IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROYAL CLARK,** Defendants and Appellants.	**S045078** (Fresno County Superior Court No. 446252-9)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
RENDERED IN FRESNO COUNTY SUPERIOR COURT
HONORABLE JOHN E. FITCH, JUDGE PRESIDING

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Appellant, Royal Clark, through his attorney, Melissa Hill, submits the following supplemental arguments not previously raised in the Appellant's Opening Brief.

STATEMENT OF PROCEDURE AND FACTS

Appellant in part adopts and incorporates by reference the Statement of Facts set forth in the Appellant's Opening Brief.

Appellant's sanity trial commenced on January 12, 1994. (RT 62:9469.) At a jury instructional conference held the same date, the prosecution requested, and defense counsel objected to the giving of former CALJIC No. 4.05, on irresistible impulse. (RT 63:9513, 9796, 9800, 9826-9827.) Defense counsel argued that the instruction was inappropriate and prejudicial because it was not contended that appellant committed the alleged criminal acts because of an uncontrollable or irresistible impulse. The defense was that appellant's uncontrollable rage reaction had produced unconsciousness, and/or caused appellant to not appreciate the nature of his acts or to know right from wrong. (RT 63:9796-9798.) Counsel strenuously

argued that the instruction would effectively take away the insanity defense. (RT64:9798-9799, 9801.)

The court ruled that CALJIC No. 4.05 would be given. (RT 63:9798.)

The jury was instructed: "If a person is legally sane, then it's not a defense that he committed the act of which he is accused because of an uncontrollable or irresistible impulse." (RT 64:9929.)

The court refused a remedial instruction pursuant to *People v. Medina* (1990) 51 Cal.3d 870, that would have clarified that the term "mental illness," as used in standard insanity instructions, referred to any combination of mental conditions which produced the requisite effects. (RT 64:9830-9831; see, Appellant's Opening Brief [AOB], Argument XXXXIX, p. 461.)

The jury found appellant sane on all counts. (RT 65:9947-9960.)

ARGUMENTS

I

THE TRIAL COURT PREJUDICIALLY ERRED BY GIVING FORMER CALJIC NO. 4.05 ON IRRESISTIBLE IMPULSE, WHICH UNCONSTITUTIONALLY REQUIRED JURORS TO REJECT APPELLANT'S INSANITY DEFENSE.

A. It Was Error to Give Former CALJIC No. 4.05.

Appellant did not rely on evidence of irresistible or uncontrollable impulse at the sanity trial. Rather, defense expert, Dr. Berg, testified appellant suffered from an extreme rage reaction during which he did not appreciate the nature and quality of his acts, and was unable to distinguish right from wrong. The trigger for the rage reaction was brain damage that produced a complex partial seizure. (RT 62:9523-9529, 9548-9555, 9575.)

Under the circumstances, it was error to give CALJIC No. 4.05 over counsels' objections. Prior to appellant's trial, Penal Code § 28 abolished the "defense of "irresistible impulse in a criminal action." However, reliance on irresistible or uncontrollable impulse evidence to prove insanity *in a Penal*

Code § 1026 proceeding was not abolished. (Pen. Code, § 1026(c).) Assuming defense expert testimony regarding appellant's rage reaction could have been understood by some jurors as an assertion that appellant was acting under an irresistible impulse, jurors should have been allowed to consider such evidence to the extent it supported the claim that temporarily, during a seizure-induced blackout, appellant did not appreciate the nature and quality of his acts, and did not know right from wrong. (*People v. Coddington* (2000) 23 Cal.4th 529, 602.)

The instruction given effectively told the sanity phase jury that irresistible impulse was *not* a defense, and was irrelevant to establish the elements of the M'Naghten test of insanity. The law is to the contrary. "If a man commits a homicide under an insane impulse, and at the time does not possess sufficient reason to understand the nature of the act, he certainly is in such a condition of mind that he is incapable of weighing the moral qualities of the act, and determining therefrom whether it is right or wrong...." (*Marceau v. Travelers' Insurance Co.* (1894) 101 Cal. 338, 346-347.)[1]

Moreover, in *People v. Coddington, supra*, this Court rejected a similar claim of instructional error in part because trial counsel did *not* "request a clarifying instruction tailored to the evidence and its relevance to his theory of insanity." (*People v. Coddington, supra*, at p. 603.) In this case, trial counsel did request a clarifying instruction pursuant to the *Medina* case, tailored to the evidence and the defense theory of insanity. The refused instruction would accurately have apprised the jury that appellant's inability to appreciate the

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[1] The *Marceau* case involved a widow who sued an insurer to recover under the life insurance policy of her husband, who was shot to death by a third party. The issue was whether under the criminal law the shooter was insane at the time of the shooting. If the shooter was insane, the killing was not considered an intentional injury, and the insurance policy covered the death. (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, 1271.)

nature and quality of his acts, or inability to distinguish right from wrong, was legal insanity even if produced by a combination of mental conditions, including mental conditions that caused uncontrollable impulses. (See, AOB, Argument XXXXIX, p. 461.)

B. There Is a Strong Likelihood That a Jury Who Found Appellant's Sanity Defense Credible Might Have Rejected it as Based on a Theory of Irresistible Impulse.

Jurors were instructed they could consider the evidence introduced at the first phase of the trial to the extent they found it relevant to the sanity phase. (RT 64:9922.) At the guilt phase, defense mental health experts testified that appellant suffered from trauma-induced frontal lobe brain damage which was responsible for producing his recurrent outbursts of aggression and rage. Defense experts also opined that during the crimes, appellant was experiencing a complex partial seizure, which rendered him temporarily insane, incapable of premeditation, planning or consideration of the consequences of his conduct. In other words, he was explosive, and impulsive, not actually judging, thinking or considering. (See, AOB, Statement of Facts, pp. 39-42.)

At the sanity trial, Dr. Paul Berg amplified upon his guilt phase testimony. He opined that appellant was legally sane up until the point he attacked Angie, then crossed the line and became legally insane. While the subsequent crimes were being committed, appellant was unconscious, but even if conscious, his rage reaction as so profound that he did not appreciate the nature and quality of his acts and could no longer distinguish right from wrong. (RT 62:9523-9575.)

Confusion regarding the role of irresistible impulse in the insanity equation was injected by the giving of CALJIC No. 4.05, and compounded by the prosecutor's argument. Mr. Cooper inaccurately stated:

"You'll also be instructed on what the law calls an

> uncontrollable or irresistible impulse. You'll be told it's not the same thing as legal insanity and it's not a defense to the crimes the defendant committed. In other words, if you find that the defendant was otherwise sane at the time of the crimes, in other words, that he knew his acts, that he knew his acts were wrong, it's no defense – it's no defense that he claims he couldn't control his anger or he couldn't result – couldn't resist the impulse to act." (RT 64:9856.)

The prosecutor's argument clearly implies that appellant was, in effect, asserting what amounted to an irresistible impulse defense. Furthermore, the cumulative effect of the instruction and argument was to incorrectly suggest that, if appellant were unable to control his behavior during the rage reaction, even if the lack of control was the product of brain damage which caused seizures, and which in turn produced the rage and mind-numbing unconsciousness, the defense of insanity was unavailable.[2]

Consequently, jurors could have accepted as true the supposition that appellant was suffering from a complex partial seizure, which temporarily caused him not to appreciate the nature and quality of his acts, or to distinguish right from wrong. Yet jurors might have rejected this as a "defense" based on the impression that the described mental state of unconsciousness or rage reaction did not constitute "legal insanity" so long as appellant had no control over his impulses or his behavior. The jurors might have reasoned that appellant's neurological damage, and attendant seizures, made his impulses "uncontrollable" or "irresistible," and thus not legal insanity.

C. The Error Is Reversible per Se, or Alternatively, Is

[2] In addition, the prosecutor's definition of insanity was misleading to the extent it implied that appellant could not be found insane if he knew that his acts were wrong. Under Penal Code § 25, a defendant is legally insane if he either fails to appreciate the nature and quality of his acts *or* if he cannot distinguish right from wrong at the time of the crimes. (*People v. Skinner* (1985) 39 Cal.3d 765, 776-777.)

Reversible Under Traditional Harmless Error Standards.

Under the circumstances, the giving of CALJIC No. 4.05, especially when combined with the denial of a *Medina* instruction (RT 64:9831), effectively took from the jury's consideration appellant's insanity defense, which depended on expert testimony that a seizure and rage reaction rendered him unable to control his impulses. Such error requires per se reversal of the sanity judgment. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *Yates v. Evatt* (1991) 500 U.S. 391, 404-406; *People v. Kobrin* (1995) 11 Cal.4th 416, 428-429; *United States v. Rodriguez* (9th Cir. 1995) 45 F.3d 302, 306-307.)

Even if traditional harmless error analysis is applied, the error is reversible. As previously explained in subsection B, a reasonable juror could have found appellant's defense credible, and within the rubric of M'Naghten. However, after being instructed with CALJIC No. 4.05, and hearing the prosecutor's argument, such a juror may well have concluded that appellant's actions were uncontrollable, having been produced by a seizure, and thus did not amount to a viable defense. It is therefore reasonably probable that the instruction adversely affected the sanity verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 693-695; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

D. Instructing with Former CALJIC No. 4.05 Was Constitutional Error.

As shown above, it was reasonably likely that, because they were instructed with CALJIC No. 4.05, and a *Medina* instruction was refused, one or more jurors may have rejected appellant's defense on spurious grounds. The instructional error violated appellant's constitutional rights in several ways. The error: (1) deprived appellant of a meaningful opportunity to present a complete defense in violation of due process and compulsory process (*Crane v. Kentucky* (1986) 476 U.S. 683, 690); (2) rendered the trial fundamentally unfair because it cut the heart out of the defense, and offered a prosecution

theory that was contrary to law (see, *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664); (3) violated appellant's right to trial by jury by preventing one or more jurors from making the crucial factual determination of the sanity phase, i.e., whether because of a mental illness appellant temporarily rendered unaware of the nature and quality of his acts, and unable to distinguish right from wrong (see, *Sullivan v. Louisiana* (1993) 508 U.S. 275); (4) violated due process by permitting appellant to be found sane under a standard that fell below constitutionally acceptable standards (see, *People v. Skinner, supra*, 39 Cal.3d at p. 774, 775) and deviated from the "one definition of insanity" that was "sanctioned" by state law (*Williams v. Vasquez* (E.D. Cal. 1993) 817 F.Supp. 1443, 1480; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346); and (5) violated the Eighth Amendment by rendering the sanity verdict too unreliable to support the death penalty (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

CONCLUSION

For the foregoing reasons, as well as the reasons previously asserted in the Appellant's Opening and Reply Briefs, the sanity and penalty judgments must necessarily be reversed.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and am not a party to the within action; my business address is P.O. Box 2758, Corrales, New Mexico 87048.

On August 23, 2006, I served the foregoing **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** on the Interested Parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in Corrales, New Mexico, addressed as follows:

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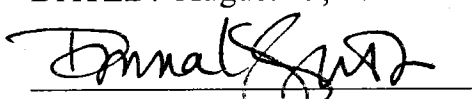
ROYAL CLARK, appellant (address omitted per CRC 37(a))

This document is filed and served on paper purchased as recycled. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: August 23, 2006



DONNA K. BENTON