility, it is reasonably probable the jury would have found Plotkin's conclusions more convincing and/or Dr. Amos's opinion less convincing.

Therefore, the misconduct was not harmless and reversal is required. Chapman, 386 U.S. at 24. Under California law, reversal is required because "'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" People v. Martinez (2010) 47 Cal.4th 911, 955-56; quoting Wallace, 44 Cal.4th at 1071.

Further, the misconduct was not harmless as to the penalty phase. Lucia's guilt phase testimony was important at the penalty trial both as evidence of an abusive childhood, and, in itself and as relied upon by defense experts, as evidence of mental impairment at the time of the crime, and possible lingering doubt as to guilt of deliberate, premeditated murder. And since he testified at the penalty phase, attacking his credibility undercut

his testimony in support of mitigation.. Separately and cumulatively, there is reasonable possibility that but for the misconduct, the jury would have rendered a verdict of life without parole. People v. Brown (1988) 46 Cal.3d 432; People v. Ashmus (1991) 54 Cal.3d 932, 983-84.

XII. CROSS-EXAMINATION OF DR. GORDON PLOTKIN

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States (1935) 295 U.S. 78, 88. During the cross-examination of Dr. Gordon Plotkin, the prosecution committed misconduct by stating in front of the jury—as if it were established fact—that Sandi Nieves had committed the crimes of perjury and fraud. 52RT 7956:27-7957:1, 7958:2-3. Sandi Nieves was neither tried nor convicted of the crimes of perjury or fraud. The prosecution's improper questions assumed prejudicial facts not in evidence and inflamed the jury against the defendant for crimes that were never charged or proved. See AOB 321-326.

The Attorney General attempts to justify the prosecution's actions. RB 265-272. But her argument that the prosecution was posing legitimate hypothetical questions fails. She does not show the prosecution's use of the inflammatory words "perjury" and "fraud" was properly "rooted in facts shown by the evidence." See People v. Boyette (2002) 29 Cal.4th 381, 449.

The Attorney General's argument that the misconduct was harmless likewise fails. She contends the misconduct did not unfairly prejudice Sandi Nieves because Dr. Plotkin managed to avoid answering the questions. RB 272. However, no matter how Plotkin answered the questions, the prosecution was still able to use the questions improperly to imply extremely prejudicial crimes that the prosecution never had to prove.

The prosecution compounded the prejudice when it told the jury

during closing argument that Sandi Nieves had committed the crime of perjury. 56RT 8761:21-23. The prosecution then further exacerbated the prejudice during the penalty phase when it committed the same form of misconduct while cross-examining defense witness Shirley Driskell. See AOB, Part XXII, and Part XXII, infra; 61RT 9499:4-12. Because the misconduct here infected the trial with such "unfairness as to make the resulting conviction a denial of due process," Sandi Nieves's conviction and death sentence must be reversed. See Darden v. Wainwright (1986) 477 U.S. 168, 181.

A. The Misconduct Claim Was Not Forfeited

The Attorney General argues Sandi Nieves forfeited any claim of prosecutorial misconduct. RB 270. The record shows otherwise. First, the misconduct at issue here involved the prosecution's statements before the jury of facts that were not in evidence. See United States v. Williams (1992) 504 U.S. 36, 60-61 (recognizing that misstating the facts during cross-examination and assuming prejudicial facts not in evidence are among "the kinds of improper tactics that overzealous or misguided prosecutors have adopted in judicial proceedings"). Defense counsel objected no less than seven times on the grounds the prosecution's questions misstated or mischaracterized the evidence. 52RT 7954:22-24, 7955:19-20, 7956:7-9, 21-23, 7957:4-6, 23-25, 7958:7-9. Counsel also objected to the form of a hypothetical question. 52RT 7958:9-10. These objections adequately preserved the misconduct claim.

Second, even if this Court finds the objections were not specific enough, the misconduct claim is not forfeited because "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." People v. Hill (1998) 17 Cal.4th

800, 820. Here, the prosecution specifically worded its improper questions to have a direct impact on the jury. Once publicly aired, the words "perjury" and "fraud" accomplished their purpose, whether or not there was evidence to support these criminal charges. Because an admonition would not have "cured the harm" caused by asking the improper questions, the claim of misconduct was preserved for review. See People v. Alfaro (2007) 41 Cal.4th 1277, 1328.

Third, the trial court immediately overruled each objection and moved on. Defense counsel had no opportunity to request an admonition. See Hill, 17 Cal.4th at 820 ("[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.'"), quoting People v. Green (1980) 27 Cal.3d 1, 35, n.19.

In any event, "the courtroom atmosphere was so poisonous" that asking the trial court to admonish the jury would have been futile. See People v. Friend (2009) 47 Cal.4th 1, 29. The trial court's favorable treatment of the prosecution and overtly hostile treatment of defense counsel and defendant throughout the trial (see AOB, Part III, and Part III, supra) provided ample "reason to assume the court would have been unresponsive" to defendant's complaints of misconduct.[44] See People v.

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[44] One of the prosecution's improper hypothetical questions asked Dr. Plotkin whether the fact defendant "fabricated a rental agreement and committed fraud upon the landlords" would affect his opinion about the defendant's credibility. 52RT 7958:2-6. Notably, when defense counsel tried to cross-examine prosecution expert Dr. Robert Brook about the significance of defendant's statements in the rental agreement with her

(continued...)

Abel (2012) 53 Cal.4th 891. Further, counsel's multiple objections on the ground the prosecutor's questions misstated or mischaracterized or went beyond the state of the evidence (52RT 7954-7958) clearly identified the core of the misconduct claim. The judge denied each objection, deeming the questions proper. Adding the word "misconduct" would have had no impact on the judge's rulings. For this reason as well, adding any further detail to the objections, or requesting an admonition, clearly would have been futile.

B. The Prosecution's Inflammatory Questions Constituted Misconduct

The Attorney General contends the prosecution asked Plotkin only proper hypothetical questions. RB 270-271. However, a prosecutor may not use the vehicle of the hypothetical question to put before the jury facts not in evidence. "[T]he prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.'" People v. Wagner (1975) 13 Cal.3d 612, 619. Even more egregious, the prosecution here inserted into its questions conclusions of facts detrimental to the defense, but not yet determined by the jury or any other trier of fact.

"Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." Hill, 17 Cal.4th at 828. In stating that Sandi Nieves "has a history of malingering and faking good" (52RT 7954:19-21), that she "was proven to be a liar"

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[44](...continued)
landlord, including her disclosure of unfavorable financial information such as her past bankruptcy, the trial court repeatedly sustained prosecution objections on the grounds of relevancy and that the questions assumed facts not in evidence. 40RT 5650:2-5651:12; 5652:21-27.

(52RT 7956:16-17), had "out and out committed perjury" (52RT 7956:27-7957:1), and had "committed fraud upon the landlords" (52RT 7958:2-3), the prosecutor acted as his own witness, "offering unsworn testimony not subject to cross-examination." See Hill, 17 Cal.4th at 828.

The Attorney General cites People v. Busch (1961) 56 Cal.2d 868, 874, for the proposition that courts should allow the prosecution "wide latitude" to test the credibility of an expert. RB 270. However, Busch endorses only the use of "facts within the limits of the evidence, not unfairly assembled." 56 Cal.2d at 875. Here, the prosecutor went far beyond fairly assembled facts when he injected assumptions the defendant had committed crimes separate from those charged against her. Cf. Boyette, 29 Cal.4th at 451 (a prosecutor's hypothetical question, put to a defense mental health expert, asking him to assume the defendant had broken away from a group of black males to punch a white man walking by, was improper because "the question implied evidence of an additional aggravating factor for which defendant had received neither notice nor an opportunity to defend").

The Attorney General does not respond to our showing in the opening brief that the prosecution's labeling of Sandi Nieves as a perjurer was "far more derogatory" than simply calling her a liar. See AOB 325 (citing People v. Ellis (1966) 65 Cal.2d 529, 539). In Ellis, this Court distinguished between "liar" and "perjurer" on the ground the latter epithet accuses the witness of having committed a felony. Id. at 540. Here, the prosecution stated as established fact Sandi Nieves had committed both the crimes of perjury and fraud.

The Attorney General argues the prosecution's statement that defendant "committed fraud" was "rooted in facts." RB 271. While she

repeats accusations from defendant's former landlord and ex-husband at length (RB 265, 271), she points to no criminal conviction in defendant's record or any other adjudication of the issue.

Notably, the Attorney General does not argue the prosecution's use of the word "perjury" was rooted in the evidence. Nonetheless, she defends the prosecution's hypothetical questions on the grounds defendant purportedly lied when she testified that "fuck you" was not her "normal way of talking." RB 271 (citing 35RT 4930). But Sandi Nieves's testimony that using obscenities was "not my normal way of talking" did not mean she never used such language. See 35RT 4930:7. The Attorney General's examples showing defendant had used the words "fuck you" before in her life were at best impeachment, not evidence that satisfied the elements of perjury.[45] See, e.g., CALJIC 2.21.1 ("Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that a witness should be discredited.").

The prosecution committed misconduct here because its improper questions were a deceptive and a reprehensible method to persuade the jury. People v. Wallace (2008) 44 Cal.4th 1032, 1070; People v. Lopez (2008) 42 Cal.4th 960, 965-966. Under California law, a prosecutor's deceptive and reprehensible methods are misconduct "even when those actions do not result in a fundamentally unfair trial." Id. But here the prosecution's misconduct infected the trial with such "unfairness as to make the resulting conviction a denial of due process." See Darden, 477 U.S. at 169, 181.

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[45] The elements of perjury are: (1) a willful statement, (2) made under oath, (3) of any material matter, and (4) that the witness knows to be false. Pen. Code § 118; People v. Garcia (2006) 39 Cal.4th 1070, 1091.

C. The Prosecution's Misconduct Was Not Harmless

1. The Misconduct Requires Reversal of the Convictions

The Attorney General argues the prosecution's misconduct was harmless. RB 272. She is wrong. The misconduct here meant the jury could have adopted the prosecution's assertion defendant had conclusively committed perjury and fraud, instead of making its own determination about credibility based on the evidence. People v. Jones (1990) 51 Cal.3d 294, 314 (it is the "exclusive province of the ... jury to determine the credibility of a witness"). We explained in the opening brief (AOB 325) that labeling the defendant as a perjurer was especially prejudicial because "it is apt adversely and unnecessarily to affect the ability of the jury dispassionately to weigh the credibility of the accused and the issue of guilt or innocence." Ellis, 65 Cal.2d at 540.

The Attorney General does not argue that the trial court took any measures to alleviate the prejudice. Instead, she argues any potential prejudice was minimized because Dr. Plotkin managed to avoid answering the prosecution's questions directly. RB 272. However, no matter how Dr. Plotkin answered, he was powerless to undue the damage of the prosecution's misstatement of facts.[46]

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[46] Further, the fact that Plotkin to did not alter his conclusions did not mean that the questions did not unfairly affect the jury's willingness to accept those conclusions, which were based, at least in part, on Dr. Plotkin's having credited Sandi Nieves' statements that on the day of the incident she had ingested not only diet pills but Zoloft, an antidepressant, which in combination with Phentermine (an ingredient in the diet pills) can cause serotonin syndrome, which would have made Sandi more susceptible to a seizure and a post-seizure (postictal) delirium-like altered state of consciousness that could have lasted a full day. 48RT 7414:1-12, 7419:4-8,

(continued...)

The Attorney General's argument ignores entirely the impact that a prosecutor's misconduct has on a jury. She does not respond to our showing in the opening brief that jurors likely gave great weight to the prosecutor's assessment of the defendant because of their "special regard" for the prosecution. AOB 325 (quoting Hill, 17 Cal.4th at 828). "The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." People v. Taylor (1961) 197 Cal.App.2d 372, 382-383.

The misconduct here requires reversal because it violated Sandi Nieves's constitutional rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments. See Darden, 477 U.S. at 169, 181. Under California law, reversal is required due to the "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." People v. Tate (2010) 49 Cal.4th 635, 687; People v. Wilson (2005) 36 Cal.4th 309, 337.

2. The Misconduct Requires Reversal of the Death Sentence

Even if this Court does not reverse her convictions, it must reverse Sandi Nieves's death sentence because the prosecution's improper questions meant the jury could have condemned defendant to death for lying about collateral matters rather than the actual crimes for which she was convicted. Zant v. Stephens (1983) 462 U.S. 862, 885 (capital sentence must not be based on considerations that are constitutionally

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[46](...continued)
7420:7-18, 7420:21-7421:10. Sandi Nieves's mental state at the time of the crimes was a crucial issue at each phase of trial – both as to whether she was guilty of first degree murder, and, if so, as to whether she acted with a level of moral culpability that would warrant a death sentence.

impermissible). The fact that the prosecution again referred to Sandi Nieves as having committed perjury during the penalty phase cross-examination of Shirley Driskell only increased the likelihood the jury applied the prosecution's remarks in this objectionable fashion. See 61RT 9499:4-12. As a result, Sandi Nieves's death sentence is unreliable under the Eighth and Fourteenth Amendments. Caldwell v. Mississippi (1985) 472 U.S. 320, 341; Zant, 462 U.S. at 879.

XIII. INSTRUCTION REGARDING DELAY AND CONCEALMENT OF EVIDENCE AT THE GUILT PHASE

Three times during the guilt phase the trial court told the jury Sandi Nieves had either concealed or delayed producing statements to the prosecution that she was legally obligated to produce. 30RT 3709:23-3710:26; 4113:28-4114:16; 54RT 8381:18-8383:3; 19RCT 4931. The second and third time the court instructed the jury Nieves had concealed and delayed giving the prosecution the documents it was entitled to receive. It did not allow the jury to decide the issues of concealment or delay. Instead, after telling the jury Nieves had violated the law, it told the jury it could draw whatever inferences it wanted by deciding the weight and significance to give to the concealment and delay when deciding if Nieves was guilty or innocent. The instruction was modeled on the 1996 version of CALJIC 2.28.

A. Former Version of CALJIC 2.28 and the Instructions Based on it Are Legally Erroneous

The Attorney General refuses to concede any error in giving the discovery violation instruction, CALJIC 2.28. She avoids a substantive legal defense of the instruction, relying instead on the facts surrounding Nieves's counsel's failure to timely disclose some written materials. She

rests her legal position on People v. Riggs (2008) 44 Cal.4th 248, 306. RB 286-288. However, People v. Thomas (2011) 51 Cal.4th 449, held the version of CALJIC 2.28 that was given at Sandi Nieves's trial is legally erroneous.

The Attorney General contends the instructions should be reviewed for an abuse of discretion. RB 282 (heading). This is plainly incorrect inasmuch as the instructions gave the jury a principle of law to apply to its determination of guilt or innocence. They are therefore subject to de novo review. People v. Alvarez (1996) 14 Cal.4th 155, 217, 219-221.

Riggs, 44 Cal.4th at 306 (RB 286-289) is manifestly different from this case. In Riggs the defendant, representing himself, failed to timely disclose two alibi witnesses. Because Riggs did not have counsel, he was directly responsible for the failure to disclose. There was no issue of whether an instruction can properly lay the blame on the defendant for late disclosure because Riggs had control over the timing of disclosure. Compare People v. Bell (2004) 118 Cal.App.4th 249.

Moreover, the instruction that was actually given in Riggs only instructed the jury it could consider the failure to disclose the alibi witnesses in determining the weight to be given to the witness's testimony. Riggs, 44 Cal.4th at 304-305. Riggs pointedly confined its analysis to that case and "the circumstances of [that] trial." Id. at 306.

Unlike Riggs, here there is no showing whatsoever that Sandi Nieves was personally responsible for concealment or any late disclosures. She had an attorney at trial, Howard Waco. She was in jail. The Attorney General has failed to point to any evidence that Nieves herself bore any responsibility for late disclosures.

In addition, unlike Riggs, the trial court's two instructions told the

jury: "The weight and significance of any concealment and delayed disclosure are matters for your consideration." 30RT 4114:5-16; 54RT 8381:18-8383:3. See AOB 343-343. This essentially introduced a wildcard into the assessment of guilt or innocence. It did not restrict the jury's consideration to the weight to be given to particular evidence.

The instructions not only failed to restrict consideration of delayed disclosure to particular pieces of evidence, they conclusively told the jury the defendant had "concealed" and had "failed to timely disclose" witness statements and other material, including readable notes and reports. The first instruction given mid-trial referred to two witnesses who never even testified during that phase of the trial, Delores Morris and Aunt Lenora [Frey]. 30RT 4113:28-4114:16, 4115:14-4116:16; See RT Vol. A, Master Index of Witnesses.[47]

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[47] The Attorney General contends Nieves forfeited the right to challenge the inclusion of references to Morris and Frey in the instructions because her attorney eventually turned over the information. RB 282. This is a specious argument. Apparently the Attorney General believes that Howard Waco's eventual compliance with Judge Wiatt's continual threats of sanctions and other coercive orders waives any right to challenge the discovery instructions as they related to Morris and Frey. Given the tenor of this trial, and Judge Wiatt's hostility toward the defense in connection with discovery disclosures, is the Attorney General contending defense counsel should have risked more sanctions or even jail in order to preserve his client's claim that he did not need to turn over Morris and Frey's statements?

Further, counsel's consent to turning over the witness statements, even if deemed completely voluntary, was in no way consent to an unfair instruction concerning those statements. Counsel objected to the instruction (30RT 4115:8-4116:25) and certainly did not invite the error. Indeed, even if counsel had not objected, the issue would be reviewable since an appellate court may "review any instruction given, ... even if no objection

(continued...)

Thomas, 51 Cal.4th 449, not Riggs, is controlling. The two CALJIC 2.28 instructions that were given during the guilt phase of the trial in this case are not a matter of judicial discretion.

First, the trial court misleadingly told the jury Nieves bore responsibility for concealing and failing to timely disclose the required information. Id. at 483. But Nieves did not conceal or control the timing of anything; her lawyer did. Indeed, even a cursory review of the transcript of the trial shows that the trial court blamed Howard Waco, not the defendant, for misconduct and inappropriate behavior throughout the trial. See, e.g., 29RT 3786:5-7 (outside the jury's presence during a discussion of discovery delay: "All of the responsibility for this falls on your shoulders as to why this case is going to get continued.").

Further, the absurdity and prejudice in holding Sandi Nieves responsible is underscored by the fact that one of the charges in the first and second instructions was that "she" "concealed and failed to timely disclose

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[47](...continued)
was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Penal Code § 1259.

The cases the Attorney General cites do not support her position. People v. Tillis (1998) 18 Cal.4th 284, 292 merely holds that a defendant asserting that the prosecution failed to disclose a witness must, at least, "affirmatively demonstrate that a specific witness or witnesses were known to and intended to be called by the prosecutor, but were undisclosed to the defense as required by the discovery chapter." That is not the situation in this case.

People v. Mitchell (1962) 209 Cal.App.2d 312, 319, likewise, is inapposite. This case addresses delay in delivering a copy of the information at arraignment. It does not involve the discovery statute. It does not even begin to address the type of forfeiture by estoppel the Attorney General is claiming with regard to Morris and Frey's statements.

... [r]eadable notes and reports and other materials relied upon [by defense expert] witnesses Dr. Philip Ney and Dr. Lorie Humphrey." 54RT 8381:18-8383:3. Sandi Nieves was not responsible for their handwriting or the process of making their handwriting more legible.

The Attorney General claims defendant forfeited her argument that she was not required to create readable notes of her experts and other witnesses. RB 283. She is wrong; defense counsel did object. 29RT 3916:8-9 ("It's not a required thing forensically to have typewritten notes. That doesn't exist."); 29RT 3917:1-2 ("What they're asking for is beyond the pale of reason."). Later, defense counsel said he had no trouble with having his experts decipher or read "what the actual words are on the paper." 30RT 3941:6-7. But that is much different than an affirmative obligation to turn over readable notes in the first instance and an instruction that the defendant is responsible when handwriting can not easily be read.

Once defense counsel made his objection, it was futile to make the argument continually. The trial court was threatening to withhold the experts' compensation if they did not provide transcriptions of their notes. 30RT 3960:22-24. See also 30RT 3941:13-15 ("The Court: I can order the experts in any time I want, and if they're not here, we'll deal with that."). As a result, defense counsel tried to work out the issue with the court and prosecution before the judge went even further and withheld the experts' compensation. See, e.g., 30RT 3959:12-3961:23.

The Attorney General cites dicta in Verdin v. Superior Court (2008) 43 Cal.4th 1096, 1103-1104 for the proposition that Penal Code § 1054.3, subd. (a), requires an expert to turn over "raw written notes." RB 283. But the raw written notes are what Drs. Ney, Humphrey, and Kaser-Boyd gave the prosecution through defense counsel. If Penal Code § 1054.3 requires

more, Verdin does not say so. In fact, Verdin holds that mandatory discovery disclosures are limited by the terms of the statute.

Thompson v. Superior Court (1997) 53 Cal.App.4th 480, 486, also cited at RB 284, is equally unavailing. Thompson merely holds that reciprocal discovery requires a defendant to turn over raw witness statements and not merely edited reports. The opinion says nothing about rewriting handwritten notes.

Elevating the legibility of a witness's self prepared handwritten notes to a discovery violation warranting a charge to the jury conclusively blaming the defendant personally is inconsistent with the discovery statute and Thomas, 51 Cal.4th 449.

Second, Thomas squarely holds that the language giving the jury discretion to consider the weight and significance of late disclosures "offered 'no guidance on how this failure might legitimately affect their deliberations.'" Id. at 483.

Third, the jury in the Thomas case, as in this case, was not told that "the discovery violation was insufficient of itself to prove guilt." Id.

The Attorney General attempts to defend the instructions against our submission that there was no prejudice to the prosecution from late disclosure. RB 287. She does not dispute that there was no prejudice to the prosecution, but contends that the late disclosures "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." RB 287, citing Riggs, 44 Cal.4th at 308. The key word here is "might." The trial court did not restrict the reach of the erroneous instructions in this way.

The instructions given the jury were not limited to consciousness of lack of credibility. The trial court did not mention consciousness of lack of

credibility when it informed the jury, mid-trial, that the defense had failed to turn over discovery in a timely manner. 30RT 3709:23-3710:26. The trial court did not limit the inferences that could be drawn from the failure timely to produce discovery when it gave the CALJIC 2.28 instruction the first time during the middle of the trial. 30RT 4113:28-4114:16. See 30RT 4114:9-11 ("The weight and significance of any concealment and delay of disclosure are matters for your consideration."). Further, the court did not limit the scope of the jury's consideration in any way when it gave the instruction in the final guilt phase charge to the jury. 54RT 8381:18-8383:3; 19RCT 4931.

The Attorney General contends the prosecution's closing argument that defendant tried to gain a strategic advantage (57RT 8864), might be viewed as pointing to a lack of credibility. RB 287-288. This speculative argument does not negate or qualify the trial court's expansive legal instructions founded on CALJIC 2.28. There is a "presumption that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" People v. Morales (2001) 25 Cal.4th 34, 47, quoting People v. Sanchez (1995) 12 Cal.4th 1, 70.

In its argument to the jury, the prosecution never once conceded the discretion conferred by CALJIC 2.28 is limited. Indeed, the Attorney General does not even make this concession at this point in her brief. Surely, the jurors cannot be expected to give the instructions a more limited meaning than the Attorney General or the judge.

CALJIC 2.28, as worded and used at the time of trial, allowed the jury discretion to consider the "weight and significance of any delayed disclosure." The jury could use late disclosure for any purpose, so long as it

also considered "whether the untimely disclosed evidence pertain[ed] to a fact of importance, something trivial or subject matters already established by other credible evidence." Accordingly, all the jury needed to do was to give preliminary "consideration" to the substance of the late disclosures, and then it was free to give the late disclosures whatever weight and significance it believed appropriate. Compare Riggs, 44 Cal.4th at 307 ("the instruction given by the trial court limited inferences the jury could draw.").

Here, the jury was allowed unfettered license to use the late disclosures as a basis for guilt without any showing the prosecution suffered any prejudice or any requirement that consideration of late disclosure be limited to credibility. The instruction encouraged the jurors to approach their deliberations under the assumption the prosecution had been disadvantaged by the delayed disclosures and that Nieves's defense was weaker because she was concealing evidence. This undoubtedly and unconstitutionally diminished the prosecution's burden of proof. See AOB 366-367.

In light of the fact the prosecution obtained continuances when it wanted them (including a full two week continuance), that the actual statements and material at issue were relatively minor, and that the prosecution nonetheless aggressively cross-examined the witnesses whose documents were belatedly disclosed, the CALJIC 2.28 instructions were gratuitous and served no purpose, other than to turn the jury against the defendant for her counsel's tardiness and her expert's bad handwriting.

B. The CALJIC 2.28 Instructions Were Plainly Prejudicial

The trial court instructed the jury Nieves had violated the law by concealing evidence and failing to turn over discovery in a timely manner. These were not inconsistent instructions that can be reconciled with other

correct instructions in the case. These were standalone wildcard instructions that gave the jury a basis to find that concealment and delay were important and find there was no reasonable doubt to acquit the defendant of any charge.

Because the instructions effectively lowered the prosecution's burden of proof with regard to the elements of the crimes and special circumstances charged, giving the instructions under the circumstances of this case is structural error requiring reversal. Sullivan v. Louisiana (1993) 508 U.S. 275, 281-282; People v. Gainer (1977) 19 Cal.3d 835, 842-43, 854-55.

The Attorney General contends that Riggs applied a harmless error analysis to the CALJIC 2.28 instruction that was given in that case. Therefore, she contends structural error analysis does not apply. RB 288. The instruction given in Riggs was not the same version of CALJIC 2.28. It was similar to a later version. Id. at 306-307. The instruction given in Riggs did not have the same flaws as the version of CALJIC 2.28 that was given at the trial in this case. The Riggs instruction said, "You may consider such failure [to disclose], if any, in determining the weight to be given to the testimony of such witnesses." 44 Cal.4th at 305.

Unlike this case, where the jury was told that Nieves concealed evidence, was late to disclose evidence, that she had no legal justification, and was given unfettered discretion to draw inferences in any way it chose and to give the information whatever weight it wanted, the Riggs instruction did not have the affect of lowering the burden of proof of any elements of the crimes charged. While the Riggs instruction told the jury what it could consider credibility, the CALJIC 2.28 instructions given here allowed the jury to give weight and significance for any purpose to concealment and

delay when it decided whether there was a reasonable doubt to acquit the defendant.

Riggs therefore does not require harmless error analysis in all cases. In other words, "the question is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." Bollenbach v. United States (1946) 326 U.S. 607, 614.

In Thomas, 51 Cal.4th at 484, the defendant did not appear to argue structural error when the jury considered matters unrelated to proof of the charges against the defendant. The Court did not consider the effect of the erroneous CALJIC 2.28 instruction on the burden of proof. In Thomas the instruction was given with regard to the testimony of a single defense witness, and the jury was not told conclusively the defendant concealed the witness's identity. The prosecutor did not mention the instruction or the delay in closing argument. The instruction had a small role, if any, with regard to the trial.

In the present case, however, allegations, accusations, and instructions about concealment and delay permeated the trial proceedings. Accusations of discovery delay were front and center for the entire trial. Harmless error analysis does not work under these circumstances. The jury's verdict "must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." Turner v. Louisiana (1965) 379 U.S. 466, 472. It can not be based on failure to meet discovery obligations.

Even if the Court holds that the instructions were not structurally

erroneous, the Attorney General has not shown the error was harmless beyond a reasonable doubt. The instructions played right into the prosecution's principal theme throughout the trial: that Nieves was a manipulator, a cheater, and a liar. The repeated instructions gave the jury a mechanism to apply this theme in order to convict the defendant and to find the special circumstances to be true.

The Attorney General points to the strength of the other evidence against Sandi Nieves to contend the CALJIC 2.28 instructions were harmless. RB 288. But if they were so harmless, why did the trial court repeatedly tell the jury about the late disclosures instead of dealing with the issue outside the jury's presence? See, e.g., 28RT 3709:23-3710:2 ("This morning, and in one case this afternoon, Mr. Waco provided the prosecution for the first time with statements of witnesses that should have been disclosed 30 days before trial.").

Why did the prosecution urge the trial court to give the instruction? We submit it is because the prosecution believed the instruction would make a difference in the outcome of the trial. A month into the case, the prosecution was already asking for the instruction, which was given to the jury. 30RT 3944:3-4 ("We want an instruction pursuant to CALJIC 2.28."). Further, the repetition of the instruction, starting mid-trial and repeated just before the jury deliberated (54RT 8381:18-8383:3, 19RCT 4931) sent the unmistakable message that the discovery violation was something likely important to the outcome of this case.

Moreover, the Attorney General's characterization of the balance of evidence is wrong. While the trial judge in many ways hampered the presentation of the defense case, the defense did present evidence that in the days before the fire Sandi Nieves was in great stress as a result of

abandonment by still another man, undergoing an abortion despite strong religious scruples against abortion, an inability to find work, and the threatened termination of child support payments and resulting inability to house herself and her children; that she had cognitive deficits that limited her ability to deal with stress and cope with multiple challenges, and a history of vulnerability to seizures; and that she had started taking Zoloft and diet pills that could have induced a dissociative state or a seizure resulting in delirium. There was certainly a basis for harboring doubt as to whether Sandi Nieves, who had no prior history of violence, acted with a deliberate, premeditated intent to kill herself and her children.

For the "powerful evidence" that Sandi Nieves deliberately set a lethal fire "to exact revenge on the men in her life" (RB 289), the Attorney General relies throughout her brief primarily on the letter to David Folden, saying he would not have to support any of them. But, as counsel argued below, that letter could have referred only to Folden's motion to terminate child support payments, not to a planned suicide and murder of children.

Sandi Nieves was entitled to have the jury make a fair and unbiased determination of the crucial mens rea issues at her guilt phase trial, without the trial court twice baselessly instructing that she herself had concealed evidence.

The Attorney General contends the prosecution's brief statement in closing argument—that the jury could not find Nieves guilty "because they hid stuff" (57RT 8864:12-13)—somehow tempers the effect of the instructions. RB 289. However, this brief and fleeting mention by the prosecutor did not override the court's instructions or the manifest prejudice that flowed from the court's repeatedly telling the jury that Nieves broke the law and that failure to turn over discovery mattered to the case. The jury

was free to disregard all arguments of counsel. It is presumed "that the jury relied on the instructions, not the arguments, in convicting defendant." Morales, 25 Cal.4th at 47.

For the reasons submitted in the opening brief and in this brief the unfettered wildcard instruction was prejudicial. The convictions must therefore be reversed.

XIV. FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES

The Attorney General does not dispute that Beck v. Alabama (1980) 447 U.S. 625, 637- 638, requires courts to instruct capital juries on lesser included offenses if warranted by the evidence. RB 296. She concedes that California law requires a trial 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." RB 296 (citing People v. Moon (2005) 37 Cal.4th 1). She nonetheless contends the evidence in this case did not support a jury instruction on involuntary manslaughter or the lesser included offenses to felony arson. RB 297-301.

In discussing the record, the Attorney General construes the evidence in the light most favorable to the premeditated first degree murder verdicts. But the issue here is not whether there was enough evidence to convict Sandi Nieves of the first degree murder charges and special circumstances. The relevant question is: was there enough evidence to require the trial court to instruct the jury on the lesser included offenses? The answer is yes. See AOB 371-394. But the trial court prejudicially refused to do so.

A. Involuntary Manslaughter

"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." People v. Ochoa (1998) 19 Cal.4th 353, 423. If it had been properly instructed, the jury could have found Sandi Nieves did not act with the required specific intent necessary for first degree murder. She could therefore be guilty of the lesser included offense of involuntary manslaughter. See AOB 377.

However, the trial court refused defendant's request for an involuntary manslaughter instruction on the ground defense counsel failed to articulate a satisfactory answer to the court's questions about the desired instruction. 52RT 8037:16-26 (the court to defense counsel: "Well, I am not going to hear from you further on this theory ... I am going [to] deem that as you have nothing further to say. I will not instruct on involuntary manslaughter, ...").

The Attorney General contends the trial court correctly refused to instruct the jury on involuntary manslaughter. RB 297-300. She argues the record does not contain substantial evidence that mental illness or voluntary intoxication caused Sandi Nieves to act in a state of unconsciousness on the night of the fire. RB 298. But in support, she provides an assessment of the evidence in the light most favorable to the first degree murder conviction. Limiting the analysis of a Beck claim to the sufficiency of the evidence supporting the first-degree murder conviction "turns Beck on its head." Phillips v. Workman (10th Cir. 2010) 604 F.3d 1202, 121.

The Attorney General inappropriately speaks to the weight of the evidence rather than its sufficiency. See People v. Breverman (1998) 19 Cal.4th 142, 177 ("In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.").

The Attorney General asserts the "evidence established" Sandi Nieves only had two drinks the night of the fire. RB 298. Although the jury could have concluded Sandi Nieves had only two drinks, other evidence—i.e., the other empty bottles found in the house (26RT 3455:2-12), Sandi Nieves's testimony that she drank both beer and wine coolers (35RT 4807:7), Debbie Wood's testimony Sandi Nieves was drinking (30RT 3990:23-25)—could "rationally support" a jury's conclusion Sandi Nieves had more than two drinks. "Even when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given." United States v. Anderson (9th Cir. 2000) 201 F.3d 1145; United States v. Crowe (9th Cir. 2009) 563 F.3d 969, 973-74 (same).

Similarly, the Attorney General construes the evidence as showing Sandi Nieves consumed only doxycycline, an antibiotic, on the night of the fire. See RB 298. However, a jury could have rationally concluded otherwise based on the evidence the toxicologist found Sandi Nieves had the diet pill Phentermine in her system (29RT 3793:21-28), Sandi Nieves's testimony she was taking a cocktail of diet pills and the anti-depressant drug Zoloft (35RT 4794:14-18, 2870:128, 4874:22-4876:13), and evidence confirming Sandi Nieves had prescriptions for Zoloft as well as diet pills such as Fastin, Fenfluramine, phenylpropanolamine, and phendimetrazine (49RT 7469:23-28, 7497:27-7499:20, 7516:10-13, Exhs. 80A & 92).[48]

The Attorney General contends Sandi Nieves's actions on the night of the fire were "inconsistent with any suggestion" of unconsciousness. RB

[48] Phentermine and Fenfluramine taken together is commonly known as "Phen-Fen." 49RT 7519:27-7520:6.

299. In support, she recounts David Nieves's testimony that his mother made him participate in the slumber party she organized, told him to stay where he was and breathe into the blankets when he woke up choking on smoke, and told his sister to vomit on the floor instead of getting up. Id. In fact, Sandi Nieves's own testimony did not contradict David's. She remembered being in the kitchen area with the children, laying down and warming her feet by the stove. 35RT 4809:8-15. She remembered the children sleeping. 35RT 4809:18-19. But the next thing she remembered was waking up in black smoke. 35RT 4809:20-4810:5. She did not recall doing the things the Attorney General asserts she did, i.e., mailing a letter to Dave Folden and setting the fire. See 35RT 4804:20-4805:15, 4815:10-12. Sandi Nieves's memory—of lack of memory— was consistent with someone who had been in a state of unconsciousness. See, e.g., 43RT 6282:16-6283:3 (defense expert Dr. Phillip Ney testified that during an organically induced dissociative state, a person cannot recover memory because there is no memory being formed). A rational jury could have believed David Nieves's testimony but also believed Sandi Nieves about her limited recall of events.

The Attorney General also points to evidence the fire was intentionally set. RB 299. Even if true, this evidence likewise does not conflict with defendant acting while in a state of unconsciousness. Dr. Ney testified that an individual is capable of performing complicated acts even while in an unconscious or dissociative state. See 40RT 5774:12-5775:18. In her assessment of the evidence, the Attorney General ignores completely the relevant expert testimony. Expert testimony is evidence that a rational jury may consider along with all other evidence. See Hirshfeld v. Dana (1924) 193 Cal. 142, 155, overruled on other grounds in People v.

Dail (1943) 22 Cal.2d 642 ("It is the duty of the jury to consider and weigh the opinions of the experts with the other evidence in the case and then determine upon all the evidence where the truth lies.").

The Attorney General does not respond to our showing in the opening brief that the expert testimony in this case could have led a rational jury to conclude that a seizure, voluntary intoxication, or a combination of all factors rendered Sandi Nieves unconscious and unable to form the specific intent required for first degree murder. AOB 383-385. The evidence included, but was not limited to, testimony from defense experts Dr. Lorie Humphrey, Dr. Ney, and Dr. Gordon Plotkin regarding Sandi Nieves's history of epilepsy or seizure disorder (37RT 5147:14-23, 40RT 5757:10-19,48RT 7390:15-7391:3), her vulnerability to serotonin syndrom based on the combination of pills she was taking (40RT 5762:8-5764:2; 48RT 7413:18-28, 7414:1-12); and her elevated CPK—an enzyme released into the bloodstream following trauma or a seizure—that showed up on her blood tests after the fire (48RT 7425:14-7426:11, 7427:1-3).

The evidence in support of providing an involuntary manslaughter instruction was substantial. The Attorney General does not show otherwise. The trial court's refusal to provide the instruction was error in violation of Sandi Nieves's Fifth and Fourteenth Amendment due process rights. See Beck, 447 U.S. at 637-638.

B. Arson

Because there was substantial evidence to raise reasonable doubt about whether the nature of the fire in this case amounted to felony arson, the trial court erred when it refused to instruct the jury as to lesser included offenses to arson. AOB 386-389.

In response, the Attorney General argues instructions on the lesser

included charges were unwarranted. RB 301. She relies exclusively on the testimony from the arson experts Dr. John Dehaan and Del Winter that the fire was "intentionally set." Id. She does not provide any factual support that the fire was "willfully and maliciously" set—the critical element that distinguishes felony arson from lesser misdemeanor offenses. Compare Pen. Code § 451 (felony arson) with Pen. Code § 452 (misdemeanor offense of unlawfully causing a fire). She makes the conclusory statement that no evidence showed the fire was started in a reckless manner. See Pen. Code § 452 ("[a] person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned"). Moreover, she ignores entirely the rest of Del Winter's testimony.

Winter elaborated about the questionable intent of the person who set the fire in this case. He pointed out oddities such as the small amount of gasoline used, the pouring of gas on fire-resistant surfaces, the failure to set fire to the numerous combustible materials present, and the large amount of leftover gas that was unused. 29RT 3809:12-3810:7; 3812:6-20; 3816:11-23. Moreover, he explained that his statement the fire was "intentionally set" meant the fire was not accidental. 29RT 3818:23-28, 3830:10-17.

A rational jury could have found Winter's testimony convincing and concluded that the defendant set the fire, but did not act willfully and maliciously. Moreover, the substantial evidence that Sandi Nieves was intoxicated further supports a finding of recklessness over maliciousness. See AOB 380-384 and Section A, supra.

This evidence was more than enough to require instructions on lesser offenses, particularly the instructions related to Penal Code § 452, the misdemeanor offense of unlawfully causing a fire. If the court had informed the jurors that they had that option, they could have reasonably found

defendant guilty of the misdemeanor offense rather than the felony. This result would have led to an involuntary manslaughter conviction rather than first degree murder. See Pen. Code § 192(b) (involuntary manslaughter is an unlawful killing without malice "in the commission of an unlawful act, not amounting to felony"). Depriving the jury of this option deprived Sandi Nieves of her due process rights under Beck, 447 U.S. at 637-638.

C. The Error Was Not Harmless

The Attorney General does not respond to the primary concern we raised in the opening brief: absent the proper instruction on lesser included offenses, the trial court left the jury with the unconstitutional choice of murder or acquittal. AOB 389; Beck, 447 U.S. 625; Hopper v. Evans (1982) 456 U.S. 605. Instead, the Attorney General argues the error in failing properly to instruct the jury on the lesser offenses was harmless because the jury decided the factual questions posed by the "omitted instructions adversely to defendant under properly given instructions." RB 297.

However, in this case it is not possible to know how the jury decided the factual questions framed by the omitted involuntary manslaughter instructions. The only instruction the trial court provided regarding unconsciousness was unconsciousness as a complete defense. See 54RT 8391:21-8392:19. The jury faced the same "all or nothing" dilemma. The trial court did not allow the jury to know that if it found defendant was unconscious due to voluntary intoxication, it could still convict her of something (involuntary manslaughter) rather than letting her off completely.

Contrary to the Attorney General's argument, the fact the jury found true the lying-in-wait special circumstance allegations does not settle the matter. See RB 300. The special circumstance findings are irrelevant to whether the error here was harmless in light of our showing in Parts XIV

and XV of this brief and the opening brief that there was insufficient evidence to support the jury's findings as to the lying-in-wait and arson-murder special circumstances.

Because the trial court's error here violated defendant's federal constitutional rights, it is the Attorney General's burden to show beyond a reasonable doubt that the failure to provide the instructions on the lesser offenses was harmless. Chapman, 386 U.S. at 24. She has not done so. Reversal of the murder and arson convictions is required.

We incorporate by reference here our argument in the opening brief that the attempted murder conviction must be similarly reversed. See AOB 392-394.

XV. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

The Attorney General is correct that "[t]his Court has recently and repeatedly found that the lying-in-wait special circumstance is not unconstitutionally vague." RB 302. See, e.g., People v. Streeter (2012) 54 Cal.4th 205, 142 Cal.Rptr.3d 481, 524. Nonetheless, the constitutionality of California's lying-in-wait special circumstance is due for reexamination. See AOB 396-401. The doctrine of stare decisis does not preclude this Court from departing from prior precedent when its rationale no longer withstands careful scrutiny. People v. Latimer (1993) 5 Cal.4th 1203, 1213. See also Price v. Superior Court (2001) 25 Cal.4th 1046, 1059 n.8 ("The doctrine of stare decisis is flexible, ... It does not preclude correction of court-created error."). As interpreted by this Court, the lying-in-wait special circumstance has been expanded so far and is so loosely applied that it no longer necessarily and sufficiently narrows the first degree murders eligible for the death penalty.

Further, the evidence at trial was insufficient to support the jury's

finding on the lying-in-wait special circumstance in this case. AOB 395, 401-405. The Attorney General's characterization of the evidence requires impermissible speculation as to the timing of relevant events. See RB 303-304.

A. Revising the Scope of the Lying-In-Wait Special Circumstance

In response to our constitutional challenge to the lying-in-wait special circumstance the Attorney General simply states this Court has repeatedly rejected similar challenges. RB 302. But sooner rather than later this Court needs to reexamine its interpretation of the lying-in-wait special circumstance. Too much is at stake in this case and every capital case to allow inertia and stare decisis to prevent a meaningful review of this Court's lying-in-wait precedents. See Rhoades v. Reinke (9th Cir. 2011) 671 F.3d 856, 859 (death penalty cases involve "superordinately high stakes for the prisoner whose execution is scheduled and for society which plans to take the prisoner's life as a sanction for the murder of one or more of its citizens").

"[P]rinciples of stare decisis do not preclude [this Court] from ever revisiting ... older decisions." Sierra Club v. San Joaquin Local Agency Formation Com. (1999) 21 Cal.4th 489, 505. See People v. King (1993) 5 Cal.4th 59, 78 ("Court-made error should not be shielded from correction."). When one of the bases on which this Court rested its prior decisions has "proved to be unsound," this Court has a "duty to reconsider the question." People v. Anderson (1987) 43 Cal.3d 1104, 1141, superseded by statute on another ground as noted in People v. Mil (2012) 53 Cal.4th 400, 408.

The Attorney General lists the elements of the lying-in-wait special

circumstance as "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." RB 303. See also Streeter, 142 Cal.Rptr.3d at 521. In our opening brief (AOB 396-401), we show the elements have eroded to the point that they no longer serve the "narrowing function" that distinguishes the death-eligible special circumstance murder from ordinary premeditated murder. See Jones v. United States (1999) 527 U.S. 373, 381.

First, this Court has expanded the concealment element so far that even a perpetrator who announces "his bloody aim" can be charged with lying in wait. See People v. Morales (1989) 48 Cal.3d 527, 575 (Mosk, J., concurring and dissenting); see, e.g., People v. Hillhouse (2002) 27 Cal.4th 469, 512 (lying-in-wait special circumstance upheld even though the perpetrator told his victim "I ought to kill you" before striking). Second, just a few minutes now qualifies as a "substantial period of waiting and watching." People v. Moon (2005) 37 Cal.4th 1, 23 ("a few minutes can suffice"). Finally, the third factor—to initiate a surprise attack on an unsuspecting victim from a position of advantage—"is nothing more than murder by surprise." People v. Stevens (2007) 41 Cal.4th 182, 220 (Moreno, J., dissenting and concurring). "Not only is surprise a common feature of murder—since murderers usually want their killings to succeed, and victims usually don't want to be murdered—but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is less culpable than one who does." Id. at 223.

"[M]urder by lying in wait as applied by the California Supreme Court has been stretched to the breaking point." Caldwell, The Prostitution

of Lying in Wait (2003) 57 U. Miami L. Rev. 311, 371. For more than twenty years, justices of this Court have pointed out the disparity in the varied interpretations of the lying-in-wait special circumstance and the "growing concern ... that these decisions may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder." See Hillhouse, 27 Cal.4th at 512 (Kennard, J, concurring); see, e.g., Stevens, 41 Cal.4th at 213 (Werdegar, J., concurring); id. at 216-226 (Moreno, J., concurring and dissenting); Hillhouse, 27 Cal.4th at 513-516 (Moreno, J., concurring and dissenting); People v. Ceja (1993) 4 Cal.4th 1134, 1147 (Kennard, J., concurring); People v. Webster (1991) 54 Cal.3d 411, 461-463 (Mosk, J., concurring and dissenting); id. at 463-468 (Broussard, J., concurring and dissenting); Morales, 48 Cal.3d at 573-575 (Mosk, J., concurring and dissenting).

As interpreted by this Court, the lying-in-wait special circumstance unconstitutionally fails appreciably to narrow the class of death-eligible defendants. See Zant v. Stephens (1983) 462 U.S. 862, 877. The distinction between the special circumstance and first degree murder does not reflect the relative culpability of the defendants, and thus does not reserve the death penalty for the most extreme cases. See Maynard v. Cartwright (1988) 486 U.S. 356, 364 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder). See also Stevens, 41 Cal.4th at 218 (Moreno, J., dissenting and concurring)(the lying-in-wait special circumstance fails to serve the narrowing function of "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'"), quoting Godfrey v. Georgia (1980) 446 U.S. 420, 427.

"Lying in wait, if it is to be used as an element of a crime that warrants execution, must be reexamined, rewritten, and reapplied to faithfully adhere to the fundamental fabric of our death penalty jurisprudence." Caldwell, 57 U. Miami L. Rev. at 375. The lying-in-wait special circumstance, as interpreted by this Court and applied here, is unconstitutional and must be reconsidered and narrowed. See Zant, 462 U.S. at 877 (a state must ensure that its capital sentencing scheme "genuinely narrow[s] the class of persons eligible for the death penalty"); see also Romano v. Oklahoma (1994) 512 U.S. 1, 7; Lowenfield v. Phelps (1988) 484 U.S. 231, 244; Godfrey, 446 U.S. at 427.

B. The Evidence Was Not Sufficient to Support the Jury's Findings

The Attorney General argues the evidence of lying in wait was sufficient to support the special finding. RB 303-304. She focuses on the evidence of concealment of purpose. Id. However, "'mere' concealment of purpose is not enough to support the lying-in-wait special circumstance." People v. Lewis (2008) 43 Cal.4th 415, 514, quoting Morales, 48 Cal.3d at 557. To support the jury's findings, the evidence of each of the essential elements must be substantial. People v. Dominguez (2006) 39 Cal.4th 1141, 1153. "'[I]t is not enough for the respondent simply to point to "some" evidence supporting the finding ... .'" Id., quoting People v. Johnson (1980) 26 Cal.3d 557, 577.

"[T]he lying-in-wait special circumstance requires 'that the killing take place during the period of concealment and watchful waiting [.]'" People v. Cruz (2008) 44 Cal.4th 636, 679, quoting People v. Gutierrez (2002) 28 Cal.4th 1083, 1149 (emphasis in original). In the opening brief (AOB 404-405), we show that in order for the jury to have found this

element true, it had to rely on guesswork and speculation. See People v. Morris (1988) 46 Cal.3d 1, 21 (a jury's finding of fact "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work").

The evidence showed Sandi Nieves left the house at least once at some point during the night. 35RT 4918:25-4919:16. There was no evidence about the timing of her departure and return in relation to when the children fell asleep or when the fire started. Id.; AOB 405. There was no evidence when the fire actually started and what Nieves was doing immediately beforehand.

The Attorney General argues the evidence was sufficient even though the only eyewitness to the fire, David Nieves, could not provide specifics as to the timing of the events surrounding the fire. See RB 304. She does not point to any evidence in support of the timing element. She simply maintains—without providing any legal authority in support— that "[t]here was no requirement that David specifically pinpoint the time of the events." Id.

The Attorney General is wrong. Speculation about the timing of relevant events is insufficient to support the lying-in-wait special circumstances. See People v. Carter (2005) 36 Cal.4th 1215, 1258 (setting aside lying-in-wait special circumstance because the jury's findings relied on multiple levels of speculation).

Significantly, the Attorney General does not address the evidence that Sandi Nieves left the house. As the court instructed the jury: "If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special

circumstance is not proved." 54RT 8365:18-25; CALJIC No. 8.81.15. Here, the prosecution did not prove that immediately after the period of watchful waiting defendant carried out the intent to kill or that there was a "continuous flow of the uninterrupted lethal events." See Lewis, 43 Cal.4th at 514 (setting aside lying-in-wait special circumstance because there was no evidence that the defendants carried out their intent to kill immediately after the lying in wait ended).

Contrary to the Attorney General's argument (RB 304), the fact the children were sleeping does not lessen the prosecution's burden to prove the timing element. It is not enough to show that a defendant "concealed his purpose to kill from each of the victims until the moment they were killed." Lewis, 43 Cal.4th at 514. The evidence must show the killings occurred during or "in the course of" the lying in wait. Id. (refusing to read the word "while" out of the statute).[49]

We don't know when the children fell soundly asleep, when appellant realized they were soundly asleep, or when in relation to either of those moments the fire was set. If appellant deliberately set the fire intending to kill her children, did she do so immediately after realizing that the children were sound asleep? Did she first leave the house to go mail letters? There is no way to know whether appellant launched a surprise

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[49] In Lewis, this Court explained: "Proposition 18, an initiative approved by the voters in the March 7, 2000, Primary Election, and effective March 8, 2000, changed the language of the lying-in-wait special circumstance to delete the word 'while' and substitute in its place 'by means of.' (Stats.1998, ch. 629, § 2; People v. Michaels (2002) 28 Cal.4th 486, 516, 122 Cal.Rptr.2d 285, 49 P.3d 1032.)." 43 Cal.4th at 512 n.25. Like Lewis, the events relevant to this case "took place before this change in the law, and the change therefore does not affect this case." Id.; AOB 402 n. 156.

attack while, or no later than "immediately" after, "watching and waiting for an opportune time to act"—or whether after such an opportunity had clearly arrived, she stopped to do something else—whether to mail letters, think about her options, or do something we know nothing about. The evidence provides no basis for finding true beyond a reasonable doubt the crucial timing element of a lying-in-wait special circumstance.

Due process consistent with the Fourteenth Amendment requires that the evidence in the record "reasonably support" the jury's finding. See Jackson v. Virginia (1979) 443 U.S. 307, 317-18. Here, the evidence falls short. The jury's findings must be reversed.

XVI. THE ARSON-MURDER SPECIAL CIRCUMSTANCE

The evidence did not support the arson-murder special circumstance. The prosecution failed to show Sandi Nieves acted with an independent felonious purpose of committing arson separate from committing murder. The trial court also erroneously provided a confusing and misleading jury instruction. Making matters worse, the prosecution misstated the law regarding arson-murder during closing argument. Because the jury's findings as to these special circumstance allegations were based on legal error and insufficient evidence, they must be reversed. See AOB 405-432.

The Attorney General argues Sandi Nieves had the independent goal of killing herself and therefore the evidence supported the arson-murder special circumstances. RB 307-308.[50]

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[50] The Attorney General also cites the testimony from the prosecutor's arson investigator, John Ament, that the fire was deliberately and intentionally set in support of a finding that Sandi Nieves acted with an independent felonious purpose. RB 308. But this testimony that the fire was intentionally set has no bearing whatsoever on the purpose for setting the fire. See People v. Cash (2002) 28 Cal.4th 703, 738 ("the 'reason a person

(continued...)

The Attorney General's theory is a non-starter. It is inconsistent with her argument in support of the lying-in-wait special circumstances. See Part XV, supra. It conflicts directly with the prosecution's contention that Sandi Nieves set out to commit the premeditated murder of her children in an act of revenge against the men in her life. Moreover, even if the defendant had the concurrent intents to kill herself and her children, the prosecution still needed to show she acted with an independent felonious purpose to burn down the house apart from killing herself and her children.

The Attorney General defends the trial court's problematic instruction regarding whether the arson was "merely incidental" to the commission of murder. RB 308-309. But as we show below this Court recently held in People v. Brents (2012) 53 Cal.4th 599, 613 that a modification of the standard instruction regarding a felony-murder special circumstance is reversible error when—like here—the evidence supports an inference that the defendant did not act with an independent felonious intent apart from murder.

The insufficient evidence and the instructional error combined to violate defendant's constitutional right to have the jury determine beyond a reasonable doubt that she acted with the independent felonious purpose of committing arson. The Attorney General does not show otherwise and has no answer to our showing in the opening brief that the prosecution's misstatement of the law during closing argument compounded the error.

Allowing the arson-murder special circumstance findings to stand when the prosecution has failed to prove an independent felonious purpose

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[50](...continued)
chooses to commit a crime' . . . is not equivalent to the 'mental state such as intent' required to commit the crime") (quoting People v. Hillhouse (2002) 27 Cal.4th 469, 504).

violates the Eighth and Fourteenth Amendments and Article I, Sections 7, 15, and 17 of the California Constitution. As we explained in the opening brief (AOB 412-413), in order for the special circumstance to "genuinely narrow the class of persons eligible for the death penalty" (Zant v. Stephens (1983) 462 U.S. 862, 877), courts must limit its application to those cases in which the defendant has killed in order to advance or conceal the separate felony of arson. See People v. Green (1980) 27 Cal.3d 1, 62, overruled on other grounds in People v. Hall (1986) 41 Cal.3d 826, 834 & n.3, and abrogated on other grounds in People v. Martinez (1999) 20 Cal.4th 225, 239, 241. Otherwise, the special circumstance does not "distinguish the few cases in which it is imposed from the many cases in which it is not." Furman v. Georgia (1972) 408 U.S. 238, 313 (White, J., concurring).

A. The Evidence Was Not Sufficient to Prove Defendant Acted For an Independent Felonious Purpose of Committing Arson

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have concluded Nieves had an independent felonious purpose to commit arson. See AOB 417; Green, 27 Cal.3d at 61-62. Because the prosecution did not prove defendant had a purpose for the arson "apart from murder," the arson-murder special circumstance findings must be reversed. See People v. Barnett (1998) 17 Cal.4th 1044, 1158; AOB 405-432.

In response, the Attorney General contends that Nieves "set the fire with the intent to commit suicide, and the concurrent intent to kill her children." RB 307. Her argument does not support a true finding as to the arson-murder special circumstances. While concurrent intents do not disprove the special circumstance (Barnett, 17 Cal.4th at 1158), the jury must still find beyond a reasonable doubt the defendant committed murder

in order "to advance" an independent purpose of committing arson. See Green, 27 Cal.3d at 61 (the legislative intent behind the felony-murder special circumstance is "to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose").

The record shows the prosecution argued Sandi Nieves set out "to burn her kids to death." 57RT 8938:6-24 (prosecution's guilt phase closing argument). The prosecution never argued or presented evidence in support of any other theory.[51] It did not introduce evidence that defendant sought to commit suicide by fire and that the children died to "advance" that purpose. See Green, 27 Cal.3d at 61. Such a theory would have conflicted directly with the prosecution's underlying theory of deliberate premeditated murder, as well as its theory on the lying-in-wait special circumstance allegations. See Part XV, supra.

A reasonable trier of fact could not have found true the prosecution's arguments in support of lying in wait and at the same time have found true the arson-murder special circumstances. The prosecution argued in this case that Sandi Nieves's purpose all along was to kill her children, that she concealed that purpose until the opportune time to act, and then launched a surprise attack against them. 54RT 8413:16-8416:24 (prosecution's closing

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[51] Throughout the Respondent's Brief, the Attorney General has echoed the prosecution's argument that the evidence showed defendant deliberately set out to kill her children in an act of revenge against the men in her life. See e.g., RB 154 ("There was solid and overwhelming evidence presented at the guilt phase showing that appellant intentionally set the fire that took the lives of her four daughters and almost took the life of her only son, and that she did so primarily in order to gain revenge on Scott Volk for breaking up with her and Dave Folden for seeking to annul the adoption of her three oldest children.").

argument in support of the lying-in-wait special circumstance). The prosecution even argued that Sandi Nieves specifically planned the slumber party for the children in the kitchen area so she could set the fire in another room without them knowing. 57RT 8892:1-8893:21 (prosecution rebuttal argument). The prosecution told the jury that Sandi Nieves was waiting to set the fire until the children were asleep "so she can take them by surprise," and "[s]o that she can gain a position of advantage." 57RT 8892:11-12.

The prosecution argued the evidence showed Sandi Nieves committed suicide as an afterthought to her crimes against the children, not vice-versa. During its penalty phase closing argument, the prosecution told the jurors: "In fact, the defendant tried to kill herself because she knew her own crimes were so hideous she didn't want to be around for the aftermath. She didn't want to be around for the consequences of those acts. She knew that." 64RT 10107:5-9. This statement is a concession that the suicide was "merely incidental" to the killing of the children. See People v. Raley (1992) 2 Cal.4th 870, 903 (when the underlying felony is "merely incidental" to the murder, the special circumstance does not apply).

Even if the defendant had the concurrent intent to kill herself and her children, the prosecution still had to prove the defendant had a purpose for burning the house down apart from causing the deaths of the inhabitants. The arson-murder special circumstance specifically encompasses murder committed while the defendant was engaged in the felony of "[a]rson that causes an inhabited structure or inhabited property to burn," in violation of Penal Code § 451(b). See Pen. Code § 190.2(a)(17)(H). If the drafters had intended the arson-murder special circumstance statute to include arson for the purpose of killing—whether it be killing oneself or another—they would have included as one of the predicate felonies Penal Code § 451(a):

"[a]rson that causes great bodily injury."[52] They did not.

The prosecution's case against Sandi Nieves was for arson committed in the course of a murder, not murder committed during the commission of an arson. See Green, 27 Cal.3d at 61. Compare People v. Clark (1990) 50 Cal.3d 593, 608 (arson-murder special circumstance finding sustained because "the victim died in an arson fire set by defendant for a purpose other than causing his death").[53] The Attorney General's retrospective attempt to characterize the facts to fit the arson-murder special circumstance allegations fails.

B. The Trial Court's Modified Instruction Was Confusing and Misleading

The Attorney General does not respond to the constitutional implications of providing the jury with an instruction unwarranted by the evidence. See AOB 420-423. The trial court should not have provided the arson-murder special circumstance instruction in the first place because it was not applicable to the facts in this case. See People v. Guiton (1993) 4

[52] Tellingly, the prosecution originally charged Sandi Nieves with violation of Penal Code § 451(a). But midway through the trial, the court—over defense objection—allowed the prosecution to amend the information to allege a violation of Penal Code § 451(b) instead. See 28RT 3608:8-3609:22; AOB 411 n. 159. There was no reason to charge Sandi Nieves with § 451(b) when the facts supported a charge under § 451(a) and the penalty for § 451(a) is more severe. Here, the prosecution was trying to force the facts to fit the arson-murder special circumstance.

[53] A construction of the arson special circumstance provision, section 190.2(a)(17)(H), that would treat an intent to kill oneself as well as one's intended murder victim as a sufficient independent purpose to make the provision applicable would produce an absurd result. A murder would be capital murder if the killer intended to kill herself and her victim, but a lesser offense if she intended to kill only her victim. No one could have intended such a result.

Cal.4th 1116, 1131; People v. Jackson (1954) 42 Cal.2d 540, 546. By providing the instruction, the trial court misled the jury to assume there was sufficient evidence in the record to support a finding that the arson was not "incidental" to the murder. The unwarranted arson-murder special circumstance instruction violated defendant's Sixth, Eighth, and Fourteenth Amendment rights. See AOB 422(citing, inter alia, Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278, and Ring v. Arizona (2002) 536 U.S. 584, 609).

The trial court instructed the jury using CALJIC 8.81.17 as follows, but added the underlined language:

> 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 8366:20-8367:8.

The Attorney General asserts the language underlined above is a correct statement of the law under Clark, 50 Cal.3d 583, Raley, 2 Cal.4th 870, and People v. Mendoza (2000) 24 Cal.4th 130. RB 308. She cites these cases for the proposition that evidence of concurrent intents support a finding of arson-murder. Id. The Attorney General contends the modified

instruction "stated in plain language that concurrent intents were permissible." See RB 309. She is wrong. The language did not clarifying the law, it prejudicially muddled it.

The first sentence of paragraph No. 2 describes a murder committed to advance or conceal a felony. The last sentence (which in the standard instruction follows the first sentence) cautions that the special circumstance is not established if the felony is "merely incidental" to the murder. The two sentences are linked through the phrase "in other words." If provided intact, the standard instruction informs the jury that a felony is "merely incidental" to a murder unless the murder is committed to advance or conceal the predicate felony. AOB 425. Here, the trial court's modification meant that "in other words" now refers to the added sentence.

The same problem occurred in Brents, 53 Cal.4th at 613, and this Court reversed the special circumstance finding as a result. In Brents, the trial court had also altered the standard language of CALJIC 8.81.17 which rendered the phrase "in other words" meaningless and confusing.

Referring to the two sentences in paragraph No. 2 of the standard instruction as sentence [A] and [B], this Court explained that the phrase "in other words" meant that sentence [B] "elaborates or clarifies the idea expressed in sentence [A]." Brents, 53 Cal.4th at 613. If altered so that sentence [B] no longer connects to sentence [A], "the phrase 'In other words' at the beginning of sentence [B] was likely to have confused the jury." Id.

This Court explained:

> The phrase 'In other words' is the verbal equivalent of an 'equals' sign in mathematics; what comes before the phrase is substantively the same as what comes after the phrase. Therefore, if the jury here was confused about the meaning of

> sentence [B] of the instruction's second paragraph, it may have decided simply to ignore that sentence, ...

Id. The reasoning applies here. With the modified instruction the jury likely disregarded sentence [B] entirely. Like the alteration in Brents, the trial court's modification of the standard instruction in this case was reversible error.

C. The Prosecution Compounded the Error By Misstating the Law Regarding the Arson-Murder Special Circumstance

The Attorney General suggests that a modification to the second paragraph of CALJIC 8.81.17 is of no consequence because the paragraph does not set out a separate element of the special circumstance. RB 309 (citing People v. Harris (2008) 43 Cal.4th 1269, 1299). However, Harris noted that the second paragraph is critical if "the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony." Id. When the evidence of an independent felonious purpose is weak, sentence [B] of the second paragraph is of "particular importance." Brents, 53 Cal.4th at 614.

Sentence [B] was critical in this case. In fact, as we explained in Section A, supra, and in the opening brief (AOB 417-420), there was no evidence of an independent felonious purpose at all in this case. In light of evidence the fire was set for the purpose of causing the children's death, the modification to the instruction was not harmless.

In People v. Stanley (2006) 39 Cal.4th 913, 957-958, the instructional error involving a slight modification affecting the second paragraph of CALJIC 8.81.17 was harmless because the trial court provided additional clarification requested by the defendant and the closing

arguments correctly stated the law. Here, neither of those safeguards occurred.

The Attorney General argues the trial court appropriately refused to provide further clarifying instructions requested by defendant. RB 309. Defendant requested the court to instruct the jury that "if the sole purpose of the arson was to kill, then the special circumstance would not apply." 51RT 7721:22-23. The Attorney General asserts this language conflicted with the law as stated in CALJIC 8.81.17. But she does not explain how. This proposed instruction was a proper and necessary clarification of the confusion inserted into the arson-murder special circumstance instruction and did not conflict with the law as stated in Mendoza or Clark that concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. See Mendoza, 24 Cal.4th at 182-183 (upholding special circumstance where evidence showed defendant "harbored independent, albeit, concurrent goals"); Clark, 50 Cal.3d at 608-609 (same).

The Attorney General is silent about the prejudice caused by the prosecution's misleading explanation of the law. See AOB 429-431. During its closing argument, the prosecution originally left out of its explanation of the arson-murder special circumstance entirely the requirement the jury find defendant had an independent felonious purpose. 54RT 8419:6-8420:16. Then, on rebuttal, the prosecution told the jury that a felony is "merely incidental to the commission of murder" if it is committed as "an afterthought" to the murder. 57RT 8894:6-16. The explanation was misleading and overly narrow. The trial court did nothing to correct the prosecution's misstatement of the law. See AOB 431.

The insufficient evidence of an independent felonious purpose, the

confusing modified instruction, and the prosecution's misstatement of the law combined to mislead the jury. The jury was permitted to find the arson-murder special circumstance allegations true without determining beyond a reasonable doubt that Sandi Nieves had an independent felonious purpose for committing arson. This result violated Nieves's Sixth, Eighth and Fourteenth Amendments rights. Ring, 536 U.S. at 609 (Sixth Amendment requires the findings on special circumstances must be unanimous and beyond a reasonable doubt); Jackson v. Virginia (1979) 443 U.S. 307, 317-18 (as a matter of due process under the Fourteenth Amendment, the evidence in the record must "reasonably support" the jury's finding).

"An instructional error regarding an element of a special circumstance requires reversal unless the error was harmless beyond a reasonable doubt." Brents, 53 Cal.4th at 612. Because the Attorney General has failed to show beyond a reasonable doubt that the jury verdict would have been the same absent the error, the arson-murder special circumstance findings must be reversed. Chapman, 386 U.S. at 24. Errors in the fact finding process "cannot be tolerated in a case in which the defendant's life is at stake." Beck v. Alabama (1980) 447 U.S. 625, 632.

The Attorney General argues reversal of the arson-murder special circumstance findings does not require reversal of the death sentence. RB 307. However, she has not shown beyond a reasonable doubt the true findings on invalid arson-murder special circumstance allegations did not have an effect on the jury's decision to sentence Sandi Nieves to death.

Under Penal Code § 190.3(a), the jury may consider in aggravation "any special circumstances found to be true." In Brown v. Sanders (2006) 546 U.S. 212, 220, the United States Supreme Court held invalidation of a special circumstance finding will not render the penalty unconstitutional if

one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. In Brown, the "heinous, atrocious, or cruel" special circumstance was invalid because it was "unconstitutionally vague." Id. The reasoning in Brown does not apply here because the arson-murder special circumstances were invalid due to lack of evidence in support combined with instructional error. Therefore, the facts and circumstances necessary to find true the arson-murder special circumstances were not "properly adduced as aggravating facts" in this case. See id. at 224. Indeed, sufficient evidence to support such findings did not exist. The jury was misled into relying upon illusory factors in aggravation.

The Attorney General has failed to show there was "no likelihood" the jury's consideration of the invalid special circumstances "tipped the balance toward death." See People v. Castaneda (2011) 51 Cal.4th 1292, 1354; People v. Mungia (2008) 44 Cal.4th 1101, 1139. Here, "a weight has been added to death's side of the scale, and one cannot presume that this weight made no difference to the jury's ultimate conclusion." Brown, 546 U.S. at 226 (Stevens, J., dissenting).

XVII. VICTIM IMPACT EVIDENCE

The victim impact evidence in this case went too far. See AOB 433-479. The trial court allowed the witnesses to go beyond humanizing the victims and describing the impact of the deaths on their own lives. It allowed the witnesses to make malicious and disparaging comments about Sandi Nieves's character, speculate as to details about the victims' deaths, opine on the appropriate penalty, and provide gratuitously emotional and irrelevant testimony. Also, without adequate or proper notice to the defendant, the trial court permitted the prosecution to display to the jury

photographic memorials and a video tribute to the victims. The video was a compilation of home movies purposely edited to diminish the participation of Sandi Nieves in the lives of her children.

In defending the admission of victim impact evidence in this case, the Attorney General argues forfeiture and relies on the plain fact that in California there is virtually no limit to the scope of victim impact evidence admissible against capital defendants. See RB 320-323. If this Court should accept the Attorney General's view that the victim impact evidence in this case was procedurally and substantively proper, then there are few limits to what is admissible as victim impact evidence. This case demonstrates the urgency to reign in trial courts, like this one, that admit emotionally-charged victim impact evidence without proper careful exercise of discretion.

A. The Claim Was Not Forfeited

In the opening brief, we detail many ways in which the trial court failed to perform its role as gatekeeper during the prosecution's intensely emotional presentation of victim impact evidence. AOB 433. The Attorney General's default argument in response is that defendant failed adequately to object each time the court permitted additional prejudicial victim impact testimony. See, e.g., RB 325, 328, 329, 332 n. 35, 336-337, 339, 341-342.

The record shows defendant appropriately and timely objected to the prosecution's presentation of victim impact evidence. Following the last minute disclosure of the prosecution's victim impact witness list and before the penalty phase began, defendant objected to the scope of the victim impact testimony. 59 RT 9163:26-28. She argued the proposed evidence violated her Fifth, Eighth, and Fourteenth Amendment rights and was inadmissible under the United States Supreme Court's decision in Payne v. Tennessee (1991) 501 U.S. 808 and this Court's decision in People v.

Edwards (1991) 54 Cal.3d 787; 59 RT 9171:18-9177:23, 9181:15-9190:26. See People v. Cowan (2010) 50 Cal.4th 401, 484-485 (constitutional challenge to the admission of victim impact adequately preserved because defendant objected to the testimony on the ground that it "'goes beyond the victim impact,'" and later "specifically referred to 'that which is permitted by the [United States] Supreme Court a[s] to victim impact testimony'").

Further objections during the testimony of the victim impact witnesses would have been futile. The trial court explicitly refused to hold a Evidence Code § 402 hearing on the scope of the testimony. 59 RT 9189:6-8. Defense counsel pointed out the pointlessness of continuing to argue the issue: "My persuasive powers in this court are zero. So my arguing it ad nauseam is not going to get me anyplace." 59 RT 9181:26-9182:1 The trial court did not disagree or invite defendant to review the objection during the testimony. It ignored defense counsel and moved on. Id.

In fact, when defense counsel reiterated the objection to "the nature of the victim impact-type evidence that the court allowed," the trial court retorted: "You already objected to it, and I overruled your objection. Why are you restating something that already has happened?" 64 RT 9437:22-9438:21. The trial court's subsequent scolding of defense counsel underscored the futility of repeated objections. See People v. Scott (1978) 21 Cal.3d 284, 290 ("In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented.").

Despite little time to review the extensive photographic evidence, defense counsel sufficiently objected to the prejudicial display and the contents. See 60 RT 9257:27-9260:5. He requested an offer of proof and an Evidence Code § 402 hearing on their admissibility. 60 RT 9262:16-17. The

trial court overruled the objection without a hearing. 60 RT 6264:9-10.

Defendant timely and sufficiently objected to the playing of the video homage to the victims. 60 RT 9261:17-18. In response to defense counsel's objections to the video, the trial court again scolded: "Don't repeat yourself, Mr. Waco." 60 RT 9261:19. At this point in the trial, it is folly to believe that the judge would have sustained an objection.

> Mr. Waco: I haven't seen the video or any transcripts, or anything else.
>
> Mr. Barshop: For the record, I am handing counsel a copy of the transcript of the video.
>
> Mr. Waco: I would ask for a delay in order to be able to look at the video, and also look -- look at the video in connection with the transcript.
>
> The Court: That request is denied. Bring in the jury.

60RT 9264: 16-24.

Nonetheless, defense counsel renewed the objections to the photographs and the video at the close of the prosecution's case-in-chief. 61 RT 9466:22-9467:9. Additionally, in the motion for a new trial defendant challenged the prejudicial victim impact evidence on the grounds it violated her Fifth, Eighth and Fourteenth Amendment rights. 22RCT 5581-84.

The record shows objections would be futile, but that defendant did make her objections to the victim impact evidence "sufficiently clear to preserve the issue for review." Cowan 50 Cal.4th at 485.

B. This Court Should Revisit the Scope of Admissible Victim Impact Evidence

The Attorney General summarily dismisses our argument that Payne was wrongly decided (AOB 450-451), and that Penal Code § 190.3, factor (a), as presently construed by this Court, is overbroad and vague. See RB

323, 341. She simply provides a string cite of this Court's precedents rejecting similar arguments. Id.

But this case presents an opportunity for this Court to rule that California does not endorse an "anything goes" use of victim impact evidence.

After the United States Supreme Court decided Payne, this Court opened the door to victim impact evidence in Edwards, 54 Cal.3d 787. Edwards involved extremely circumscribed victim impact evidence—three photographs of two 12-year-old victims as they appeared shortly before the murder and attempted murder. Id. at 832. Over vigorous dissenting views, this Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." Id. at 835. At the same time, this Court cautioned that Edwards did "not mean there are no limits on emotional evidence and argument." Id. at 836. It reiterated its prior admonition in People v. Haskett (1982) 30 Cal.3d 841, 864, that a jury "must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." Edwards, 54 Cal.3d at 836. It held that a trial court must "strike a careful balance between the probative and the prejudicial" and curtail "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" Id. at 836, quoting Haskett, 30 Cal.3d at 864.

Since Edwards, the Court has incrementally expanded the scope of victim impact evidence by affirming death sentences over all sorts of evidence challenges. Rejecting bright-line restrictions, the Court has approved victim impact evidence from witnesses other than the murder victims' relatives or people present during the crime. See RB 333, citing

People v. Brady (2010) 50 Cal.4th 547, 573 (a police-killing case in which the court allowed penalty phase testimony from the officer's four sisters, fiancée, treating physician, two fellow officers, and his police chief). It has upheld the admission of evidence regarding circumstances not known or foreseeable to the defendant at the time of the crime (People v. Hamilton (2009) 45 Ca1.4th 863, 928-929), evidence of specific traits and activities of the victim, including a recording of sad songs about loss of a loved one sung by the victim for her father shortly before she was murdered (People v. Verdugo (2010) 50 Ca1.4th 263, 297), and evidence in the form of videotaped memorial tributes, including images from the victim's funeral and memorial service (see RB 334, citing Brady, 50 Cal.4th at 579-581; see also People v. Kelly (2007) 42 Ca1.4th 763, 797 and People v. Zamudio (2008) 43 Ca1.4th 327, 363-367).

California's de facto "anything goes" position on victim impact evidence results from the rule that evidence is admissible under § 190.3, factor (a), as a circumstance of the crime "[u]nless it invites a purely irrational response" (Brady, 50 Cal.4th at 574) or is "'so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case'" (RB 342, quoting People v. Dykes (2009) 46 Cal.4th 731, 786 and People v. Pollock (2004) 32 Cal.4th 1153, 1180). The "purely irrational response" standard has been referred to repeatedly in decisions in recent years. See, e.g., People v. Booker (2011) 51 Ca1.4th 141, 190; People v. Burney (2009) 47 Ca1.4th 203, 258; Dykes, 46 Ca1.4th at 781. But this is not the standard originally adopted by this Court. In Haskett, this Court held that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." 30 Cal.3d at 864.

The difference between Haskett and the "purely irrational" standard may be subtle, but it is important, even when the first clause of Haskett is disregarded. In Haskett, this Court directed that evidence inviting a purely subjective or irrational response must be limited. 30 Cal.3d at 864. This placed a duty on the trial court to screen out inflammatory evidence. In contrast, the reformulated test places an absolute burden on the defendant that must be met before inflammatory evidence can be excluded. Evidence now "is admissible ... [u]nless" the defendant shows that "it invites a purely irrational response from the jury" (Brady, 50 Cal.4th at 574, emphasis added) or, alternatively, "elicit[s] . .. an irrational or emotional response untethered to the facts of the case" (Dykes, 46 Cal.4th at 781).

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

Second, the "purely irrational response" standard is no standard at all. It gives trial courts no guidance in deciding when victim impact evidence should be excluded because it elicits a "purely irrational response" and when it should be admitted because it does not. The phrase offers no clue as to the difference between "irrational" and "purely irrational"

responses. In fact, we are not aware of any case in which this Court has found that victim impact evidence has violated the "purely irrational response" rule.

Without some intelligible definition, there can be no uniformity and consistency in how trial courts throughout this state apply the "purely irrational response" test. Without guidance from this Court, trial judges are left on their own to make ad hoc decisions about admitting victim impact evidence. They are left to apply their own subjective notions of what is permissible and what is proscribed which, in other contexts, this Court has said they may not do. See, e.g., Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 184 (because this Court had not yet defined the meaning of "unfair" under the state Unfair Practices Act, it instructed that lower "courts may not apply purely subjective notions of fairness").

In failing to provide any enforceable standard for determining the admissibility of victim impact evidence, the Court's "purely irrational response" rule does not prevent death sentences resulting from the inflamed emotions of jurors understandably moved by heart-rending victim testimony and documentary evidence. In short, the state standard does not adequately guard against fundamentally unfair capital sentencing trials leading to the arbitrary, capricious and unreliable imposition of a death sentence in violation of the Eighth Amendment and Fourteenth Amendments.

Payne held that victim impact evidence was not per se inadmissible under the Eighth Amendment. 501 U.S. at 827. It did not hold that victim impact evidence is required or that all victim impact evidence is admissible. And Payne placed no limit on this Court's authority to devise rules, if it

decided victim impact evidence was admissible under state law and to guarantee that inflammatory evidence is not injected as an aggravating factor into the jury's decisionmaking, unfairly tipping the evidentiary balance toward death.

It is time for the Court to refine its rules and impose some real limit on the admission of victim impact evidence. This is an appropriate case.

C. The Trial Court Did Not Require Adequate or Proper Notice

In the opening brief, we showed the trial court did not "'afford defendant an opportunity to meet the prosecutor's aggravating evidence.'" AOB 452, quoting People v. Taylor (2001) 26 Cal.4th 1155, 1182.[54] The prosecution did not disclose in advance its intention to mount an extensive visual display that included eight memorial posters with over 50 carefully arranged photographs of the victims and the large-print titles "Family Memories," "In Remembrance," and "Fun Times Together." AOB 442-444, 451-454. Also, despite his request, the trial court did not allow defense counsel an opportunity to view and compare copies of both the unedited and the edited version of the prosecution's video montage. AOB 444-445, 453-454. Finally, the prosecution waited until the last minute to reveal the names of its penalty phase witnesses. AOB 454.[55]

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[54] Compare the court's solicitude for the prosecution: sanctioning defense counsel, four times telling the jury defendant had delayed and/or concealed the disclosure of evidence, repeatedly admonishing the defense for discovery violations, and granting the prosecution a full two week delay in the trial proceedings in order that it would be prepared to cross-examine defense experts in the guilt phase.

[55] The Attorney General argues the lack of notice claim is forfeited because defendant did not object on the grounds of inadequate notice or request a continuance. RB 325. But the record shows defense counsel

(continued...)

In response, the Attorney General argues the time period between 9:00 a.m., when the prosecution put up its display of victim impact photographs in the courtroom, and 9:35 a.m., the time when the penalty phase proceedings began, was sufficient notice for defendant adequately to review the prosecution's photographic display and prepare how to respond. See RB 325, 326.

This last minute disclosure violated the requirement under Penal Code § 190.3 that the prosecution disclose its evidence in aggravation "prior to trial." This Court has interpreted "prior to trial" to mean "either before the case is called to trial ... or before the start of jury selection." People v. Stitely (2005) 35 Cal.4th 514, 562 (internal citation omitted). Disclosing the photographs for the first time the same morning the prosecution planned to introduce them did not afford Nieves "a reasonable chance to defend against the charge." Id. at 562. In Stitely, notice of the aggravation evidence was sufficient because it was provided before "any guilt evidence was introduced." See also People v. Jurado (2006) 38 Cal.4th 72, 136 (notice of aggravation evidence sufficient when provided 11 days before jury selection began).

The Attorney General argues the prosecution's generic notice of its intention to put on victim impact evidence was sufficient. RB 325. However, the record shows the trial court did not require the prosecution to

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[55](...continued)
adequately protested the late disclosure of the photographs. 60 RT 9258:4-9 (defense counsel explaining he had not yet had time to look at the photographs since arriving in court that morning and seeing them on display for the first time). As explained in Section A, supra, defense counsel requested an Evidence Code § 402 hearing in order for the prosecution to lay a foundation and explain the purposes for which it intended to use the photographs. 60 RT 9259:12-15. The trial court refused the request. Id.

provide defendant with any specific information about who would testify. 59 RT 9167:3 (the court: "Well, let's see who they will call."). In fact, the trial court informed defense counsel that it was his responsibility to "reasonably expect" that family members would be testifying, and he did not need to know more! 59 RT 9167:10-17. The prosecution's "generic, nonspecific notice" was insufficient. See People v. Roldan (2005) 35 Cal.4th 646, 733, disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390.

The Attorney General contends that thirty minutes was sufficient time for defense counsel to review the over 50 photographs, and that no harm resulted from the fact he could not consult with the defendant about their contents. RB 326-327. The insufficient notice prevented defense counsel from learning from Nieves whether she was present for, but specifically excluded from, each image chosen. As a result, the defense could not respond adequately through cross-examination or argument to the prosecution's portrayal to the jury that "family memories" and "fun times together" did not include the defendant.

The trial court ignored completely defense counsel's specific request for the opportunity to have both the unedited and edited versions of the video so that he could compare the two. 60 RT 9260:6-9261:19. Denying this opportunity to defendant adversely affected her ability effectively to cross-examine the witnesses, especially Charlotte Nieves, who the prosecution had asked to make the video montage. See AOB 454; 61 RT 9455:10-9457:26.

The prosecution's last minute disclosure of the victim impact evidence it intended to present to the jury violated Nieves's rights under Penal Code § 190.3 and the Sixth, Eighth, and Fourteenth Amendments.

See Crane v. Kentucky (1986) 476 U.S. 683, 690; Gardner v. Florida (1977) 430 U.S. 349, 358; Beck v. Alabama (1980) 447 U.S. 625, 637-38.

D. The Trial Court Did Not Review and Assess the Victim Impact Evidence Prior to Admitting It

The Attorney General admits the trial court considered the photographs of the children admissible without ever looking at them itself. See RB 328-329 (quoting the court's statement [59 RT 9242:2-3] that "if these are photographs of the children while alive, they're admissible"). Nonetheless, she contends the court "viewed the photographs before ultimately overruling defense counsel's objections." RB 329. She cites to page 9264 of the Reporter's Transcript. Id. But nowhere on page 9264 or elsewhere does the trial court explain it had reviewed the photographs. The record shows the photographs were displayed on posterboard in the courtroom. The trial court made no record whatsoever about what kind, if any, review it conducted as to the individual photographs. See AOB 455-456. Given the court's impatience with the defense throughout the trial, there is no reason to presume the court reviewed the photographs.

The Attorney General admits the trial court never viewed the video compilation prior to the jury's viewing. RB 331. Incredibly, she argues the trial court "carefully considered the evidence, even if it did not do so on the record." Id. This argument backhandedly concedes that the trial court abdicated completely its duty to carefully exercise discretion when admitting "emotionally laden evidence." See Brady, 50 Cal.4th at 575-76.

This Court has routinely upheld the admission of victim impact evidence including photographs and videos. However, it has done so only when the record shows the trial court has carefully reviewed the material beforehand. See, e.g., People v. Jones (2012) 54 Cal.4th 1, 71-72 (the trial

court was carefully exercising its discretion because even though it admitted the majority of photographs, it excluded two as irrelevant and the video montage as "over the line"); People v. Garcia (2011) 52 Cal.4th 706, 754 (trial court "conducted its own careful analysis" of video before allowing the jury to view it); Brady, 50 Cal.4th at 578 ("The trial court properly informed its exercise of discretion by viewing the videotapes before allowing the jury to view them ..."); Dykes, 46 Cal.4th at 784 ("The court carefully reviewed the videotape prior to its admission ...").

The record here contains nothing to indicate "'the court was aware of and performed its balancing function.'" See RB 331, quoting People v. Lewis (2009) 46 Cal.4th 1255, 1285. See United States v. Curtain (9th Cir. 2007) 489 F.3d 935, 958 (en banc)("Relying only on the descriptions of adversary counsel is insufficient to ensure that a defendant receives the due process and fair trial to which he is entitled under our Constitution").

E. The Admission of Unnecessary, Excessive, Irrelevant, Cumulative and Inflammatory Victim Impact Evidence Was Error

In the opening brief, we challenged the admissibility of the victim impact evidence in this case because it served no constitutionally permissible purpose. AOB 458-460. The Attorney General mischaracterizes our argument, construing it to mean no victim impact should be allowed when the defendant is the mother of the victims. See RB 332. This is not our argument. Instead, we contend that victim impact evidence during the penalty phase was improper because, unlike many other cases, here the victims were not faceless, unknown strangers. AOB 459. Testimony during the guilt phase already humanized the children. The jury already had a chance to hear directly from their fathers.

Moreover, we show in the opening brief that the evidence the trial court admitted was far too extreme. First, the court allowed the witnesses to attack Sandi Nieves's character. AOB 461-463. The Attorney General's primary response is that defendant did not object. RB 336-337. However, as we explained in Section A, supra, defendant properly protested the testimony. The Attorney General's secondary argument—that the attack was not prejudicial or inflammatory "compared to the circumstances of the crimes"—makes no sense. See RB 337. The circumstances of the crime do not make the character evidence less damaging. Her argument underscores the fact that the family members' disparaging comments had nothing to do with the "circumstances of the crime" and therefore were not proper 190.3, factor (a), testimony. Cowan, 50 Cal.4th at 484 (the scope of constitutionally permissible victim impact testimony does not include the victim's family members' opinions about the defendant); see also Ex Parte Washington (Ala. S.Ct., April 15, 2011) __ So.3d __, 2011 WL 1449032 *3-5 (reversible error occurred when victim's parents told the jury that defendant's crime was "brutal, evil, terrible," that he was "someone without a conscience," and that death was the appropriate punishment); State v. Bryant (Ga. S.Ct., Mar. 18, 2011) __S.E.2d __, 2011 WL 977871 (reversible error to allow family members to say victim was left like a "piece of trash on the side of the road" and to characterize the crimes as "nothing but wickedness and evil").

The Attorney General also suggests "it surely could not be unexpected" that the witnesses were critical of Sandi Nieves. RB 337. This point simply demonstrates why the trial court should have carefully exercised its discretion during victim impact testimony. See Jones, 54 Cal.4th at 71-72 (admission of victim impact photographs upheld where

trial court "carefully exercised" its discretion). When the court can easily anticipate—and defense counsel has already raised the alarm—that the witnesses risk getting into improper testimony, its role as gatekeeper becomes all the more critical. Compare, e.g., Dykes, 46 Cal.4th at 782 ("The court emphatically admonished counsel to prepare witnesses well to avoid inflammatory emotional remarks and to ensure they did not blurt out their views concerning the crime itself, the defendant, or the appropriate penalty.").

The Attorney General does not argue the testimony about the positive parenting of Minerva Serna, and Fernando and Charlotte Nieves was proper. See RB 337. Instead, she insists it was "brief and benign." Id. But when the errors is repeated over and over, it can no longer be characterized as brief or benign. Here, the trial court failed to "strike a careful balance between the probative and the prejudicial." Edwards, 54 Cal.3d at 836.

Second, the trial court allowed the witnesses to give damaging and fictionalized accounts about how the victims died. AOB 463-464. In particular, we show in the opening brief Serna's testimony that the girls death lasting "for hours and hours" was prejudicial. Id. The Attorney General responds that it was proper based on the testimony of the medical examiner. RB 338. She reinforces our point. Serna was not a qualified medical examiner and had no personal knowledge or expertise to support her testimony.

The Attorney General also defends Fernando Nieves's improper speculation that defendant would have used force to stop David from leaving the house. RB 339. She asserts his comments were proper because they were "consistent with the facts of the crime." Id. Her argument borders

on the absurd. Fernando Nieves's testimony was still fiction. A witness may not fabricate evidence because it would be "consistent" with the prosecution's theory of the evidence. Family members' characterization of the crime is simply not proper victim impact testimony. Cowan, 50 Cal.4th at 484; Pollock, 32 Cal.4th at 1180. See State v. Bryant, supra.

Third, David Folden's opinion about the proper sentence for Sandi Nieves was irrelevant and inadmissible. AOB 464. The Attorney General argues his comments that "this time it stops" did not indicate he wanted the death penalty – despite he was testifying for the prosecution during the penalty phase of the trial. RB 339. But the meaning of his comment that he did not want her to "win" again would not have been lost on the jury, If life without parole was a win, then a death sentence was a loss. If the meaning was lost on the jury the prosecutor cleared it up during closing argument: "she wins again if you give her life." 64 RT 10126:9-11. Folden's testimony was inadmissible. "The views of a victim's family as to the appropriate punishment are beyond the scope of constitutionally permissible victim impact testimony." People v. Enraca (2012) 53 Cal.4th 735, 764. See Ex Parte Washington, supra.

The opening brief contains other examples of gratuitously inflammatory testimony from the victim impact witnesses. AOB 469-470. While the circumstance of the death of the children here was undeniably tragic, admitting further unchecked evidence and improper testimony from family members injected unfair emphasis on the emotional tragedy and took the jury's focus away from the defendant's moral culpability. Roldan, 35 Cal.4th at 732 (victim impact evidence inadmissible "if it is so inflammatory that it would tend to divert the jury's attention from the task at hand").

Here, the testimony from the four witnesses was accompanied by the emotionally charged photographic display and the lengthy and misleading video montage. The admission of each type of evidence was error, both separately and cumulatively. See AOB 470-471. The result violated Sandi Nieves's Eighth and Fourteenth Amendment rights to a fair penalty phase of her capital trial and a reliable penalty determination. Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 304; Johnson v. Mississippi (1988) 486 U.S. 578, 584-85.

F. The Errors Were Not Harmless

The Attorney General has failed to show the errors were harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24; People v. Harris (2005) 37 Cal.4th 310, 352 (applying Chapman harmless error analysis). The burden is on her.

Reversal is required because it was reasonably probable that the improperly admitted victim impact evidence aroused jurors' passions and led them to vote for death instead of life without parole. See People v. Gonzalez (2006) 38 Cal.4th 932, 961.

The Attorney General does not respond to our showing in the opening brief that the risks of prejudice resulting from inflammatory victim impact evidence were increased several fold in this case. AOB 473-474. She does not respond to our showing that the balance of aggravating versus mitigating evidence was not so overwhelming to point irresistibly to a verdict of death. Instead, the Attorney General attempts to compare this case to Brady, 50 Cal.4th at 573-574. See RB 343. She argues Brady involved a greater amount of victim impact evidence, but did not result in reversal. Id. Notably, the defendant in Brady was convicted of shooting a police officer execution style in front of the officer's 12 year-old nephew

and other witnesses. 50 Cal.4th at 553-555. But comparing the length and breadth of the victim impact evidence here to Brady does nothing to respond to our showing that the particular prejudicial evidence introduced here likely led the jury to vote for death.

Also, the Attorney General does not respond to our showing that the prosecution relied heavily on the inflammatory victim impact evidence in its argument for the death penalty. AOB 474-475. See Kyles v. Whitley (1995) 514 U.S. 419, 444 ("The likely damage is best understood by taking the work of the prosecutor ... during closing arguments."); People v. Roder (1983) 33 Cal.3d 491, 505 (error not harmless where prosecutor relied on it in his closing argument).

The Attorney General argues the trial court did not aggravate the prejudice when it refused to provide defendant's proposed cautionary instruction. See RB 343-345. She argues the trial court's instructions as provided were sufficient. Id. However, she does not explain why, then, a juror specifically requested further guidance on how properly to weigh the victim impact evidence. See 60 RT 9421:18-22; AOB 476-477. The list of general instructions the trial court provided and the Attorney General recites (RB 344-345) did not serve to cure the harm caused by admitting unduly prejudicial evidence.

The trial court's several errors in admitting the challenged victim impact evidence in this case and refusal to appropriately instruct the jury, whether viewed individually or collectively, require reversal of Sandi Nieves's death sentence.

XVIII. EXCLUSION OF STATE OF MIND EVIDENCE AT THE PENALTY PHASE

Evidence Sandi Nieves was distraught over the abortion she had five days prior to the fire was critical information for the jury to consider when determining whether to sentence her to death. As we explained in the opening brief, the trial court erroneously sustained objections that prevented defendant from adequately cross-examining two key prosecution witnesses, Scott Volk and Fernando Nieves, about the defendant's state of mind in the days following her abortion. AOB 479-485. Although the trial court excluded this evidence during the guilt phase, its ruling prejudiced defendant in the penalty phase because her state of mind was relevant to "the circumstances of the offense" and the jury's determination of her "moral culpability." Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 263-264. See People v. Gay (2008) 42 Cal.4th 1195, 1217-1224 (regardless of admission during the guilt phase, Penal Code § 190.3 authorizes the admission of evidence relevant to the nature and circumstances of the underlying crime at the penalty phase).

The Attorney General contends the trial court did not err when it excluded the testimony from Volk on hearsay grounds, and the testimony from Fernando Nieves as improper lay opinion. RB 345-350. She also argues that even if the court did err, any error was harmless. Id.

But the record shows the trial court's evidentiary rulings were wrong. And because the trial court's rulings operated to exclude critical evidence of the defendant's state of mind contemporaneous with the crimes charged against her, the errors violated her constitutional rights to due process, the opportunity to put forward a meaningful defense, and a reliable sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments.

A. The Trial Court's Evidentiary Rulings Were Wrong

First, defense counsel attempted to question Scott Volk, the defendant's former boyfriend and the putative father, about defendant's anguish over the abortion decision. The trial court sustained objections to the questions on hearsay grounds. 23RT 2735:20-2736:12. In the opening brief (AOB 480-81), we showed defendant's out-of-court statements were admissible under the state of mind exception. Evid. Code § 1250(a).

In response, the Attorney General contends the court did not err, but provides no argument in support. RB 348-349.

Second, defense counsel sought to question Fernando Nieves, defendant's ex-husband, about a statement he purportedly made shortly after the fire that defendant had "lost it because of the abortion." 24RT 3007:19-21. The trial court sustained the prosecution's objection to the question and ruled the witness's opinion about defendant's state of mind was irrelevant. 24RT 3009:17-19. In the opening brief, we showed his lay opinion was admissible under Evid. Code § 800 and relevant because he had seen and spoken to defendant between the time of the abortion and the fire. AOB 482-483. See People v. Guerra (2006) 37 Cal.4th 1067, 1154 (defendant's state of mind contemporaneous with the alleged capital murder is relevant).

In response, the Attorney General argues Fernando Nieves's opinion was inadmissible because it was not "helpful to a clear understanding of his testimony," was "conjectural," and the trial court had to exclude it in order to "control the proceedings." RB 348-349. She is wrong on all grounds.

Fernando Nieves's lay opinion was helpful to understanding his testimony. The trial court had permitted the prosecution to ask him to describe Sandi Nieves's demeanor in reaction to other events during this

same time period. Specifically, the court allowed him to give opinions about her reaction to receiving news from Dave Folden about the adoption annulment. He used conclusory words such as "furious," and "very upset." 23RT 2824:19-25. The trial court should not have treated his testimony about how he perceived her reaction to the abortion any differently. See Osborn v. Mission Ready Mix (1990) 224 Cal.App.3d 104, 112 ("Opinion testimony of a lay witness may be particularly helpful when the matters observed by the witness may be too complex or subtle to enable the witness accurately to convey them without resorting to the use of conclusory descriptions.").

Fernando Nieves's lay opinion was not "conjectural" because it was based on his perceptions. The record shows he had seen and spoken to the defendant during the time between the abortion and the time of the alleged crimes. 23RT 2822:20-2824:25. His lay opinion relaying his observations of defendant "was not so far 'beyond the common experience' that expert testimony was required." People v. Lewis (2008) 43 Cal.4th 415, 504 (citing Evid. Code § 801).

As for the court's "duty to control the proceedings," the Attorney General refers to the trial court's scolding of defense counsel after sustaining the objection to the cross-examination of Fernando Nieves. RB 347-348 (citing 24RT 3009-10). The trial court accused defense counsel of injecting error by asking Fernando Nieves "for his opinion as to why [defendant] murdered her children." Id. The trial court's accusation was baseless. Defense counsel explained he was simply asking about an earlier statement Fernando Nieves had made to a social worker at the hospital after the fire. 24RT 3009:9-11.The question properly sought evidence relevant to defendant's state of mind during the critical window of time between the

abortion and the fire.

In support of the trial court, the Attorney General cites People v. Harris (2005) 37 Cal.4th 310. But Harris stands for more than the proposition that the court "had a duty to control the proceedings." See RB 349. Harris states:

> Although "the trial court has both the duty and the discretion to control the conduct of the trial" (People v. Fudge (1994) 7 Cal.4th 1075, 1108, 31 Cal.Rptr.2d 321, 875 P.2d 36), "the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Id. at 346. The Attorney General ignores the emphasis in Harris on a defendant's right to an impartial judge despite its relevance to this case. Judge Wiatt needlessly disparaged defense counsel and erroneously restricted defendant's right to put on a defense in the guise of controlling the proceedings. His unnecessary scolding serves as one more example of his disparate treatment of defense counsel and his bias against Sandi Nieves that permeated this trial. See AOB Part III; Part III, supra.

B. The Errors Were Not Harmless

The Attorney General argues any errors were harmless because other witnesses were able to testify as to Sandi Nieves's state of mind after the abortion. RB 349. However, no amount of testimony from other witnesses could make up for the exclusion of testimony from Scott Volk, who impregnated defendant in the first place, and Fernando Nieves, the father of three of defendant's children, two of whom died in the fire.

The Attorney General relies on People v. Farley (2009) 46 Cal.4th 1053. In Farley, the defendant had written between 150 to 200 letters to a

victim. Id. at 1103. The defendant had sought to introduce 19 of the letters to show the defendant's state of mind. The trial court admitted four. This Court held the exclusion of the additional letters was harmless because the letters that were admitted sufficiently established the facts about the defendant's state of mind that he sought to introduce. Id. at 1104. Unlike multiple letters saying essentially the same thing, here the trial court excluded uniquely mitigating evidence from critical prosecution witnesses.

Scott Volk and Fernando Nieves's testimony was essential to the prosecutor's theme that Sandi Nieves was acting out of anger and seeking revenge on the men in her life. See, e.g., 15RT 1330:21, 1334:11-14 (prosecutor's opening statement: "This is a case about revenge. It's about retribution. It's about anger."; "the defendant was desperate, she was angry, and she wanted to punish the men she felt had put her in this position").

First, Scott Volk testified the abortion was not his decision. 19RT 2099:11-21, 2100:4-5. He testified Sandi Nieves never informed him she went through with the abortion. 19RT 2100:19-23. The prosecution used this testimony to argue to the jury the defendant's decision to have the abortion victimized Volk. 54RT 8441:13-18 (prosecutor's closing argument: "I submit to you that's what she did to Scott Volk. That's why she didn't even tell him [about having the abortion]. Wanted to make him pay.").

The jury never heard Volk admit he knew how much Sandi Nieves had struggled with the decision. Testimony about Nieves's internal struggle and anguish coming from the man who got her pregnant would have cast defendant in a more sympathetic light and neutralized the prosecution's theme of revenge and anger. See People v. Haskett (1982) 30 Cal.3d 841, 863 ("It is not only appropriate, but necessary, that the jury weigh the

sympathetic elements of defendant's background against those that may offend the conscience.").

Second, Fernando Nieves testified for the prosecution during both the guilt and penalty phases of the trial. As the father of two of the girls who died, his testimony must have carried considerable weight. People v. Cowan (2010) 50 Cal.4th 401, 503 ("jury likely assigned more weight" to alleged victim's testimony than to other witnesses). Confirmation from Fernando Nieves that he had, in fact, told a social worker he felt Sandi Nieves had "lost it" after the abortion would have served as powerful mitigation evidence. 24RT 3009:9-11. His answer would have shown—despite his description of Sandi Nieves as "furious" the last time he saw her—he knew she was experiencing other emotional turmoil related to the abortion. 23RT 2824:19-25.

The trial court denied Sandi Nieves her due process rights to a meaningful defense (Crane v. Kentucky (1986) 476 U.S. 683, 690), and her Eighth and Fourteenth Amendment rights to a reliable sentence (Chambers v. Mississippi (1973) 41 U.S. 284, 302) when it excluded the critically mitigating testimony from Scott Volk and Fernando Nieves. The death sentence must be reversed because the Attorney General has failed to show beyond a reasonable doubt the error was harmless under Chapman, 386 U.S. at 24.

The Attorney General argues the error was harmless under People v. Watson (1956) 46 Cal.2d 818. RB 349. However, we explained in the opening brief the error was prejudicial not to guilt, but to sentencing. See AOB 484-485. Therefore, under California law, the death sentence must be reversed because "there is a reasonable possibility it affected the verdict." People v. Gay (2008) 42 Cal.4th 1195, 1223; People v. Brown (1988) 46

Cal.3d 432, 448.

XIX. EXCLUSION OF DR. KYLE BOONE FROM THE PENALTY PHASE

The record in this case is overflowing with examples of the trial court cutting off questions to defense witnesses or sustaining objections that operated to limit their testimony. But in the case of defense expert Dr. Kyle Boone, a neuropsychologist, the trial court did not allow her to present mitigating evidence at all.

As set forth in the opening brief, the trial court's grounds for excluding Dr. Boone's penalty phase testimony were constitutionally impermissible. The exclusion was not harmless. AOB 485-510.

Dr. Boone's expert testimony was critical to Sandi Nieves's penalty phase defense. It would have shown how Sandi Nieves's cognitive impairments and executive/frontal lobe dysfunction affected the circumstances surrounding the offense, untethered from considerations of guilt or innocence. See Exh. YY-1 (Dr. Boone's report). Dr. Boone could have explained how Sandi Nieves, because of her cognitive impairments, was not capable of coping with the multiple stressors that had come into her life all at once: the abandonment by Scott Volk, the abortion, the abandonment of the children by David Folden, the potential loss of child support. Importantly, Dr. Boone's explanation of Sandi Nieves's particular brain dysfunction could have invoked sympathy and mercy from the jury. It could have also shown Nieves's lack of future dangerousness and the likelihood she would positively adjust to life in prison. Furthermore, Dr. Boone had unique expertise in the area of malingering – which was a major prosecution theme throughout the case. Her conclusion that Nieves had not, in fact, faked any of her answers during the neurophysiological evaluation

would have been a powerful antidote to the prosecution's theme that Nieves was a manipulator.

Disregarding Nieves's right to present mitigating evidence, the trial court ruled Dr. Boone's testimony was cumulative to the guilt phase testimony of Dr. Lorie Humphrey. The trial court's error violated Nieves's rights to present a meaningful penalty phase defense, due process, a fair trial on the issue of penalty, and a reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

The Attorney General attempts to justify the trial court's arbitrary and unconstitutional exclusion of Dr. Boone's testimony. RB 350-358. She argues the trial court did not abuse its discretion when it excluded the testimony as "cumulative and speculative." RB 354. She also contends the jury rejected the guilt phase mental impairment evidence, making it "inconceivable" that Dr. Boone's testimony would have persuaded the jury to return a sentence less than death. RB 358.

To follow the Attorney General's logic, penalty phase mental impairment evidence would never be admissible if a capital defendant had already raised the issue during the guilt phase and put on experts. The Attorney General does not and can not cite to any capital case in which this Court or the Supreme Court of the United States has expressly affirmed a trial court's decision summarily to exclude penalty phase mitigation evidence related to the defendant's mental impairments on the ground it was cumulative to guilt phase evidence.

A. The Trial Court's Complete Exclusion of Dr. Kyle Boone's Testimony Was Constitutionally Wrong

The record shows the trial court excluded Dr. Boone's testimony out of impatience and a fundamental misunderstanding of the defendant's

constitutional rights. The court ruled to exclude Dr. Boone's testimony on these grounds: "It would be cumulative. It would involve the undue consumption of time. It would take days." 62RT 9648:7-8. These grounds were not supported by the record; nor are they permissible grounds on which to exclude critical mitigating evidence during the penalty phase of a capital case.

The Attorney General does not directly defend the trial court's ruling that Dr. Boone's testimony would have taken too much of the court's time.[56] Instead, she defends the trial court's ruling to exclude Dr. Boone's testimony as cumulative because "[t]he right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence." RB 354-357.[57] She basically contends the court had unfettered discretion to exclude potentially mitigating evidence if a basis could be found to support exclusion.

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[56] Defense counsel assured the court Dr. Boone's testimony would not take more than an hour. AOB 495; 61RT 9648:10-11.

[57] In her recitation of the factual background to the trial court's ruling to exclude Dr. Boone's testimony, the Attorney General emphasizes the late disclosure of Dr. Boone as a defense witness. RB 350-352. The Attorney General does not, however, present any legal argument that the delayed disclosure served as a lawful basis for the exclusion of her testimony. "[I]t is established that '... an appellate brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."'" Mansell v. Board of Administration (1994) 30 Cal.App.4th 539, 545 (quoting In re Marriage of Schroeder (1987) 192 Cal.App.3d 1154, 1164). See also Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal.App.4th 1586, 1595 n.8 ("Failure to argue a point in a brief permits us to deem such point abandoned."). Therefore, this Court should not decide this point which was not properly raised nor relied upon by the Attorney General. Nor was it a ground upon which the trial court relied.

The Attorney General's contention is a misapplication of fundamental principles governing capital cases. "'[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.'" Tennard v. Dretke (2004) 542 U.S. 274, 285 (quoting Payne v. Tennessee (1991) 501 U.S. 808, 822. To be admissible during the penalty phase, mitigating evidence need only overcome a "low threshold for relevance." Tennard, 542 U.S. at 285. Once this threshold for relevance is met, "the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." Brewer v. Quarterman (2007) 550 U.S. 286, 296. Here, of course, as discussed in the opening brief at 496-503 and discussed further below, the relevance of the proffered evidence was manifest.

If a death sentence is at stake, no barrier "whether statutory, instructional, evidentiary, or otherwise" may preclude a jury from considering relevant mitigating evidence. People v. Mickey (1991) 54 Cal.3d 612, 693.

When a defendant proffers evidence for mitigation purposes, the fact that the rules of evidence might normally operate to exclude the evidence "does not necessarily undermine its value—or its admissibility—for penalty phase purposes." Sears v. Upton (2010) __U.S.__, 130 S.Ct. 3259, 3263, n.6 (reiterating that "reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule"). This is because death "'in its finality'" is different. Mickey, 54 Cal.3d at 693 (quoting Woodson v. North Carolina (1976) 428 U.S. 280, 304-305).

In People v. Thornton (2007) 41 Cal.4th 391, this Court held the defendant's rights were not infringed by exclusion of defense evidence "on a minor or subsidiary point." Id. at 442 (excluding on hearsay grounds a 30-minute video tape of a lecture on learning disabilities). But the trial court here did not prevent the defense from making a minor point. Defense counsel proffered Dr. Boone's testimony to address critical issues that would mitigate the crimes, make the defendant more sympathetic, and give the jurors reasons to vote for life, rather than death.

First, impaired mental functioning is inherently mitigating. Tennard, 542 U.S. at 287. See also Blystone v. Horn (3rd Cir. 2011) 664 F.3d 397 (death sentence overturned due to counsel's failure to investigate, develop, or introduce expert mental health testimony including evidence of organic brain damage); Summerlin v. Schriro (9th Cir. 2005) 427 F.3d 623, 641 ("lack of impulse and emotional control and organic brain dysfunction could have provided significant mitigating evidence"). "[I]t is not reasonable to discount" the effect on a jury or sentencing judge of evidence about a defendant's brain abnormality and cognitive defects. Porter v. McCollum (2009) __ U.S. __, 130 S.Ct. 447, 454-55.

Second, Dr. Boone would have provided an expert's explanation of the impact of defendant's brain dysfunction on her day-to-day life. 61RT 9617:21-25, AOB 494, 498. She would have addressed how Sandi Nieves's mental impairment affected her ability to face multiple problems and high levels of stress, causing her to be unaware of or unable to choose from the same wide range of solutions as a normal person. 61RT 9615-9616; AOB 500. This testimony would have provided important information for the jury to consider regarding the defendant's state of mind leading up to the fire and the death of her children. Such evidence is admissible under Penal

Code 190.3, sentencing factor (a). People v. Guerra (2006) 37 Cal.4th 1067, 1154; accord People v. Nelson (2011) 51 Cal.4th 198, 224.

This testimony would also likely have provided a basis for sympathy and compassion from one or more jurors. Such evidence is admissible under Penal Code § 190.3, sentencing factor (k).[58] See People v. Hinton (2006) 37 Cal.4th 839, 912 (approving an instruction with regard to Pen. Code §190.3(k) "that sympathy and compassion were legitimate factors for its consideration and that either alone could justify a sentence of life imprisonment without the possibility of parole"). Moreover, the information was critical to "humanizing" defendant and allowing the jury to "accurately gauge [her] moral culpability." Porter, 130 S.Ct. at 454; see also Caro v. Calderon (9th Cir. 1999) 165 F.3d 1223 ("death cannot be constitutionally imposed without adequate consideration of factors which might evoke mercy").

Third, Nieves's lack of future dangerousness was important information for the jury to consider in its sentencing determination. See Skipper v. South Carolina (1986) 476 U.S. 1, 5, 7. Dr. Boone's testimony regarding Sandi Nieves's particular brain dysfunction could have led a juror to conclude she would not pose a danger if allowed to live the rest of her life in prison. Evidence that defendant was a "likely candidate to lead a

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[58] The Attorney General argues Dr. Boone's testimony is not admissible under factor (k) because factor (k) does not allow a defendant to present cumulative evidence to the jury, citing People v. Fauber (1992) 2 Cal.4th 792, 857. RB 356. But in Fauber, the court did not exclude the proffered factor (k) mitigation evidence – the defendant's refusal to accept a plea bargain – on the ground it was cumulative. Rather, it excluded the evidence because it "had the potential to mislead and confuse the jury." Fauber, 2 Cal.4th at 857. No one has argued in this case that Dr. Boone's testimony would have been confusing or misleading in any way.

productive and nonviolent life in prison ... 'must be considered mitigating'" and " 'may not be excluded from the sentencer's consideration.'" People v. Fudge (1994) 7 Cal.4th 1075, 1117 (quoting Skipper, 476 U.S. at 5).[59]

Fourth, a major theme of the prosecution's case was that Sandi Nieves was a liar and that she faked her responses to the MMPI-2 and other tests. See 30RT 5423:10-13, 5727:11-15 (prosecution expert Dr. Brook testifying that defendant engaged in "impression management" and that her test results were "more indicative of malingering than of organic brain damage"); 44RT 6593:20-21, 26-27 (prosecution expert Dr. Caldwell testifying defendant had "clearly set out to try to look bad on the [MMPI-2] test"); 56RT 8743:18-23, 8762:12-16, 8771:9-11, 8775:3-9 (prosecution closing argument accusing defendant of malingering); 8775:25-27 (prosecutor describing defendant: "Malingering, lying, faking, manipulating. That's her.").

Dr. Boone had particular expertise in interpreting normative data for indications an individual was malingering. See 61RT 9614:16-19; Exh YY-2 (Dr. Boone's curriculum vitae includes at least eight publications

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[59] The Attorney General insists defense counsel stated he did not intend to ask for Dr. Boone's opinion on whether Sandi Nieves posed a threat of danger if allowed to live the rest of her life in prison. RB 356. However, the record is not clear as to what, specifically, defense counsel was referring when he stated, "It's not something I would say we would ask Dr. Boone's opinion on." See 61RT 9617:2-4. Clearly, defense counsel was not arguing Dr. Boone was an expert on prison conditions.

Counsel adequately explained that Dr. Boone's opinions about Sandi Nieves's particular "cognitive dysfunction," meant "a juror could conclude that if her problem is one which arises only when she has multiple problems to deal with, they may -- they could conclude from that that she wouldn't be a problem in prison, that her adjustment would be satisfactory." 61RT 9616:19-24, 9617:6.

specifically addressing techniques and tests for detecting malingering). In her report, she explained Sandi Nieves had completed three tests specifically designed to detect malingering. Exh. YY-1. In her expert opinion, "Ms. Nieves did not show a malingering pattern on any of these three tests." Id. Dr. Boone also opined that other standard neuropsychological tests were "sensitive to the presence of faking" and "Ms. Nieves's did not show a malingering pattern on any of these standard instruments." Id. The trial court's ruling prevented the jury from considering Dr. Boone's assessment. In this sense, the court did not allow the jury to come to its own conclusion as to which expert's opinion was the most credible. See Evid. Code § 312(b) ("the jury is to determine ... the credibility of witnesses"); People v. Young (2005) 34 Cal.4th 1149, 1181.

The Attorney General nonetheless argues the trial court retains its discretion during the penalty phase to exclude evidence based on its form, that is if the evidence is cumulative. RB 354. However, the cases cited limit such exclusions to "particular items of evidence" (People v. Smith (2005) 35 Cal.4th 334, 357), such as "a particular photograph or piece of clothing" (People v. Davenport (1995) 11 Cal.4th 1171, 1206, abrogated on other grounds by People v. Griffin (2004) 33 Cal.4th 536). The Attorney General does not cite any case that involves a trial court excluding a witness's entire testimony on the ground that it was cumulative of guilt phase testimony.

In fact, Smith, 35 Cal.4th at 357, did not address the exclusion of defense evidence during the penalty phase. The issue in Smith was whether the trial court abused its discretion by not excluding "misleading, cumulative, or unduly inflammatory" aggravating evidence. In People v. Price (1991) 1 Cal.4th 324, this Court affirmed a trial court's ruling that penalty phase evidence was cumulative of other penalty phase evidence. It

did not address cumulation of guilt phase evidence. See id. at 485-86 (excluding defendant's 23 pages of notes and letters addressed to the trial judge protesting a shackling order and jail conditions during the trial, but admitting all of his other writings including short stories, letters, and essays about life in prison). In People v. Carasi (2008) 44 Cal.4th 1263, this Court affirmed the exclusion of evidence pertaining to the state of mind of one of the victims, not the defendant. See id. at 1313 (the victim's state of mind "had no tendency in reason to prove the occurrence of a chain of events triggering a lethal response on defendant's part").

Here, the trial court did not simply exclude a particular item of evidence. It summarily denied defendant the opportunity to present relevant mitigating evidence about her particular brain dysfunction. This evidence was "precisely the type of evidence ... critical for a jury to consider when deciding whether to impose a death sentence." Douglas v. Woodford (9th Cir. 2003) 316 F.3d 1079, 1090. "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Penry v. Lynaugh (1989) 492 U.S. 302, 319, abrogated on other grounds by Atkins v. Virginia (2002) 536 U.S. 304.

The trial court's error violated defendant's due process right to "a meaningful opportunity to present a complete defense." Crane v. Kentucky (1986) 476 U.S. 683, 690. See also Chambers v. Mississippi (1973) 410 U.S. 284, 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

B. The Penalty Phase Testimony Was Not Cumulative

1. Dr. Boone Would Have Rehabilitated and Corroborated Dr. Humphrey's Testimony

The Attorney General contends the jury rejected Dr. Humphrey's neuropsychological findings in the guilt phase. RB 358. The United States Supreme Court has held that evidence is not "merely cumulative" if it corroborates other evidence that is "unbelievable" on its own. Arizona v. Fulminante (1991) 499 U.S. 279, 298-299. If the jury had initially rejected Dr. Humphrey's testimony as the Attorney General contends, the jury could have found, after hearing from Dr. Boone, that the two neurophyschologists actually "reinforced and corroborated each other." Fulminante , 499 U.S. at 299. See also People v. Lucero (1988) 44 Cal.3d 1006, 1030-1031 (testimony from two experts on the same issue was not cumulative because it was important to show that "not only one, but two mental health experts" had diagnosed the defendant with the same syndrome). In this respect, Dr. Boone was necessary to rehabilitate Dr. Humphrey's findings. Rehabilitation is not cumulative when it bolsters credibility.

The prosecution had waged an attack on Humphrey's testimony, going so far as calling her a liar during guilt phase closing argument. See 56RT 8770:10-16. The prosecution's witness, Dr. Robert Brook, had attacked the validity of the tests Humphrey administered. 38RT 5377:20-5380:10, 5382:19-25, 5383:6-20, 5391:19. He testified Humphrey's conclusions were unreliable. 38RT 5414:26-27, 5420:1-5420:9-5422:10. Dr. Boone would have explained that she reviewed the tests Humphrey administered to the defendant, and despite using the incorrect norms on the Color Trails test, Humphrey's conclusion that defendant showed executive/frontal lobe dysfunction was a valid scientific finding. Exh. YY-

1, 21RCT 5272. Under California law, the jury "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony." Evid. Code § 780.[60] The Attorney General herself asserts that "the evidence of appellant's alleged mental impairments was decidedly thin." RB 201. However fair or unfair a characterization of Dr. Humphrey's testimony that may be, it would have been more difficult for the Attorney General to make such an assertion had Dr. Boone's testimony been admitted.

2. Guilt Phase Evidence Can Not Constitutionally Substitute For Evidence in Support of Mitigation

Dr. Boone's testimony was not cumulative because evidence proffered during the guilt phase can not substitute for a capital defendant's opportunity fully to present her case in mitigation. The Attorney General does not acknowledge that a capital defendant's posture and purpose for presenting evidence during the guilt phase differs entirely from the penalty phase.

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[60] The Attorney General recites the trial court's finding that testimony from Dr. Boone about how Dr. Humphrey gained access to the wrong norms would be speculative. RB 353, 354 (Section XVII, Part C (heading: "The Trial Court Properly Excluded Dr. Boone's Testimony as Cumulative and Speculative").

The Attorney General does not provide any supporting legal argument or authority. She has forfeited this argument. Moreover, the trial court could have easily precluded Dr. Boone from testifying Dr. Humphrey received the wrong norms without excluding Dr. Boone's entire testimony.

The court could also have conducted a brief section 402 hearing to determine what Dr. Boone's basis was for her statement as to how Dr. Humphrey had gained access to the wrong norms. The court routinely held 402 hearings as to proposed defense evidence.

During the guilt phase, the defendant was presenting evidence to the jury packaged to persuade it on the issue of innocence versus guilt. She was not focused on why a death sentence should not be imposed on her. "Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." Gregg v. Georgia (1976) 428 U.S. 153, 190.

During the penalty phase, the defendant had a right to present evidence in a way to convince the jury that she should not be killed. Regardless of what came into evidence during the guilt phase, under Lockett v. Ohio (1978) 438 U.S. 586, 604 and its progeny, defendant had a right to present any evidence in the penalty phase that might serve to mitigate the crimes. During the penalty phase, defendant had a right to introduce evidence as to any "circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Pen. Code §190.3(k). Such testimony, not relevant to guilt or innocence, would be inadmissible in the guilt phase. Evidence that invokes sympathy and compassion from the jury and evidence that defendant poses no threat of future dangerousness was not cumulative because it would not, and did not in this case, come into evidence during the guilt phase.

The Attorney General contends "the jury was not precluded from considering the issue of appellant's future dangerousness" because defense counsel argued the point during closing argument. RB 357. She erroneously equates argument to evidence. See People v. Breaux (1991) 1 Cal.4th 281, 313 ("It is axiomatic that argument is not evidence."). Also, the trial court specifically instructed the jury at the beginning of the penalty phase as follows: "I'll just remind you jurors again that what counsel say in an

opening statement or their questions or their argument is not evidence. The only evidence is questions that are answered, or things that are received in evidence, presented to the senses. I instructed you on that previously, and that still applies to this phase of the trial." 60RT 9266:18-25.

3. Presentation of Dr. Humphrey's Testimony Was Incomplete

Additionally, Dr. Boone's testimony could not have been cumulative to Humphrey's because Boone would have provided her expert opinion on issues Humphrey never reached. The Attorney General does not address how the trial court inappropriately cut off Humphrey. The record shows the court never allowed Dr. Humphrey to testify as to how events or incidents in Sandi Nieves's personal history related to the brain damage Sandi exhibited:

> ... Mr. Waco: With regards to information that you derived from Mr. Lucia with regards to [defendant's] history of seizures and multiple head trauma caused by the mother, do you find -- or did you find -- that those descriptions would be consistent with causing the brain damage that you observed, or abnormality that you observed?
>
> [Dr. Humphrey:] Yes. As I mentioned before --
>
> Mr. Barshop: The answer -- I believe she's answered the question.
>
> The Court: Yes. You have answered it "yes".
>
> ... Mr. Waco: Can you describe where in the brain these specific childhood injuries or trauma, as you -- as I described, of the early seizures and mother's physical --
>
> The Court: I am going to sustain my own objection. Your description is not relevant, Mr. Waco. Haven't you already discussed the basis for your opinion as to where and when in the brain?
>
> [Dr. Humphrey:] Yeah, but I haven't connected the two.

Mr. Waco: Would the court allow her to connect the two?

The Court: Well, I'll allow you to ask a proper question and see where it leads us.

37RT 5203:14-5204:10. Defense counsel reformulated the question no less than ten more times. The trial court sustained objections every time. 37RT 5204:11-5206:28. The prosecutors (in tandem) objected on grounds the defense counsel's questions were vague or constituted an improper hypothetical, but the trial court also sustained objections on grounds of irrelevancy and that the questions called for an answer outside the scope of the witness's expertise. Id. Ultimately, Dr. Humphrey never gave an answer.

Dr. Boone could have picked up where the trial court cut Humphrey off. She could have made the connection for the jury between Sandi Nieves's brain dysfunction and her personal background. See Porter, 130 S.Ct. at 454 (evidence of a capital defendant's troubled history is relevant to assessing a defendant's moral culpability); Wiggins v. Smith (2003) 539 U.S. 510, 513 ("available mitigating evidence" from a defendant's life history "might well have influenced the jury's appraisal of his moral culpability").

Dr. Boone could have explained how Nieves's history of seizures and head trauma related to childhood physical abuse and adversely affected her brain. She could have connected this history not only to Nieves's inability to cope with the multiple stressors present in her life before the fire, but also show how it affected her on a day to day basis – invoking sympathy from the jury. See AOB 494. Because the trial court prevented the jury from considering this mitigating evidence, the penalty phase and sentencing of defendant was constitutionally inadequate. See Abdul-Kabir

v. Quarterman (2007) 550 U.S. 233, 263-264 ("when the jury is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence ... the sentencing process is fatally flawed").

4. The Constitutional Right to Rebut the Prosecution's Argument In Favor of a Death Sentence

The prosecution took full advantage of the exclusion of Dr. Boone's testimony. During the penalty phase closing argument, the prosecution argued there was no mitigating evidence concerning defendant's mental condition at the time of the fire. 64RT 10105:12-10106:24. The prosecution disparaged the guilt phase expert testimony pertaining to defendant's mental impairment as "speculation." 64RT 10105:12-17. The prosecution also discounted penalty phase lay-witness testimony that defendant was "not in her right mind" by pointing out none were "qualified as experts to make that evaluation." 64RT 10106:6-7.

A trial court may not exclude testimony as cumulative, then turn around and allow the prosecution to use the absence of the testimony against the defendant. "The due process clause prohibits a defendant from being sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" People v. Frye (1998) 18 Cal.4th 894, 1017, disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390 (quoting Gardner v. Florida (1977) 430 U.S. 349, 362). "When a defendant is precluded from introducing evidence rebutting the prosecution's argument in support of the death penalty, fundamental notions of due process are implicated." Frye, 18 Cal.4th at 1017.

C. The Error Requires Reversal of the Death Sentence

The Attorney General concedes the Eighth and Fourteenth

Amendments require the admission of any mitigating evidence "in all but the rarest case." RB 353. The Attorney General has not made a showing that this was a rare case. Further, she has failed under Chapman, 386 U.S. at 24, to demonstrate beyond a reasonable doubt the error in excluding Dr. Boone's testimony was harmless.

First, the Attorney General contends the trial court's instruction to the jury to consider guilt phase testimony when determining Sandi Nieves's sentence cured the error. See RB 357. Because we have shown in the opening brief and here that Dr. Boone's testimony would have been presented for a different purpose and was not cumulative of the truncated testimony of Dr. Humphrey, this instruction did nothing to render the trial court's error harmless.

Second, the Attorney General argues the error was harmless in light of the "sufficiently grave" circumstances of the underlying offenses. RB 357-358. But even when "the crime committed was undeniably heinous," a death sentence is "by no means a forgone conclusion." People v. Sturm (2006) 37 Cal.4th 1218, 1244. As one court recently pointed out, the "heinous nature of the underlying offense" does not determine whether a defendant was prejudiced. Stanley v. Schriro (9th Cir. 2010) 598 F.3d 612, 616 ("There is no doubt that the facts of this case are repulsive. But that is true for every case where the death penalty is imposed.); see also Douglas v. Woodford (9th Cir.2003) 316 F.3d 1079, 1091 ("The gruesome nature of the killing did not necessarily mean the death penalty was unavoidable."); In re Fields (1990) 51 Cal.3d 1063, 1079 -1080 (while "murders with special circumstances are generally horrifying crimes, ... juries nevertheless return verdicts of life imprisonment without possibility of parole in more than half the cases").

Juries return sentences of life imprisonment without the possibility of parole in highly aggravated cases, including cases of filicide. See, e.g., Benjaminson, Jury Advises Prison Time For Former Student, The Daily Californian (June 2, 2000)(jury rejected death penalty after convicting Michael Singh of having lured his pregnant ex-girlfriend and their six-month-old son into a deserted Safeway parking lot where he shot them both at close range).[61] Cases involving a mother accused of killing her own children have resulted in life sentences. See, e.g., Life for Susan Smith, N.Y. Times (Aug. 1, 1995)(unanimous jury in South Carolina sentenced woman to life in prison with the possibility of parole for the "unspeakable crime of drowning one's children"); Killer of Infant Daughter Sentenced, N.Y. Times (Oct. 2, 1987)(Mary Beth Tinning, convicted in New York of smothering her three and a half month old to death, sentenced to 20 years to life).

Third, the Attorney General argues the exclusion of relevant mitigating evidence was harmless because defendant had a weak case in mitigation. RB 358. The Attorney General is wrong. The question here is whether Dr. Boone's testimony, separately or with other evidence, could reasonably have led one juror to vote for a sentence less than death. See People v. Gay (2008) 42 Cal.4th 1195, 1223. The answer here is yes.

A reasonable juror certainly could have felt compassion or pity for Sandi Nieves. She had otherwise been a good and caring mother. If she really did deliberately and premeditatedly determine to kill herself and her children, she must have done so because she was desperate, and in her

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[61] Available at http://archive.dailycal.org/article/2665/jury_advises_prison_time_for_former_student (accessed on July 12, 2012).

stressed and confused condition, with her limited coping abilities, saw no other solution to the problems confronting her. Pity and compassion would have been all the more likely for a juror who understood that Sandi's inability to see any other path forward was, at least in part, the product of cognitive deficits, which themselves may have resulted from childhood trauma and illness. Dr. Boone's testimony clearly would have helped to promote that understanding.

Finally, as set forth in the opening brief (AOB 487-491), the trial court's disdainful treatment of defense expert Lorie Humphrey compared to its preferential treatment of prosecution expert Robert Brook compounded the error here. The record shows the court actively prevented the jury from considering the "inherently mitigating" information about defendant's particular brain dysfunction. See Tennard, 542 U.S. at 287. And, when limited evidence of defendant's mental impairment did come in, the court facilitated the prosecution's efforts to discredit it.

The trial court prematurely cut off Dr. Humphrey's testimony. 37RT 5210:17-28; 38RT 5277:14-5278:9. It degraded her, threatened her, and effectively chased her off. 37RT 5222:28-5223:1; 38RT 5319:26-28, 5362:5-12; 22RCT 5591-92 (Declaration of Howard Waco: "Dr. Humphrey informed me ... [t]hat but for the perceived hostile attitude of the court toward her, she would not have been reluctant to return to complete her testimony."). The trial court allowed the prosecution to call Dr. Brook out of order, so that Dr. Brook could testify immediately following Dr. Humphrey and attack her conclusion that Sandi Nieves suffered brain damage. 38RT 5420:1-5420:9; 5714:25-5715:6 (Dr. Brook: "it is my opinion that it is more indicative of malingering than of organic brain damage"). It then prematurely cut off defendant's cross-examination of Dr.

Brook. 38RT 5615:23-5619:11. Next, the court refused to admit Dr. Humphrey's report into evidence. 53RT 8248:20-8249:6.

Excluding Dr. Boone from testifying at the penalty phase was the final blow. The trial court effectively shut down defendant's ability to present any mitigating evidence about the impact of mental impairment.

Reversal of Sandi Nieves's death sentence is required because the Attorney General has not shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Lucero, 44 Cal.3d at 1032 (citing Chapman, 386 U.S. at 24).

XX. VIOLATION OF THE CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE

The trial court allowed the prosecution and its victim impact witnesses to ravage Sandi Nieves during the penalty phase of her death penalty trial. In response, she sought to present mitigating evidence from a series of character witnesses. But the trial court systematically shut down their testimony, one after another. Specifically, the trial court wrongly excluded mitigating testimony from penalty phase defense witnesses Shirley Driskell, Tammy Olivares Pearce, Henry Thompson, Lynn Taylor Jones, Cindy Hall, Albert Lucia, Shannon North, Tricia Mulder, and Leila Mrotzek. AOB 511-542.

The Attorney General downplays the impact of the trial court's many erroneous rulings. She argues the jury had "a complete picture of appellant." RB 371, 373.

The record shows the picture the jury had of Sandi Nieves was the picture painted by the prosecution. The Attorney General utterly ignores the purpose of a penalty phase and defendant's right to present her own version of mitigating factors.

Here, Sandi Nieves sought to introduce evidence about her character from the people in her life who knew her best. But the trial court arbitrarily sustained objection after objection. Ultimately, the record contained nothing more than a few statements from witnesses about defendant being a good mother.

Sandi Nieves also sought to introduce testimony about how the abortion—just days before the fire—had thrown her into a state of turmoil. But the trial court kept the testimony out, erroneously sustaining hearsay objections.

Finally, Sandi Nieves sought to bolster the credibility of Chaplain Mrotzek, one of the most important witnesses to testify on her behalf. But when she asked the chaplain for her views on the death penalty, the trial court shut her down, too.

In the end, the trial court gutted the penalty phase defense. It deprived the jury of critical information that could have contradicted the prosecution's one dimensional portrayal of the defendant. The jury sentenced Sandi Nieves without the information necessary to "its calculus of deciding whether [this] defendant [was] truly deserving of death." Brewer v. Quarterman (2007) 550 U.S. 286, 296.

To make matters worse, the trial court allowed the prosecution to commit misconduct. During the cross-examination of Shirley Driskell, the prosecutor stated—as if it were established fact—Sandi Nieves had committed the crime of perjury. AOB 542-545.

The Attorney General makes the incorrect and long-overruled legal argument the prosecutor did not commit misconduct because she did not act in bad faith. See RB 374-377. She further claims the misconduct was harmless because the prosecutor was referring to defendant's lies on a

"tangential issue." Id. The prosecutor never suggested there was anything tangential about the "perjury" Sandi Nieves had "committed," when it worked to the prosecution's advantage at trial.

The exclusion of testimony from defense character witnesses and the prosecution's misconduct—considered separately and cumulatively—resulted in an unfair penalty phase, the denial of the opportunity to put on a meaningful defense, and an unreliable sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Gardner v. Florida (1977) 430 U.S. 349; Crane v. Kentucky (1986) 476 U.S. 683, 690; Holmes v. South Carolina (2006) 547 U.S. 319, 324-329; Chambers v. Mississippi (1973) 410 U.S. 284, 302; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v. Mississippi (1988) 486 U.S. 578, 584-85.

Defendant's death sentence must be reversed because the Attorney General has failed to show beyond a reasonable doubt the errors were harmless. See Chapman, 386 U.S. at 24; People v. Bennett (2009) 45 Cal.4th 577, 604.

A. Prejudicial Exclusion of Mitigating Character Evidence

The Attorney General argues "[t]he right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence." RB 368. However, the Attorney General does not point to any rule of evidence the trial court properly applied. Out of the myriad of objections the trial court sustained during the testimony of defense penalty phase character witnesses (see AOB 513-525), the Attorney General defends only a selected few. She focuses primarily on the court's rulings during the testimony of Driskell and Pearce concerning their observations of defendant's mothering skills. See RB 367-368. She states the trial court was "correct" but does not explain on what grounds or provide legal

authority to support her argument. Id. at 368. In short, the Attorney General makes no real effort to defend the numerous improper exclusions of mitigating evidence identified in appellant's opening brief . The sheer number of improper, indefensible rulings is remarkable, and likely a reflection of the trial court's ongoing hostility to the defense and/or lack of understanding of the scope of relevant penalty phase mitigation. Cf. People v. Gay (2008) 42 Cal.4th 1195, 1217-1224 (reversing Hon. L. Jeffrey Wiatt after penalty phase retrial).

Even if the Attorney General could point to a proper ruling by the trial court, an "application of the ordinary rules of evidence," which operates completely to exclude a defendant's defense, violates due process. People v. Thornton (2007) 41 Cal.4th 391, 443. Here, the trial court did not merely exclude evidence "on a minor or subsidiary point." Compare, e.g., id. at 442 (excluding on hearsay grounds a 30-minute video tape of a lecture on learning disabilities). As set forth in the opening brief, the trial court excluded answers from witness after witness about defendant's positive character traits. AOB 526-531.[62]

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[62] The Attorney General cites People v. Bennett (2009) 45 Cal.4th 577 and People v. Ochoa (1998) 19 Cal.4th 353 for the general proposition evidence of the impact of a defendant's execution on his or her family is inadmissible. RB 366. We do not argue otherwise. In fact, the Attorney General does not assert the trial court excluded the proffered testimony on this ground. Therefore, her discussion of the issue in the Respondent's Brief is irrelevant.

Moreover, under Bennett and Ochoa, evidence about a defendant's relationship with his or her family is "relevant in mitigation 'because it constitutes indirect evidence of the defendant's character.'" Bennett, 45 Cal.4th at 604, quoting Ochoa, 19 Cal.4th at 456. Defendant had a right to present "evidence that [she] is loved by family members or others, and that

(continued...)

Like any capital defendant, Sandi Nieves had a right to present mitigating character evidence. Woodson v. North Carolina (1976) 428 U.S. 280, 304. In Sandi Nieves's case, this right was all the more critical because, by the time defendant had her opportunity to put on mitigation evidence, the prosecution's victim impact witnesses had already attacked her. See, e.g., 60RT 9308:16, 9311:13 (Minerva Serna testified Sandi Nieves was "vicious and malicious" and "evil all the time"), 9338:5-8, 9365:12-22 (Fernando Nieves testified Sandi Nieves used her children to get her way and was manipulative and controlling), 9371:21-23, 9374:1-3 (David Folden testified Sandi Nieves was manipulative and controlling).

The prosecution may not attack a defendant's character in its penalty phase case-in-chief. See AOB 534-535 (citing People v. Boyd (1985) 38 Cal.3d 762, 775-776). Cf. People v. Loker (2008) 44 Cal.4th 691, 709 (prosecution may respond with character evidence only when a defendant places his character at issue in the penalty phase, and the direct evidence determines the scope of the rebuttal). Nonetheless, the trial court ignored this rule and allowed the assault.

Certainly, Sandi Nieves had a right to rebut the attack. Instead, the jury sentenced her to death "'on the basis of information which [s]he had no opportunity to deny or explain.'" Skipper v. South Carolina (1986) 476 U.S. 1, 4 n.1, quoting Gardner v. Florida (1977) 430 U.S. 349, 362. "When a defendant is precluded from introducing evidence rebutting the prosecution's argument in support of the death penalty, fundamental notions of due process are implicated." People v. Frye (1998) 18 Cal.4th 894, 1017,

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[62](...continued)
these individuals want ... her to live." People v. Fuiava (2012) 53 Cal.4th 622, 724 (internal quotations omitted).

disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390.

Without grounds on which to defend the trial court's erroneous rulings, the Attorney General's only argument is that the errors were harmless. She contends the jury was able to consider "other forms of evidence" that defendant had positive character traits. Id. In support, she points to testimony permitted by the trial court that Nieves was a good mother. RB 369-370. But the mitigating value of this testimony was undermined by the prosecution's argumentative cross-examination—to say nothing of the fact the jury had just convicted defendant of killing four of her children while lying in wait. The prosecutor certainly did not agree that Sandi Nieves was a good mother. See, e.g., 61RT 9500:26-9501:2 (prosecution cross-examination of Driskell: "Does a good mother do this to her children?"). Nieves was entitled to fully present testimony on that issue from those who knew her and her family well in order to demonstrate just how out of character the killings were. Nor was the excluded mitigating character evidence limited to Sandi Nieves' role as a mother. The Attorney General nonetheless asserts the information allowed into evidence about defendant being a good mother gave the jury "a complete picture of appellant." RB 371.

The Attorney General's portrayal of the penalty phase evidence is inaccurate. The record shows the amount of mitigating character evidence the trial court excluded dwarfed the amount admitted. For example, the trial court sustained over 40 objections to questions related to defendant's character during the short direct-examination of defense witness Driskell. 61RT 9474-9514. The trial court allowed defense witness Pearce to answer only three out of approximately 21 questions in a row focused on

defendant's character. 61RT 9509:26-9514:18. During prison chaplain Mrotzek's testimony, the court sustained 10 prosecution objections in a row. It specifically prevented the chaplain from answering questions about Sandi Nieves's positive character traits and whether she had anything to offer other people in the prison system. 61RT 9891:12-9892:24.

The Attorney General concedes the trial court improperly excluded testimony about Sandi Nieves's character for nonviolence. RB 369, 371. However, she does not acknowledge or even address the trial court's many other erroneous rulings. She does not respond to our showing in the opening brief that the trial court precluded the jury from considering testimony from family and friends that they valued defendant as a person or that defendant had something to offer others if allowed to live the rest of her life in prison. The record shows in addition to its pattern of sustaining objections during the Driskell, Pearce, and Mrotzek testimony, the trial court:

- denied defense counsel's offer of proof regarding testimony from Henry Thompson as to "what value my client has to the witness, what she adds to his life, what meaning she has to him" (61RT 9572:18-9575:26);
- prevented Lynn Jones, a bishop in defendant's church, from testifying whether Sandi Nieves's character "benefited [sic] those around her at the church" (61RT 9585:4-10);
- prevented Cindy Hall from testifying whether Sandi Nieves was "the type of person who you feel comfortable in being around" (62RT 9730:17-30);
- prevented Albert Lucia, Sandi Nieves's stepfather, from testifying about her "value to her community" and whether he considered her a "decent person" 62RT 9753:9-16, 9755:9-

14);

- prevented Shannon North from testifying whether Sandi Nieves "was a person of value" (63RT 9859:15-19); and
- prevented Tricia Mulder from testifying whether "Sandi's life has value" (63RT 9873:7-9).

Also, as we explained in the opening brief, defendant laid a foundation with defense witnesses as to their individual relationship with her. AOB 528-529. Each had a unique perspective on Sandi Nieves based on how many years and in what capacity he or she knew her. See, e.g., 61RT 9473:23-27; 9478:26-9479: (Driskell); 9547:25-9551:25 (Thompson); 62RT 9651:11-9655:23 (Carl Hall); 9681:1-9 (Lenora Frey); 9723:27-9725:3 (Cindy Hall); 9750:3-9751:14 (Lucia); 9855:3-18 (North); 9867:10-14 (Mulder). Out of the eight witnesses defense counsel attempted to ask what particular value Sandi Nieves had to them as a person, the trial court arbitrarily allowed only three to answer. Compare 61RT 9542:27-9544:5 (Driskell), 9557:7-8 (Thompson), 62RT 9665:21-9667:2 (Carl Hall), 9753:9-12 (Lucia), 63RT 9872:15-18 (Mulder) with 62RT 9687:1-2 (Frey), 9729:8-10 (Cindy Hall), 63RT 9859:26-28 (North).

The opinion in Bennett, 45 Cal.4th at 604, serves as a helpful comparison. This Court held the trial court wrongly excluded a witness from testifying the defendant had inquired about his family. The testimony was admissible as "indirect evidence of the defendant's character." Id. The error was harmless in Bennett because the trial court had allowed in "ample alternative evidence." Id. Specifically, the trial court allowed the defendant's wife to testify "extensively about her love for him, how he had wanted to plead guilty to avoid causing more pain for his family, his character, and his relationship with her and with his children." Id. at 605.

Additionally, an expert witness had "testified at length about the children's bond with defendant, their love for him, and how they would benefit from a continuing relationship if he were allowed to live." Id.

Here, the exclusion of relevant mitigating evidence was significantly greater than in Bennett. Instead of excluding just one mitigating fact from one witness, this case involves a systemic pattern of exclusion. Furthermore, the trial court did not allow in "ample alternative evidence." See Bennett, 45 Cal.4th at 604. The court excluded from the jury's consideration the positive and sympathetic aspects of Sandi Nieves's character that would have countered the prosecution's negative and one-sided image of her. "It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." People v. Haskett (1982) 30 Cal.3d 841, 863. See also People v. Hinton (2006) 37 Cal.4th 839, 912 ("sympathy and compassion were legitimate factors for [the jury's] consideration and ... either alone could justify a sentence of life imprisonment without the possibility of parole"). The trial court cannot bar evidence "if the sentencer could reasonably find that it warrants a sentence less than death." McKoy v. North Carolina (1990) 494 U.S. 433, 441.

The trial court's consistent pattern of shutting down character testimony deprived defendant of her due process right to "a meaningful opportunity to present a complete defense." Crane, 476 U.S. at 690; Chambers, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

B. The Trial Court Prejudicially Excluded Mitigating State of Mind Evidence

The trial court erroneously excluded testimony from penalty phase defense witnesses regarding Sandi Nieves's state of mind leading up to the time of the fire, including her turmoil regarding the abortion. See AOB 531-534. The Attorney General does not disagree. Instead, she argues the trial court's error was harmless in light of guilt phase evidence about the abortion. RB 371-373. She is wrong. The fact jurors heard about the abortion during the guilt phase does not cure the trial court's error.

The Attorney General ignores the reason why capital trials include a separate penalty phase. In Gregg v. Georgia (1976) 428 U.S. 153, 189-191, the United States Supreme Court explained that part of the solution for eliminating "arbitrary and capricious" sentencing in capital trials "is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence." (Internal quotations omitted.)

Although the jury may consider evidence from the guilt phase when determining the appropriate sentence, the purpose of the sentencing phase is to introduce evidence "as to any matter relevant to aggravation, mitigation, and sentence." Pen. Code § 190.3. This includes, but is not limited to, evidence of "the nature and circumstances of" the offense, and "the defendant's character, background, history, mental condition and physical condition." Id.

The fact the prosecution's guilt phase case-in-chief included evidence about the abortion is completely insufficient. See RB 372. Defendant had a right to present during the penalty phase her version of the

circumstances surrounding the offense regardless of the evidence admitted during the guilt phase. See Gay, 42 Cal.4th at 1217-1224. Under Penal Code § 190.3(a), defendant's right to present evidence "'extends to "[t]hat which surrounds materially, morally, or logically" the crime.'" People v. Blair (2005) 36 Cal.4th 686, 749, quoting People v. Edwards (1991) 54 Cal.3d 787, 833. Under Penal Code § 190.3(k), defendant had a right to present evidence of any "circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." If anything, the fact the prosecution used information about the abortion in its guilt phase case-in-chief accentuated defendant's need to address the issue in her case for mitigation of the penalty.[63]

The fact defendant presented evidence about the abortion during the guilt phase is also irrelevant. See RB 372 (pointing to the testimony of defense witnesses Debbie Wood and Rhonda Hill). The defendant stands in a different position with respect to guilt or innocence in each phase. Because the separate phases have differing purposes, defense counsel's strategy and presentation of the evidence differ in each phase. See Gregg, 428 U.S. at 190 ("Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."). Defendant was not focused during the guilt phase on why a death sentence should not be imposed on her. Therefore, evidence proffered during the guilt phase cannot substitute for the opportunity fully to present her case in mitigation.

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[63] The Attorney General's argument is further undermined by the trial court's rulings during the prosecution case-in-chief to prevent cross-examination of key prosecution witnesses Fernando Nieves and Scott Volk about the defendant's state of mind following the abortion. See AOB Part XVIII, and Part XVIII, supra.

Furthermore, the Attorney General cannot equate the excluded penalty phase testimony to the guilt phase testimony of Wood and Hill because the record shows each witness had a unique relationship with defendant. See 61RT 9473:23-27; 9478:26-9479:4 (Driskell); 61RT 9547:25-9551:25 (Thompson); 63RT 9855:3-18 (North); 63RT 9867:10-14 (Mulder). They each had different reasons to have insight into defendant's state of mind and how the abortion would have affected her. "[I]t is desirable for a jury to have as much information as possible when it makes the sentencing decision." Gregg, 428 U.S. at 156. To the extent that their testimony was consistent, it served to corroborate and bolster the credibility of the others.

The only penalty phase information about the abortion issue came from Bishop Jones who discussed the position of the Mormon church. 61RT 9586:20-9587:19. But without testimony about the affect of the abortion from four of the people who knew Nieves best—Driskell, Thompson, North, and Mulder—the bishop's testimony was abstract and untethered from the reality of her life and the turmoil of her decision. The information from these witnesses was relevant to "humanizing" defendant and allowing the jury to "accurately gauge [her] moral culpability." Porter v. McCollum (2009) __ U.S. __, 130 S.Ct. 447, 454. The testimony was therefore imperative for the jury to "be allowed to consider" before it could "undertake the grave task of imposing a death sentence." Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 263-264.

The trial court's rulings to exclude testimony about defendant's state of mind after the abortion violated her constitutional right to put on a complete defense, to due process and a fair trial, and to a reliable sentencing determination. Crane, 476 U.S. at 690; Chambers, 410 U.S. at 302; Zant,

462 U.S. at 879.

C. The Trial Court Prejudicially Excluded Chaplain Mrotzek's View of the Death Penalty

This Court has held "[t]he witness's personal philosophical opposition to the death penalty is relevant to his credibility." Bennett, 45 Cal.4th at 606. The Attorney General admits Chaplain Mrotzek's views on the death penalty were "relevant to ... her credibility and a proper subject for examination." Id. However, the Attorney General argues the trial court correctly prevented her from answering questions on the subject because her credibility "was never at issue." RB 374.

The Attorney General is mistaken. "Whenever a witness takes the stand, he necessarily puts the genuineness of his demeanor into issue." Stewart v. United States (1961) 366 U.S. 1, 6. See also Coronado Police Officers Ass'n v. Carroll (2003) 106 Cal.App.4th 1001, 1014 (evidence bearing on the credibility of witnesses is always relevant); Susan S. v. Israels (1997) 55 Cal.App.4th 1290, 1297 ("a witness's credibility is always in issue").

A witness's credibility is especially relevant when she is providing critical testimony on behalf of a defendant facing the death penalty. In this case, the trial court specifically informed the jury the credibility of penalty phase witnesses was an important issue for their consideration. 65RT 10193:24-27. The court instructed the jury: "In determining the believability of a witness, you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of a witness, including, but not limited to ... the existence or nonexistence of a bias, interest, or other motive, ..." 65RT 10194:14-10195:6.

Mrotzek's credibility was at issue, and as a result, so were her views

on capital punishment. People v. Mickle (1991) 54 Cal.3d 140, 196 (witnesses's "philosophical views" on capital punishment might disclose bias). The opportunity for defendant to bolster Mrotzek's credibility was critical. See AOB 540. Chaplain Mrotzek provided the only testimony about how Sandi Nieves was functioning in prison, how she was exhibiting remorse, and how she was trying to better her life. 63RT 9888:22-9889:7. Even the trial court pointed out the special significance of the chaplain's testimony: "If an attorney were ever going to get to the penalty phase, I cannot imaging not calling [Chaplain Mrotzek] as a witness." 63RT 9964:6-8. Tellingly, the Attorney General does not dispute the critical nature of the chaplain's testimony.

By excluding credibility evidence pertaining to this valuable mitigation testimony, the trial court denied defendant her constitutional right to put on a complete defense and violated her right to due process and a reliable death penalty verdict. Crane, 476 U.S. at 690; Chambers, 410 U.S. at 302; Zant, 462 U.S. at 879.

D. Prosecutorial Misconduct During Cross-Examination of Penalty Phase Witness Shirley Driskell

In appellant's opening brief, we showed the prosecutor committed misconduct when she stated to the jury—in the form of questions to Shirley Driskell during cross-examination—defendant had "committed perjury." AOB 542-545. As a threshold matter, despite defendant's timely objection (61RT 9499:14-28), the Attorney General argues defendant has forfeited this claim by failing to request the trial court to admonish the jury. RB 375. Her argument fails for several reasons.

First, the prosecutor worded her inflammatory questions to have an argumentative impact on the jury. The questions were pejorative. "[A]n

admonition would not have cured the harm caused by the misconduct." People v. Adanandus (2007) 157 Cal.App.4th 496, 512. Second, the trial court immediately overruled the objection and moved on. Defense counsel had no opportunity to make a request for an admonition. "[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.'" People v. Hill (1998) 17 Cal.4th 800, 820, quoting People v. Green (1980) 27 Cal.3d 1, 35, fn. 19. Third, the record shows the trial court treated Howard Waco and Sandi Nieves with hostility throughout the guilt and penalty phases. See AOB, Part III, and Part III, supra. In fact, the trial court had allowed similar misconduct to occur during the guilt phase over defense objections. See AOB, Part XII, and Part XII, supra. A request for an admonition from defense counsel "would have been futile and counterproductive to his client." Hill, 17 Cal.4th at 821. The claim is not forfeited.

The Attorney General further contends defendant's claim "lacks merit." RB 375. Citing People v. Sandoval (1992) 4 Cal.4th 155, 182-183, she argues the prosecutor did not commit misconduct because she was not "proceeding in bad faith." RB 376. This has not been the law since 1979. Hill, 17 Cal.4th at 822. Before 1979, bad faith was a prerequisite to obtain appellate relief for prosecutorial misconduct. But in People v. Bolton (1979) 23 Cal.3d 208, 213-214, this Court held a showing of bad faith was no longer required. Nothing in Sandoval states otherwise.

In any event, the Attorney General's argument the prosecutor did not commit misconduct because her reference to perjury was "based on the evidence" (RB 376) is plainly wrong. Simply put, defendant was not

convicted of perjury. See AOB 543. The suggestion defendant lied under oath was pure argument by the prosecution. No trier of fact had found her guilty of perjury because she denied that use of "obscenities" was her "normal way of talking." RB 376, 377. Not only was this never adjudicated, but this is a highly implausible basis for a perjury charge. Indeed, the Attorney General points to some cards found with a pager code and testimony from Debbie Wood as contradictory evidence. Id. This hardly proves anything inasmuch as it is unclear what Sandi Nieves meant by normal or that the pager code or Woods' single comment showed "normalcy."

The Attorney General argues any misconduct was harmless because the perjury comment referred to "a tangential issue concerning whether appellant used bad language" in the note to Folden. RB 377. But when the prosecutor called defendant a perjurer to the jury, she did not say she was referring to lies about "a tangential issue." She made the unqualified statements defendant "took the witness stand and committed perjury and lied," and defendant "committed perjury, took the oath, swore to tell the truth and lied." 61RT 9499:5-11. If the prosecutor was, in fact, referring to only a tangential issue, she was misleading the jury by suggesting otherwise. The Attorney General's own argument proves the prosecutor used "deceptive or reprehensible methods to attempt to persuade either the court or the jury." See People v. Wallace (2008) 44 Cal.4th 1032, 1070.

The prosecutor's comment meant the balance between life and death may have been tipped by an uncharged, unproven act of perjury rather than the crimes for which Sandi Nieves was actually convicted. See AOB 544-545; Zant, 462 U.S. at 879, 885 (capital sentence must not be based on considerations that are constitutionally impermissible); People v. Boyd

(1985) 38 Cal.3d 762, 771-779 (capital sentence must be based on listed statutory factors).

Here, the misconduct infected 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. As a result, Sandi Nieves's death sentence is unreliable under the Eighth and Fourteenth Amendments. Caldwell v. Mississippi (1985) 472 U.S. 320, 341; Zant, 462 U.S. at 879.

E. The Errors Require Reversal of the Death Sentence

The Attorney General concedes many of the trial court's errors. In her attempt to isolate each error and argue its harmlessness, she does not address the trial court's systematic approach to thwarting the testimony of the defendant's character witnesses. The trial court allowed the prosecution to attack defendant's character, then it shut down witness after witness, excluding mitigating character, state of mind, and witness credibility evidence. The trial court's errors and the prosecution's misconduct—when considered separately and together—require reversal of the death sentence because the Attorney General did not meet her burden of "prov[ing] beyond a reasonable doubt that the error ... did not contribute to the verdict obtained." Chapman, 386 U.S. at 24; Bennett, 45 Cal.4th at 604.

Similarly, under California law, the prosecution's misconduct and the trial court's systematic exclusion of mitigating evidence, considered separately and in combination, require reversal of the death sentence because there was a "reasonable possibility the error[s] affected the verdict." See Fuiava, 53 Cal.4th at 721 (the state standard for evaluating prejudicial effect of penalty phase error is "'effectively the same' as the federal 'harmless beyond a reasonable doubt' standard") (quoting People v. Wilson (2008) 43 Cal.4th 1, 28). The prosecutor's misconduct is also

reversible error under California law because "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." People v. Wallace (2008) 44 Cal.4th 1032, 1070.

Under federal and California law, defendant's sentence must be reversed.

XXI. THE TREATMENT OF DR. ROBERT SUITER

Throughout the guilt and penalty phases of the trial, the prosecution painted Sandi Nieves as a liar and a manipulator. Dr. Robert Suiter's penalty phase testimony that Sandi Nieves had not malingered during his 1997 evaluation of her, and that she was forthcoming and honest, was critical to her defense. However, as we explained in the opening brief, the trial court curtailed Dr. Suiter's testimony, then delivered a fatal blow by asking Dr. Suiter in the jury's presence an inflammatory, disparaging, and offensive question insinuating the tragic deaths in this case could have been avoided if Suiter had not recommended in 1997 that Sandi Nieves be awarded custody of her children. See AOB 545-569.

The Attorney General argues the trial court correctly limited Dr. Suiter's testimony on grounds of privilege and as an "undue consumption of time." RB 383-386. She also claims Nieves forfeited her challenge to Judge Wiatt's damaging question to Suiter. RB 383. She then asserts "in any event, the trial court's comments were reasonable." Id.

The record does not support the Attorney General's arguments. First, the family court in 1997 appointed Dr. Suiter to perform an evaluation of defendant, her children, and ex-husband David Folden for the purpose of making a custody recommendation. Dr. Suiter could testify to statements made during the evaluation because they served as a basis for his expert conclusion recommending that Sandi Nieves have custody of her children,

instead of David Folden. See AOB 559-60; Evidence Code § 802. Under Evidence Code § 1017(a), no privilege applied here.

Second, Dr. Suiter was the only mental health expert to testify on behalf of Sandi Nieves during the penalty phase. His testimony countering prosecution expert Dr. Alex Caldwell's adverse conclusions about Sandi Nieves during the guilt phase was critical mitigating evidence. The trial court's barring such testimony as an undue consumption of time violated Sandi Nieves's constitutional right to present all relevant mitigating evidence and to put on a meaningful defense.

Finally, Sandi Nieves did not forfeit her claim by failing to object to Judge Wiatt's offensive questioning of Dr. Suiter. Her claim is preserved because Judge Wiatt had already created an environment hostile to defendant and her counsel. Objecting would have been futile. The judge's opprobrious treatment of Dr. Suiter was an outrageous display of bias.

Judge Wiatt's actions during the testimony of Dr. Suiter require reversal of Sandi Nieves's death sentence. He prevented her from presenting mitigating evidence and having it meaningfully considered by the jury. He denied her a fair penalty phase trial and a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Trial Court Prejudicially Limited Dr. Suiter's Testimony

1. Privilege Did Not Apply

The Attorney General does not respond to our argument that the trial court was wrong to exclude testimony from Dr. Suiter on hearsay grounds. AOB 558-564. Instead, she argues the testimony was privileged. RB 383-85. She contends the trial court properly precluded Suiter from relaying statements made by David Folden and Sandi Nieves's children during the child custody evaluation. Id. She acknowledges that Evidence Code

§ 1017(a) states no privilege applies to court-appointed psychologists who perform court-ordered evaluations. RB 384. However, she argues Evidence Code § 1017 is a general statute which must yield to the confidentiality requirements contained in statutes "addressing child custody evaluations." RB 384.

The Attorney General is wrong. Evidence Code § 1017 applies in the family court setting. In re Eduardo A. (1989) 209 Cal.App.3d 1038, 1042. In fact, its application is not uncommon. See, e.g., Simek v. Superior Court (1981) 117 Cal.App.3d 169, 177 (a mental examination ordered by the court related to determining parental visitation rights was not subject to a claim of privilege)(citing Evid. Code § 1017). As In re Eduardo explained: "[A] court-ordered psychiatric examination is aimed at determining for the information of the patient and/or for the court, the patient's mental or emotional condition. It is an information-gathering tool, rather than a treatment tool. The exception to the psychotherapist-patient privilege in Evidence Code section 1017 is directed toward this latter, information-gathering examination." Id.

The rules and statutes the Attorney General cites do not create an exception to Evidence Code § 1017. In fact, under California Rule of Court, Rule 5.220, cited by the Attorney General (RB 384), persons who conduct child custody evaluations are instructed to inform the subjects of the evaluation about the "limitations on the confidentiality of the process." Rule 5.220, subsections (d)(2)(C) & (e)(1)(D). Family Code § 3111, also cited by the Attorney General (RB 384), only addresses the general confidentiality issues related to reports produced by a court-appointed mental examiner.

In support of her argument, the Attorney General also relies on Dr. Suiter's testimony on the witness stand that statements from Folden and the

children would "normally be privileged." RB 384 (citing 62RT 9763-9764). But the witness's opinion about a question of law is irrelevant. The witness was not a judge or even a lawyer. "An expert witness may not properly testify on questions of law or the interpretation of a statute." Communications Satellite Corp. v. Franchise Tax Bd. (1984) 156 Cal.App.3d 726, 747.

As we explained in the opening brief, David Folden had testified as a victim impact witness in the prosecution's penalty phase case that Sandi Nieves was manipulating and controlling. AOB 551 (citing 60RT 9371:20-23). He denied telling Dr. Suiter that he believed Sandi Nieves was a good mother and instilled good values in the children. He also denied he never complained about her relationship with the children. Id. (citing 60RT 9395:6-20). Even if confidentiality provisions were applicable to Dr. Suiter's 1997 custody evaluation, confidentiality must yield to the defendant's right to put on a defense and impeach Folden with Dr. Suiter's testimony. See Rinaker v. Superior Court (1998) 62 Cal.App.4th 155, 165 (upholding juvenile court's ruling that confidentiality provisions pertaining to a mediation session must yield to the minor's due process rights to put on a defense and confront, cross-examine, and impeach the victim witness with his prior inconsistent statements)(citing Pennsylvania v. Ritchie (1987) 480 U.S. 39, 51–52; Davis v. Alaska (1974) 415 U.S. 308, 315-319). See also People v. Reber (1986) 177 Cal.App.3d 523, 531, overruled on other grounds in People v. Hammon (1997) 15 Cal.4th 1117, 1127 (the psychotherapist-patient privilege must give way to a defendant's constitutional right to cross-examine and impeach witnesses).[64]

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[64] Hammon, 15 Cal.4th at 1123-1128, overruled Reber only to the (continued...)

2. The Exclusion of Mitigating Evidence

The Attorney General asserts the trial court did not unconstitutionally limit Dr. Suiter's testimony. She contends defendant was able to impeach Folden. She points to Dr. Suiter's response, when questioned by the trial court, that Folden had no "appreciable complaint" about Sandi Nieves, and that he had made no allegations of abuse against her. RB 385 (citing 62RT 9807). The Attorney General also contends Dr. Suiter was sufficiently able to testify about the abuse Sandi Nieves suffered as a child because he testified she told him her mother was "physically abusive and would scream and yell at her." Id. (citing 62RT 9809).

These snippets of testimony do not make up for the limitation on Dr. Suiter's mitigation testimony. The trial court's rulings operated to prejudicially limit critical areas of Dr. Suiter's testimony. The record shows the trial court sustained relevancy, hearsay, and/or privilege objections to the following questions (among others):

- "With regards to expressing an interest or opinions, did Mr. Folden ever say anything negative about the parenting of Sandi Nieves, as well?" (62RT 9763:20-22);
- "And did Mrs. Nieves tell you about an experience about being sexually molested by one of her former boyfriends, or husbands, of her mother?" (62RT 9765:15-18);
- "Mrs. Nieves, was she forthcoming in telling you about previous sexual experiences where other women would not have told you?" (62RT 9765:23-25);

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[64](...continued)
extent it held the Confrontation Clause requires pretrial discovery of privileged information.

- "You indicated that she told you of her difficulty in growing up. Did that include both physical and mental abuse by her mother?" (62RT 9767:18-23);

  "What about–without going into any details, did Mr. Folden have any significant complaints about Mrs. Folden?" (62RT 9769:6-8);
- "And with regards to the children, did they each indicate that they felt their mother loved them?" (62RT 9771:18-19);
- "And did that [information] include statements by each of the children, as well as Mr. Folden himself?" (62RT 9772:14-15);
- "And would [the basis for your conclusion that the children would be best served by living with their mother] also include not only the statements or letters by other people, the statements by the percipients themselves -- Mrs. Nieves, her children and her husband -- but was that also based on your overall testing of each of them, including Mrs. Nieves?" (62RT 9773:14-19);
- "In your conversations with Sandi Nieves, did she tell you that one of her mother's boyfriends had molested her, and her mother even blamed her for that?" (62RT 9809:22-24); and,
- "In that same conversation that the district attorney was asking about, did Sandi Nieves tell you that her mother's boyfriend had molested her[?]" (62RT 9810:22-24).

In addition, during redirect-examination, the prosecutor objected on relevancy, hearsay, and exceeding the scope grounds to a defense question about Dr. Suiter's conversations with David Nieves. The court sustained the objections without specifying on which grounds. 62RT 9815:14-25.

Defense counsel then asked the court, "Can I ask about conversations with the other children?" The court replied, "No, you may not." 62RT 9816:2-4.

The Attorney General has no response for the prejudice caused by the across-the-board exclusion of out-of-court statements from the children. AOB 558-564. An understanding of what Dr. Suiter learned directly from the children was invaluable to the jury's assessment of the credibility of Dr. Suiter's evaluation and his testimony about the defendant.

The Attorney General argues the trial court "allowed the jury to hear about the abuse that appellant suffered as a child." RB 385. She points to the limited testimony that Sandi Nieves's mother had physically abused her. Id. She does not address the court's exclusion of all questions related to the sexual abuse Nieves suffered as a child. Dr. Suiter testified that in general women are "reluctant to describe experiences of molestation as they were growing up." 62RT 9765:13-14. The court would not allow Dr. Suiter to testify that Nieves had nonetheless disclosed that her mother's boyfriend had sexual molested her. 62RT 9465:15-28.

Disclosing sexual abuse is not the same as discussing one's experience with general physical abuse. See Arata, To Tell or Not to Tell: Current Functioning of Child Sexual Abuse Survivors Who Disclosed Their Victimization in Child Maltreatment (1998) Vol. 3, No. 1, page 63 ("Historically, it has been presumed and empirically demonstrated that some children do not disclose their victimization until adulthood, or possibly, not even then."). The prosecution accused Nieves of "faking good," and manipulating her answers to the MMPI-2 to make herself look better. But there was no self-serving reason for Sandi Nieves to disclose the sexual abuse she had suffered. Dr. Suiter's testimony that she freely shared this difficult information would have shown she was honest and

forthcoming.

The trial court's rulings were in error. The error violated Sandi Nieves's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, the opportunity to put on a meaningful defense, and a reliable sentence of death. Gardner v. Florida (1977) 430 U.S. 349, 362; Crane v. Kentucky (1986) 476 U.S. 683, 690; Zant v. Stephens (1983) 462 U.S. 862, 879.

3. Sandi Nieves Had a Right to Rebut the Prosecution's Accusations She Was a Manipulator and a Liar

In the opening brief, we explained that defendant had sought testimony from Dr. Suiter explaining why he disagreed with Dr. Caldwell, one of the prosecution's star mental health experts. AOB 563. Caldwell had already testified to his conclusions—based on the MMPI-2 administered by Dr. Suiter—that Sandi Nieves was engaging in "conscious distortion" and "impression management." 44RT 6609:13-24. But the trial court would not allow Suiter to answer questions to rebut Caldwell's findings. 62RT 9816:17- 9819:26; 9822:7-22-9817:24.

The Attorney General argues the trial court properly ruled Suiter's testimony about Caldwell's report was an "undue consumption of time." RB 386. In support, the Attorney General cites People v. Rodrigues (1994) 8 Cal.4th 1060 and People v. Thornton (2007) 41 Cal.4th 391. The Attorney General's reliance on these cases is misplaced. First, the Attorney General cites to a discussion in Rodrigues of the trial court's discretion to exclude guilt phase testimony in that case which was time consuming and confusing. 8 Cal.4th at 1124. The holding in Rodrigues does not address the admissibility of mitigating evidence during the penalty phase of a death penalty trial. This Court has recognized death "'in its finality'" is different.

People v. Mickey (1991) 54 Cal.3d 612, 693 (quoting Woodson v. North Carolina (1976) 428 U.S. 280, 304-305).

When a death sentence is at stake, no barrier "whether statutory, instructional, evidentiary, or otherwise" may preclude a jury from considering relevant mitigating evidence. Mickey 54 Cal.3d at 693. Even if a trial court considers certain evidence "legally irrelevant," it "cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." McKoy v. North Carolina (1990) 494 U.S. 433, 441.

Second, the Attorney General relies on Thornton, 41 Cal.4th at 443, to argue for deference to the trial court's "application of the ordinary rules of evidence." RB 386. But Thornton held deference is appropriate only when a trial court's ruling operates to exclude relevant mitigating evidence during the penalty phase "on a minor or subsidiary point." Id. The excluded testimony here was not on a minor point. Depicting Sandi Nieves as a liar and a manipulator was a major theme of the prosecution's case in both the guilt and penalty phases of the trial. During the cross-examination of defense expert Dr. Gordon Plotkin and again during the guilt phase closing argument, the prosecutor accused Sandi Nieves of committing the crimes of perjury and fraud. See AOB, Part XII, and Part XII, supra. The prosecutor called Sandi Nieves "a manipulator," "a faker," and "a liar" during the guilt phase closing. 57RT 8845:14-8846:4. Then, throughout the penalty phase closing, the prosecutor continued to characterize Sandi Nieves as manipulative and calculating. 64RT 10107:10-11; 10110:4-8; 10116:10-14. The prosecutor emphasized the theme to the jury as follows:

> And we heard that the defendant has a history of manipulating people. Don't let her manipulate you now through tears into

> sympathy which is not warranted by the facts of this case. Show her the same mercy she showed to her children; no more and no less.

64RT 10115:9-13. During cross-examination of Shirley Driskell and during closing argument, the prosecutors again accused Sandi Nieves of lying and committing the crime of perjury. 61RT 9499:5-11; 10119:14-17; see also AOB, Part XX, and Part XX, supra (arguing the prosecution's accusation that defendant committed perjury constitutes misconduct).

Challenging Dr. Caldwell was also of major significance to Sandi Nieves's penalty phase defense. He was a star expert for the prosecution. See, e.g., 56RT 8728:5-7 (prosecutor referring to Caldwell as "one of the top three people probably in the world in interpreting the MMPI"). In fact, during its penalty phase closing argument, the prosecution used Caldwell to discredit Dr. Suiter's qualifications: "Of course he's not in the same position as Dr. Caldwell in terms of his experience or expertise, nor did he compare the two different MMPI's from 1997 and 1999, as Alex Caldwell did, in order to get a true picture of the defendant." 64RT 10117:5-9.

The Attorney General also argues the trial court did not improperly curtail Dr. Suiter's responses to questions about Dr. Caldwell's report because Suiter was able to state Caldwell's "scoring was 'inconsistent' with Dr. Suiter's findings." RB 386 (quoting 62RT 9782). The Attorney General ignores the fact this fleeting comment was made in response to cross-examination questions in which the prosecution sought to impeach Suiter.

Sandi Nieves had a right on redirect to give Suiter an opportunity to explain why he disagreed with Caldwell. Instead, Judge Wiatt interrupted this line of questioning to ask his own questions (62RT 9816:17-9817:24), then sustained objection after objection to defense counsel's attempts to

elicit the information (62RT 9818:3-9819:24), and ultimately cut off questioning entirely: "I will not permit you to question any further on the Caldwell report, period" (62RT 9819:25-26).

Sandi Nieves sought to rebut Caldwell's damaging testimony. But the trial court did not let her."When a defendant is precluded from introducing evidence rebutting the prosecution's argument in support of the death penalty, fundamental notions of due process are implicated." People v. Frye (1998) 18 Cal.4th 894, 1017, disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390. This error violated Sandi Nieves's constitutional right to present this relevant mitigating testimony and put on her penalty phase defense. Crane, 476 U.S. at 690; Gardner, 430 U.S. at 362.

B. The Inflammatory Questions

1. The Misconduct Claim Was Not Forfeited

The Attorney General argues Sandi Nieves forfeited her claim that Judge Wiatt's offensive questioning of Dr. Suiter was prejudicially detrimental to her penalty phase defense. RB 383. However, as we explained in the opening brief (AOB 567-568), in the case of judicial misconduct "a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile." People v. Sturm (2006) 37 Cal.4th 1218, 1237 (quoting People v. Terry (1970) 2 Cal.3d 362, 398).

In this instance, defense counsel would have had to object and essentially rebuke the trial judge in front of the jury. Given the history of previous interactions between Judge Wiatt and defense counsel Howard Waco, it is more likely that Judge Wiatt would have held Waco in contempt

than told the jury to ignore the judge's own improper comment. Judge Wiatt exhibited extraordinary hostility toward defendant and her counsel throughout the guilt and penalty phases of the trial. Requiring defense counsel to object on the record to Judge Wiatt's actions would have put him in the untenable position of choosing between "repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal." Sturm, 37 Cal.4th at 1237. Under these conditions, this Court does not require defendant to object to preserve the issue for appeal. It "would have been futile and counterproductive." People v. Hill (1998) 17 Cal.4th 800, 821.

Defendant's claim is not forfeited.

2. The Questions Were Prejudicial

Judge Wiatt interrupted cross-examination of Dr. Suiter to ask him whether knowing what he knew now—that defendant had been convicted of murdering her children—he would want to change his original recommendation that Sandi Nieves get custody of the children. 62RT 9787:4-6. The judge's questions insinuated that Dr. Suiter should feel some guilt or responsibility connected to the tragedy in this case. They also insinuated that Dr. Suiter's opinion was worthless. As we explained in the opening brief, the judge's intervention undermined Dr. Suiter in front of the jury. It sent a strong message about the judge's own view of Sandi Nieves and Dr. Suiter. AOB 564-69.

The Attorney General dismisses Judge Wiatt's questions as "brief, neutral, non-inflammatory" and simply clarifying Dr. Suiter's testimony. RB 383. This is a facile argument. Judge Wiatt's questions were neither brief, nor neutral. The judge asked several questions, setting Dr. Suiter up:

"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?" 62RT 9786:27-9787:2. Then the judge asked: "Knowing that now, you would probably want to change your opinion made back in 1997, wouldn't you, if you could do it?" 62RT 9787:4-6. When Dr. Suiter replied he would not, Judge Wiatt emphasized his point: "You wouldn't?" 62RT 9787:8. Here, the judge was not asking for clarification of confusing testimony; he was making an argument on behalf of the prosecution.

Prior to the judge's interjection, the prosecutor had been asking Suiter about Sandi Nieves's grades in school. See 62RT 9785:6-9786:8. By intervening, Judge Wiatt made himself an advocate, turning the course of the testimony in a wholly different direction. The judge sounded like one of the lawyers making argumentative points, not a neutral judge.

In support of the trial judge's questions, the Attorney General cites People v. Sanders (1995) 11 Cal.4th 475. In Sanders, this Court clarified that a judge may question a witness in order to "elicit additional information or clarify confusing testimony." Id. at 531. But the judge's remarks must be "'accurate, temperate, and scrupulously fair.'" Id. (quoting People v. Melton (1988) 44 Cal.3d 713, 735). The trial judge in Sanders asked only innocuous questions to clarify testimony that needed clarification. See, e.g., 11 Cal.4th at 530 (the judge clarified what a witness meant by a term he had used).

Here, Judge Wiatt took on the role of prosecutor and inflamed the jury against defendant's only penalty phase mental health expert.

C. The Treatment of Dr. Suiter Requires Reversal of the Death Sentence

Notably, the Attorney General does not dispute the significance of Dr. Suiter's testimony. Dr. Suiter was the only mental health expert to testify on Sandi Nieves's behalf during the penalty phase. The judge altogether excluded defendant's other mental health expert, Dr. Kyle Boone. See AOB Part XIX and Part XIX, supra.

Separately and cumulatively with other errors and misconduct by the judge, the improper questions to Dr. Suiter were not harmless. The result was structural error in violation of due process and the Eighth Amendment. Caperton v. A.T. Massey Coal Co., Inc. (2009) 556 U.S. 868, 876 ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"); In re Murchison (1955) 349 U.S. 133, 136 ("Fairness of course requires an absence of actual bias in the trial of cases."); Zant v. Stephens (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require a reliable penalty determination).

Sandi Nieves did not receive a fair trial on the issue of penalty. Dr. Suiter's testimony was critical to rebutting the prosecution's theme she was a liar, a faker, and a manipulator, and helped confirm that childhood abuse, depression, and use of psychotropic medication were not mitigating themes invented for trial. Dr. Suiter's testimony also provided affirmative and objective mitigating evidence Sandi Nieves had been a good and loving mother, and hence that the lethal fire, if intentionally set, was completely out of character. After arbitrarily excluding significant areas of Suiter's testimony pertaining to the credibility of his conclusions, Judge Wiatt's interjections turned the jury against him. Judge Wiatt's questions "impress[ed] on the jury a judicial imprimatur of the People's position."

People v. Perkins (2003) 109 Cal.App.4th 1562, 1571-72.

Under Chapman, 386 U.S. at 24, the Attorney General has not met her burden to show the trial court's errors were harmless beyond a reasonable doubt. Under California law, the trial court's treatment of Dr. Suiter requires reversal of Sandi Nieves's death sentence because "there is a reasonable possibility it affected the verdict." People v. Gay (2008) 42 Cal.4th 1195, 1223; People v. Brown (1988) 46 Cal.3d 432, 448.

XXII. PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE CLOSING

During the penalty phase closing argument, prosecutor Beth Silverman, stated to the jury:

> And doesn't the horror of those crimes deserve the ultimate punishment?
>
> I will be satisfied and justice will be done if you show her again the same mercy that she showed to her own children.

64RT 10122:18-22 (emphasis added). The prosecutor improperly injected into the closing argument her personal belief Sandi Nieves should be sentenced to death. Her statement constituted an egregious form of misconduct. See AOB 573-574.

In response to our showing that the prosecutor committed misconduct, the Attorney General argues the prosecutor's statement was proper because it "did not imply she based her feelings on facts not in evidence." RB 389. The Attorney General misses the point. The prosecutor's feelings have no place in a capital trial penalty phase closing argument. By sharing her personal views and feelings, she invoked the prestige of her office, as well as possible juror concern for her personally, to improperly influence the jury's sentencing deliberations. AOB 573-574.

The record shows the misconduct in this case meant the jury could

have condemned defendant to death not based on the evidence but rather to appease the prosecutor – a factor "constitutionally impermissible" and "totally irrelevant to the sentencing process." Johnson v. Mississippi (1988) 486 U.S. 578, 585; Zant v. Stephens (1983)462 U.S. 862, 884-885.

Because the misconduct here infected the trial with such "unfairness as to make the resulting conviction a denial of due process," Sandi Nieves's death sentence must be reversed. See Darden v. Wainwright (1986) 477 U.S. 168, 181.

A. The Prosecutor Invoked the Prestige of Her Office and Her Own Personal Feelings To Improperly Influence the Jury

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." People v. Hill (1998) 17 Cal.4th 800, 820. See also United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142, 1148 ("the ethical bar is set higher for the prosecutor than for the criminal defense lawyer-a proposition that has been clear for at least seven decades"). Prosecutors must refrain from expressing personal views which risk inflaming the jury against the defendant. People v. Rowland (1992) 4 Cal.4th 238, 281.

In United States v. Young (1985) 470 U.S. 1, 18-19, the United States Supreme Court identified not one, but two reasons why a prosecutor must not place his or her personal opinions before the jury: 1) "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury" and 2) "the prosecutor's opinion carries with it the imprimatur of the Government and may induce

the jury to trust the Government's judgment rather than its own view of the evidence." See also Berger v. United States (1935) 295 U.S. 78, 88-89. The second of those dangers applies here. Because the prosecutor made a "flat-out statement" of her personal opinion in this case, she invoked the prestige of her office improperly to influence the jury. See Weatherspoon, 410 F.3d at 1147-49.

The Attorney General devotes pages to the first form of vouching identified in Young, which we do not argue occurred here. She argues the prosecutor did not commit misconduct because her "arguments were based solely on facts in the record." RB 389. She relies on People v. Ghent (1987) 43 Cal.3d 739, which in turn relies on People v. Bandhauer (1976) 66 Cal.2d 524. In Bandhauer, the prosecutor stated the defendant deserved the death penalty because he was one of the most "depraved" characters the prosecutor had ever seen. 66 Cal.2d at 529-530. The prosecutor's statement was improper vouching because it was "not related to the evidence in the case and was not subject to cross-examination." Id. In contrast, the prosecutor's argument in Ghent that he knew "what the appropriate penalty is for what [the defendant] did" was not vouching because it "was based solely on the facts of record." 43 Cal.3d at 772.

These cases simply do not address the form of vouching at issue here—when the prosecutor uses the prestige of her office to improperly sway the jury. See, e.g., People v. Fuiava (2012) 53 Cal.4th 622, 694 (by placing "his own prestige and the prestige of his office" before the jury, the prosecutor "improperly interjected into the trial his personal view of the credibility of the heart of the defense case").

Also, the Attorney General is wrong to the extent she contends the prosecutor's announcement that she "will be satisfied" was proper argument

about the evidence. See RB 389. The prosecutor was not addressing the evidence. Rather, she was discussing "retribution," the death penalty as the "best punishment for the worst crimes," and the "horror of those crimes." 64RT 10122:15-22. She was not asking the jury to sentence Sandi Nieves "based solely" on the evidence. Compare People v. Rundle (2008) 43 Cal.4th 76, 191, disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390. In Rundle, cited by the Attorney General (RB 389), the prosecutor stated he "believe[d]" the evidence required "the maximum punishment allowed by California law." Id. This statement did not amount to misconduct because in the same breath he was clear he was asking the jury to decide "based solely on this evidence and the law in this case and everything you have heard concerning this case over the last, oh, approximately two to three months since the first witness was called." Id.

In this case, on the other hand, the prosecutor was not asking the jury to sentence Sandi Nieves based on the evidence, but rather to "satisfy" her, or in other words, appease the government. The prosecutor's statement implied the jurors had a civic duty to satisfy the government.

Further, to the extent one or more jurors may have construed the improper remark more personally, i.e., as a statement of what. Ms. Silverman herself, as opposed to the government, needed to feel satisfied, the result is equally improper. It is reasonably possible, over the course of this long trial, that some juror may have been impressed by Silverman's zeal and dedication to the case, and, after hearing her improper remark, had become concerned about leaving Silverman frustrated and unrewarded for all her hard work. Silverman's remark invited this improper consideration. The potential impact of the verdict on Ms. Silverman's feelings, or as a measure of her hard work, was not a permissible factor to weigh in

determining whether death was the appropriate sentence.

B. The Prosecutor's Misconduct Requires Reversal of the Death Sentence

The trial court should have sustained defendant's objection to the prosecutor's statement and immediately admonished the jury. However, it did not. Contrary to the Attorney General's argument, no amount of general instructions from the judge (i.e. "that [the jurors] were not to be influenced by bias or prejudice" or "that statements from the attorneys are not evidence" (RB 389)) could cure the harm the misconduct caused here. This Court only presumes a court's instructions cure the prejudice from a prosecutor's misconduct if the trial court immediately admonishes the jury to disregard the prosecutor's improper statement. See People v. Hinton (2006) 37 Cal.4th 839, 865.

In fact, when the prosecutor in People v. Mendoza (2007) 42 Cal.4th 686, a case cited repeatedly by the Attorney General (RB 388, 389), committed misconduct during the penalty phase closing argument, this Court found no prejudice only because "[t]he trial court immediately admonished the jury to disregard the statements, specifically chastising the prosecutor." Id. at 706. The trial court in this case gave no such admonition, despite the defendant's objection. Here, the "prejudicial effect of the improper comments by the prosecutor was exacerbated by the trial court's passive reaction to them." People v. Vance (2010) 188 Cal.App.4th 1182, 1201.

The Attorney General tries to overcome the trial court's failure to admonish the jury by arguing the prosecution's statements during closing argument likely did not carry significant weight with the jurors. RB 389-390. She is mistaken. First, unlike Boyde v. California (1990) 494 U.S. 370,

on which the Attorney General relies, we do not argue the prosecutor misconstrued the law for the jury. See id. at 384-385 (the prosecutor's argument on how to interpret factor (k) of Penal Code § 190.3 would not have "the same force as an instruction from the court"). Instead, we take issue with the implication to the jury that, by voting for death over a sentence of life without parole, the jury would "satisfy" the government and the prosecutor.

Second, as we explained in the opening brief (AOB 571-572), the district attorney's argument carried great weight with the jury because "prosecuting attorneys are government officials and clothed with the dignity and prestige of their office." People v. Taylor (1961) 197 Cal.App.2d 372, 382-383. See also United States v. Modica (2nd Cir.) 663 F.2d 1173, 1178–79, cert. denied, (1982) 456 U.S. 989 ("The prosecutor is cloaked with the authority of the [government]; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a [government] official duty-bound to see that justice is done.").

The egregiousness of this particular form of vouching and the failure to admonish the jury meant the misconduct infected the trial with such "unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181. Because the prosecutor's misconduct violated Sandi Nieves's Fifth, Sixth, Eighth and Fourteenth Amendment rights and denied her a fair penalty phase trial and reliable death verdict, her death sentence must be reversed.

Under California law, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, "even when those actions do not result in a fundamentally unfair trial." People v.

Friend (2009) 47 Cal.4th 1, 29. Reversal is required here because "there is a reasonable likelihood that the jury construed or applied ... the complained-of remarks in an objectionable fashion." People v. Thomas (2012) 53 Cal.4th 771, 822; Friend, 47 Cal.4th at 29.

XXIV. TELLING THE JURY A FOURTH TIME THAT SANDI NIEVES CONCEALED EVIDENCE REQUIRES REVERSAL OF THE DEATH SENTENCE

The Attorney General refuses to concede any error in giving the discovery violation instruction based on CALJIC 2.28 at the penalty phase. 63RT 9960:23-9965:13. She once more avoids a substantive legal defense of the instruction, relying instead on the facts surrounding Nieves's counsel's failure to timely disclose some witness names and statements, and resting her legal position on People v. Riggs (2008) 44 Cal.4th 248, 306. RB 409-410.

In Part XIII of the opening brief and Part XIII of this brief we addressed the legal defects in the instruction. We incorporate the entire argument here, including the argument regarding structural error. However, by failing to rebrief the substantive issues, we do not mean to diminish the importance of the issue to the penalty phase. In many ways, the discovery violation instruction given in the penalty phase was even more prejudicial than in the guilt phase because the instruction went beyond the statutory sentencing scheme in Penal Code § 190.3 and introduced this wildcard into the jury's consideration of life or death.

The instruction in substantially the form given at the conclusion of the penalty phase was held to be erroneous in People v. Thomas (2011) 51 Cal.4th 449, 478-484.

The Attorney General contends the trial court was within its

discretion to give the instruction to the jury.[65] It is not surprising that she fails to cite a single case where this Court upheld a death sentence after the trial court gave the penalty phase jury an instruction based on the former version of CALJIC 2.28.

Discovery violations by counsel do not fit the statutory calculus governing a jury's decision whether a defendant should be put to death. A court does not have any discretion in the penalty phase of a trial to charge a jury that "the weight and significance of any delayed disclosure are matters for your consideration." 64RT 10079:13-15. There is no discretion to allow a jury to weigh discovery violations when it considers a defendant's moral

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[65] The Attorney General contends that defense counsel's representation that he did not disclose the names of defense penalty phase witnesses because he believed the PET scan would be admissible for penalty purposes was not credible. She says that "at no point had the trial court ever indicated a willingness to reconsider its [guilt phase] ruling [that the PET scan was inadmissible]." RB 411. She is wrong.

When the court excluded the PET scan from the guilt phase, the court told defense counsel it would defer ruling on admissibility at the penalty phase until "later." 44RT 6443:24-27 ("The motion to reconsider is denied as far as the guilt phase. ¶And as far as penalty phase, we can discuss that at a later time."). In fact, it was considered "later." The court held a reconsideration hearing for the penalty phase. 57RT 8978-9002.

The Attorney General does not dispute that if, as counsel stated, he had not decided who he would be calling at the penalty phase until shortly before it was scheduled to begin, there was no discovery violation. People v. Superior Court (Sturm) (1992) 9 Cal.App.4th 172, 181. Further, the Attorney General completely ignores that the prosecution also disclosed new witnesses shortly before the penalty phase was about to begin, and that when defense counsel sought comparable sanctions against the prosecution, the trial court, consistent with its ongoing bias against the defense, simply ignored the request. AOB 594-595.

culpability and decides "whether death is an appropriate punishment for the individual in light of his personal history and characteristics and the circumstances of the offense." Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 263.

The Attorney General cites People v. Ayala (2000) 23 Cal.4th 225, 299 (RB 410, 411) for the proposition that the trial court has discretion "to give a sanction instruction." However, she reads too much into the opinion. It is not remarkable that a court has discretion to order a sanction for a discovery violation in an appropriate case. But Ayala does not discuss CALJIC 2.28 or any other instruction as a potential remedy. The case simply holds that a sanction (whatever it might be) was not warranted by the prosecution's late disclosures prior to the penalty phase in that case. It further holds that the defendant had sufficient time to prepare his defense and therefore the late disclosure was not prejudicial.

People v. Lamb (2006) 136 Cal.App.4th 575, 581, which is also cited by the Attorney General (RB 410, 411) is no more helpful. Lamb is not a capital case. Further, Lamb held that preclusion of surrebuttal testimony was not an abuse of discretion as a sanction for a discovery violation. It further held that the trial court properly exercised its authority to preclude an expert's surrebuttal testimony under Evidence Code § 352 because it would be repetitious and unduly time consuming. Neither Ayala nor Lamb validates the instruction given in this case.

After contending that the trial court had discretion to give the CALJIC 2.28 instruction, the Attorney General immediately claims the instruction was not prejudicial and thus that there is no need for the Court to address its defects. RB 411.

First, it is important to note that the discovery violation instruction

given at the penalty phase amounted to the fourth time the jury heard that the defendant personally and conclusively had violated the law by failing to abide by discovery rules. At this point the jury could not miss the point: Nieves was a manipulator, a cheat, and dishonest in the eyes of the judge and the law.

Given the fact that the prosecution thoroughly cross-examined each of the defense witnesses who testified at the penalty phase, the instruction was gratuitous, vindictive and punitive. It did not serve any purpose at this point, except to tip the balance towards death. It gave the jurors another reason to turn against the defendant and condemn her. The repeated instruction encouraged the jury to take the discovery violations into account in deciding whether Nieves should live the rest of her life in prison or die.

Second, the Attorney General misses the point and does not address the arguments we made at pp. 600-604 of the opening brief: the wildcard instruction altered the statutory scheme for determining whether defendant should live or die. It allowed the jury to use the discovery violations, which were presented conclusively by the trial court, as a non-statutory factor in aggravation, with the "weight and significance" to be decided without further guidance.

A discovery violation by defendant's counsel does not address a defendant's moral culpability and is not a statutory aggravating factor that can be weighed in favor of death. People v. Boyd (1985) 38 Cal.3d 762, 772-775 ("By thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the initiative [statute] necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination.")(emphasis added). The discovery violation, if any, was a

constitutionally irrelevant matter. The instruction violated Nieves's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. See Dawson v. Delaware (1992) 503 U.S. 159 and cases cited on pages 602-603 of the opening brief.

The Attorney General's only response is to rely on Riggs, 44 Cal.4th at 308 (RB 411), a case we have already shown is different, and to say the discovery violation instruction was not argued to the jury by the prosecution. RB 411-412. Further, she says the facts of appellant's crimes against her own children make the instruction immaterial to the outcome. RB 412.

First, the prosecution did not need to argue the instruction to the jury. The trial court read it to them and they were expected to follow it, not ignore it. The instruction told the jury for the fourth time Nieves had concealed and delayed producing names or statements of over half her penalty phase witnesses. Hearing that Nieves herself had violated the discovery rules and concealed information for the fourth time undoubtedly had a cumulative effect.

Second, although the crimes were serious, Nieves did have mitigating factors to balance against aggravation: she had no prior criminal record, she presented evidence of a dysfunctional family history, mental impairments, and extreme stress and a physiological inability to cope with it. It is easy for the Attorney General to say the crimes made any mitigation irrelevant, but this case is in fact different. There is reasonable possibility that but for the trial court's improper CALJIC 2.28 instructions, the jury would have rendered a verdict of life without parole. People v. Brown (1988) 46 Cal.3d 432; People v. Ashmus (1991) 54 Cal.3d 932, 983-84.

XXIII. MULTIPLE FACTOR (K) FACTORS

As shown in the opening brief at 575-592, the prosecution and the judge interrupted defendant's closing penalty phase argument, the judge told the jurors defense counsel misstated the law, the judge gave the jury a special instruction telling the jurors defense counsel had tried to mislead them, and the judge instructed the jurors to disregard defense counsel's argument about multiple factor (k) mitigation factors.

The court's order to disregard multiple defense mitigation factors, and its special instruction restricting factor (k) factors, were clearly meant to diminish the jury's identification of circumstances to be weighed on the side of life and impermissibly precluded the jury from giving independent weight to entirely legitimate and crucially important mitigating factors. It is very likely the jury paid particularly close attention to the supplemental instruction, expressly directed to correct a purported legal error by defense counsel, because the court made this one of the first matters it addressed when court reconvened the morning after the objection was sustained. 65RT 10178:23-10195:22. Moreover, the judge had denigrated defense counsel throughout the trial and had accused him before the jury of acting improperly. Under these circumstances the jury must have given great weight to the court's final admonition concerning an alleged misstatement of law by defense counsel. Further, since the supplemental instruction was presented as an explanation of how properly to read CALJIC 8.85 and its listing of factors, the special instruction would have controlled the jury's understanding of CALJIC 8.85 and the factors that were to be weighed in determining the appropriate sentence.

Sandi Nieves had the federal constitutional right to "full consideration" of her mitigating evidence, not truncated and condensed

consideration that would fit inside an artificial box labeled as a single factor (k). See Abdul-Kabir v. Quarterman (2007) 550 U.S. 233, 250. "[T]he Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to consideration of that evidence by the sentencing authority." Id. at 251, n. 13 (emphasis in original). "[A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances. " Smith v. Texas (2004) 543 U.S. 37, 46 (internal quotation marks and citations omitted; emphasis in original). See also Lockett v. Ohio (1978) 438 U.S. 586, 605 (condemning as incompatible with the commands of the Eighth and Fourteenth Amendments a statute that prevented the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation")(emphasis supplied).[66]

First, the Attorney General fails to respond or give a reason why it was necessary for the trial court to give the supplemental instruction at all. She offers no explanation of why the difference between "factors" and "circumstances" in a closing argument mattered, so long as the jury was properly instructed to consider the relative persuasive weight of these factors (or circumstances). People v. Brown (1985) 40 Cal.3d 512, 541.

Instead the Attorney General rests on a case in which this Court has

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[66] Citing Boyde v. California (1990) 494 U.S. 370, 380 (RB 402), the Attorney General claims the constitutional 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." But that is only part of the test. It is whether there is a likelihood the jury gave full meaning and full consideration to mitigating evidence. Even giving the evidence "sufficient mitigating effect" is insufficient. "Full effect" is essential. Brewer v. Quarterman (2007) 550 U.S. 286, 295-296.

said "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." People v. Vieira (2005) 35 Cal.4th 264, 299. RB 402. This contention and the citation to Vieira miss the point. Defendant is not complaining that Penal Code § 190.3(k) or the CALJIC instructions given in this case are insufficient to take account of mitigating factors or circumstances in the abstract. Instead, we submit the trial court, under the circumstances of this case, gave factor (k) a misleading gloss that prevented the jury from giving full consideration and full and independent weight to the mitigating circumstances proffered by the defense.

Second, the Attorney General completely ignores and fails to respond to our submission that the statute, opinions of this Court, the jury questionnaire in this case, the trial court's statements, and its post-trial Penal Code §190.4 order, all use "factors" and "circumstances" interchangeably. See AOB 583-586.

The Attorney General argues defense counsel was inviting the jury to double or triple count factor (k). RB 403. In context, this is not what defense counsel was doing. He, like many others, including the trial judge in this case, was using "factors" and "circumstances" as if they meant the same thing. He was properly identifying mitigating factors to be weighed on life's side of the scale: appellant's very difficult and abusive upbringing, the terrible stress she was under and depression from which she was suffering in the days before the fire, the otherwise productive and caring life she had led, and lingering doubt as to whether she acted with a deliberate, premeditated intent to kill.

In closing argument, defense counsel expressly said one mitigating

factor alone could outweigh all the aggravation in the case. He was not asking for a duplicative calculation or counting. He was expressing the argument that even one factor in mitigation would be enough for the jury to decide death was not the appropriate punishment. Defense counsel argued: "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." 64RT 10160:11-16. He further argued:

> 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.

64RT 10164:21-26.

Counsel's argument is the law in California. What matters is the relative persuasive weight of the factors (or circumstances). Brown, 40 Cal.3d at 541. See People v. Brasure (2008) 42 Cal.4th 1037, 1066 ("The trial court should have followed our Brown decision, which had not then, and still has not, been overruled."). Defense counsel never suggested any kind of counting of factors. There was no misstatement of law for the trial court to bring to the jury's attention and cure.

Third, the Attorney General cites boilerplate law regarding double counting. But the cases cited all involve this Court's rejecting claims concerning the alleged danger of double counting in connection with aggravating factors that are subsumed within Penal Code § 190.3(a) and/or § 190.3(c). RB 403. See, e.g., People v. Ramos (2004) 34 Cal.4th 494, 531; People v. Ayala (2000) 24 Cal.4th 243, 289. There is nothing in these cases to suggest that identifying multiple mitigating factors under factor (k) is a

form of "double counting."

Here, however, after hearing that defense counsel misstated the law and that there is only one factor (k), the jury would have been led to believe that counsel's identifying multiple mitigators under factor (k) was improper and that this actually mattered to the outcome of this case. The jury further would have erroneously believed that the multiple mitigating circumstances were not entitled to as much weight as they might have been if they had been separate statutory factors expressly identified in the court's instruction.[67] The trial court had told the jury that defense counsel erred in suggesting that the mitigating circumstances he identified could be weighed as independent mitigating factors.

Factor (k) and the other "factors" listed in Penal Code § 190.3 are categories of evidence. Defense counsel correctly stated the principle in closing argument when he referred to the "k category of other factors." 64RT 10163:25. The statutory list permits categorization of evidence and simplifies analysis. But the list does not in itself act as a straightjacket. The various factors, or categories, have different meanings and encompass different types of evidence. With respect to factor (k), unlike the other factors or categories, the scope of potential mitigation is generally unlimited. But the trial court in this case limited the impact of such mitigation by precluding giving independent mitigating weight to a variety

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[67] Unlike most of a the other factors listed in Penal Code § 190.3, factor (k) is expansive, open ended, and contemplates multiple circumstances or factors in mitigation. Consistent with federal constitutional principles, it does not place restrictions on what can be considered in mitigation. People v. Easley (1983) 34 Cal.3d 858. See, e.g., Brewer v. Quarterman, 550 U.S. at 289; Eddings v. Oklahoma (1982) 455 U.S. 104.

of distinct mitigating circumstances falling under factor (k).

The Attorney General contends it is not reasonably probable the jury was misled. RB 403-404. She makes this argument, however, without addressing what the jury would have thought when the judge corrected defense counsel and specially instructed the jury that any suggestion that there "are more than one factor k factors is wrong." 64RT 10196:14-28. Surely the judge would not have done this unless it mattered for purposes of the sentencing deliberations the jury was about to commence.[68]

The Attorney General cites Brasure, 42 Cal.4th at 1062. In Brasure, the trial court erroneously instructed that the jury "shall" impose death if the aggravating circumstances outweigh the mitigating circumstances. This Court looked to the totality of the instructions and found there was no reasonable probability the jury had been misled as to the scope of its sentencing discretion. The Brasure holding was, of course, case specific and has little bearing here.[69] In this case the prosecution seized on semantics

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[68] The court instructed that:

> 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.

65RT 10196:17-28.

[69] The Attorney General also cites People v. Champion (1995) 9 Cal.4th 879, 946. RB 404. But Champion simply holds that on the record in (continued...)

that made no practical difference. The trial court gave the supplemental instruction, which brought the purported misrepresentation to the jury's attention under circumstances where the distinction between "factors" and "circumstances' would otherwise have gone unnoticed or have been ignored.

In this case, the prosecutor artfully used the words "factors" and weighing of factors throughout her closing argument in favor of death. 64RT 10095-10129. The prosecutor did say that the jury should not count factors. But she said this for a specific purpose, not to explain the law to the jury. She made the point that if factors were counted "no one would ever be able to impose the death penalty, because there's only three factors in aggravation. The rest really are factors in mitigation." 64RT 10098:1-4. In other words, she only had three factors to work with and factor (a) was the only one relevant to this case. Accordingly, when the prosecution objected to defense counsel's repeated use of the term "factors" to describe mitigating circumstances, the prosecution was not very subtly trying to limit the effect of the mitigators by packaging them as only one factor, weighing against her single aggravator.

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[69](...continued)
that case a concluding penalty phase instruction was consistent with the Supreme Court's opinion in Boyde v. California (1990) 494 U.S. 370, despite the fact it did not meet this Court's direction in Easley, 34 Cal.3d 858, a case that was decided after Champion's trial.

People v. Mickey (1991) 54 Cal.3d 612, 693-695, also cited by the Attorney General is not on point. RB 404. The opinion again is case specific. Defendant asserted the instructions did not permit consideration of mitigating "factors." Although the opinion intermixed the terms "evidence," "factors," and "circumstances," the Court held that the terms of the penalty phase instructions given in that case "refute the assertion." Mickey did not address the type of error that occurred in this case.

By objecting and calling attention to defense counsel's terminology, the prosecution could and did make its point that there is only one factor (k). It thereby invited the jury to discount the cumulation of defendant's mitigating evidence. The court followed up by telling the jurors that defense counsel was wrong, implying, once again, that the defendant and her counsel were trying to trick them. Impliedly this was similar to defense counsel's purported efforts to conceal and delay discovery, the defendant's refusal to submit to a mental evaluation, and the prosecution's general theme that defendant was a manipulator, a cheat, and liar.

Putting the trial court's emphatic imprimatur on the prosecution's assertion of a semantic distinction that had no legitimate bearing on sentencing deliberations distorted the weighing process. It undercut the defense case. It thereby favored the prosecution's contention that "justice demands" death. 64RT 10129:7. The jury could not give full consideration and full effect to the mitigating factors shown by the evidence. If a finding of prejudice is required, there is no basis for finding "beyond a reasonable doubt that the error[s] ... did not contribute to the verdict obtained." Chapman, 386 U.S. at 24.

XXV. DISPROPORTIONATE SENTENCE

The Attorney General says that "appellant is easily among the most heinous of murderers, and her crimes are surely as abominable as any this Court has considered." RB 413. Undoubtedly the Court has seen worse, including some first degree murderers who were not charged with death at all.

We do not mean to diminish the loss of life in this tragic case when we contend there were mitigating circumstances favoring a life sentence as against death. But the Attorney General completely dismisses any

consideration of mitigation or consideration of human frailty. The Attorney General only sees vengeance – vengeance by Sandi Nieves and vengeance by the state. Finding that the sentence is disproportionate would not excuse the crime, but it would recognize that factors in defendant's character and background warrant a sentence less than death.

Despite the fact the trial judge excluded significant mitigation evidence, Sandi Nieves did show that she was under great stress immediately before the fire. She had been abandoned by Scott Volk, a man much younger than her. She had been abandoned after he had impregnated her. After a great deal of turmoil Nieves sought and obtained an abortion, although abortion was against her Mormon beliefs. She already had five children, she was no longer married, and her only form of support was her ex-husband, David Folden. Her first husband, Fernando Nieves, had abandoned the children and abandoned Sandi Nieves for another woman. Folden served Sandi Nieves with legal papers in an attempt to terminate his obligation to pay child support. Nieves did not have the coping skills or capacity to handle multiple stressors. She started taking pills that could have induced dissociation and delirium. Her life, and the lives of her children, faced a very uncertain future. She did not have the capacity to face this future alone.

There is no evidence Nieves previously abused her children. In fact, there was evidence she was a good and protective mother. There was no indication Nieves would pose a risk of future dangerousness to anyone or would be other than a model prisoner. She had no prior criminal record.

She will have to live with the consequences of her acts – the death of those she loved the most.

Under these circumstances death is disproportionate to the crime.

XXVI. CUMULATIVE ERROR

For the reasons stated in the opening brief and this reply brief, cumulative multiple errors require reversal of the convictions and death sentence, even if none were individually prejudicial. People v. Butler (2009) 46 Cal.4th 847, 855.

XXVII. CONSTITUTIONALITY OF THE DEATH PENALTY

For the reasons stated in the opening brief, the death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution and international law. We do not waive either directly or indirectly any claim previously raised.

XXVIII. RESTITUTION

The trial court violated Sandi Nieves's constitutional and statutory rights to be present when it held hearings on restitution. See AOB 627-635. Its determination—in Nieves's absence—that she pay the maximum restitution fine of $10,000 and over $15,579.99 in victim restitution must be reversed.

A. The Restitution Hearings Were a Critical Stage of the Case

The Attorney General admits a defendant has a constitutional right to be present for "every critical stage of the trial." RB 420. But she cites People v. Rundle (2008) 43 Cal.4th 76, 177-179, disapproved of on other grounds by People v. Doolin (2009) 45 Cal.4th 390, for the proposition that not all proceedings during a criminal trial are critical. RB 420. To the extent she is suggesting that a hearing on the issue of restitution is not critical, she is wrong.[70]

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[70] In Rundle, defense counsel met with the judge in camera and outside the presence of the defendant to discuss a juror's alleged misconduct. 43 Cal.4th at 178. The meetings were not critical because they (continued...)

As we explained in the opening brief, Sandi Nieves's constitutional and statutory rights to be present at critical stages of the criminal prosecution included the restitution hearings. See AOB 631-632.[71] Determining restitution is "part and parcel" to the sentencing process. People v. Cain (2000) 82 Cal.App.4th 81, 87. And the sentencing process is a critical stage of a criminal prosecution. People v. Rodriguez (1998) 17 Cal.4th 253, 257; see also People v. Dehle (2008) 166 Cal.App.4th 1380, 1386; People v. Wilen (2008) 165 Cal.App.4th 270, 287. Cf. People v. Souza (2012) 54 Cal.4th 90, 143 ("It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions.").

The Attorney General argues defendant's due process rights were not violated because her counsel was present at the restitution hearings and argued on her behalf. RB 421. But defense counsel's presence is insufficient to satisfy due process because Sandi Nieves's presence would

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[70](...continued)
"were merely exploratory discussions concerning the potential problem of juror misconduct and possible courses of action that might be taken to resolve that issue." Id. Also, the record in Rundle showed the defendant was present for several subsequent discussions on the same subject. These facts bear no resemblance to the critical hearings at issue here. The record shows the restitution was never discussed in Nieves's presence.

[71] The Attorney General concedes Nieves had a statutory right to be present at the October 10, 2000 restitution hearing. RB 421. But she vaguely suggests that the same right did not extend to the December 1, 2000 restitution hearing. Id. In the opening brief, we explained that under Penal Code §§ 977, 1043, and 1193, Nieves had a right to be present during any hearing in which the trial court determined restitution. The Attorney General provides no authority or legal argument to suggest otherwise.

have "contribute[d] to the fairness of the procedure." Kentucky v. Stincer (1987) 482 U.S. 730, 745. She was the only person with complete knowledge of her financial situation, her personal assets, and the details of the life insurance policy discussed at length at the court proceeding. See, e.g., 67RT 10422:3-11 (prosecution arguing the insurance money was irrelevant). Nieves's absence meant she could not communicate with her attorney about any of these issues. See Illinois v. Allen (1970) 397 U.S. 337, 344 (a defendant's "ability to communicate with his counsel" is "one of the defendant's primary advantages of being present at the trial"). The trial court's decision to go ahead with the restitution hearings in Nieves's absence violated her right to federal due process because her presence had "a relation, reasonably substantial, to the fulness of [her] opportunity to defend against the charge." Snyder v. Massachusetts (1934) 291 U.S. 97, 105-106; People v. Rodriguez (1998) 17 Cal.4th 253, 257 (same).

Moreover, the Attorney General does not address the violation of Sandi Nieves's Sixth Amendment right to be present. The trial court's decision to impose victim restitution in the amounts suggested by the prosecution violated Nieves's rights under the Confrontation Clause to confront the evidence against her. See United States v. Gagnon (1985) 470 U.S. 522, 526 (a defendant's right to "confront[] witnesses or evidence against him" is "rooted" in the Confrontation Clause of the Sixth Amendment). "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Allen, 397 U.S. at 338. See also United States v. Marks (9th Cir. 2008) 530 F.3d 799, 812 ("[T]he right to be present at every 'critical stage' of the trial, is based in the Fifth Amendment Due Process Clause and the Sixth Amendment Right to Confrontation Clause."); United

States v. Rosales–Rodriguez (9th Cir.2002) 289 F.3d 1106, 1109 (same).

B. The Claim Was Not Forfeited

The Attorney General argues defendant has forfeited her claim because her counsel failed to object to her absence during the restitution hearings. RB 421. However, she cites no law that a defendant forfeits her complaint of a violation of the right to be present merely by failing to raise the issue below. On the contrary, case law establishes that a defendant only waives her constitutional right to be present during a critical stage if "the waiver is knowing, intelligent, and voluntary." Rundle, 43 Cal.4th at 133-134.

Forfeiture due to a defendant's silence in front of the trial court would be inconsistent with the requirement that a defendant affirmatively waive her right to be present. See Pen. Code § 977(b) (requiring a written waiver by the defendant of the right to be present). In People v. Marks (2007) 152 Cal.App.4th 1325, for example, the defendant argued the trial court had deprived him of his right to be present for part of jury selection. The court of appeal rejected "out of hand" the argument the defendant forfeited his right to appellate review by not making a timely objection below. Id. at 1334 n. 3. It emphasized "there is absolutely no evidence in the record of a knowing and intelligent waiver of his right to be present." Id. The same is true here. The record contains no mention of a waiver of any sort, let alone a written one.

In any event, an attorney may not effectuate a valid waiver of a defendant's federal and statutory rights to presence. People v. Davis (2005) 36 Cal.4th 510, 529-532. In Davis, the defense counsel's assurance to the court that the defendant was aware of the purpose of a pretrial hearing and had decided to waive his presence was insufficient. This Court held that the

constitutional and statutory right to be personally present at a criminal trial could not be waived unless the defendant submitted a personal written waiver. Id. Absent a waiver in written form, there was no evidence he understood the right he was waiving and the consequences of doing so. Id.

The Attorney General's reliance on People v. Prosser (2007) 157 Cal.App.4th 682 and People v. Whisenand (1995) 37 Cal.App.4th 1383 is misplaced. See RB 421. Even though they concern restitution hearings, neither case addresses the defendant's right to be present. See Prosser, 157 Cal.App.4th at 689 (defendant waived challenge to the trial court's failure to provide a detailed explanation of the restitution amount); Whisenand, 37 Cal.App.4th at1395-1396 (defendant's failure to object at the time of the hearing on grounds she had inadequate notice or time to prepare waived the issue for appeal).

Defense counsel's failure to object to Sandi Nieves's absence is irrelevant. She never waived her rights and therefore did not forfeit her claim.

C. The Restitution Orders Must Be Reversed

The Attorney General has not met her burden under Chapman, 386 U.S. at 24, to show beyond a reasonable doubt the constitutional violation here was harmless. She provides no response to our showing in the opening brief that the trial court prevented Sandi Nieves from participating meaningfully in her own defense. AOB 632. Her absence meant she could not communicate with her attorney during the proceedings. She had knowledge critical to the facts at issue and discussed in the trial court, including but not limited to her personal finances and her ability to pay. Id.

As we explained in the opening brief, the trial court failed to make any express findings as to Sandi Nieves's ability to pay. AOB 634-635.

Therefore, the Attorney General cannot point to any specific findings that indicate Sandi Nieves's absence and inability to contribute to her defense would have made no difference to the outcome.

If this Court affirms the guilt phase verdicts, it must nonetheless reverse the restitution orders and remand for a new hearing to be held in Sandi Nieves's presence.

CONCLUSION

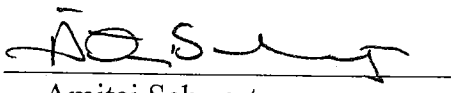
The entire judgment—the convictions, the special circumstance findings, the death sentence, and restitution—should be reversed.

July 13, 2012

Respectfully Submitted,

LAW OFFICES OF AMITAI SCHWARTZ

Amitai Schwartz
Moira Duvernay

By: 

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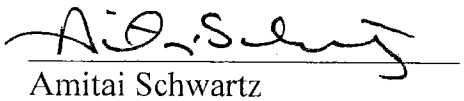
Sandi Dawn Nieves

CERTIFICATE OF COUNSEL

I am the attorney for Appellant Sandi Dawn Nieves in this automatic appeal from a judgment of death. The text of the foregoing brief consists of 81,327 words as counted by the Corel WordPerfect X5 word-processing program used to generate the brief.

July 13, 2012



Amitai Schwartz
Attorney for Appellant

PROOF OF SERVICE

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

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

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

APPELLANT'S REPLY BRIEF

on the following by placing a copy in an envelope addressed to the parties listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid, at Emeryville, California, on July 13, 2012.

Kamala Harris, Attorney General
Mary Sanchez, Deputy Attorney General
300 South Spring Street, Suite 5000
Los Angeles, CA 90013

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

(In addition, I will personally deliver a copy of this Reply Brief to the Appellant, Sandi Dawn Nieves, at the Central California Women's Facility Chowchilla, CA, within 30 days of July 13, 2012)

Clerk, Los Angeles Superior Court, 111 N. Hill Street, Los Angeles, CA 90012-3014

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

Executed on July 13, 2012 at Emeryville, California.

Amitai Schwartz