SUPREME COURT COPY

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Mary Jameson
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California Supreme Court
350 McAllister St.
San Francisco, Ca 94102

September 3, 2013

Re: People v. Angelina Rodriguez S122123

Dear Ms. Jameson:

The purpose of this letter is to provide the original and 10 copies of pages 250-262 of appellant Angelina Rodriguez' opening brief. It is my understanding that these pages, as included in the bound original and copies of appellant's opening brief, filed March 7, 2011 were either missing, duplicated, and/or out of sequence.

Once again, I apologized for any inconvenience this may have cause you and the court.

Please do not hesitate to contact me if I can be of any further assistance.

Very truly,

Karen Kelly
ene.

DEATH PENALTY

3.a. The autopsy report and testimony of the medical official regarding Alicia's cause of death

On September 20, 1993, then Deputy Medical Examiner for Santa Barbara County, Wallace Carroll, examined Alicia's organs after the autopsy was performed. Carroll determined the cause of death to be asphyxiation due to airway obstruction. At the time of her death, Alicia had two lower front teeth. Alicia weighed approximately 30 pounds and measured approximately 30 inches in length. (RT 2865-2869, 2874.)

Carroll did not perform the autopsy. He "viewed the body" then "returned to view the organs." (RT 2868.) Dr. Ducale, the pathologist assistant performed the autopsy. (RT 2873.) Although Carroll "reviewed all the dictation and so forth" (RT 2868), Carroll did not personally observe the number of teeth Alicia had or make the notation in the autopsy report about her teeth. (RT 2873.) When asked whether "he" determined the cause of death, Carroll responded "Yes, "we" did. (RT 2868.) The autopsy report was entered into evidence. (RT 2874; Peo. Exh. 45.)

Whether or not Alicia had any teeth and where they were was evidence essential to the prosecutor's theory that appellant murdered her daughter.

"I didn't happen from a baby chewing on it." (RT 3766.)

"She only had two lower teeth. Her teeth were nowhere near where this break occurred. (RT 3771.)

3.b. The lab results and testimony indicating Oleander was found in the victim's organs, the lab results and testimony indicating Ethylene Glycol was found in the victim's organs

On September 26, 2000, based on the information from Frank's mother, Steinwand contacted Los Angeles County coroner's office and advised them that it was possible Frank may have ingested Oleander. It took several months before the officers were "able to get Oleander tests sent out and results back from them." (RT 1978, 1984-1985.)

Los Angeles County Department of Coroner Supervising Criminalist Dan Anderson performed a toxicology screening to eliminate common drugs of abuse such as cocaine, methamphetamine, barbiturates, opiates and alcohol substances on samples obtained from Frank Rodriguez. (RT 2078-2079, 2081-2083.) Anderson explained "there's no such thing as a general screening for everything."

However, the tests run by Anderson did not indicate Frank had ingested a "fatal amount of anything." (RT 2084, 2089.) In the case of both ethylene-glycol, the primary chemical component of antifreeze, and Oleander, specific tests would be required. The Los Angeles Coroner's Office did not have the ability to screen

for Ethylene-Glycol or Oleander. (RT 2085-2087.) According to Anderson, they "needed help." (RT 2089.)

On November 9, 2000, after receiving a call from one of the detectives indicating there was reason to test for ethylene-glycol, a sample was sent to Medtox Laboratories in Minnesota to test for that substance. According to Anderson, another coroner employee, Joseph Muto, requested the testing at Medtox. Muto also received the test results back from Medtox. (RT 2090-2096; Peo. Exh. 19.) According to Anderson, the Medtox test results indicated that the level of ethylene-glycol was consistent with a fatal amount. (RT 2089-2090, 2095-2097, 2100.) Thereafter, Anderson tested the heart blood, the femoral blood, the gastric and vitreous fluid for the presence of ethylene-glycol. Ethylene-glycol was present in each sample. (RT 2100-2102.)

On December 26, 2000, Anderson sent out samples to the University of California at Davis to be tested for Oleander (RT 2107-2108.) According to Anderson, Birgit Puschner, a toxicologist at UC Davis, in the animal health and food safety lab, received blood samples, stomach contents and a liver sample from which it was requested she perform Oleander testing. Oleander was present in all four samples. The amount in the stomach contents was deemed to be significant and would indicate recent exposure through ingestion. (RT 2112-

2119.) Puschner's report was entered into evidence. (Peo. Exh. 21.) No one from Medtox testified. Anderson's final report (Peo. Exh. 20), referenced both the results of Puschner's report and the Medtox report. (RT 2106, 2108.) In no other case had Anderson testified as an expert regarding the presence of Ethylene-Glycol. He had not published or lectured on the presence of Ethylene-Glycol. (RT 2109-2110.)

Puschner testified that she received samples from the Los Angeles Coroner's Office and determined that those samples contained Oleander. (RT 2116-2119.)

Emergency medicine physician (in other words he saw patients) Richard Franklin Clark, was the medical director of the poison center at the University of California at San Diego. (RT 2120-2123.) Based on his review of documents prepared for him by the Office of the District Attorney (Peo. Exh. 22) and Exhibits 21 (Puschner's report), 8 (Kaiser records), and 20 (Coroner's results), Dr. Clark offered his opinion that the documents indicated the presence ethylene-glycol in Frank's tissue and that he was of the opinion that Frank Rodriguez died from ethylene-glycol poisoning. (RT 2134-2138.) It was Dr. Clark's opinion that Frank Rodriguez received fatal doses of the ethylene-glycol that killed him with in 24 hours of the time of death, and most likely within six or seven hours of the time of

death. Dr. Clark based this opinion on autopsy results indicating very small amounts of ethylene-glycol in the stomach -- meaning it had been absorbed into the body -- a process that would take five to six hours -- and the finding of crystals in the kidneys. (RT 2140-2142.) In Dr. Clark's opinion, Frank Rodriguez would have had to have taken four to five shot glasses of ethylene-glycol. (RT 2151.) Dr. Clark also reviewed medical records from Kaiser Permanente generated by Frank Rodriguez's September, 7, 2000 visit. According to the medical records, doctors at Kaiser did not measure for ethylene-glycol. Nevertheless, Dr. Clark found it interesting that the hospital had performed tests which indicated Frank Rodriguez's kidneys were functioning within the normal range and the acidity level of his blood was also with in normal ranges. Additionally, Frank wasn't given any therapy for ethylene-glycol. It was Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital. (RT 2146-2148.)

Dr. Clark found it difficult to say what if any part the oleander played in Frank's death. He hypothesized it would certainly have caused him to become nauseated and to vomit. He could not predict how the levels of Oleander would correlate with the chance that he may have died of an irregular heartbeat although that could have been possible. (RT 2152.)

The symptomology noted in the Kaiser medical records was, for the most part, consistent with Oleander poisoning. The addition of diarrhea was something Dr. Clark could not say with certainty would have occurred from Oleander poisoning. (RT 2153.)

On November 28, 2000, after receiving a toxicology report which indicated ethylene-glycol, Dr. Chinwah reviewed kidney tissues for crystals associated with the ingestion of ethylene-glycol. Dr. Chinwah formed the opinion that the kidney tissues were consistent with the ingestion of ethylene-glycol. (RT 2166-2169.) Dr. Chinwah formed the opinion that Frank Rodriguez had died from ethylene-glycol and Oleander toxicity. (RT 2170.)

As noted above, improper hearsay evidence was offered against appellant. Given the court's holding in *Melendez-Diaz* there can be little doubt that the following are all testimonial: (1) test results back from Medtox and Anderson's testimony that the Medtox test results indicated that the level of ethylene-glycol was consistent with a fatal amount; (2) Anderson's testimony that a toxicologist at UC Davis performed Oleander testing and that Oleander was present in all tested samples; (3) those portions of Anderson's final report which referenced both the results of Puschner's report and the Medtox report; (4) Dr. Clark's opinion based on the Medtox report indicated Frank Rodriguez died from

ethylene-glycol poisoning; (5) Dr. Clark's opinion that Frank Rodriguez received fatal doses of the ethylene-glycol that killed him with in 24 hours of the time of death, and most likely within six or seven hours of the time of death; (6) Dr. Clark's testimony that on based on autopsy results indicating very small amounts of ethylene-glycol in the stomach and the finding of crystals in the kidneys confirmed his opinion as to the time of death and amount of ethylene-glycol ingested; (7) Dr. Clark's opinion based on Kaiser medical records that (a) doctors at Kaiser did not measure for ethylene-glycol, (b) his kidneys were functioning within the normal range, (c) the acidity level of his blood was with in normal ranges; and (4) Frank wasn't given any therapy for ethylene-glycol – all of which formed the basis for (8) Dr. Clark's opinion that either he was not suffering from ethylene-glycol poisoning or he had taken ethylene-glycol within an hour of coming in to the hospital; and (9) Dr. Clark's opinion that oleander would have caused Frank to become nauseated and to vomit and that (10) the symptomology noted in the Kaiser medical records was with Oleander poisoning. Reliance by Clark and Anderson on these reports violated appellant's right to confrontation.

C. Admission of the testimony based on the evidence was not harmless

Confrontation Clause violations are subject to the federal harmless-error analysis articulated in *Chapman v. California, supra,* 386 U.S. at p. 24. The

harmless error analysis asks: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

In the instant case, but for Hall's statements to police regarding Erlinda Allen, there was no evidence to support the charged aggravator that appellant solicited another to assault or murder Allen. The determination of how Alicia died was contested. The prosecutor relied heavily of the theory that because Alicia had only two teeth and her teeth were not in position to cause the damage to the pacifier, appellant must have intentionally ripped it apart with pliers and shoved a portion down Alicia's throat.

Although there was testimony from the coroner and two of the toxicologists involved in determining Frank's cause of death, admission of the *Crawford* evidence regarding the presence of Oleander and ethylene-glycol in amounts sufficient to cause symptomology and to determine cause of death by those witnesses relying only on reports authored by those persons appellant was not permitted to cross examine resulted prejudicial evidence against appellant. Admission of the evidence and testimony thereon, as outlined above, was not harmless beyond a reasonable doubt.

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PENALTY PHASE ARGUMENTS

XI. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

Appellant has demonstrated that this Court should reverse her conviction because of substantial guilt phase errors. Those same errors also poisoned appellant's penalty phase. Should this Court hold that the guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused appellant at the penalty phase.

The jury was instructed by the trial court that they should consider all guilt phase and penalty phase evidence in deciding the sentence: "In determining which penalty is to be imposed on a defendant, you shall consider all the evidence which has been received during any part of the trial of this case." (RT 3863.) The prosecutor emphasized this instruction during closing argument. (RT 3742-3743, 3747-3750, 3751-3753, 3775-3779.)

In this case, the errors in the guilt phase were not harmless in the penalty phase. For example, life-leaning jurors were erroneously excused for cause excusal of a juror; the conditions of appellant's confinement in jail -- which extended throughout her guilt and penalty phase trials -- were so adverse as to

substantially impair the ability of an accused to defend herself, or to assist counsel in the preparation of a defense, and the effects of such confinement on appellant were argued by the prosecutor in his plea to the jury to sentence appellant to death; the many interferences with appellant's constitutionally guaranteed right to counsel committed by the jail staff and the court impacted appellant at both the guilt and penalty phases; appellant was required to proceed through both the guilt and penalty phases of her trial with an attorney who did not adequately represent appellant and with whom there had been a complete dissolution of an attorney-client relationship; the court's failure to properly evaluate appellant's competency to proceed to trial extended throughout her guilt and penalty phases; and the court's obvious bias against appellant extended into her penalty phase trial.

The errors above, which were committed in the guilt phases directly affected appellant's case in mitigation as well as the jury's assessment of the prosecution case so that the errors affected the penalty phase as a whole. Thus, the penalty determination was not sufficiently reliable to form the basis for a death sentence.

This Court has recognized that guilt phase errors can prejudice the penalty decision, even in cases where evidence of guilt is overwhelming. This is so

because in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. (*People v. Brown* (1988) 46 Cal.3d 432, 464 citing *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137.)

If, as was the case here, any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, one of the twelve jurors may have been swayed by the inadmissible evidence or error. It follows that, in the absence of that evidence or error, the death penalty would not have been imposed. For that reason, this Court has concluded that "it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial." (*Ibid.*)

In *Satterwhite v. Texas* (1988) 486 U.S. 249, the Supreme Court considered the effect of constitutional error in the guilt phase upon the penalty determination. In *Satterwhite*, the Court held that the harmless error standard in *Chapman v. California* (1967) 386 U.S. 18, should be used to decide whether psychiatric evidence obtained in violation of the defendant's right to counsel and admitted at the penalty phase of a capital trial was prejudicial enough to require reversal of the death sentence. The Supreme Court stated that such error

required reversal of the death sentence unless the State proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Satterwhite, supra*, 486 U.S. at 256, quoting *Chapman, supra*, 386 U.S. at 24.)

In *Smith v. Zant* (11th Cir. 1988) 855 F.2d 712, affd. (1989) 877 F.2d 1407, the Eleventh Circuit followed *Satterwhite* and vacated a habeas corpus petitioner's death sentence because the defendant's written confession, obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, was admitted at the guilt phase of his trial. The Court found that the error was harmless as to the guilt determination, but the Court could not conclude beyond a reasonable doubt that the erroneously admitted confession did not influence the sentencing jury because of the difference in tone between the written confession and the defendant's more detailed and sympathetic trial testimony. (*Smith v. Zant, supra,* 855 F.2d at 722.)

Although *Satterwhite* and *Smith* involved Fifth and Sixth Amendment violations, because the federal constitutional right to freedom from cruel and unusual punishment is equally worthy of protection, appellant submits that a similarly stringent harmless error standard should be applied in cases in which the Eighth Amendment requirements are violated.

This Court has adopted a "reasonable possibility" standard for assessing prejudice resulting from state law errors at the penalty phase. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) However, in *Chapman, supra*, the United States Supreme Court equated an almost identically worded standard adopted by it in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, with the Chapman standard of "harmless beyond a reasonable doubt." The Supreme Court stated:

There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of may have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman, supra*, 386 U.S. at 24.)

Thus, the Supreme Court has recognized that the language of "reasonable possibility" and of "harmless beyond a reasonable doubt" implicate virtually the same standard and impose the same burden upon a "beneficiary of a constitutional error." This Court should similarly recognize that the "reasonable possibility" standard articulated in *Brown, supra*, is functionally equivalent to the "harmless beyond a reasonable doubt" standard adopted in Chapman. Under this standard, it is not certain beyond a reasonable doubt that the many guilt phase

PROOF OF SERVICE

I am a citizen of the United States and am employed in the Stanislaus County. I am over 18 years of age and am not a party to the within action. My business address is P.O. Box 6308 Modesto, CA 95357. On the date specified below I served the attached:

ERRATA LETTER WITH PAGES 250-262 OF
APPELLANT'S OPENING BRIEF

on the interested parties by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in an United States Postal Service mailbox at Modesto, CA addressed as follows:

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I, K. Kelly, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 9/9 /13 at Modesto, California.