No. 22-5867

IN THE SUPREME COURT OF THE UNITED STATES

MONICA MCCARRICK,
Petitioner,

v.

JANELLE ESPINOZA,
Respondent.

Supreme Court, U.S.
FILED
SEP 12 2022
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does an objectively unreasonable violation of the Constitutional right to present a meaningful defense occur when a trial court prevents a defendant from presenting evidence supporting her sole defense to first degree murder – that she was unable to premeditate and deliberate because she suffered from paranoid delusions (not hallucinations)?

LIST OF PARTIES

Petitioner, Monica McCarrick, is represented by Erin J. Radekin, of Sacramento, California.

Respondent, Janelle Espinoza, Warden of the Central California Women's Facility, is represented by Deputy Attorney General Jill M. Thayer, of Sacramento, California.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Monica McCarrick, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

A. Opinions in the Federal § 2254 Proceedings

The opinion of the court of appeals in docket number 20-17311, App. 2-9, *infra*, 1-8, is unpublished, but available online at *Monica McCarrick v. Janelle Espinoza,* 2022 U.S. App. LEXIS 16456, 2022 WL 2128904 (CA9 2022).

The district court's order denying Ms. McCarrick's petition for habeas relief pursuant to 28 U.S.C. § 2254 in docket number 2:17-cv-02652 JKS, filed on November 19, 2020, App. 10-42, is unpublished, but available online at *McCarrick v. Pallares*, 2020 U.S. Dist. LEXIS 217226, 2020 WL 6800422 (E.D. Cal. 2020).

B. Opinions on Direct Review in the California Appellate Judiciary

The opinion of the California Court of Appeal, First Appellate District, Division Four, affirming Ms. McCarrick's murder convictions and sentence of life without parole is published at *People v. McCarrick*, 6 Cal.App.5th 227, 210 Cal.Rptr.3d 838 (2016). App. 43-84.

The order of the California Supreme Court, denying discretionary review, App. 86, is unpublished, but reported at *People v. McCarrick*, 2017 Cal. Lexis 1868 (2017). Justices Werdegar and Cuéllar were of the opinion that review should have been granted. App. 86.

JURISDICTION

The judgment of the court of appeals was filed on June 14, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *Ayestas v. Davis*, 138 S.Ct. 1080, 1089 (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CALCRIM No. 627

A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening.

You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation.

The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

California Penal Code section 25(a):

The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or

other mental state required for the commission of the crime charged.

California Penal Code section 1026(a):

If a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only the other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury finds the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. If the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding is that the defendant was insane at the time the offense was committed, the court, unless it appears to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be committed to the State Department of State Hospitals for the care and treatment of persons with mental health disorders or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with Section 1600) of Part 2.

California Penal Code section 1259:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

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STATEMENT

This case involves the issue of a defendant's right to present evidence of her mental illness as a defense to whether she had the ability to premeditate and deliberate, as required for first degree murder under California Law. See Cal. Pen. Code, 189, subd. (a).

While "suffering from grotesque, reality-based delusions," App. 72; *People v. McCarrick*, 6 Cal.App.5th 227, 252, 210 Cal.Rptr.3d 838 (2016) (Streeter, J., concurring and dissenting), Monica McCarrick killed her three-year-old twin daughters with a sword and then attempted to kill herself with the same sword. App. 11-12, 43-45; *McCarrick*, 6 Cal.App.5th at 230-231 (Majority Opn.).[1, 2] Charged with two counts of first degree murder, Ms. McCarrick "pleaded both not guilty and not guilty by reason of insanity." App. 10, 43; *McCarrick*, 6 Cal.App.5th at 231 (Majority Opn.). The defense theory was that when Ms. McCarrick killed her twin daughters, "she suffered from delusions that she [and her daughters] were going to be held in slavery, and that the only way to save the girls from this fate was to kill them." App. 15, 50; *McCarrick*, 6 Cal.App.5th at 235 (Majority Opn.).

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[1] Early on, during the course of proceedings in the trial court, the court commented, "All of th[e] [evidence] is suggestive of a murder-suicide situation." Tr. 8. ("Tr" refers to the reporter's transcript of proceedings conducted in the trial court.)

[2] When emergency personnel arrived at the scene, the twins were both dead, and Ms. McCarrick, who was unconscious, was in critical condition. App. 11, 43-44; *McCarrick*, 6 Cal.App.5th at 230-231 (Majority Opn.). Both of the girls died as a result of multiple stab and slash wounds. Ms. McCarrick had large slash wounds to her neck, arms, wrists, one of her thighs, and both of her Achilles tendons. The tendons in one of her wrists were severed, and both of her Achilles tendons were severed. App. 11-12, 44-45; *McCarrick*, 6 Cal.App.5th at 230-231 (Majority Opn.).

Despite the sworn opinions of *all* mental health professionals who testified at Ms. McCarrick's trial — a psychiatrist and two psychologists — that Ms. McCarrick "was not able to understand that her actions were legally or morally wrong" App. 20, 56, 64; *McCarrick*, 6 Cal.App.5th at 241, 246-247 (Majority Opn.),[3] the jury found Ms. McCarrick guilty on both counts of first degree murder in the guilt phase, and in the sanity phase, the jury found she was sane at the time of the homicides. App. 21, 43; *McCarrick*, 6 Cal.App.5th at 229 (Majority Opn.).

During the guilt phase of the trial, Ms. McCarrick contended she did not act with premeditation and deliberation, and that she should therefore be found guilty of second degree murder, not first degree murder. However, her defense was thwarted by the trial court, which compelled her to present the defense on the basis of a mental health condition other than that with which she was actually afflicted. The trial court compelled her to predicate her defense on nonexistent hallucinations.[4] But, at the time of her homicidal offense conduct in the instant

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[3] The details of the uniform testimony of the mental health professionals are described at pages 7-9, *infra*.

[4] The trial court forced her to present a defense based on hallucinations rather than delusions by giving a pattern instruction — CALCRIM No. 627 — "which framed th[e] defense for the jury ... solely in terms of 'hallucinations.'" App. 72; *McCarrick*, 6 Cal.App.5th at 252 (Streeter, J., dissenting). The trial court's instructional choice "[s]traightjacketed" the defense by compelling her to mount a defense based only on "'actual hallucinations[,]'" despite the fact that "she had none" and she thus "had noevidence" of hallucinations to present to the jury. App. 82; *McCarrick*, 6 Cal.App.5th at 260 (Streeter, J., dissenting). Instead, the defense had no choice but to attempt to characterize Ms. McCarrick's delusions as hallucinations. Then, the prosecution was "able to argue in closing that [Ms. McCarrick] was not hallucinating ... [at the time of the homicides]. The argument was devastating, because it was irrefutably true: On the day of the killings and in the weeks before, McCarrick was suffering from grotesque, reality-based delusions, but not from hallucinations." App. 72; *McCarrick*, 6 Cal.App.5th at 252 (Streeter,

case, Monica McCarrick "was suffering from grotesque, reality-based *delusions*, but not from *hallucinations*." App. 71; *People v. McCarrick*, 6 Cal.App.5th 227, 252, 210 Cal.Rptr.3d 838 (2016) (Streeter, J., concurring and dissenting) (italics added).[5]

The distinction between delusions and hallucinations is recognized by the American Psychiatric Association[6] and the Diagnostic and Statistical Manual of Mental Disorders,[7, 8] "[T]he American Psychiatric Association tells us that

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J., dissenting).

[5] The offense conduct occurred on October 12, 2010. App. 42: *People v. McCarrick*, 6 Cal.App.5th at 230 (Majority Opn.). Ms. McCarrick was 28 years old at the time. App. 50; *McCarrick*, 6 Cal.App.5th at 236 n. 4.

[6] The American Psychiatric Association has long been regarded as a "respected, knowledgeable, and informed professional organization[]...." *Washington v. Harper*, 494 U.S. 210, 236 (1990) (Blackmun, J.,. concurring).

[7] The Diagnostic and Statistical Manual of Mental Disorders is one of the leading diagnostic manual[s]" concerning mental illness. *Moore v. Texas*, 137 S.Ct. 1039, 1055 (2017) (Roberts, C.J., dissenting). "[T]he Diagnostic and Statistical Manual of Mental Disorders[] [is] one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, e.g., 'DSM-5.'" *Hall v. Florida*, 572 U.S. 701, 704-705 (2014)

[8] "There is a difference between a delusion with no basis in objective reality, commonly called a hallucination, and a delusion based on a distorted perception of reality." App. 71; *People v. McCarrick*, 6 Cal.App.5th at 252 (Streeter, J., concurring and dissenting). "The Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) defines delusions as 'fixed beliefs that are not amenable to change in light of conflicting evidence.'" *People v. Elmore*, 59 Cal. 4th 121, 136 n. 7 (2014) (citing DSM-V at 87; *Dorland's Illustrated Medical Dict.* (30th ed. 2003) at 486 ("a false belief that is firmly maintained in spite of incontrovertible and obvious proof or evidence to the contrary ..."); *Stedman's Medical Dict.* (27th ed. 2000) at 470 ("A false belief or wrong judgment held with conviction despite incontrovertible evidence to the contrary."). "[A] delusion[] [is] a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality." *People v. Elmore*, 59 Cal.4th at 136. "A hallucination is a perception with no objective reality." *Id.* at 136 n. 7. "Both delusions and hallucinations are hallmarks of psychotic disorder." *Id.* (citing DSM-V at 87.) "Because it is rare that the difference matters, courts do not draw a crisp distinction between 'hallucinations' and 'delusions.'" App. 77; *McCarrick*, 6 Cal.App.5th at 256 (Streeter, J., dissenting).

individuals suffering from mental illness may experience delusions—erroneous perceptions of the outside world held with strong conviction. They may believe, incorrectly, that others are threatening them harm (persecutory delusions)...." *Kahler v. Kansas*, 140 S.Ct. 1021, 1048, 206 L.Ed.2d 312, 344 (2020) (Breyer, J., dissenting). Persecutory delusions are consistent with schizophrenia. *Rogers v. Dzurenda*, 25 F.4th 1171, 1195 (9th Cir. 2022).

The trial court's refusal to allow Ms. McCarrick to present her mental health defense based on her *actual* mental health condition, rather than a contrivance, was unconstitutional, prejudicial, and objectively unreasonable by any measure.

Ms. McCarrick presented abundant evidence concerning her fear-based delusions in the weeks preceding the crimes at the guilt phase of her trial. App. 13-15; *McCarrick*, 6 Cal.App.5th at 246-247 (Majority Opn.). A dissenting judge in the intermediate-level California Court of Appeal that reviewed Ms. McCarrick's first degree murder convictions concluded that the trial court prejudicially erred by stripping away the ability of the defense to convey the upshot of the evidence of her delusions and false beliefs to the jury, i.e., by "preclud[ing] [the jury] from considering [Ms. McCarrick's] delusions at the guilt phase." App. 84; *McCarrick*, 6 Cal.App.5th at 261 (Streeter, J., dissenting).[9]

This Court's precedent pertaining to mental health evidence and the right to present a complete and meaningful defense compels the conclusion that the trial

[9] The dissenting judge noted the starkness of the prejudicial error, "whether [it] is viewed as rising to the level of federal constitutional magnitude or simply state law error." App. 83; *McCarrick*, 6 Cal.App.5th at 261 (Streeter, J., dissenting).

court committed objectively unreasonable prejudicial constitutional error by refusing to allow Ms. McCarrick to predicate her defense on her actual mental health condition:

"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." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks omitted). Furthermore, this Court has held that "as a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (citation omitted). This standard applies to habeas petitions arising from state convictions. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.").[10]

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[10] The right to a meaningful opportunity to present a complete defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense. Accordingly, ... a criminal defendant has a federal constitutional right to have the jury instructed according to his or her theory of the case if the theory has some foundation in evidence." *United States v. Johnson*, 459 F.3d 990, 992 (9th Cir. 2006) (internal quotation marks omitted). "It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case." *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (citing *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990) ("A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence.") Further, a state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. *Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir. 1999) (granting habeas relief under AEDPA because an

Of course, defenses are often based on the mental state of the accused. "In practical terms, if a defendant did not know what he [or she] was doing when he [or she] acted, he [or she] could not have known that he [or she] was performing the wrongful act charged as a crime." *Clark v. Arizona*, 548 U.S. 735, 753-754 (2006). Indeed, "evidence tending to show that a defendant suffers from mental disease and lacks capacity to form mens rea is relevant to rebut evidence that he did in fact form the required mens rea at the time in question[.]" *Id.* at 769. And, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

This case presents the question whether the trial court unreasonably abridged Ms. McCarrick's Constitutional right to present her defense by instructing the jury in a manner that caused Ms. McCarrick to seek to characterize her persecutory delusions as something they were not, *viz.*, hallucinations.

Pursuant to this Court's Rule 10 review on certiorari is warranted because the courts which have entertained Ms. McCarrick's case up to this point have failed to recognize the abridgement of this Court's precedent that occurred when Ms. McCarrick was forced to present her mental state defense on the basis of a mental health condition with which she was not afflicted.

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erroneous self-defense instruction deprived the defendant[] of a "meaningful opportunity to present a complete defense"); *Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1997) (the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense").

A. Basis for Jurisdiction in the Lower Courts

This is a federal habeas action brought pursuant to 28 U.S.C. § 2254. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

B. Factual Background

The homicides occurred on October 12, 2010. App. 43; *McCarrick*, 6 Cal.App.5th at 230 (Majority Opn.). At that time, Ms. McCarrick was 28 years old. App. 51; *McCarrick*, 6 Cal.App.5th at 236 n. 4.

Monica McCarrick has a history of mental illness. As noted above, all mental health professionals who testified in this case expressed their opinions that Ms. McCarrick "was not able to understand that her actions were legally or morally wrong." App. 20, 56, 64; *McCarrick*, 6 Cal.App.5th at 241, 246-247 (Majority Opn.).

These mental health professionals also presented uncontradicted testimony concerning Ms. McCarrick's lengthy history of mental illness. When she was 12 years old, she was hospitalized for "suicidal ideation and superficial self-inflicted wounds." App. 50, 54; *McCarrick*, 6 Cal.App.5th at 235-236, 238 (Majority Opn.) She did not receive "follow-up care after her hospitalization" and then began abusing multiple substances. App. 54; *McCarrick*, 6 Cal.App.5th at 239. It is "common for psychiatric patients who do not receive proper mental health care to self-medicate through substance abuse." *Id.* At age 14, she "was diagnosed with a form of attention deficit disorder and received medication." App. 50; *McCarrick*, 6 Cal.App.5th at 236. (Majority Opn.). She "was diagnosed with major depression

sometime between 2003 and 2005[,] while she was living in San Diego and received psychiatric treatment. During that time, she reported experiencing paranoid thoughts." App. 51, 54; *McCarrick*, 6 Cal.App.5th at 236, 239 (Majority Opn.). She then "began treatment with antidepressants." App. 54; *McCarrick*, 6 Cal.App.5th at 239 (Majority Opn.).

The mental health professionals diagnosed her with "bipolar disorder with psychotic features, signs of a delusional disorder, and polysubstance abuse" App. 50-51, 57; *McCarrick*, 6 Cal.App.5th at 236, 241 (Majority Opn.), along with "major depressive disorder with psychotic features." App. 54; *McCarrick*, 6 Cal.App.5th at 238 (Majority Opn.). They found no evidence of malingering, i.e., no faked mental illness of impairment. App. 51, 57; *McCarrick*, 6 Cal.App.5th at 236, 241 (Majority Opn.).

They concluded her homicidal actions and self-harm "were largely motivated by the delusional idea that she was being persecuted and that someone was going to take her daughters, separate them, enslave them in a camp setting, and torture them eternally." App. 52, 56; *McCarrick*, 6 Cal.App.5th at 237, 241 (Majority Opn.). She believed "that she and her children would be kidnapped and raped or made to be sex slaves." App. 56; *McCarrick*, 6 Cal.App.5th at 240 (Majority Opn.). Her "delusion[s] ... were symptoms of psychosis and ... a product of her mental illness." App. 53; *McCarrick*, 6 Cal.App.5th at 237 (Majority Opn.). "[A]t the time of the killings, [she] was in a state of psychosis, suffering from paranoid delusions." App. 55; *McCarrick*, 6 Cal.App.5th at 239 (Majority Opn.). "She was not able to

appreciate her acts' harmful nature because she believed she was saving the children from harm, not causing them harm." App. 53; *McCarrick*, 6 Cal.App.5th at 238, 240 (Majority Opn.).

While in county jail, awaiting trial, Ms. McCarrick was diagnosed with "bipolar disorder with psychosis and depressive order with psychosis." A jail psychiatrist "also considered a diagnosis of a disorder on the schizophrenic spectrum." Thus, she "was given antipsychotic and antidepressive medication in jail." App. 53; *McCarrick*, 6 Cal.App.5th at 238 (Majority Opn.). She "was on antipsychotic medication during her entire time in custody." App. 55; *McCarrick*, 6 Cal.App.5th at 239 (Majority Opn.).

Thus, the mental health professionals concluded Ms. McCarrick "met the criteria for being not guilty by reason of insanity." App. 56; *McCarrick*, 6 Cal.App.5th at 240 (Majority Opn.).

C. Litigation in the Trial Court Concerning the Guilt-Phase Defense Based on Ms. McCarrick's Delusions

The issue concerning the distinction between hallucination and delusion arose in a convoluted manner during the guilt phase of the trial.

1. Trial Court Denies Defense Request for Jury Instruction on Imperfect Defense of Others Based on Ms. McCarrick's Paranoid Delusions

Prior to the commencement of trial, Ms. McCarrick filed an in limine motion in which she requested a jury instruction concerning "imperfect defense of another." App. 87-97. The request for the jury instruction was predicated upon a psychologist's finding that Ms. McCarrick was "psychotic" and that she killed her

daughters as "a direct result of ... delusions and paranoia" and because she "was incapable of knowing or understanding the nature and quality of her acts and distinguishing right from wrong...." App.91. On the day of the killings, Ms. McCarrick "believed that an army of men who wanted to rape, torture and kill her daughters would arrive at any moment.... [S]he believed that her daughters would be kidnapped, 'raped for the rest of their lives' and 'treated like pets.' While Ms. McCarrick said that the idea of killing her daughters would be scary and horrible, the alternative would be much worse. She decided to kill her daughters and then herself using [her fiancé's] Japanese katana sword." App. 90-91.

Arguing against the requested instruction, the prosecutor characterized Ms. McCarrick's legal theory as an "imperfect self-defense theory,[11] or ... delusional theory...." The prosecutor also contended that the instruction, which, if given could have paved the way for a jury to convict Ms. McCarrick of manslaughter rather than murder, "doesn't apply when someone is acting under a delusion." App. 99-100. Defense counsel responded by characterizing Ms. McCarrick's actions as based partially on delusion and partially on "actual events and actual things that occurred which she misinterpreted ... [and] unreasonably interpreted...." App. 101. The trial court denied the request to "instruct[] the jury on manslaughter, on the basis that there was an imperfect defense of others belief held by the defendant." App. 105.

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[11] The prosecutor misspoke. There was no request for an instruction on imperfect self-defense. The request was for an instruction on imperfect defense of others. App. 91

Defense counsel stated her intention to introduce evidence in the guilt phase pertaining to Ms. McCarrick's state of mind, which would be relevant for the jury to assess whether she acted with premeditation and deliberation. The court stated that she would be allowed to do so. App. 109.

2. The Trial Court Ultimately Decides to Instruct the Jury that Evidence of Hallucinations Can Negate Premeditation and Deliberation, Despite the Circumstance that Ms. McCarrick Suffered from Delusions, Not Hallucinations.

In defense counsel's opening statement, she told the jury she would produce evidence that McCarrick was "acting crazy" around the time of the homicides and that Ms. McCarrick killed her daughters in order to "save" them from what she perceived to be "a worse fate." App. 110, 133-134.[12]

The prosecutor expressed concern about Ms. McCarrick introducing evidence "that all these people think she's crazy...." The prosecutor felt the "crazy" behavior was attributable to drug use, and sought to counter evidence of the "crazy" behavior with evidence of Ms. McCarrick's drug use. App. 109-112.[13]

The trial court noted that the mental state issue in the guilt phase was whether Ms. McCarrick had the capacity to premeditate and deliberate. In that connection, the court commented that "one of the jury instructions permitted is this instruction relating to hallucinations," and that evidence of hallucinations can negate premeditation and deliberation. App. 115. Thus, the court stated:

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[12] The opening statements were not transcribed. Tr. 95. The above-referenced descriptions of defense counsel's opening statement were made by the prosecutor and trial court.

[13] As noted above, when Ms.McCarrick was hospitalized after the homicides, toxicology tests were negative. App. 44.

> [I]n the guilt phase I am going to allow you to bring in evidence of hallucination on the issue of the ability to deliberate and premeditate, but that is as far as this goes.

App. 117.

Defense counsel rejoined:

> What I am planning to present is background information, and then what was going on in mid to late September through October 12th to show that Ms. McCarrick, for whatever reason, was hallucinating and experiencing delusions and had beliefs that were not true, and that those beliefs, and all the other evidence, would lead the jury to conclude that she did not premeditate and deliberate....

App. 118-119.

The court then made it clear it would only allow evidence of hallucinations, not delusions, and also that the court did not discern the distinction between hallucinations and delusions:

> [T[he concern I have is what type of hallucinations are you indicating, is the evidence going to indicate that the defendant had? Because hallucinations that just permitted her or caused her to knowingly kill her children and make that decision to do that is not the type of evidence that is relevant in the guilt phase. If the hallucinations are as to the nature and quality of her acts, that she didn't understand what she was doing, so whe wasn't premeditating or deliberating, I think that's fine. But if the hallucinations have to do with some bizarre concept that, for example, she felt like she needed to kill the children, and it was essentially in her mind better that she kill the children in this fashion than something else happen, that really supports the position of the People that there is premeditation and deliberation; that she is knowinglty deciding to do the act, knwoing what the effect is going to be and it's simply that she is not understanding that her act is wrong. That is the essence of our sanity phase.

App. 119-120.

Defense counsel repeatedly stressed her desire to put on evidence of Ms.

McCarrick's "delusional behavior" and evidence that she was "experiencing delusions" in an effort to persuade the jury to find that she did not act with premeditation and deliberation. App. 121.

The court reiterated, "Well, I'm going to allow evidence of hallucinations if there is some evidence that hallucinations prevented the defendant from deliberating and premeditating." App. 121-122. "[T]he fact that she may have done it for an entirely bizarre reason, that suggests that she did not understand the wrongfulness of these acts, that is something that is not at issue in the guilt phase." App. 122.

Defense counsel stated that the defense theory was that Ms. McCarrick's irrational "fears" were germane to her mental state, in terms of her capacity to premeditate and deliberate. App. 122-125.

The prosecutor contended the defense theory was actually paranoia, not hallucination. App. 129. The trial court agreed, stating, "I really don't think the defendant's paranoia in and of itself is relevant in these proceedings." App. 129-130. Defense counsel countered, "[T]he fact that she was acting bizarrely[] [and] having these strange fears ... is relevant to the premeditation and deliberation." App. 130. The court said it was "having trouble ... understanding where the fear comes into" the guilt phase of the case. App. 133. The court said it understood "that hallucination may have some effect on premeditation[,]" but did not believe evidence of "fear" was relevant. *Id.*

Defense counsel attempted to clarify her position:

> I believe the evidence will show, that I can present, that ... she was experiencing fear; that her life and the life of her daughters was in danger, and she took certain actions that demonstrated that fear, and that fear built up, culminating on October 12th. And it would be my argument to the juty that that fear clouded her judgment, clouded her ability to make rational decisions[,] ... [and] affected her ability to premeditate and deliberate[,] and so she acted rashly because of the fear.

App. 134.

The prosecutor responded by contending that "fear" which "doesn't rise to the level of a hallucination" is irrelevant, and cited *People v. Padilla*, 103 Cal.App.4th 675, 126 Cal.Rptr. 2d (2002),in support of that proposition. App. 136. After adjourning proceedings to review the *Padilla* case, App. 136, the court inquired about the nature of the "fear" evidence the defense was seeking to present. App. 137. Defense counsel said she intended to adduce evidence that Ms. McCarrick feared her fiancé was going to "kill her and hurt the girls...." The court then asked whether this constituted a "delusion" or a "hallucination". Defense counsel responded that it constituted Ms. McCarrick's "belief[,]" which was "a perception that's not based on objective reality...." App. 138-139. Defense counsel continued, "[I]t's ... relevant because it shows ... that she is concerned about her daughters' safety." It helps explain "her bizarre behavior...." App. 139. It was a "continuing" "delusion." App. 142-143.

Nevertheless, instead of instructing the jury concerning delusions, the trial court only instructed the jury that evidence of hallucinations could negate premeditation and deliberation. App. 149-150.

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3. Federalization of the Issue in the Trial Court

Significantly, the federal constitutional aspect of this issue was preserved during an in limine hearing prior to the commencement of the guilt phase, when the trial court granted Ms. MsCarrick's motion for all defense objections "to be deemed to include an objection under the 5th, 6th and 14th Amendments." Tr. 58

D. Direct Appellate Review in the California Judiciary

1. California Court of Appeal

In Ms. McCarrick's opening brief in the California Court of Appeal, she expressly argued that the trial court's instructional error "violated the Sixth and Fourteenth Amendments." Specifically, she contended the instructional error violated her constitutional "right to correct instructions on the defense theory of the case" and "prevent[ed] the jury from considering defense evidence and making findins of fact necessary to establish guilt." AOB[14] 45-46.

Likewise, in the reply brief Ms. McCarrick filed in the California Court of Appeal, she argued:

> Ms. McCarrick's Rights Were Violated Under the Sixth and Fourteenth Amendments, and Under California Law, When the Instructions Precluded Consideration of Ms. McCarrick's Paranoid Delusions in Resolving Whether She Had Acted With Premeditation and Deliberation.

ARB[15] 2.

A divided panel of the Court of Appeal concluded that Ms. McCarrick

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[14] "AOB" refers to the appellant's opening brief Ms. McCarrick filed in the California Court of Appeal

[15] "ARB" refers to the appellant's reply brief Ms. McCarrick filed in the California Court of Appeal.

forfeited the instructional issue by not specifically requesting a pinpoint instruction on delusions. Further, the court rejected the issue on the merits, concluding the instructions given by the trial court did not preclude the jury from considering Ms. McCarrick's defense based on delusions. App. 59-63.

The dissenting judge in the Court of Appeal concluded Ms. McCarrick did not forfeit the issue, because the rulings by the trial court rendered futile any request for an instruction on delusion, and, moreover, California Penal Code section 1259 required the court to instruct the jury concerning the defense based on delusions. App. 80-82; *McCarrick*, 6 Cal.App.5 at 259-260 (Streeter, J., concurring and dissenting). The trial court's failure to so instruct constituted prejudicial error because it precluded the jury from considering Ms. McCarrick's delusions in the guilt phase. App. 83-84; *McCarrick*, 6 Cal.App.5th at 261-262 (Streeter, J., concurring and dissenting).

Ms. McCarrick raised the very same instructional issue in her petition for review filed in the California Supreme Court. Pet. Rev.[16] 8-15.

On March 15, 2017, the California Supreme Court denied Ms. McCarrick's petition for discretionary review. Jusitces Werdegar and Cuéllar were of the opinion that review should have been granted. App. 85.

E. § 2254 Proceedings in the District Court and the Ninth Circuit.

1. The District Court

Ms. McCarrick filed a habeas petition pursuant to 28 U.S.C. § 2254 in the

[16] "Pet. Rev." refers to the petition for review Ms. McCarrick filed in the California Supreme Court.

United States District Court for the Eastern District of California. One of the claims she raised in the petition was that the trial court's instructional error precluded her from presenting her defense based on her paranoid delusions. App. 22-23. The district court framed the issue as follows:

> McCarrick first argues that the trial court erred in its instruction pursuant to CALCRIM No. 627, which refers to hallucinations. The record reflects that the trial court instructed the jury pursuant to the standard version of CALCRIM No. 627 as follows:
>
> > A hallucination is a perception that is not based on objective reality. In other words, a person has a hallucination when the person believes that he or she is seeing or hearing or otherwise perceiving something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation.
>
> During the guilt phase of her trial, McCarrick relied on the theory that, due to her delusional beliefs, she did not premeditate or deliberate and therefore could not be guilty of first degree murder. According to McCarrick, in light of her defense, the court should have modified the instruction above to specifically refer to delusions. She argues that the evidence showed that she suffered from delusions rather than hallucinations, and thus under the instruction as given, the jury was precluded from considering the effects of her paranoid delusions when considering whether McCarrick acted with premeditation and deliberation. McCarrick contends that the court's failure to do so deprived her of her Sixth and Fourteenth Amendment rights to have the jury consider the evidence presented by the defense and determine whether she was guilty of a lesser offense.

App. 26-27.

The district court rejected the claim "on both procedural and substantive grounds." App. 27-28.

As to procedure, Ms. McCarrick acknowledged the state appellate court's

ruling that review of the claim was "forfeited ... because McCarrick did not ask the trial court to modify the instruction to specifically refer to delusions." App. 27-28. But Ms. McCarrick contended the claim was "not procedurally defaulted because she [has] show[n] cause and prejudice to excuse it." App. 28. After discussing the diverging opinions of the members of the state appellate court on the question of forfeiture, App. 28-32, the district court concluded that the reasoning of the majority of the state appellate tribunal precluded a finding of "the requisite cause and prejudice to excuse the procedural default." App. 32.

As to substance, because Ms. McCarrick cited "no Supreme Court authority to support the theory that the term delusion is distinct from hallucination," the district court concluded the majority opinion of the California Court of Appeal was not "unreasonable or contrary to Federal law...." App. 33.

The district court denied Ms. McCarrick's § 2254 petition but granted a certificate of appealability with respect to her claim that "the trial court committed instructional error by precluding the jury from considering McCarrick's paranoid delusions in resolving whether she had acted with premeditation and deliberation...." App. 41.

2. The Ninth Circuit

The Ninth Circuit affirmed the district court's order denying habeas relief. The court held her instructional claim "is procedurally defaulted and barred from review" App. 3, "because she failed to ask the trial court to modify CALCRIM No. 627 to include delusions." App. 5. Further, the court held she "failed to show cause

and prejudice to excuse her procedurally defaulted claim" because the court disagreed with the viewpoint of Ms. McCarrick and the dissenting judge in the state appellate court that "it would have been futile to ask the trial court to modify the instruction." App. 5-6, 81-82; *McCarrick*, 6 Cal.App.5th at 259-260 (Streeter, J., concurring and dissenting). The Ninth Circuit justified this conclusion by suggesting the trial litigants "understood that the 'hallucinations' in question included McCarrick's delusional beliefs that her children were in danger." App. 6.

The Ninth Circuit's discussion and holding on this procedural default issue includes no reference to significant components of the record, including the portion of the record which shows that "[b]y the time the guilt phase instructions were argued and settled, the trial court had already ruled, unequivocally," CALCRIM No. 627 "applies only to hallucinations[,]" App. 82; *McCarrick*, 6 Cal.App.5th at 260 (Streeter, J., concurring and dissenting);[17, 18] that Ms. McCarrick was suffering from delusions, not hallucinations, App. 72, 82; *McCarrick*, 6 Cal.App.5th at 252, 260 (Streeter, J., concurring and dissenting); and, in order to decimate defense counsel's awkwardly constrained effort to suggest to the jury that Ms. McCarrick's "delusions qualified as hallucinations," all the prosecution "had to do was point out that there was no evidence of hallucinations, which, predictably, is exactly what they did....[,]" App. 83; *McCarrick*, 6 Cal.App.5th at 260-261 (Streeter, J.,

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[17] More precisely, the trial court ruled that CALCRIM No. 627's progenitor, *People v. Padilla*, 103 Cal.App.4 675, "applies only to hallucinations." App. 71, 81; *McCarrick*, 6 Cal.App.5th at 252, 260 (Streeter, J., concurring and dissenting).

[18] The trial judge expressly ruled that "*the evidence will be as to the actual hallucination.*" App. 80 (italics in the original); *McCarrick*, 6 Cal.App.5th at 259 (Streeter, J., concurring and dissenting).

concurring and dissenting).[19]

Additionally, the Ninth Circuit's discussion and holding on the procedural default issue contains no reference to California Penal Code section 1259, which provides that no forfeiture occurs in a cases where instructional error affects the accused's substantial rights. App. 81; *McCarrick*, 6 Cal.App.5th at 259 (Streeter, J., concurring and dissenting); *Barco v. Tilton*, 694 F.Supp.2d 1122, 1138 (C.D. Cal. 2009) ("contemporaneous objection to jury instructions is not required if the 'substantial rights' of the defendant were implicated by the instructions").

The Ninth Circuit also affirmed the district court's denial of Ms. McCarrick's § 2254 petition on the merits, concluding that any instructional infirmity in Ms. McCarrick's trial did not prevent the jury's consideration of constitutionally relevant evidence, App. 7-8, and "McCarrick has not cited any Supreme Court authority or federal law that distinguishes delusions from hallucinations....[,]" App. 8. Finally, applying the "heightened" AEDPA standard set forth in 28 U.S.C. § 2254(d), the court concluded the majority opinion of the California Court of Appeal "is not contrary to or an unreasonable application of federal law, as it did not 'infect the entire trial' resulting in a conviction that violates due process." App. 8-9 (citing

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[19] The prosecution argued, "'There is not one piece of evidence that she was under any form of hallucination on October 12, 2010.'" App. 83; *McCarrick*, 6 Cal.App.5th at 260-261 (Streeter, J., concurring and dissenting). This argument "was irrefutable. When McCarrick killed her children, she was not seeing imaginary things, or hearing voices, or in a dream state; she was having real conversations, and reacting to real events, while grossly misreading what was actually happening." App. 83; *McCarrick*, 6 Cal.App.5th at 261 (Streeter, J., concurring and dissenting). "She suffered from delusions, not from hallucinations." App. 84; *McCarrick*, 6 Cal.App.5th at 262 (Streeter, J., concurring and dissenting).

Middleton v. McNeil, 541 U.S. 433, 437 (2004) (internal brackets omitted).

REASONS FOR GRANTING THE PETITION

This petition should be granted, because the courts which have heretofore reviewed Ms. McCarrick's constitutional claim concerning the trial court's withdrawal of her defense based on her delusions have applied this Court's governing precedent in an objectively unreasonable manner.

"The starting point for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v. Rodgers*, 133 S.Ct. 1446, 1449, 185 L.Ed.2d 540 (2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

The clearly established law in this regard is: (1) A defendant has a constitutional right to present a complete and meaningful defense. *Holmes v. South Carolina*, 547 U.S. at 324. (2) A defendant is constitutionally entitled to instructions to the jury that support her defense when she adduces substantial evidence in support of that defense. *Mathews v. United States*, 485 U.S. at 63. (3) A defendant has a constitutional right to show that mental illness prevented her from acting with the intent required to establish the offense with which she is charged. *Clark v. Arizona*, 548 U.S. at 769; *In re Winship*, 397 U.S. at 364. This precedent was violated when the trial court "preclude[d] [the jury] from considering [Ms. McCarrick's] delusions at the guilt phase" of her trial. App. 84. The trial court violated Ms. McCarrick's basic Constitutional rights when it forced her to mount a defense based upon hallucinations, when, in fact, "[o]n the day of the killings and in

the weeks before, McCarrick was suffering from grotesque, reality-based delusions, but not from hallucinations." App. 72.

The district court and the Ninth Circuit erroneously concluded that § 2254 relief is unavailable in this case because Ms. McCarrick has not cited any precedent from this Court in which a distinction is drawn between delusions and hallucinations. App. 8, 32. The fact that this Court has never drawn such a distinction does not foreclose relief pursuant to AEDPA. "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2007) (Kennedy, J., concurring in the judgment)). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). "[T]o the contrary, ... even a general standard may be applied in an unreasonable manner." *Id.*

As this Court has explained:

> [A] state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or *unreasonably refuses to extend that principle to a new context* where it should apply.

Williams v. Taylor, 529 U.S. 362, 407 (2000) (italics added).

The clear and relevant precedent from this Court's decisions has been identified above: An accused has a constitutional right to present a complete and meaningful defense and to instructions supporting application of that defense. *Holmes v. South Carolina*, 547 U.S. at 324; *Mathews v. United States*, 485 U.S. at 63. The trial court violated these fundamental constitutional rights by erroneously instructing the jury in a manner that "preclude[d] it from considering [Ms. McCarrick's] delusions at the guilt phase." App. 84; *McCarrick*, 6 Cal.App.5th at 261 (Streeter, J., concurring and dissenting). It would be unreasonable not to extend this Court's precedent to apply in this context.

Additionally, the district court and Ninth Circuit erred by concluding that Ms. McCarrick has not established cause and prejudice for any purported forfeiture of her instructional claim. App. 4-6, 27-32. First, the record demonstrates that Ms. McCarrick consistently sought to predicate her defense on her delusional beliefs. Indeed, "[s]he suffered from delusions, but not from hallucinations." App. 72; *McCarrick*, 6 Cal.App.5th at 252 (Streeter, J., concurring and dissenting). Second, since her mental health defense was germane to the question whether she premeditated and deliberated the killings, her defense and instructions pertaining to her defense obviously affected her substantial rights. Thus, pursuant to California Penal Code section 1259, any failure on her part to make a specific request for a pinpoint instruction concerning delusions did not occasion a forfeiture. *Barco v. Tilton*, 694 F.Supp.2d at 1138. Indeed, as the court explained in *Barco v. Tilton*:

> In California, contemporaneous objection to jury instructions is not required if the "substantial rights" of the defendant were implicated by the instructions. See Cal. Penal Code § 1259; *People v. Hannon*, 19 Cal. 3d 588, 600, 138 Cal. Rptr. 885, 564 P.2d 1203 (1977). Thus, for example, the California Supreme Court has held that the contemporaneous objection rule was not applicable where the defendant was claiming an instruction violated his right to due process. See *People v. Smithey*, 20 Cal. 4th 936, 976 n.7, 86 Cal. Rptr. 2d 243, 978 P.2d 1171 (1999), cert. denied, 529 U.S. 1026, 120 S. Ct. 1435, 146 L. Ed. 2d 324 (2000); *People v. Flood*, 18 Cal. 4th 470, 482 n.7, 76 Cal. Rptr. 2d 180, 957 P.2d 869 (1998). The foregoing authorities belie [the notion] ... that California's contemporaneous objection rule is applied independent of federal law insofar as it relates to instructional errors claims.... The Court finds and concludes that petitioner's instructional error claim ... is not procedurally defaulted.

Barco v. Tilton, 694 F.Supp.2d at 1138.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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