Appendix

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONICA MCCARRICK, Petitioner-Appellant, v. JANELLE ESPINOZA, Respondent-Appellee.	No. 20-17311 D.C. No. 2:17-cv-02652-JKS MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, District Judge, Presiding

Argued and Submitted March 11, 2022
San Francisco, California

Before: WALLACE, S.R. THOMAS, and McKEOWN, Circuit Judges.

Petitioner-Appellant Monica McCarrick appeals from the district court's denial of her petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. §§ 1291, 2253. We review the district court's decision to deny a § 2254 habeas petition de novo and its findings of fact for clear error, *see McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003), and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, we cannot grant federal habeas relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "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." 28 U.S.C. § 2254(d). In addition, "state court findings of fact are presumed correct unless rebutted by clear and convincing evidence." *McClure*, 323 F.3d at 1241 (citing 28 U.S.C. § 2254(e)(1)). This is a high standard that is meant to be "difficult to meet" because the role of a federal court is limited to guarding against "extreme malfunctions in the state criminal justice systems" and not performing "error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation omitted). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court . . . ." *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004) (citation omitted). In this case, the last reasoned decision by a state court is the California Court of Appeal's decision affirming the state trial court's judgment.

On appeal to our court, McCarrick argues that the district court erred in

denying her habeas claim that the state trial court committed instructional error by not modifying CALCRIM No. 627 to permit the jury to consider McCarrick's paranoid delusions in resolving whether she had acted with premeditation and deliberation.[1] At the outset, we hold that McCarrick's claim is procedurally defaulted and barred from review. As a threshold matter, federal courts are not allowed to "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural." *Id.*

Here, the California Court of Appeal held that McCarrick forfeited the claim

[1] Similar to McCarrick's direct appeal to the California Court of Appeal, her habeas petition before the district court raised three claims: (1) the trial court committed instructional error by not modifying CALCRIM No. 627 to permit the jury to consider McCarrick's paranoid delusions in resolving whether she had acted with premeditation and deliberation; (2) there was no substantial evidence to support the jury's sanity verdict because the jury could not reasonably reject the opinions of three defense experts that McCarrick had been legally insane; and (3) the trial court committed instructional error with its instruction of CALCRIM No. 3450, which instructs the jury on whether a defendant is legally insane. After denying her petition, the district court granted a certificate of appealability only to the first two claims. On appeal before our court, however, McCarrick raises the first certified issue as well as the third uncertified issue. Because the third claim is uncertified, we decline to address it and we decline to expand the certificate of appealability. *See, e.g.*, *Ochoa v. Davis*, 16 F.4th 1314, 1346 (9th Cir. 2021). Thus, we only address the first certified claim.

because she failed to ask the trial court to modify CALCRIM No. 627 to include delusions. Under California law, "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." *People v. Andrews*, 776 P.2d 285, 295 (Cal. 1989). The California Court of Appeal therefore rejected McCarrick's argument on state law grounds. We do not review that decision because it rests on independent, *see, e.g.*, *People v. Williams*, 16 Cal. 4th 153, 208–09 (Cal. 1997), and adequate, *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011), state grounds. *See Coleman*, 501 U.S. at 729–30.

In addition, McCarrick failed to show cause and prejudice to excuse her procedurally defaulted claim. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) ("[A] court may [] reach the merits of . . . procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims" if a "habeas petitioner shows cause and prejudice." (internal citations omitted) (emphasis removed)). "A showing of cause 'must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule.'" *Robinson*, 360 F.3d at 1052 (citation omitted). We reject McCarrick's argument that cause and prejudice exist because it would have been futile to ask the trial court to modify the instruction. We agree with the California Court of Appeal that the "record does not support

[McCarrick's] contention." The state trial court considered the issue of whether McCarrick can introduce evidence about her fears that her fiancé, Robert Paulson, was going to harm her or the girls, a delusional belief based on paranoia. Referring to this fear, the trial court was unsure whether to call it "hallucination" or "delusion" but ultimately decided it was going to allow McCarrick to present the evidence as "hallucinations" to do with "her belief that the children were in imminent peril of being kidnapped and tortured, and therefore this was her alternative as she saw it." The trial court asked both parties if everyone was on the same page and both parties responded "yes." Thus, it is clear that at the time the trial court made its ruling on the issue, both parties understood that the "hallucinations" in question included McCarrick's delusional beliefs that her children were in danger. Nothing on the record suggests that there is an external factor that impeded McCarrick's efforts to comply with California's procedural rule or that it would have been futile for McCarrick to ask the trial court to modify the instruction to specifically include the word "delusions" alongside "hallucinations." *See Engle v. Isaac*, 456 U.S. 107, 130 & n.36 (1982). Therefore, we conclude that McCarrick failed to establish cause and prejudice to excuse her procedural default.

Moreover, even if McCarrick's procedurally defaulted claim is excused, the district court did not err in denying it on the merits. For the following reasons, the California Court of Appeal decision that the state trial court did not err in failing to

modify CALCRIM No. 627 *sua sponte* is not contrary to or an unreasonable application of federal law. In general, "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Thus, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Because jury instructions in a state trial are matters of state law, an instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding." *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988) (citation omitted). Rather, "[t]he error must so infect the entire trial that the defendant was deprived of his right to a fair trial guaranteed by the due process clause of the fourteenth amendment." *Id.* (citation omitted). When an instruction is subject to an erroneous interpretation, the "proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

McCarrick's main argument is that hallucinations are clearly different from delusions and that there was a reasonable likelihood that the jury would not consider her irrational belief that Paulson was going to harm her and her children as hallucinations under CALCRIM No. 627. First, it is not clear if the language of CALCRIM No. 627 facially excludes McCarrick's delusional beliefs. CALCRIM

No. 627 provides that a hallucination is a "perception not based on objective reality" or in other words when a person is "perceiving something that is not actually present or happening." The definition of hallucination provided to the jury does not expressly limit it to only sensory perceptions not grounded in reality and may very well include her delusional beliefs. Second, the record shows that the jury was repeatedly presented with evidence that McCarrick had irrational beliefs that Paulson intended to harm her and her children. In particular, the defense counsel argued that the hallucination instruction was important because McCarrick had irrational beliefs that Paulson intended to kill her and harm her girls. Furthermore, the State did not challenge that McCarrick's irrational and delusional beliefs are not hallucinations. Rather, the State focused on arguing that McCarrick did not appear to have those irrational beliefs the day of the killings.

Finally, McCarrick has not cited any Supreme Court authority or federal law that distinguishes delusions from hallucinations or held that the California Court of Appeal's ruling is contrary to federal law. Indeed, even if the instruction was an error, the Supreme Court has held that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). The jury heard three days of testimony from numerous witnesses about McCarrick's irrational fear of Paulson. Considering the heightened standard for habeas review, we conclude that the

California Court of Appeal's decision 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. *Middleton*, 541 U.S. at 437.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MONICA MCCARRICK,

Petitioner,

vs.

MICHAEL PALLARES, Acting Warden, Central California Women's Facility,[1]

Respondent.

No. 2:17-cv-02652-JKS

MEMORANDUM DECISION

Monica McCarrick, a state prisoner now represented by counsel, filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. McCarrick is in the custody of the California Department of Corrections and Rehabilitation and incarcerated at Central California Women's Facility. Respondent has answered, and McCarrick has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On March 28, 2011, McCarrick was charged with the malice aforethought murder of her three-year old daughters, L.B. and T.B. The information also charged McCarrick with two counts of assault on a child causing death. McCarrick entered a not-guilty plea and subsequently added a plea of not guilty by reason of insanity. On direct appeal of her conviction, the California Court of Appeals recounted the following facts underlying the charges against McCarrick and the evidence presented at trial during the guilt phase and the sanity phase:

[1] Michael Pallares is substituted for Janelle Espinoza as Acting Warden, Central California Women's Facility. FED. R. CIV. P. 25(d).

A. Guilt Phase

1. The Crimes and Crime Scene

On the evening of October 12, 2010, [McCarrick] killed her three-year-old twin daughters, Lily and Tori Ball, with a sword. A downstairs neighbor heard loud thumping from [McCarrick's] apartment. An hour or two later, a fire alarm went off, and the neighbor saw smoke coming from one of the windows. He ran upstairs and kicked in the front door, but it was blocked, and he was unable to enter. He succeeded in breaking a sliding glass door; when he entered the apartment, he saw a sword on the floor, covered in blood.

Firefighters arrived and found the door to the apartment slightly ajar but difficult to open. They forced the door open, found a fire in a closet near the front door, and extinguished it. They then found the bodies of Lily and Tori close to the door. One of the bodies had been blocking the door. The girls had both suffered severe lacerations, and were dead. The firefighters found [McCarrick] in the kitchen and carried her out. She was unconscious and had sustained injuries, including cuts to her throat and wrist.

A search of the apartment revealed an assault rifle and a shotgun in the living room and a box with a loaded handgun and additional live rounds. In the hallway was a straight-bladed sword covered with blood. Near it was a lighter with blood on it. Two high chairs had been overturned in the dining room, with their food trays removed. The high chairs were completely soaked in blood. On a table facing the highchairs was a laptop computer playing an animated children's program. In the kitchen, a landline telephone was on the counter; both the telephone and the countertop were covered in blood. Water was running from the bathroom faucet, and blood was in the sink and on the counter. A cell phone was on the bathroom floor, and on a stool was a novel by James Patterson, Double Cross (2007). The book was about a serial killer, and it was open to a page that contained the words, "My daughter is dead."

2. The Injuries

The doctor who performed the autopsies on the two girls testified about their injuries. Tori had 11 cutting wounds to her face, two cutting wounds to her neck, a gaping wound on the front of her neck, nine superficial cutting wounds to her chest, two deep stab wounds on her chest, one of which penetrated her heart and the other her lung, a deep stab wound to her abdomen as well as three small superficial cutting wounds to the abdomen, and wounds on her hands and arms consistent with defensive wounds. Lily had five cutting wounds to her face, four to her neck, and nine to her chest; a large gaping wound to the front of her neck that had severed her larynx and cut the carotid arteries; multiple defensive wounds to her hands and arms; and a six-inch-deep stab wound to her abdomen. Neither girl had inhaled smoke, which meant they were dead before the fire started.

[McCarrick] had multiple injuries and was in critical condition. She had two large lacerations to her throat and multiple cuts and lacerations on her arms and wrists. On one of her arms the tendons that flex the wrist and fingers were severed. She had a

large laceration on her upper thigh and large lacerations on each ankle, which cut the Achilles tendons. Tests for alcohol, cocaine, and methamphetamine were negative.

3. Observations of [McCarrick's] Fiancé

[McCarrick] and her two daughters lived with [McCarrick's] fiancé, Robert Paulson. [McCarrick] and Paulson had known each other about a decade previously and renewed their relationship over Facebook around Thanksgiving of 2009. They became engaged in May 2010, and [McCarrick] and her daughters moved to California from Pennsylvania during the last week of August 2010. Paulson's job required large amounts of travel, and on September 9, shortly after the couple moved into their new apartment, he was called away for a month-long assignment in Minnesota. On October 11, Paulson was told he would have to go to Alaska for five to 10 days after the Minnesota assignment ended, rather than returning home. [McCarrick] was upset when Paulson told her about the extension of his trip.

Paulson and [McCarrick] spoke on the telephone several times on October 12, the day of the killings. One of the calls took place during the evening, on [McCarrick's] cell phone. [McCarrick] was incoherent and "jumbled," and sounded like she was running around the house doing something. Paulson heard [McCarrick] "freaking out," and "hysterical noises going on in the background." She told him, "If Tori and Lily are okay tell them that it was an accident." He heard her say, "It's okay. It's going to be okay. We are going to make a fire. We are going to make a fire"; then he heard a fire alarm go off, and then a scream, and then the call ended. He tried to call the apartment several times but got no response.

4. [McCarrick's] Recent Behavior

On the morning of the day of the killings, the assistant manager of the apartment complex where [McCarrick] lived asked [McCarrick] to move her car because it was blocking other parking spots. At first, [McCarrick] would not open her apartment door. [McCarrick] had a hard time telling the assistant manager what she wanted her to do and why the car was parked the way it was. The assistant manager watched the girls while [McCarrick] moved the car.

On the morning of the same day, the assistant manager had noticed [McCarrick] had a work order to have her locks changed. [McCarrick] later called to ask whether the maintenance department had changed the locks. The girls were crying in the background, and [McCarrick] seemed to want the assistant manager to help her with the girls.

Terry Fay, the paternal grandmother of Lily and Tori, lived in southern California. She spoke with [McCarrick] often by telephone, and she had cared for the girls on occasion. On October 11, 2010, [McCarrick] called Fay and asked, "Who is going to take the girls?" Fay thought [McCarrick] needed someone to take care of the girls. Fay told [McCarrick] that if she brought the girls to her home, Fay and her family would begin proceedings to have custody of them. [McCarrick] did not sound rational during the conversation. She told Fay that Paulson had had a vendetta against her for 10 years and was kicking her out.

5. Defense Evidence

a. [McCarrick's] Fiancé

Robert Paulson was called as a defense witness. He testified that he had previously had a relationship with a woman named Jill who killed herself with one of Paulson's guns in April 2010, several months after their relationship ended.

While [McCarrick] was living in Pennsylvania, she appeared happy and stable. She was working at a dental office and going to school. She was supportive as Paulson coped with Jill's death. When [McCarrick] moved to California, she looked for a school so she could get a license to be a dental assistant in the state. Paulson provided money when [McCarrick] needed it. Paulson thought [McCarrick] was a good mother, and she never did anything to make him think she would harm her daughters.

Paulson noticed that [McCarrick] changed two or three weeks after he left on his business trip, and in the two and a half weeks before the killings they had a series of communications that led Paulson to believe her behavior was "slowly deteriorating." She found a synopsis for a horror movie Paulson was writing with a friend, which he described as a "slasher" film about a man stalking children on a beach, in which "everyone died." [McCarrick] was upset and thought Paulson had written the story about her and that he might hurt her. She repeatedly brought the subject up during their conversations during Paulson's absence and suggested he had resumed their relationship in order to hurt her. [McCarrick] also questioned Paulson about whether he had driven Jill to suicide, accused him of being with another woman, and said his female friends hated her. She expressed her fear of a UPS delivery man and said he had entered the apartment. At times she said she would not leave the apartment because someone was sitting in a car outside. She thought a Facebook post by a friend of Paulson's, which made a joke about breaking up with a girlfriend using "Dobermans, tasers, and rounds," referred to her. Her mood went "up and down"; Paulson would spend hours reassuring her, she would seem fine, and the next day she would be upset again. She also indicated she wanted help with the children.

When Paulson told [McCarrick] he had to go to Alaska for a few days after the Minnesota job, she was upset and they argued. She wanted him to come home and said she missed him. On the evening of the killings, [McCarrick] sent him text messages that caused him concern. One, which he said "made no sense," referred to "robot butterflies" and concluded "u will never have me again!" In another, [McCarrick] told Paulson to say to the children's father, " 'let the bunnies go forever so we can keep what's ours' and say that defending then [sic] is the number 1 most high on your priority list [etc.]." This was apparently a reference to their hope that Lily and Tori's father might give up his parental rights so Paulson could adopt them. Later in the evening, [McCarrick] sent a text message that said, "Tick tock." Another message said, "Read James Patterson." When they spoke on the telephone that evening, [McCarrick] "rant[ed]" and ran around. She would hang up, and he would call her back. Paulson described her conversation as "rambling. No coherent thought or trying to get any message across of what was going on." She did not respond to his attempts to communicate with her after the last call ended.

b. Paulson's Mother

Paulson's mother, Roxanne Paulson, testified that she had helped [McCarrick] and the girls move to California from Pennsylvania in August 2010.[FN2] Roxanne continued to have frequent contact with them after they moved into their apartment in September. Roxanne became concerned because [McCarrick] seemed nervous and anxious. A few days before the killings, [McCarrick] and the girls spent the night at Roxanne's home. Between 2:00 and 3:00 in the morning, [McCarrick] decided to leave. When she took one of the girls to the car, she told Roxanne there was a car outside; she thought someone was watching her. Roxanne reassured her that the person was a neighbor who left for work early. After the girls were in the car, [McCarrick] texted Roxanne to ask if it was safe to leave. Once they got home, she texted Roxanne to tell her they were safe. The day before the killings, [McCarrick] called Roxanne at work and told her the UPS driver was coming into the apartment. Roxanne testified that [McCarrick] was having a hard time managing while Paulson was out of town.

FN2. To avoid confusion, we shall refer to Paulson's mother as Roxanne. We intend no disrespect.

c. [McCarrick's] Mother

[McCarrick's] mother testified that [McCarrick] was managing well before moving from Pennsylvania to California. [McCarrick] began expressing fear of Paulson shortly after she moved. When [McCarrick] visited her mother in San Diego from September 29 to October 4, 2010, she brought the synopsis of the horror movie Paulson had worked on and asked her mother what she thought of it and whether it meant Paulson was feeling violent toward her. During the visit, she repeatedly discussed her fears and her uncertainty about getting married. She expressed her concern about the fact that Paulson kept guns in the apartment, but she did not mention the sword. She appeared anxious and disorganized. [McCarrick] and her mother shopped for a wedding dress; when they did so, [McCarrick] did not seem fearful.

On October 11, the day before the killings, [McCarrick] called her mother, who told her it was not a good time to talk. She asked if [McCarrick] had called about something important, and [McCarrick] said, "No, it's okay." She sounded sad and subdued.

d. [McCarrick's] Friends

Three friends of [McCarrick] also testified to her state of mind before the killings. Regina B. testified that [McCarrick] sent her a text message on September 25, 2010, saying she was afraid that Paulson and his mother were out to get her, and that Regina B. should let someone know if anything happened to [McCarrick] or if she went missing.

Maritza D., a friend from Pennsylvania, testified that she was in regular contact with [McCarrick] after the move to California. Within about a week of the move, [McCarrick] began to express concern about whether Paulson and his mother would accept her. On September 25, [McCarrick] sent Maritza D. text messages saying, "My fiancé Robert Paulson and his mom are acting strange, so f.y.I. [sic] if I end up missing or

turn up dead or they try to say I committed suicide it is a [] coverup so feel free to get revenge for me." Maritza D. called [McCarrick], who told her that she was afraid Paulson was not going to approve of her and the children, that she was jealous of his relationships over Facebook, and that they were not getting along. She also said she was afraid because of a book Paulson was writing about a murder of a wife or girlfriend. On September 29, [McCarrick] sent Maritza D. texts saying, "They want to steal the girls [] And kill me I think[.]" They had further conversations that were "all about the fear"; the last one was about a week before the killings.

Pamela T., [McCarrick's] friend who lived in Los Angeles, testified that [McCarrick] told her she was afraid Paulson would hurt her or kill her. In a text dated September 25,[FN3] [McCarrick] said "He scares me. I feel like he is going to hurt me. I never meant to hurt him . . . . I need to know I am safe so hopefully this is a paranoid delusion but I'm telling u if I end up missing or turn up dead and or they say I tried to commit suicide it is a coverup." Pamela T. recommended that [McCarrick] visit her mother. Later, [McCarrick] sent Pamela T. a picture of herself in a wedding dress. In the week or two before the killings, [McCarrick] told Pamela T. she was afraid and had arranged a telephone counseling appointment for October 6 to help her deal with the situation. During a conversation within two weeks of the killings, [McCarrick] said she had read an obituary of Paulson's former girlfriend and that she thought that rather than dying by suicide, Jill had been killed by Paulson.

FN3. Pamela T. testified the date on the text was October 3; however, the copy of the text message in the record indicates it was sent on September 25.

B. Sanity Phase

The parties stipulated that the jury could consider in the sanity phase all evidence that had been presented at the guilt phase. In addition, three mental health professionals who had evaluated [McCarrick] testified on her behalf at the sanity phase of the trial. [McCarrick's] theory was that she suffered from delusions that she, Lily, and Tori were going to be kidnapped and held in slavery, and that the only way to save the girls from this fate was to kill them.

1. John Shields, Ph.D.

Dr. Shields testified that he had met with [McCarrick] nine times between October 2010 and June 2011 and had spent more than 20 hours with her. He administered psychological tests, interviewed [McCarrick's] mother, and reviewed other documents, including reports of other interviews, police reports, and mental health records. He opined that [McCarrick] suffered from a mental disease, most probably a depressive condition, which had first manifested itself when she was 12 years old when she was hospitalized in 1995 for suicidal ideation and superficial self-inflicted wounds. The records from that incident indicated she had tried to harm herself in the past. At age 14, [McCarrick] was diagnosed with a form of attention deficit disorder and received medication. Dr. Shields testified that adolescents with untreated depressive disorders

often develop substance abuse problems. Dr. Shields also opined that [McCarrick] had bipolar disorder with psychotic features, signs of a delusional disorder, and polysubstance abuse.

[McCarrick] 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.

[McCarrick] reported that she started using alcohol at age 12 and began using illegal drugs, including marijuana, LSD, mushrooms, methamphetamine, Ecstasy, and possibly cocaine, by age 14. She continued using Ecstasy until age 27.[FN4] She began using crystal methamphetamine at age 18. She continued to use it regularly, except while she was pregnant with the twins. She reported variations in her pattern of methamphetamine use and said she used it less as time went on; at another point, however, she said she used it nearly every day until she was 25 years old. She was using it during the month of September 2010, the month she sent some of the text messages. A text message from the time she was visiting her mother in late September and early October 2010 indicated she was using methamphetamine. She told Dr. Shields she smoked it in Roxanne's garage four days before the killings.[FN5] In an October 10, 2010 text message to Paulson, [McCarrick] wrote, "You wanted me to stay thin and said it was important and okayed me to use to do that."

FN4. [McCarrick] was 28 years old at the time of the killings.

FN5. [McCarrick] told Dr. Shields this was the last time she used methamphetamine before the killings.

Dr. Shields testified that paranoia is a common side effect of ongoing methamphetamine use. Long-term drug use can cause mental problems well after someone uses the drug, and it can cause delusions.

Psychological testing administered by Dr. Shields showed that [McCarrick] did not have a significant probability of faked mental illness or impairment; suggested that she was experiencing suicidal ideation; showed that her intellectual functioning was well above average; showed that she had impaired executive functioning; and suggested that she had severe mental illness.

Dr. Shields believed that [McCarrick's] mental disorder played a role in her actions the night of the killings and that her actions were "largely a product of that mental illness in combination with the defective reasoning." In his view, drugs were not the primary cause of [McCarrick's] actions, although he acknowledged that there was a possibility that her long-term daily drug use could have caused her to have the issues she had on the day of the killings. In his opinion, [McCarrick's] actions 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. This delusion was fueled by the story Paulson had written about girls or women being taken to an island, mistreated, and killed. She believed that the UPS driver had keys to her apartment and was part of the conspiracy to harm her and the girls and

that messages were embedded in videos or shows she and the children were watching after the move to California. She told Dr. Shields that while she was reading the novel Double Cross, she understood a reference to the time of day in the book to refer to the time that people were going to come and take her daughters away into slavery. Dr. Shields characterized this belief as an "idea of reference," which was a psychotic symptom.

A few days before the killings, [McCarrick] and the girls were eating pizza at Roxanne's house. [McCarrick] told Dr. Shields the pizza made them sick, and she believed it was poisoned as part of an effort by someone, including Roxanne, to kill her and her daughters.[FN6] When Paulson told her he was going to Alaska instead of returning to California immediately, [McCarrick] believed that was a sign she or one of the girls was going to be taken to an enslavement camp in Alaska. She became increasingly desperate to prevent that from happening. She believed the only way she could save the children from enslavement was to kill them and herself. On the day of the killings, she sent Paulson a text that read, "Your [sic] separating them?" [McCarrick] told Dr. Shields she started the fire because she wanted to hide the evidence of what she had done so her family would not find out.

FN6. The pizza incident occurred around the time [McCarrick] smoked methamphetamine in Roxanne's garage.

Dr. Shields concluded that [McCarrick's] delusion, or false belief that she and the girls were going to be enslaved, and her "ideas of reference" or belief that real events (such as Paulson's trip to Alaska) had another meaning, were symptoms of psychosis and that [McCarrick's] false belief was a product of her mental illness. In light of [McCarrick's] history of methamphetamine use, he had considered whether her beliefs were the product of intoxication. He stated that there was "no question that [McCarrick] had paranoid ideas related to meth use at times," but that there was also "some indication that she had paranoid or delusional ideas that were likely not related to intoxication with methamphetamine." He based this conclusion on [McCarrick's] statements to him, the toxicology report the day after the killings, and information related to [McCarrick's] subsequent treatment in the county jail.

Dr. Shields testified that [McCarrick's] mental disorder affected her ability to understand the nature and quality of her actions. She was not able to appreciate her acts' harmful nature because she believed she was saving the children from harm, not causing them harm. Dr. Shields opined that at the time of the killing, [McCarrick] was unable to recognize the moral or legal wrongfulness of her actions.

[McCarrick's] county jail records indicated that by nine days after the killings, she said she was not suicidal. She told the jail psychiatric staff she never heard voices, although she later said otherwise. A jail psychiatrist who saw [McCarrick] for a year and a half diagnosed her with chronic and recurring adjustment disorder issues. She also received diagnoses of bipolar disorder with psychosis and depressive disorder with psychosis, and the psychiatrist also considered a diagnosis of a disorder on the schizophrenic spectrum. [McCarrick] was given antipsychotic and antidepressive

medication in jail. On October 25, 2011, [McCarrick] told another inmate to "cut themselves and hear voices and shit" so they could meet each other at the hospital. In November 2011, [McCarrick] reported paranoid thoughts that people were going to attack her. In April 2012, she used cocaine and drank 12 cups of coffee and was treated for a possible overdose. She was described as paranoid, delusional, and psychotic. She stated that gangs were out to kill her for "snitch[ing]" on a boyfriend 10 years previously, and that if she had the means, she would slit her throat and hang herself. She said she "gets drugs from the guards."

Some of [McCarrick's] text messages from the period before the killings discuss the stress she experienced because she had to care for the children on her own. In one, she said she wanted to be young and free and be able to "party." Facebook messages [McCarrick] exchanged on October 3 and October 7 revealed no delusions, paranoia, or fear of Paulson.

2. Pablo Stewart, M.D.

Dr. Pablo Stewart, a psychiatrist, also evaluated [McCarrick]. He opined that on the day of the killings, she was suffering from major depressive disorder with psychotic features. He also opined that this was the most recent episode of a recurrent major depressive disorder that preexisted her substance abuse.

Dr. Stewart had reviewed voluminous documents and treatment records and interviewed [McCarrick] three times. He noted that [McCarrick] was involuntarily hospitalized at age 12 after cutting her wrists. She had been drinking alcohol at the time she was taken to the hospital and had a .10 percent blood alcohol level. She began abusing multiple substances after that. There was no indication in [McCarrick's] records that she received follow-up care after her hospitalization, and Dr. Stewart noted that it was common for psychiatric patients who do not receive proper mental health care to self-medicate through substance abuse. [McCarrick's] methamphetamine use from age 18 to 25 was "significant."

When [McCarrick] was a young adult living in San Diego between 2003 and 2005, she was diagnosed with major depressive disorder and began treatment with antidepressants. The records indicated that during a three-month period when [McCarrick] reported she was not using methamphetamine, she began to have paranoid delusions. There were times that she reported she was using methamphetamine but did not have psychotic symptoms. [McCarrick] reported that she did not use methamphetamine during her pregnancy with the twins and that she used it only occasionally in the ensuing period while she lived in Pennsylvania with an aunt. She did not report any psychotic symptoms during the time she was pregnant.

When [McCarrick] returned to California in August 2010 to live with Paulson, she was under a lot of stress and was ripe for a recurrence of major depression. She was having difficulty caring for the children and had less support than had been available in Pennsylvania. She was having sleep disturbances, was irritable, and said things people found difficult to understand. Dr. Stewart believed [McCarrick] was suffering from major depression in September and October of 2010.

Dr. Stewart opined that at the time of the killings, [McCarrick] was in a state of psychosis, suffering from paranoid delusions. He noted that while [McCarrick] was treated for her injuries at the hospital after the killings, a doctor thought she was suffering from a major depressive episode or a psychotic episode. Four days after [McCarrick] was transferred from the hospital to the jail, she was put on antipsychotic medication, which suggested that the psychiatrists at the jail believed she was experiencing a psychotic disorder. In jail, [McCarrick] was diagnosed at various points with bipolar disorder, schizophrenia, schizoaffective disorder, and adjustment disorder. [McCarrick] was on antipsychotic medication during her entire time in custody.

Dr. Stewart testified he believed [McCarrick's] substance abuse history played a role in the crimes. She had reported using methamphetamine about once a week in the period before the homicide, which Dr. Stewart said contributed to her mental state. However, he believed her chronic depressive condition, which was exacerbated when she returned to California, was the primary reason for her altered mental state. He also testified that it takes two and a half days for methamphetamine to be eliminated from a person's system but that it can take longer in the case of someone who has used it for a prolonged period. In light of [McCarrick's] negative test after the killings, Dr. Stewart did not think the use of drugs had an appreciable impact on her mental state at the time of the killings. He thought it was very unlikely that [McCarrick's] delusions were the result of methamphetamine withdrawal. Dr. Stewart was also aware that [McCarrick's] mother had tested her for drugs on her recent visit to San Diego and that the test was negative.

Dr. Stewart opined that [McCarrick] understood the nature and quality of her acts at the time of the killings, that is, she knew she had a sword and was going to kill her children. However, in his opinion, [McCarrick] was not capable of understanding that her actions were morally or legally wrong. He explained that [McCarrick] was operating under profound psychotic delusions which caused her to believe killing the children was the best thing she could do to protect them. He believed that drugs contributed to her delusions, but not to an appreciable degree, that the major factor affecting her thinking was her depression, and that in the absence of the depression she would not have killed her children.

Dr. Stewart acknowledged that the messages indicating [McCarrick] feared Paulson was part of a plot to harm her were sent in September and that [McCarrick] did not express that concern in any later messages. However, [McCarrick] had told Dr. Stewart that at the time of the killings she was afraid people were going to break into her apartment, kidnap her and her children, enslave them, and rape the children. He did not think the fact that [McCarrick] used the children's bodies to block the door indicated she understood her actions were wrong, because her psychotic plan was to burn the apartment down so there would be nothing for anyone to see.

3. Janice Nakagawa, Ph.D.

Dr. Janice Nakagawa, a psychologist, also evaluated [McCarrick]. As well as reviewing documents, she interviewed [McCarrick] three times. She concluded that [McCarrick] met the criteria for being not guilty by reason of insanity.

[McCarrick] described to Dr. Nakagawa her belief that she and her children would be kidnapped and raped or made sex slaves. She thought the movie synopsis indicated Paulson planned to kidnap her, she was concerned that times mentioned in the novel Double Cross indicated when the door would be kicked in, she believed people were going to come and get her, and she heard helicopters outside and thought they were coming for her. On October 10, she began thinking of killing the girls. When she went to the assistant manager's office on the day of the killings and found it closed, she thought that meant the people who planned to kidnap her were setting up their operations there. [McCarrick] mentioned that she had asked the assistant manager to watch the girls while she moved the car, but said she was not afraid because the assistant manager was a pregnant woman and the people who were going to harm them were predominantly men. However, she was afraid to leave the house because she had heard noises in the ceiling, and she thought "they were coming to get her."

[McCarrick] discussed the facts of the crime with Dr. Nakagawa. She described a telephone conversation she had with Paulson during the incident, saying "I get on the phone with Robert and told him about Lily and Tori, and say it's just like you wanted, and put the phone down and I get a book." She said she set the fire because it would be easier for her family if the house burnt down, and that if her family knew what had happened they would become involved with the people who were "after" her and the children. Dr. Nakagawa had noted that the text messages [McCarrick] sent did not show delusional or paranoid content; [McCarrick] said she did not want Paulson to know of her suspicions because if he did, he would carry out the plan sooner.

[McCarrick] told Dr. Nakagawa she had bought approximately two grams of methamphetamine in September and that she continued to use it off and on until October. However, it appeared she was not under the influence of drugs the day of the killings.

Dr. Nakagawa opined that [McCarrick] was experiencing paranoia and a delusional belief, which led her to commit the offenses. She diagnosed [McCarrick] as either bipolar with psychotic features or having a psychotic disorder not otherwise specified. In Dr. Nakagawa's clinical judgment, [McCarrick] was not malingering. Dr. Nakagawa did not believe [McCarrick] understood the nature and quality of her acts because she was paranoid or delusional. She also believed [McCarrick] was not capable of understanding that her acts were legally or morally wrong. She testified that [McCarrick's] drug use could have been a factor contributing to the emergence of psychotic symptoms and that drug use could trigger predispositions to delusions, paranoia, or depression. However, [McCarrick's] mental disorder, bipolar disorder with psychotic features, was independent of her drug use.

On cross-examination, the prosecutor elicited testimony about facts that Dr. Nakagawa did not know or consider when she reached her conclusions. In the latter part of September 2010, [McCarrick] had exchanged text messages with Paulson. One stated, "I am dying to smoke. I am leaving them alone here. They probably won't wake up but I can't help it. It's too hard to bring them everywhere." In a September 15, 2010 text message, [McCarrick] said, "I need some free time or I'll snap." Dr. Nakagawa had not taken these messages into account in reaching her conclusions.

> [McCarrick] told Dr. Nakagawa she smoked a "bowl" in Roxanne's garage and then had paranoid delusions about Roxanne poisoning the food and people being "out to get her," and that because of the delusions she packed up the girls in the middle of the night and drove them back to the apartment. Dr. Nakagawa acknowledged that these delusions were induced by methamphetamine. She believed the delusions continued for the next few days, with or without the drugs.
>
> [McCarrick] told Dr. Nakagawa that in the days leading up to the killings, she armed herself with a gun or sword and sat by the door waiting for people to come. [McCarrick] said she packed up the teddy bears and other stuffed animals because they had cameras in their eyes. One of the girls was wearing a teddy bear harness when she was killed; Dr. Nakagawa did not ask [McCarrick] if that was consistent with her story that she had gotten rid of the stuffed animals.
>
> On the day of the killings, [McCarrick] had a series of telephone calls and e-mails with a cousin, who reported that [McCarrick] said, "I don't know what to do," and "You are going to hate me." Paulson had said in a statement that [McCarrick] told him on the telephone on the evening of the killings, "I am so sorry. It's okay. We are just making a fire." Dr. Nakagawa agreed that these communications, as well as [McCarrick's] direction to Paulson to tell the girls it was an "accident" if they survived, could be taken into consideration in deciding whether [McCarrick] knew what she did was wrong.

People v. McCarrick, 210 Cal. Rptr. 3d 838, 841-50 (Cal. Ct. App. 2016).

At the conclusion of the two-week guilt phase of trial, the jury found McCarrick guilty as charged of two counts of first degree murder with a multiple-murder special circumstance finding, and two counts of assault on a child causing death. After a week-long jury trial on the question of sanity, the jury found that McCarrick was sane at the time she committed the crimes. The trial court sentenced McCarrick to two consecutive terms of life without the possibility of parole ("LWOP") for the two murders and stayed pursuant to California Penal Code § 654[2] the sentences for the remaining counts.

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[2] Section 654 provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." CAL. PENAL CODE § 654.

Through counsel, McCarrick appealed her conviction, arguing that: 1) 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; 2) there was no substantial evidence to support the jury's sanity verdict because the jury "could not reasonably reject" the opinions of three defense experts that McCarrick had been legally insane; and 3) the trial court's issuance of CALCRIM 3450, which instructs the jury as to whether a defendant is legally insane, was problematic as given for a variety of reasons. In a divided opinion published on November 30, 2016, the Court of Appeal affirmed the judgment against McCarrick. *McCarrick*, 210 Cal. Rptr. 3d at 858. Justice Streeter concurred with the appellate court's determination as to two grounds for relief, but issued a dissenting opinion as to that court's disposition of McCarrick's first claim. McCarrick filed a counseled petition for review in the California Supreme Court, raising all claims unsuccessfully raised to the Court of Appeal. In a divided opinion, the Supreme Court denied review without comment on March 15, 2017.

McCarrick timely filed a *pro se* Petition for a Writ of Habeas Corpus in this Court on January 31, 2018. Docket No. 1 ("Petition"); *see* 28 U.S.C. § 2244(d)(1),(2). McCarrick's request for the appointment of counsel was subsequently granted, and counsel filed a supplemental brief in support of the *pro se* Petition. Docket No. 31. Briefing is now complete, and the case is before the undersigned judge for adjudication.

II. GROUNDS/CLAIMS

In her Petition before this Court, McCarrick argues, as she did on direct appeal, that: 1) 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; 2) there was no substantial evidence to support the jury's sanity verdict because the jury "could not reasonably reject" the opinions of three defense experts that McCarrick had been legally insane; and 3) the trial court's issuance of CALCRIM 3450, which instructs the jury as to whether a defendant is legally insane, was problematic as given for a variety of reasons.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

The Supreme Court has explained that "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme Court] as of the time of the relevant state-court decision." *Id.* at 412. The holding must also be intended to be binding upon the states; that is, the decision must be based upon constitutional grounds, not on the supervisory power of the Supreme Court over federal courts. *Early v. Packer*, 537 U.S. 3, 10 (2002). Where holdings of the Supreme Court regarding the issue presented on habeas review are lacking, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (citation omitted).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona,* 497 U.S. 639, 653 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *See Robinson v. Ignacio,* 360 F.3d 1044, 1055 (9th Cir. 2004) (citing *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002)). A summary denial is an adjudication on the merits and entitled to deference. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

IV. DISCUSSION

Grounds 1, 3. *Instructional Error*

McCarrick first argues that the trial court made errors with respect to two of its instructions to the jury. Because jury instructions in state trial are typically matters of state law, federal courts are bound by a state appellate court's determination that a jury instruction was not warranted under state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (noting that the

Supreme Court has repeatedly held that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *see also Williams v. Calderon*, 52 F.3d 1465, 1480-81 (9th Cir. 1995). An instructional error, therefore, "does not alone raise a ground cognizable in a federal habeas proceeding." *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1986) (citation omitted).

A challenged instruction violates the federal constitution if there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The question is whether the instruction, when read in the context of the jury charges as a whole, is sufficiently erroneous to violate the Fourteenth Amendment. *Francis v. Franklin*, 471 U.S. 307, 309 (1985). This Court must also assume in the absence of evidence to the contrary that the jury followed those instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting the "almost invariable assumption of the law that jurors follow their instructions"); *see Francis*, 471 U.S. at 323-24 & n.9 (discussing the subject in depth).

It is well-established that not only must the challenged instruction be erroneous but it must violate some constitutional right, and it may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record. *Estelle*, 502 U.S. at 72. This Court must also bear in mind that the Supreme Court has admonished that the inquiry is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution and that the category of infractions that violate "fundamental fairness" is very narrowly drawn. *Id.* at 72-73. "Beyond the specific guarantees enumerated in

the Bill of Rights, the Due Process clause has limited operation." *Id.* Where the defect is the failure to give an instruction, the burden is even heavier because an omitted or incomplete instruction is less likely to be prejudicial than an instruction that misstates the law. *See Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). In those cases, the inquiry is whether the trial court's refusal to give the requested instruction "so infected the entire trial that the resulting conviction violates due process." *See id.* at 156-57; *Estelle*, 502 U.S. at 72. Moreover, even if the trial court's failure to give the instruction violated due process, habeas relief would still not be available unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *California v. Roy*, 519 U.S. 2, 5 (1996).

A. *Instructions as to paranoid delusions*

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.

In considering this claim on direct appeal, the Court of Appeal rejected it on both procedural and substantive grounds. *McCarrick*, 210 Cal. Rptr. 3d at 851. First, the appellate court concluded that the claim was forfeited from appellate review because McCarrick did not ask the trial court to modify the instruction to specifically refer to delusions. The Court of Appeal rejected McCarrick's contention that forfeiture should not apply because it would have been futile to ask the trial court to include delusions in the instruction because the court had already rejected her interpretation of the law when it ruled that the only evidence that would be deemed to bear on premeditation and deliberation would be that reflecting hallucinations. The court also rejected the claim on the merits, determining that there was no reasonable possibility that the jury interpreted the instruction to preclude it from considering McCarrick's claimed delusions that she and her daughters were at risk of harm.

As an initial matter, Respondent argues that the Court of Appeal's rejection of McCarrick's claim on procedural grounds also renders the claim procedurally barred from federal habeas review here. The Ninth Circuit has repeatedly recognized and applied the California contemporaneous objection rule in affirming denial of a federal habeas petition on grounds of procedural default where there was a complete failure to object at trial. *See, e.g.*, *Inthavong v. Lamarque*, 420 F.3d 1055, 1058 (9th Cir. 2005); *Paulino v. Castro*, 371 F.3d 1083,

1092-93 (9th Cir. 2004). Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

McCarrick acknowledges that the state court's holding as to forfeiture is not reviewable by this Court. Docket No. 41 at 6. McCarrick nonetheless argues that the claim is not procedurally defaulted because she can show cause and prejudice to excuse it. A federal habeas court may not reach the merits of a claim that is procedurally barred unless the petitioner first shows cause and prejudice. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *see also Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011). In support of her argument that requisite case and prejudice exists, McCarrick again points to the transcript of the pre-trial hearing on her motion in limine seeking a ruling on whether the trial court would instruct the jury as to imperfect self defense or imperfect defense of another, which served as the basis for her argument before the Court of Appeal that it would have been futile to request that the trial court include delusions in the CALCRIM No. 627. The Court of Appeal rejected that contention and found that the parties' and court's discussion on the motion in limine did not serve to excuse forfeiture from appellate review:

> Before trial, [McCarrick] brought a motion in limine seeking a ruling on whether the trial court would instruct the jury that she was guilty only of manslaughter if she had acted in imperfect self-defense or imperfect defense of another, that is, that she acted in the actual but unreasonable belief that the killings were necessary to prevent imminent danger to her daughters. (CALCRIM No. 571.) The People opposed the instruction, in part on the ground that imperfect self-defense cannot be based on a psychotic delusion alone. (*People v. Mejia–Lenares* (2006) 135 Cal. App. 4th 1437, 1444, 1462, 38 Cal. Rptr. 3d 404.) Defense counsel argued that [McCarrick's] actions were not completely delusional because they were based on actual events and things she misinterpreted. The trial court denied the motion, reasoning that there was no authority that the defenses of

imperfect self-defense or imperfect defense of another were available when a defendant intentionally killed a victim in order to save the victim from a worse fate. [McCarrick] does not challenge this ruling.

Later, the parties presented argument to the court as to whether [McCarrick] could introduce evidence about her fears that Paulson was going to harm her or the girls. The prosecutor initially argued that [McCarrick's] fears were based on paranoia, not hallucination, and hence did not fall within the rule of *Padilla*, *supra*, 103 Cal. App. 4th 675, 126 Cal. Rptr. 2d 889. In referring to [McCarrick's] belief that Paulson wanted to kill her, the trial court asked defense counsel, "So this is the delusions or—I don't know if we call it a delusion, we call it a hallucination? This is her—." Defense counsel argued that [McCarrick's] belief qualified as a hallucination, that is, a perception not based on objective reality for purposes of CALCRIM No. 627. The prosecutor then argued that, although there was evidence of unreasonable beliefs in late September, [McCarrick] had no conversations on October 11 or 12 that showed delusional beliefs that Paulson would harm her or the girls. The prosecutor referred to the beliefs as "some hallucination that [McCarrick] was having at the end of September," and argued that "there [was] no evidence that this was going on at the time, on October 12th whatsoever." Defense counsel countered that there were text messages showing that [McCarrick's] delusions continued to exist on October 12, and argued that *Padilla* supported her position that "these hallucinations are relevant" to the question of premeditation and deliberation. The prosecutor, in her turn, disputed defense counsel's characterization of the October text messages, pointing out that they referred to the biological father giving up his parental rights and arguing, "That is not hallucinating."

The trial court ruled: "I'm going to allow you to present evidence, what you claim is hallucinations, on this issue . . . . 'I'm going to allow at least a good portion of this evidence, provided it does in fact tend to show [McCarrick] was suffering from hallucinations about this time. I think there is an inference that can be made if there is evidence that she had these hallucinations within a day or two. I don't know exactly when, but I think these are factual matters for the jury to determine . . . . [I]t would be much clearer if the hallucinations had to do with a misunderstanding as to the act that she was committing or she didn't understand who these acts were directed at were her children [sic]. But that's not the nature of these hallucinations, supposedly. [¶] As I understand it, these hallucinations had to do with her belief that the children were in imminent peril of being kidnapped and tortured, and therefore this was her alternative as she saw it. I don't know what evidence there is of that at this point in particular, but you can bring all that out." When the prosecutor argued that under *Mejia–Lenares*, *supra*, 135 Cal. App. 4th 1437, 38 Cal. Rptr. 3d 404 evidence of unreasonable fear was inadmissible to show imperfect self-defense, the court stated, "I am allowing evidence of hallucination and if part of that—if the argument ultimately is fear induced by these is what caused her to not to be able to form the ability to premeditate, that can be the argument, I suppose. But the evidence will be as to the actual hallucination." The court concluded by asking counsel, "Are we all on the same page here?" to which they responded, "Yes."

> Despite the prosecutor's initial characterization of [McCarrick's] fears as being based on paranoia, not hallucination, it is clear from this colloquy that at the time the trial court made its ruling, both it and counsel understood that the "hallucinations" in question were [McCarrick's] delusional beliefs. Nothing in these discussions suggests that it would have been futile to ask the trial court to modify the instruction to include delusions because the trial court had already rejected [McCarrick's] interpretation of the law; rather, the court accepted defense counsel's characterization of defendant's delusions as hallucinations for purposes of *Padilla, supra*, 103 Cal. App. 4th 675, 126 Cal. Rptr. 2d 889 and CALCRIM No. 627.

McCarrick, 210 Cal. Rptr. 3d at 851-53.

McCarrick nonetheless argues that the discussion can support a finding of cause and prejudice sufficient to excuse procedural default here largely by relying on the dissent's contrary conclusion on appeal:

> In pretrial argument on a motion in limine concerning the applicability of *Mejia-Lenares*—an argument McCarrick lost when the trial court ruled, correctly, that her irrational fears could not support a claim of imperfect self-defense—her counsel was quite clear that these fears were not "completely delusional as they were in *Mejia–Lenares*." Later, during the guilt phase trial, when the admissibility of McCarrick's fears to negate premeditation and deliberation under the second prong of *Padilla's* holding arose, counsel did, it is true, seem to accept the idea that delusions and hallucinations are interchangeable, but she did so only after the court sounded a note of skepticism about the appropriate terminology, interjecting "I don't know if we call it a delusion," and then immediately asking whether "we call it a hallucination?" Although the People pin blame on the defense for equating delusions and hallucinations, the quote from McCarrick's counsel to which they cite is a response to the court's inquiry during this colloquy, and appears to be nothing more than an effort to fit the evidence within a reading of the law the court seemed inclined to take—and eventually did take.
>
> Who originally came up with the notion that the term "hallucinations," alone, may be used to describe the evidence of McCarrick's paranoid delusions is not definitively clear in the record, but the sequence of events suggests it is more fairly attributable to the People than to the defense. The specific issue under discussion when this point of terminology surfaced was the admissibility of proffered defense testimony from Paulson and "three or four other witnesses who would testify that Ms. McCarrick reached out to them, either spoke to them or sent them test messages that she was afraid of Mr. Paulson and that he was going to hurt—kill her and hurt the girls." The People insisted that this evidence "doesn't rise to the level of a hallucination . . . . Hallucination, as I said in *People versus Padilla* . . . [¶] . . . [¶] . . . it takes it right from the dictionary. It's some kind of belief that you are seeing something, hearing something . . . that's not there. That's not based on reality. And I don't think fear . . . [is] hallucination . . . . [H]er fear

is based on paranoia . . . ."[FN10] While the trial court ultimately ruled for the defense on the evidentiary point then under discussion, deciding to allow testimony about McCarrick's irrational fear of Paulson as it bore on her diminished actuality defense, it did so only within the confines of the People's legal argument—which incorrectly limited the second prong of *Padilla's* holding to hallucination cases. The court ruled: "I am allowing evidence of hallucination and if part of that—if the argument ultimately is fear induced by these is what caused her to not be able to form the ability to premeditate, that can be the argument, I suppose. *But the evidence will be as to the actual hallucination.*" (Italics added.)[FN11]

FN10. The prosecution argued "[t]hat is not a hallucination. That is paranoia, but there is a difference. Hallucination is seeing things, hearing things. I mean, it's right in that *Padilla* case."

FN11. The court also ruled, "I am going to allow you to bring in evidence of hallucination on the issue of ability to deliberate and premeditate, but that is as far as it goes." It noted "there is no question that hallucination, evidence of hallucinations can have a bearing and is relevant on the issues of premeditation and deliberation, and that is supported by . . . this *Padilla* case." And again, it said, "I'm going to allow at least a good portion of this evidence, provided it does in fact show [McCarrick] was suffering from hallucinations about this time."

It may be that later, at the close of the guilt phase evidence, when the instructions were argued and settled, it would have been wise for McCarrick's counsel to propose a pinpoint modification to CALCRIM No. 627, making clear that it covers the type of delusions shown by the evidence in this case. But her failure to make such a request should not come at the price of forfeiture. Her substantial rights were affected by the instruction (PEN. CODE, § 1259; *see People v. Gray* (2005) 37 Cal.4th 168, 235, 33 Cal. Rptr. 3d 451, 118 P.3d 496), and in any event, any effort to seek a modification would likely have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432, 127 Cal. Rptr. 2d 544, 58 P.3d 391; *see People v. O'Connell* (1995) 39 Cal. App. 4th 1182, 1190, 46 Cal. Rptr. 2d 379 [applying "the principle of law that excuses parties for their failure to raise an issue at trial where to do so would have been an exercise in futility" where defendant failed to request clarifying modification of challenged pattern instruction after trial court had unequivocally rejected legal argument supporting the clarification].) By the time the guilt phase instructions were argued and settled, the trial court had already ruled, unequivocally, and unduly narrowly, in my view, that *Padilla* applies only to hallucinations. Since the court had already announced its interpretation of *Padilla*, McCarrick was not required to seek reconsideration. At that stage, given what the evidence showed—paranoid delusions based on a misperception of actual facts—the court had a sua sponte duty to correct its own error and add clarifying language to make sure the jury understood CALCRIM No. 627 applies to any form of delusionary thinking, including hallucinations.

McCarrick, 210 Cal. Rptr. 3d at 864-65 (Streeter, J., dissenting).

Upon independent review, the Court finds that the reasoning employed by the Court of Appeal in finding McCarrick's claim forfeited, as quoted above, also fully supports that McCarrick fails to establish the requisite cause and prejudice to excuse the procedural default. Moreover, the Court of Appeal also denied the claim on the merits as follows:

> [McCarrick] points out that the prosecutor argued in her closing argument that there was no evidence she was suffering from hallucinations the day of the killings. According to [McCarrick], this argument suggested to the jury that her delusions did not qualify as hallucinations for purposes of CALCRIM No. 627. The record does not support this conclusion. The prosecutor made this statement while summing up her argument that, although [McCarrick] had expressed irrational fears of her fiancé a week or two previously, there was no evidence she was experiencing such fears on the day of the killings. Defense counsel then argued that the hallucination instruction was important because [McCarrick] had irrational beliefs that Paulson intended to kill her and harm the girls and that he had a vendetta against her. In her rebuttal, the prosecutor did not challenge defense counsel's characterization of the delusions as hallucinations, but argued again that [McCarrick] did not appear irrational on the day of the killings. There is no reasonable possibility that the jury interpreted the instruction to preclude it from considering [McCarrick's] delusions.[FN8]
>
> FN8. We are unpersuaded by [McCarrick's] argument that our Supreme Court's decision in *People v. Elmore* (2014) 59 Cal.4th 121, 136, footnote 7, 172 Cal. Rptr. 3d 413, 325 P.3d 951 indicates that the term "delusion" includes hallucinations, but not vice versa, and that the terms are therefore not interchangeable for purposes of CALCRIM No. 627. On this record, there is no basis to conclude the jury did not understand the instruction to include [McCarrick's] claimed delusions that she and the girls were at risk of harm.

McCarrick, 210 Cal. Rptr. 3d at 853.

McCarrick argues in her Traverse that the Court of Appeal unreasonably applied and contravened Federal law in its merits determination. But she cites no Supreme Court authority to support the theory that the term delusion is distinct from hallucination. She therefore appears to rely on the general Supreme Court authority addressed in the standards enumerated above to

argue that the court's failure to specifically refer to delusions when instructing pursuant to CALCRIM No. 627 "did, in fact, preclude the jury from considering the defense evidence of Ms.. McCarrick's false beliefs on the issues of premeditation and deliberation and thus removed her only real defense at the guilt phase from jury consideration" and therefore had a "substantial and injurious effect on the verdict." Docket No. 41 at 13.

But as aforementioned, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Because McCarrick cites no Supreme Court authority to support the theory that the term delusion is distinct from hallucination, and this Court is unaware of any, the Court cannot find unreasonable or contrary to Federal law the Court of Appeal's determination that there was no reasonable probability that the jury could have understood the instruction as given to preclude them from considering McCarrick's claimed delusions that she and the girls were at risk of harm when assessing whether McCarrick acted with premeditation and deliberation. McCarrick is therefore not entitled to relief on this claim.

B. *CALCRIM 3450*

McCarrick additionally contends that the trial court erred in instructing the jury as to her insanity defense. The record reflects that the trial court instructed the jury with CALCRIM No. 3450 as follows:

> You have found the defendant guilty of murder and inflicting injury on a child under eight causing death. Now you must decide whether she was legally sane at the time she committed the crime. [¶] The defendant must prove that it is more likely than not that she was legally insane when she committed the crimes. [¶] The defendant is legally insane if: [¶] First, when she committed the crimes, she had a mental disease or defect. [¶] And secondly, because of that disease or defect she was incapable of

> understanding the nature and quality of her acts, or was incapable of knowing or understanding that her acts were morally or legally wrong. [¶] None of the following qualifies as a mental disease or defect for purposes of an insanity defense: Personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts. [¶] If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, and that settled mental disease or defect combined with another mental disease or defect, that may qualify as legal insanity. A settled disease or defect is one that remains after the effects of the drugs or intoxicants has worn off. [¶] You may consider any evidence that the defendant had a mental disease or defect before the commission of the crimes. If you are satisfied that she had a mental disease or defect before she committed the crimes, you may conclude that she suffered from the same condition when she committed the crimes. You must decide whether that mental disease or defect constitutes legal insanity.

McCarrick, 210 Cal. Rptr. 3d at 856-57.

McCarrick argues, as she did on direct appeal, that the instruction was erroneous for three reasons. First, McCarrick points to the portion of the insanity test referring to her understanding that the acts were "morally or legally wrong," and argues that the jury could have understood that phrase to mean "morally and legally wrong." Second, she argues that the instruction did not make clear that her incapacity to understand right from wrong did not refer to a general incapacity so to understand, but to her capacity "in respect of the 'very act' charged." Third, she contends the paragraph listing the conditions that would not support a finding of insanity—including adjustment disorder—should have been omitted because it could confuse and mislead the jury.

The Court of Appeal rejected as forfeited for failure to raise before the trial court her first contention regarding the phrase "morally or legally wrong." As discussed *supra* with regard to Claim 1, the appellate court's reliance on the contemporaneous objection rule in rejecting this instructional error claim likewise forecloses federal habeas review. *See, e.g.*, *Inthavong*, 420 F.3d at 1058. Moreover, the Court of Appeal reasonably concluded that the claim is "entirely

unpersuasive" as McCarrick offered no basis other than speculation to believe that the jury would have interpreted the phrase "legally or morally wrong" to mean "legally *and* morally wrong." *McCarrick*, 210 Cal. Rptr. 3d at 857. Nor does McCarrick provide such support on federal habeas review. *Woodford v. Visciotti*, 537 U.S. 19, 15 (2002) (*per curiam*) (holding that state habeas petitioner carries the burden of proof).

The Court of Appeal likewise concluded that McCarrick's second contention–that the instruction failed to inform the jury that she had to be incapable of understanding the wrongfulness of the "very act" charged–was forfeited on direct appeal, thus rendering the claim procedurally barred on federal habeas review as well. *See, e.g.*, *Inthavong*, 420 F.3d at 1058. In any event, as the Court of Appeal reasonably concluded, "[t]he only reasonable interpretation of this language is that it refers to the offenses with which [McCarrick] was charged." *McCarrick*, 210 Cal. Rptr. 3d at 858.

In her counseled Traverse, McCarrick focuses on the third reason enumerated above and argues that the Court of Appeal unreasonably applied Federal law when it held that the inclusion of "adjustment disorder" in CALCRIM No. 3450 was not reasonably likely to confuse or mislead the jury. The Court of Appeal considered and rejected on direct appeal McCarrick's contention regarding "adjustment disorder" as follows:

> We likewise reject [McCarrick's] contention that the instruction contained surplus language that confused and misled the jury, specifically, the paragraph stating that various conditions, including adjustment disorder, were insufficient to establish insanity.[FN9]
>
> FN9. [McCarrick] objected to this portion of the instruction at the beginning of the sanity phase of the trial. Although she did not renew her objection after evidence had been presented, we will not treat the issue as forfeited.

> [McCarrick] points out that the only indication she had an adjustment disorder was found in jail records discussed by the mental health experts, which were not admitted for their truth; rather, the jury was instructed, "Doctors John Shields, Pablo Stewart and Janice Nakagawa testified that in reaching their conclusions as expert witnesses they considered statements made by mental health providers, jail staff, police officers, friends and relatives of [McCarrick], and [McCarrick] herself, including texts and e-mails. You may consider these statements only to evaluate the expert's opinion. *Do not consider these statements as proof that the information contained in the statements is true.*" (Italics added.) In closing argument, the prosecutor pointed out that while cross-examining the experts, she had confronted them about the fact that the jail records showed [McCarrick] was being treated for adjustment disorder.
>
> Because the evidence of adjustment disorder was not admitted for its truth, [McCarrick] argues, the instruction referring to it was not responsive to the evidence and was likely to confuse the jury. We disagree. The jury was instructed that in evaluating the expert's opinions, it could consider the material upon which the experts relied, and that material included the diagnosis of adjustment disorder. Nor do we see any possibility of confusion. [McCarrick's] theory of the case was that she suffered from a mental disease with psychotic, delusional features; the prosecution's theory was that there was no evidence [McCarrick] was suffering delusions on the day of the killings and that, if she was, they were a result of her drug use. There is no basis to conclude that the listing of conditions insufficient to support a finding of insanity misled the jury in any way.

McCarrick, 210 Cal. Rptr. 3d at 858.

In arguing that the Court of Appeal's conclusion unreasonably applied Federal law, McCarrick again points to no specific authority of the U.S. Supreme Court when arguing that "it is reasonably likely the jury accepted that there was a substantial basis for finding Ms. McCarrick was suffering from an adjustment disorder at the time of the homicides and found she was sane based on the surplus language permitting such finding." Docket No. 41 at 15. And again, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. Given this leeway and the deference this Court must afford the state court decision, the Court cannot find unreasonable or contrary to Federal law the Court of Appeal's determination that there was no reasonable

probability that the challenged instruction would have misled the jury in the manner she now suggests. Accordingly, McCarrick is not entitled to relief on this claim either.

Ground 2. *Sufficiency of the Evidence*

McCarrick additionally avers that there was insufficient evidence to support the jury's finding that she was sane when she killed her children. As articulated by the Supreme Court in *Jackson*, the constitutional standard for sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in the original); *see also McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) (reaffirming this standard). This Court must therefore determine whether the California court unreasonably applied *Jackson*. In making this determination, this Court may not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial. *Jackson*, 443 U.S. at 318-19. Rather, when "faced with a record of historical facts that supports conflicting inferences," this Court "must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and defer to that resolution." *Id.* at 326.

It is a fundamental precept of dual federalism that the States possess primary authority for defining and enforcing the criminal law. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982). Consequently, although the sufficiency of the evidence review by this Court is grounded in the Fourteenth Amendment, it must take its inquiry by reference to the elements of the crime as set forth in state law. *Jackson*, 443 U.S. at 324 n.16. This Court must also be ever mindful of the deference owed to the trier of fact and the sharply limited nature of constitutional sufficiency

review. *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005). A fundamental principle of our federal system is "that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam); *see West v. AT&T*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . . .").

The Court of Appeal considered and rejected McCarrick's legal insufficiency claim on direct appeal as follows:

> As [McCarrick] points out, each of the experts who testified concluded [McCarrick] was not able to understand that her actions were legally or morally wrong. However, "expert testimony, even if uncontradicted, is not binding on the trier of fact, and may be rejected, *especially where experts are asked to speculate about a defendant's state of mind at the moment the crime was committed* . . . . The trier of fact may consider the reasons given for expert opinions, and may weigh expert testimony with all of the evidence including the circumstances before, during, and after the offenses." (*People v. Green* (1984) 163 Cal.App.3d 239, 243-244, 209 Cal. Rptr. 255, italics added.) As our Supreme Court has stated, "'However impressive [a] seeming unanimity of expert opinion may at first appear . . . our inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the jury's verdict of sanity . . . under the law of this state. [Citations.] It is only in the rare case when "the evidence is uncontradicted and entirely to the effect that the accused is insane" [citation] that a unanimity of expert testimony could authorize upsetting a jury finding to the contrary.' [Citation.] Indeed we have frequently upheld on appeal verdicts which find a defendant to be sane in the face of contrary unanimous expert opinion. [Citations.]" (*People v. Drew* (1978) 22 Cal.3d 333, 350, 149 Cal.Rptr. 275, 583 P.2d 1318, superseded by statute on other grounds as stated in *Skinner*, *supra*, 39 Cal.3d at pp. 768-769, 217 Cal. Rptr. 685, 704 P.2d 752.) The chief value of an expert's testimony "'rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion.'" (*Drew*, at p. 350, 149 Cal. Rptr. 275, 583 P.2d 1318.)
>
> One more prefatory note: A defendant may not be found insane solely on the basis of addiction to, or abuse of, intoxicating substances. (§ 29.8.) This provision "makes no exception for brain damage or mental disorders caused solely by one's voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the

substances caused organic [brain] damage or a settled mental disorder which persists after the immediate effects of the intoxicant have worn off." (*People v. Robinson* (1999) 72 Cal. App. 4th 421, 427, 84 Cal. Rptr. 2d 832.) Pursuant to this rule, the jury was instructed that "[i]f the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, and that settled mental disease or defect combined with another mental disease or defect, that may qualify as legal insanity. A settled disease or defect is one that remains after the effects of the drugs or intoxicants has worn off." (CALJIC No. 3450.)

On this record, we conclude that the jury could have found that [McCarrick] did not meet her burden to show she was insane at the time of the crimes. Because the defendant has the burden of proof on the issue of insanity, "the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it." (*People v. Drew*, *supra*, 22 Cal.3d at p. 351, 149 Cal. Rptr. 275, 583 P.2d 1318; *accord People v. Duckett* (1984) 162 Cal. App. 3d 1115, 1119, 209 Cal. Rptr. 96 (*Duckett*).) [McCarrick] had a long history of drug use, particularly abuse of methamphetamine. She had used methamphetamine on a nearly daily basis from ages 18 to 25 and had been using it in the weeks preceding the killings, up to at least four days beforehand, during the time she expressed fears of Paulson and others. Dr. Shields acknowledged that paranoia is a common side effect of ongoing methamphetamine use, that long-term drug use can cause delusions, and that long-term drug use can cause mental problems well after someone uses the drug. There was also evidence from which a jury could conclude that the expert opinions did not take sufficiently into account the overlap between the times [McCarrick] was using drugs and the times she suffered delusions. [McCarrick] expressed fear of Paulson and others in late September 2010, at a time there is evidence she was using methamphetamine. She thought someone had poisoned her pizza on the day she admitted to last smoking methamphetamine. In 2012, [McCarrick] used cocaine and was treated for a possible overdose; she was paranoid and delusional and stated gangs were out to kill her for "snitch[ing]" on a boyfriend 10 years previously. Dr. Stewart testified that [McCarrick's] substance abuse history played a role in the crimes, although he did not believe it was the primary cause of her altered mental state. Dr. Nakagawa testified that [McCarrick's] drug use could have contributed to the onset of psychosis, although she believed [McCarrick] had a disorder with psychotic features independent of the drug use. She also acknowledged that [McCarrick's] delusions a few days before the killings, after which she drove the girls home from Roxanne's house in the middle of the night, were induced by methamphetamine. Even in the face of the unanimous expert opinions, the jury could rationally reject those opinions and find that [McCarrick's] long-term and recent drug use, singly or in combination, caused any psychotic symptoms she was experiencing at the time of the killings and that [McCarrick] had not met her burden to show she was legally insane.

The record also contains evidence from which the jury could conclude that [McCarrick] knew the nature and quality of her acts and that her actions were both legally and morally wrong. She told Dr. Nakagawa she began planning to kill the girls about two days before she did so. Her own explanation of events indicates that she

> intended to kill them. She told a cousin on the day of the killings, "You are going to hate me." On the telephone after the killings, she told Paulson to tell the girls "it was an accident" if they survived. There was also evidence that [McCarrick] was overwhelmed by the demands of caring for the girls and wanted to be young and free and to "party." This evidence could support a finding that [McCarrick] not only knew the nature of her acts but also knew they were both legally and morally wrong when she committed them.
>
> We are not persuaded otherwise by [McCarrick's] reliance on *Duckett*, *supra*, 162 Cal. App. 3d 1115, 209 Cal. Rptr. 96. In *Duckett*, a divided court concluded the jury could not reasonably reject the three experts' unanimous opinions of defendant's insanity where there was evidence that defendant reported he saw demons; that he was obsessed with the victim and believed she was a witch who was practicing voodoo on him; that he had a long history of chronic paranoid schizophrenia characterized by disordered thoughts, delusions, hallucinations, inappropriate affect, and bizarre behavior; that while in the hospital, he developed a "delusional system" within two weeks of being taken off medications on an experimental basis; and that before the offense, he had ceased taking his medications. (*Id.* at pp. 1120-1123, 209 Cal. Rptr. 96.) Additionally, the defendant had previously shot other victims; for these crimes, he had been found legally insane, and was confined to a mental hospital for five years. Within a month of his release, he shot and killed the victims in his current case. (*Id.* at p. 1118, 209 Cal.Rptr. 96.) Here, the evidence of persistent insanity and delusions was far less compelling. Moreover, the evidence here was susceptible to an interpretation that [McCarrick's] delusions stemmed from her drug use, which also distinguishes this case from *Duckett*.
>
> *People v. Samuel* (1981) 29 Cal. 3d 489, 174 Cal.Rptr. 684, 629 P.2d 485 is similarly distinguishable. There, the evidence of incompetence was overwhelming: as our high court has recently explained, "'Five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three psychiatric technicians testified to Samuel's incompetency, and four psychiatric reports were admitted into evidence. [Citation.] Each witness and every report concluded Samuel was incompetent to stand trial. [Citation.] In response, the prosecution offered no expert testimony and only two lay witnesses, neither of whom contradicted any of the defense testimony. [Citation.] . . . Prosecution witnesses merely testified regarding Samuel's escape from Patton State Hospital and his ability to perform routine manual tasks.' [Citation.] On that record, we found that no reasonable trier of fact could reject the defense evidence of incompetency. [Citations.]'" (*People v. Mendoza* (2016) 62 Cal. 4th 856, 882, 198 Cal. Rptr. 3d 445, 365 P.3d 297, *citing Samuel*, at p. 506, 174 Cal. Rptr. 684, 629 P.2d 485.) The question before the experts here was not [McCarrick's] current competence to stand trial, but her mental state at the time of the crimes, and for the reasons we have discussed, the jury could reasonably reject their opinions.

McCarrick, 210 Cal. Rptr. 3d at 854-56.

Here, McCarrick essentially asks this Court to credit the opinion of the defense experts over any other evidence presented at trial. But this Court is limited to determining whether the

state court unreasonably applied federal law, under which it must "presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *See Jackson*, 443 U.S. at 326. As the state court noted, the jury was not limited to merely weighing the opinions of these four experts but was expected to assess all of the evidence before it. *See People v. Drew*, 583 P.2d 1318, 1327-28 (Cal. 1978) (noting that the California Supreme Court has "frequently upheld on appeal verdicts which find a defendant to be sane in the face of contrary unanimous expert opinion"), *superseded by statute on other grounds as recognized in People v. Skinner*, 704 P.2d 752 (Cal. 1985). Considering the "sharply limited nature of constitutional sufficiency review" and applying the "additional layer of deference" required by AEDPA, this Court finds that the California court's rejection of McCarrick's sufficiency claim related to her sanity was not objectively unreasonable, for the reasons persuasively explained by the Court of Appeal. *Juan H.*, 408 F.3d at 1274-75; *see also Jackson*, 443 U.S. at 319, 326. Accordingly, McCarrick is not entitled to habeas relief on this claim.

V. CONCLUSION AND ORDER

McCarrick is not entitled to relief on any ground raised in her Petition.

IT IS THEREFORE ORDERED THAT the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED THAT the Court grants a Certificate of Appealability solely with respect to McCarrick's claims 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 (Ground 1); and there was no substantial evidence to support the jury's sanity verdict because the jury "could not reasonably reject" the opinions of

three defense experts that McCarrick had been legally insane (Ground 2). *See* 28 U.S.C. § 2253(c); *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller-El*, 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Ninth Circuit Court of Appeals. *See* FED. R. APP. P. 22(b); 9TH CIR. R. 22-1.

The Clerk of the Court is to enter judgment accordingly.

Dated: November 19, 2020.

/s/James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge

Filed 11/30/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MONICA McCARRICK, Defendant and Appellant.	A136822 (Solano County Super. Ct. No. FCR279982)

Defendant Monica McCarrick appeals a judgment entered upon a jury verdict finding her guilty of two counts of first degree murder (Pen. Code,[1] § 187), with a multiple-murder special circumstance finding (§ 190.2, subd. (a)(3)), and two counts of assault on a child under the age of eight resulting in death (§ 273ab, subd. (a)). She pleaded both not guilty and not guilty by reason of insanity. In the sanity phase of the trial, the jury found defendant was sane at the time she committed the crimes. The trial court sentenced defendant to two consecutive terms of life without the possibility of parole for the two murders and stayed the sentences for the remaining counts. (§ 654.) On appeal, defendant contends that the evidence does not support the jury's sanity verdict and that the trial court committed instructional error. We shall affirm the judgment.

I. BACKGROUND

A. Guilt Phase

1. The Crimes and Crime Scene

On the evening of October 12, 2010, defendant killed her three-year-old twin daughters, Lily and Tori Ball, with a sword. A downstairs neighbor heard loud thumping

[1] All statutory references are to the Penal Code.

from defendant's apartment. An hour or two later, a fire alarm went off, and the neighbor saw smoke coming from one of the windows. He ran upstairs and kicked in the front door, but it was blocked, and he was unable to enter. He succeeded in breaking a sliding glass door; when he entered the apartment, he saw a sword on the floor, covered in blood.

Firefighters arrived and found the door to the apartment slightly ajar but difficult to open. They forced the door open, found a fire in a closet near the front door, and extinguished it. They then found the bodies of Lily and Tori close to the door. One of the bodies had been blocking the door. The girls had both suffered severe lacerations, and were dead. The firefighters found defendant in the kitchen and carried her out. She was unconscious and had sustained injuries, including cuts to her throat and wrist.

A search of the apartment revealed an assault rifle and a shotgun in the living room and a box with a loaded handgun and additional live rounds. In the hallway was a straight-bladed sword covered with blood. Near it was a lighter with blood on it. Two high chairs had been overturned in the dining room, with their food trays removed. The high chairs were completely soaked in blood. On a table facing the highchairs was a laptop computer playing an animated children's program. In the kitchen, a landline telephone was on the counter; both the telephone and the countertop were covered in blood. Water was running from the bathroom faucet, and blood was in the sink and on the counter. A cell phone was on the bathroom floor, and on a stool was a novel by James Patterson, Double Cross (2007). The book was about a serial killer, and it was open to a page that contained the words, "My daughter is dead."

2. The Injuries

The doctor who performed the autopsies on the two girls testified about their injuries. Tori had 11 cutting wounds to her face, two cutting wounds to her neck, a gaping wound on the front of her neck, nine superficial cutting wounds to her chest, two deep stab wounds on her chest, one of which penetrated her heart and the other her lung, a deep stab wound to her abdomen as well as three small superficial cutting wounds to the abdomen, and wounds on her hands and arms consistent with defensive wounds. Lily had five cutting wounds to her face, four to her neck, and nine to her chest; a large gaping

wound to the front of her neck that had severed her larynx and cut the carotid arteries; multiple defensive wounds to her hands and arms; and a six-inch-deep stab wound to her abdomen. Neither girl had inhaled smoke, which meant they were dead before the fire started.

Defendant had multiple injuries and was in critical condition. She had two large lacerations to her throat and multiple cuts and lacerations on her arms and wrists. On one of her arms the tendons that flex the wrist and fingers were severed. She had a large laceration on her upper thigh and large lacerations on each ankle, which cut the Achilles tendons. Tests for alcohol, cocaine, and methamphetamine were negative.

3. Observations of Defendant's Fiancé

Defendant and her two daughters lived with defendant's fiancé, Robert Paulson. Defendant and Paulson had known each other about a decade previously and renewed their relationship over Facebook around Thanksgiving of 2009. They became engaged in May 2010, and defendant and her daughters moved to California from Pennsylvania during the last week of August 2010. Paulson's job required large amounts of travel, and on September 9, shortly after the couple moved into their new apartment, he was called away for a month-long assignment in Minnesota. On October 11, Paulson was told he would have to go to Alaska for five to 10 days after the Minnesota assignment ended, rather than returning home. Defendant was upset when Paulson told her about the extension of his trip.

Paulson and defendant spoke on the telephone several times on October 12, the day of the killings. One of the calls took place during the evening, on defendant's cell phone. Defendant was incoherent and "jumbled," and sounded like she was running around the house doing something. Paulson heard defendant "freaking out," and "hysterical noises going on in the background." She told him, "If Tori and Lily are okay tell them that it was an accident." He heard her say, "It's okay. It's going to be okay. We are going to make a fire. We are going to make a fire"; then he heard a fire alarm go off, and then a scream, and then the call ended. He tried to call the apartment several times but got no response.

4. Defendant's Recent Behavior

On the morning of the day of the killings, the assistant manager of the apartment complex where defendant lived asked defendant to move her car because it was blocking other parking spots. At first, defendant would not open her apartment door. Defendant had a hard time telling the assistant manager what she wanted her to do and why the car was parked the way it was. The assistant manager watched the girls while defendant moved the car.

On the morning of the same day, the assistant manager had noticed defendant had a work order to have her locks changed. Defendant later called to ask whether the maintenance department had changed the locks. The girls were crying in the background, and defendant seemed to want the assistant manager to help her with the girls.

Terry Fay, the paternal grandmother of Lily and Tori, lived in southern California. She spoke with defendant often by telephone, and she had cared for the girls on occasion. On October 11, 2010, defendant called Fay and asked, "Who is going to take the girls?" Fay thought defendant needed someone to take care of the girls. Fay told defendant that if she brought the girls to her home, Fay and her family would begin proceedings to have custody of them. Defendant did not sound rational during the conversation. She told Fay that Paulson had had a vendetta against her for 10 years and was kicking her out.

5. Defense Evidence

a. Defendant's Fiancé

Robert Paulson was called as a defense witness. He testified that he had previously had a relationship with a woman named Jill who killed herself with one of Paulson's guns in April 2010, several months after their relationship ended.

While defendant was living in Pennsylvania, she appeared happy and stable. She was working at a dental office and going to school. She was supportive as Paulson coped with Jill's death. When defendant moved to California, she looked for a school so she could get a license to be a dental assistant in the state. Paulson provided money when defendant needed it. Paulson thought defendant was a good mother, and she never did anything to make him think she would harm her daughters.

Paulson noticed that defendant changed two or three weeks after he left on his business trip, and in the two and a half weeks before the killings they had a series of communications that led Paulson to believe her behavior was "slowly deteriorating." She found a synopsis for a horror movie Paulson was writing with a friend, which he described as a "slasher" film about a man stalking children on a beach, in which "everyone died." Defendant was upset and thought Paulson had written the story about her and that he might hurt her. She repeatedly brought the subject up during their conversations during Paulson's absence and suggested he had resumed their relationship in order to hurt her. Defendant also questioned Paulson about whether he had driven Jill to suicide, accused him of being with another woman, and said his female friends hated her. She expressed her fear of a UPS delivery man and said he had entered the apartment. At times she said she would not leave the apartment because someone was sitting in a car outside. She thought a Facebook post by a friend of Paulson's, which made a joke about breaking up with a girlfriend using "Dobermans, tasers, and rounds," referred to her. Her mood went "up and down"; Paulson would spend hours reassuring her, she would seem fine, and the next day she would be upset again. She also indicated she wanted help with the children.

When Paulson told defendant he had to go to Alaska for a few days after the Minnesota job, she was upset and they fought. She wanted him to come home and said she missed him. On the evening of the killings, defendant sent him text messages that caused him concern. One, which he said "made no sense," referred to "robot butterflies" and concluded "u will never have me again!" In another, defendant told Paulson to say to the children's father, " 'let the bunnies go forever so we can keep what's ours' and say that defending then [*sic*] is the number 1 most high on your priority list [etc.]. " This was apparently a reference to their hope that Lily and Tori's father might give up his parental rights so Paulson could adopt them. Later in the evening, defendant sent a text message that said, "Tick tock." Another message said, "Read James Patterson." When they spoke on the telephone that evening, defendant "rant[ed]" and ran around. She would hang up, and he would call her back. Paulson described her conversation as "rambling. No

coherent thought or trying to get any message across of what was going on." She did not respond to his attempts to communicate with her after the last call ended.

b. Paulson's Mother

Paulson's mother, Roxanne Paulson, testified that she had helped defendant and the girls move to California from Pennsylvania in August 2010.[2] Roxanne continued to have frequent contact with them after they moved into their apartment in September. Roxanne became concerned because defendant seemed nervous and anxious. A few days before the killings, defendant and the girls spent the night at Roxanne's home. Between 2:00 and 3:00 in the morning, defendant decided to leave. When she took one of the girls to the car, she told Roxanne there was a car outside; she thought someone was watching her. Roxanne reassured her that the person was a neighbor who left for work early. After the girls were in the car, defendant texted Roxanne to ask if it was safe to leave. Once they got home, she texted Roxanne to tell her they were safe. The day before the killings, defendant called Roxanne at work and told her the UPS driver was coming into the apartment. Roxanne testified that defendant was having a hard time managing while Paulson was out of town.

c. Defendant's Mother

Defendant's mother testified that defendant was managing well before moving from Pennsylvania to California. Defendant began expressing fear of Paulson shortly after she moved. When defendant visited her mother in San Diego from September 29 to October 4, 2010, she brought the synopsis of the horror movie Paulson had worked on and asked her mother what she thought of it and whether it meant Paulson was feeling violent toward her. During the visit, she repeatedly discussed her fears and her uncertainty about getting married. She expressed her concern about the fact that Paulson kept guns in the apartment, but she did not mention the sword. She appeared anxious and

[2] To avoid confusion, we shall refer to Paulson's mother as Roxanne. We intend no disrespect.

disorganized. Defendant and her mother shopped for a wedding dress; when they did so, defendant did not seem fearful.

On October 11, the day before the killings, defendant called her mother, who told her it was not a good time to talk. She asked if defendant had called about something important, and defendant said, "No, it's okay." She sounded sad and subdued.

d. Defendant's Friends

Three friends of defendant also testified to her state of mind before the killings. Regina B. testified that defendant sent her a text message on September 25, 2010, saying she was afraid that Paulson and his mother were out to get her, and that Regina B. should let someone know if anything happened to defendant or if she went missing.

Maritza D., a friend from Pennsylvania, testified that she was in regular contact with defendant after the move to California. Within about a week of the move, defendant began to express concern about whether Paulson and his mother would accept her. On September 25, defendant sent Maritza D. text messages saying, "My fiancé Robert Paulson and his mom are acting strange, so f.y.I. [*sic*] if I end up missing or turn up dead or they try to say I committed suicide it is a [] coverup so feel free to get revenge for me." Maritza D. called defendant, who told her that she was afraid Paulson was not going to approve of her and the children, that she was jealous of his relationships over Facebook, and that they were not getting along. She also said she was afraid because of a book Paulson was writing about a murder of a wife or girlfriend. On September 29, defendant sent Maritza D. texts saying, "They want to steal the girls [] And kill me I think[.]" They had further conversations that were "all about the fear"; the last one was about a week before the killings.

Pamela T., defendant's friend who lived in Los Angeles, testified that defendant told her she was afraid Paulson would hurt her or kill her. In a text dated September 25,[3] defendant said "He scares me. I feel like he is going to hurt me. I never meant to hurt

[3] Pamela T. testified the date on the text was October 3; however, the copy of the text message in the record indicates it was sent on September 25.

him. . . . I need to know I am safe so hopefully this is a paranoid delusion but I'm telling u if I end up missing or turn up dead and or they say I tried to commit suicide it is a coverup." Pamela T. recommended that defendant visit her mother. Later, defendant sent Pamela T. a picture of herself in a wedding dress. In the week or two before the killings, defendant told Pamela T. she was afraid and had arranged a telephone counseling appointment for October 6 to help her deal with the situation. During a conversation within two weeks of the killings, defendant said she had read an obituary of Paulson's former girlfriend and that she thought that rather than dying by suicide, Jill had been killed by Paulson.

B. Sanity Phase

The parties stipulated that the jury could consider in the sanity phase all evidence that had been presented at the guilt phase. In addition, three mental health professionals who had evaluated defendant testified on her behalf at the sanity phase of the trial. Defendant's theory was that she suffered from delusions that she, Lily, and Tori were going to be kidnapped and held in slavery, and that the only way to save the girls from this fate was to kill them.

1. John Shields, Ph.D.

Dr. Shields testified that he had met with defendant nine times between October 2010 and June 2011 and had spent more than 20 hours with her. He administered psychological tests, interviewed defendant's mother, and reviewed other documents, including reports of other interviews, police reports, and mental health records. He opined that defendant suffered from a mental disease, most probably a depressive condition, which had first manifested itself when she was 12 years old when she was hospitalized in 1995 for suicidal ideation and superficial self-inflicted wounds. The records from that incident indicated she had tried to harm herself in the past. At age 14, defendant was diagnosed with a form of attention deficit disorder and received medication. Dr. Shields testified that adolescents with untreated depressive disorders often develop substance abuse problems. Dr. Shields also opined that defendant had

bipolar disorder with psychotic features, signs of a delusional disorder, and polysubstance abuse.

Defendant 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.

Defendant reported that she started using alcohol at age 12 and began using illegal drugs, including marijuana, LSD, mushrooms, methamphetamine, Ecstasy, and possibly cocaine, by age 14. She continued using Ecstasy until age 27.[4] She began using crystal methamphetamine at age 18. She continued to use it regularly, except while she was pregnant with the twins. She reported variations in her pattern of methamphetamine use and said she used it less as time went on; at another point, however, she said she used it nearly every day until she was 25 years old. She was using it during the month of September 2010, the month she sent some of the text messages. A text message from the time she was visiting her mother in late September and early October 2010 indicated she was using methamphetamine. She told Dr. Shields she smoked it in Roxanne's garage four days before the killings.[5] In an October 10, 2010 text message to Paulson, defendant wrote, "You wanted me to stay thin and said it was important and okayed me to use to do that."

Dr. Shields testified that paranoia is a common side effect of ongoing methamphetamine use. Long-term drug use can cause mental problems well after someone uses the drug, and it can cause delusions.

Psychological testing administered by Dr. Shields showed that defendant did not have a significant probability of faked mental illness or impairment; suggested that she was experiencing suicidal ideation; showed that her intellectual functioning was well above average; showed that she had impaired executive functioning; and suggested that she had severe mental illness.

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[4] Defendant was 28 years old at the time of the killings.

[5] Defendant told Dr. Shields this was the last time she used methamphetamine before the killings.

Dr. Shields believed that defendant's mental disorder played a role in her actions the night of the killings and that her actions were "largely a product of that mental illness in combination with the defective reasoning." In his view, drugs were not the primary cause of defendant's actions, although he acknowledged that there was a possibility that her long-term daily drug use could have caused her to have the issues she had on the day of the killings. In his opinion, defendant's actions 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. This delusion was fueled by the story Paulson had written about girls or women being taken to an island, mistreated, and killed. She believed that the UPS driver had keys to her apartment and was part of the conspiracy to harm her and the girls and that messages were embedded in videos or shows she and the children were watching after the move to California. She told Dr. Shields that while she was reading the novel Double Cross, she understood a reference to the time of day in the book to refer to the time that people were going to come and take her daughters away into slavery. Dr. Shields characterized this belief as an "idea of reference," which was a psychotic symptom.

A few days before the killings, defendant and the girls were eating pizza at Roxanne's house. Defendant told Dr. Shields the pizza made them sick, and she believed it was poisoned as part of an effort by someone, including Roxanne, to kill her and her daughters.[6] When Paulson told her he was going to Alaska instead of returning to California immediately, defendant believed that was a sign she or one of the girls was going to be taken to an enslavement camp in Alaska. She became increasingly desperate to prevent that from happening. She believed the only way she could save the children from enslavement was to kill them and herself. On the day of the killings, she sent Paulson a text that read, "Your [*sic*] separating them?" Defendant told Dr. Shields she

[6] The pizza incident occurred around the time defendant smoked methamphetamine in Roxanne's garage.

started the fire because she wanted to hide the evidence of what she had done so her family would not find out.

Dr. Shields concluded that defendant's delusion, or false belief that she and the girls were going to be enslaved, and her "ideas of reference" or belief that real events (such as Paulson's trip to Alaska) had another meaning, were symptoms of psychosis and that defendant's false belief was a product of her mental illness. In light of defendant's history of methamphetamine use, he had considered whether her beliefs were the product of intoxication. He stated that there was "no question that [defendant] had paranoid ideas related to meth use at times," but that there was also "some indication that she had paranoid or delusional ideas that were likely not related to intoxication with methamphetamine." He based this conclusion on defendant's statements to him, the toxicology report the day after the killings, and information related to defendant's subsequent treatment in the county jail.

Dr. Shields testified that defendant's mental disorder affected her ability to understand the nature and quality of her actions. She was not able to appreciate her acts' harmful nature because she believed she was saving the children from harm, not causing them harm. Dr. Shields opined that at the time of the killing, defendant was unable to recognize the moral or legal wrongfulness of her actions.

Defendant's county jail records indicated that by nine days after the killings, she said she was not suicidal. She told the jail psychiatric staff she never heard voices, although she later said otherwise. A jail psychiatrist who saw defendant for a year and a half diagnosed her with chronic and recurring adjustment disorder issues. She also received diagnoses of bipolar disorder with psychosis and depressive disorder with psychosis, and the psychiatrist also considered a diagnosis of a disorder on the schizophrenic spectrum. Defendant was given antipsychotic and antidepressive medication in jail. On October 25, 2011, defendant told another inmate to "cut themselves and hear voices and shit" so they could meet each other at the hospital. In November 2011, defendant reported paranoid thoughts that people were going to attack her. In April 2012, she used cocaine and drank 12 cups of coffee and was treated for a

possible overdose. She was described as paranoid, delusional, and psychotic. She stated that gangs were out to kill her for "snitch[ing]" on a boyfriend 10 years previously, and that if she had the means, she would slit her throat and hang herself. She said she "gets drugs from the guards."

Some of defendant's text messages from the period before the killings discuss the stress she experienced because she had to care for the children on her own. In one, she said she wanted to be young and free and be able to "party." Facebook messages defendant exchanged on October 3 and October 7 revealed no delusions, paranoia, or fear of Paulson.

2. Pablo Stewart, M.D.

Dr. Pablo Stewart, a psychiatrist, also evaluated defendant. He opined that on the day of the killings, she was suffering from major depressive disorder with psychotic features. He also opined that this was the most recent episode of a recurrent major depressive disorder that pre-existed her substance abuse.

Dr. Stewart had reviewed voluminous documents and treatment records and interviewed defendant three times. He noted that defendant was involuntarily hospitalized at age 12 after cutting her wrists. She had been drinking alcohol at the time she was taken to the hospital and had a .10 percent blood alcohol level. She began abusing multiple substances after that. There was no indication in defendant's records that she received follow-up care after her hospitalization, and Dr. Stewart noted that it was common for psychiatric patients who do not receive proper mental health care to self-medicate through substance abuse. Defendant's methamphetamine use from age 18 to 25 was "significant."

When defendant was a young adult living in San Diego between 2003 and 2005, she was diagnosed with major depressive disorder and began treatment with antidepressants. The records indicated that during a three-month period when defendant reported she was not using methamphetamine, she began to have paranoid delusions. There were times that she reported she was using methamphetamine but did not have psychotic symptoms. Defendant reported that she did not use methamphetamine during

her pregnancy with the twins and that she used it only occasionally in the ensuing period while she lived in Pennsylvania with an aunt. She did not report any psychotic symptoms during the time she was pregnant.

When defendant returned to California in August 2010 to live with Paulson, she was under a lot of stress and was ripe for a recurrence of major depression. She was having difficulty caring for the children and had less support than had been available in Pennsylvania. She was having sleep disturbances, was irritable, and said things people found difficult to understand. Dr. Stewart believed defendant was suffering from major depression in September and October of 2010.

Dr. Stewart opined that at the time of the killings, defendant was in a state of psychosis, suffering from paranoid delusions. He noted that while defendant was treated for her injuries at the hospital after the killings, a doctor thought she was suffering from a major depressive episode or a psychotic episode. Four days after defendant was transferred from the hospital to the jail, she was put on antipsychotic medication, which suggested that the psychiatrists at the jail believed she was experiencing a psychotic disorder. In jail, defendant was diagnosed at various points with bipolar disorder, schizophrenia, schizoaffective disorder, and adjustment disorder. Defendant was on antipsychotic medication during her entire time in custody.

Dr. Stewart testified he believed defendant's substance abuse history played a role in the crimes. She had reported using methamphetamine about once a week in the period before the homicide, which Dr. Stewart said contributed to her mental state. However, he believed her chronic depressive condition, which was exacerbated when she returned to California, was the primary reason for her altered mental state. He also testified that it takes two and a half days for methamphetamine to be eliminated from a person's system but that it can take longer in the case of someone who has used it for a prolonged period. In light of defendant's negative test after the killings, Dr. Stewart did not think the use of drugs had an appreciable impact on her mental state at the time of the killings. He thought it was very unlikely that defendant's delusions were the result of

methamphetamine withdrawal. Dr. Stewart was also aware that defendant's mother had tested her for drugs on her recent visit to San Diego and that the test was negative.

Dr. Stewart opined that defendant understood the nature and quality of her acts at the time of the killings, that is, she knew she had a sword and was going to kill her children. However, in his opinion, defendant was not capable of understanding that her actions were morally or legally wrong. He explained that defendant was operating under profound psychotic delusions which caused her to believe killing the children was the best thing she could do to protect them. He believed that drugs contributed to her delusions, but not to an appreciable degree, that the major factor affecting her thinking was her depression, and that in the absence of the depression she would not have killed her children.

Dr. Stewart acknowledged that the messages indicating defendant feared Paulson was part of a plot to harm her were sent in September and that defendant did not express that concern in any later messages. However, defendant had told Dr. Stewart that at the time of the killings she was afraid people were going to break into her apartment, kidnap her and her children, enslave them, and rape the children. He did not think the fact that defendant used the children's bodies to block the door indicated she understood her actions were wrong, because her psychotic plan was to burn the apartment down so there would be nothing for anyone to see.

3. Janice Nakagawa, Ph.D.

Dr. Janice Nakagawa, a psychologist, also evaluated defendant. As well as reviewing documents, she interviewed defendant three times. She concluded that defendant met the criteria for being not guilty by reason of insanity.

Defendant described to Dr. Nakagawa her belief that she and her children would be kidnapped and raped or made sex slaves. She thought the movie synopsis indicated Paulson planned to kidnap her, she was concerned that times mentioned in the novel Double Cross indicated when the door would be kicked in, she believed people were going to come and get her, and she heard helicopters outside and thought they were coming for her. On October 10, she began thinking of killing the girls. When she went

to the assistant manager's office on the day of the killings and found it closed, she thought that meant the people who planned to kidnap her were setting up their operations there. Defendant mentioned that she had asked the assistant manager to watch the girls while she moved the car, but said she was not afraid because the assistant manager was a pregnant woman and the people who were going to harm them were predominantly men. However, she was afraid to leave the house because she had heard noises in the ceiling, and she thought "they were coming to get her."

Defendant discussed the facts of the crime with Dr. Nakagawa. She described a telephone conversation she had with Paulson during the incident, saying "I get on the phone with Robert and told him about Lily and Tori, and say it's just like you wanted, and put the phone down and I get a book." She said she set the fire because it would be easier for her family if the house burnt down, and that if her family knew what had happened they would become involved with the people who were "after" her and the children. Dr. Nakagawa had noted that the text messages defendant sent did not show delusional or paranoid content; defendant said she did not want Paulson to know of her suspicions because if he did, he would carry out the plan sooner.

Defendant told Dr. Nakagawa she had bought approximately two grams of methamphetamine in September and that she continued to use it off and on until October. However, it appeared she was not under the influence of drugs the day of the killings.

Dr. Nakagawa opined that defendant was experiencing paranoia and a delusional belief, which led her to commit the offenses. She diagnosed defendant as either bipolar with psychotic features or having a psychotic disorder not otherwise specified. In Dr. Nakagawa's clinical judgment, defendant was not malingering. Dr. Nakagawa did not believe defendant understood the nature and quality of her acts because she was paranoid or delusional. She also believed defendant was not capable of understanding that her acts were legally or morally wrong. She testified that defendant's drug use could have been a factor contributing to the emergence of psychotic symptoms and that drug use could trigger predispositions to delusions, paranoia, or depression. However,

defendant's mental disorder, bipolar disorder with psychotic features, was independent of her drug use.

On cross-examination, the prosecutor elicited testimony about facts that Dr. Nakagawa did not know or consider when she reached her conclusions. In the latter part of September 2010, defendant had exchanged text messages with Paulson. One stated, "I am dying to smoke. I am leaving them alone here. They probably won't wake up but I can't help it. It's too hard to bring them everywhere." In a September 15, 2010 text message, defendant said, "I need some free time or I'll snap." Dr. Nakagawa had not taken these messages into account in reaching her conclusions.

Defendant told Dr. Nakagawa she smoked a "bowl" in Roxanne's garage and then had paranoid delusions about Roxanne poisoning the food and people being "out to get her," and that because of the delusions she packed up the girls in the middle of the night and drove them back to the apartment. Dr. Nakagawa acknowledged that these delusions were induced by methamphetamine. She believed the delusions continued for the next few days, with or without the drugs.

Defendant told Dr. Nakagawa that in the days leading up to the killings, she armed herself with a gun or sword and sat by the door waiting for people to come. Defendant said she packed up the teddy bears and other stuffed animals because they had cameras in their eyes. One of the girls was wearing a teddy bear harness when she was killed; Dr. Nakagawa did not ask defendant if that was consistent with her story that she had gotten rid of the stuffed animals.

On the day of the killings, defendant had a series of telephone calls and emails with a cousin, who reported that defendant said, "I don't know what to do," and "You are going to hate me." Paulson had said in a statement that defendant told him on the telephone on the evening of the killings, "I am so sorry. It's okay. We are just making a fire." Dr. Nakagawa agreed that these communications, as well as defendant's direction to Paulson to tell the girls it was an "accident" if they survived, could be taken into consideration in deciding whether defendant knew what she did was wrong.

II. DISCUSSION

A. Instruction on Hallucinations

In the guilt phase of the trial, defendant relied on the theory that due to her delusional beliefs, she did not premeditate or deliberate, and accordingly she was not guilty of first-degree murder. The trial court instructed the jury pursuant to 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." Defendant contends that the instruction should have been modified to include delusions. She argues that the evidence showed she suffered from *delusions* rather than *hallucinations* as defined in the instruction, and that under the instruction as given, the jury was precluded from considering the effects of her paranoid delusions in considering whether she acted with premeditation and deliberation. The trial court's failure to do so, she argues, 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.

We reject this contention on both procedural and substantive grounds. First, we note that defendant did not ask the trial court to modify the instruction to refer to delusions, and she has therefore forfeited the issue. "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218; see also *People v. Tuggles* (2009) 179 Cal.App.4th 339, 364-365.) Defendant does not claim that the instruction was incorrect. (See *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 (*Padilla*) ["We hold that evidence of a hallucination—a perception with no objective reality—is . . . admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder"].) Moreover, our Supreme Court has held that instructions on the effect of a defendant's mental disease or disorder on his or her mental

state need not be given sua sponte; rather, they are "in the nature of pinpoint instructions required *to be given only on request* where the evidence supports the defense theory." (*People v. Ervin* (2000) 22 Cal.4th 48, 90-91, italics added.)

Defendant seeks to avoid this rule by arguing that it would have been futile to ask the trial court to include delusions in the instruction because the court had already rejected her interpretation of the law when it ruled that the only evidence that would be deemed to bear on premeditation and deliberation would be that reflecting hallucinations. (See *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1 [failure to make argument is not waiver when it would have been futile].) The record does not support this contention. Before trial, defendant brought a motion in limine seeking a ruling on whether the trial court would instruct the jury that she was guilty only of manslaughter if she had acted in imperfect self-defense or imperfect defense of another, that is, that she acted in the actual but unreasonable belief that the killings were necessary to prevent imminent danger to her daughters. (CALCRIM No. 571.) The People opposed the instruction, in part on the ground that imperfect self-defense cannot be based on a psychotic delusion alone. (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1444, 1462.) Defense counsel argued that defendant's actions were not completely delusional because they were based on actual events and things she misinterpreted. The trial court denied the motion, reasoning that there was no authority that the defenses of imperfect self-defense or imperfect defense of another were available when a defendant intentionally killed a victim in order to save the victim from a worse fate. Defendant does not challenge this ruling.

Later, the parties presented argument to the court as to whether defendant could introduce evidence about her fears that Paulson was going to harm her or the girls. The prosecutor initially argued that defendant's fears were based on paranoia, not hallucination, and hence did not fall within the rule of *Padilla*, *supra*, 103 Cal.App.4th 675. In referring to defendant's belief that Paulson wanted to kill her, the trial court asked defense counsel, "So this is the delusions or—I don't know if we call it a delusion, we call it a hallucination? This is her—." Defense counsel argued that defendant's belief

qualified as a hallucination, that is, a perception not based on objective reality for purposes of CALCRIM No. 627. The prosecutor then argued that, although there was evidence of unreasonable beliefs in late September, defendant had no conversations on October 11 or 12 that showed delusional beliefs that Paulson would harm her or the girls. The prosecutor referred to the beliefs as "some hallucination that [defendant] was having at the end of September," and argued that "there [was] no evidence that this was going on at the time, on October 12th whatsoever." Defense counsel countered that there were text messages showing that defendant's delusions continued to exist on October 12, and argued that *Padilla* supported her position that "these hallucinations are relevant" to the question of premeditation and deliberation. The prosecutor, in her turn, disputed defense counsel's characterization of the October text messages, pointing out that they referred to the biological father giving up his parental rights and arguing, "That is not hallucinating."

The trial court ruled: "I'm going to allow you to present evidence, what you claim is hallucinations, on this issue. . . . 'I'm going to allow at least a good portion of this evidence, provided it does in fact tend to show the defendant was suffering from hallucinations about this time. I think there is an inference that can be made if there is evidence that she had these hallucinations within a day or two. I don't know exactly when, but I think these are factual matters for the jury to determine. . . . [I]t would be much clearer if the hallucinations had to do with a misunderstanding as to the act that she was committing or she didn't understand who these acts were directed at were her children [*sic*]. But that's not the nature of these hallucinations, supposedly. [¶] As I understand it, these hallucinations had to do with her belief that the children were in imminent peril of being kidnapped and tortured, and therefore this was her alternative as she saw it. I don't know what evidence there is of that at this point in particular, but you can bring all that out." When the prosecutor argued that under *Mejia-Lenares*, *supra*, 135 Cal.App.4th 1437 evidence of unreasonable fear was inadmissible to show imperfect self-defense, the court stated, "I am allowing evidence of hallucination and if part of that—if the argument ultimately is fear induced by these is what caused her to not to be able to form the ability to premeditate, that can be the argument, I suppose. But the

evidence will be as to the actual hallucination." The court concluded by asking counsel, "Are we all on the same page here?" to which they responded, "Yes."

Despite the prosecutor's initial characterization of defendant's fears as being based on paranoia, not hallucination, it is clear from this colloquy that at the time the trial court made its ruling, both it and counsel understood that the "hallucinations" in question were defendant's delusional beliefs. Nothing in these discussions suggests that it would have been futile to ask the trial court to modify the instruction to include delusions because the trial court had already rejected defendant's interpretation of the law; rather, the court *accepted* defense counsel's characterization of defendant's delusions as hallucinations for purposes of *Padilla*, *supra*, 103 Cal.App.4th 675 and CALCRIM No. 627.

Although it is not necessary to reach this point in order to resolve this case, we do not disagree with our dissenting colleague's conclusion that the rule of *Padilla*, *supra*, 103 Cal.App.4th 675 applies to forms of delusional thinking that do not qualify as hallucinations.[7] However, we do disagree with the dissenting opinion's interpretation of the record to the extent it concludes it would have been futile for defense counsel to request a modification of CALCRIM No. 627 to include a reference to delusions because the trial court had already ruled that *Padilla* did not apply to nonhallucinatory delusions. Our reading of the transcript persuades us that the trial court and counsel understood the term "hallucinations" to encompass defendant's delusional beliefs.

We also reject defendant's contention on the merits. "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229; see also *People v. Mills* (2012) 55 Cal.4th 663, 677 [in

[7] In fact, in *Padilla*, the defendant "hallucinate[ed] that [the victim] had killed [defendant]'s father and brothers." (*Padilla*, *supra*, 103 Cal.App.4th at p. 677.) There is no indication the defendant was suffering under a visual or auditory hallucination in which he believed he was seeing or hearing the actual killings.

considering due process challenge to ambiguous jury instruction, question is whether there is reasonable likelihood jury applied instruction in a way that violates constitution].)

Defendant points out that the prosecutor argued in her closing argument that there was no evidence she was suffering from hallucinations the day of the killings. According to defendant, this argument suggested to the jury that her delusions did not qualify as hallucinations for purposes of CALCRIM No. 627. The record does not support this conclusion. The prosecutor made this statement while summing up her argument that, although defendant had expressed irrational fears of her fiancé a week or two previously, there was no evidence she was experiencing such fears on the day of the killings. Defense counsel then argued that the hallucination instruction was important because defendant had irrational beliefs that Paulson intended to kill her and harm the girls and that he had a vendetta against her. In her rebuttal, the prosecutor did not challenge defense counsel's characterization of the delusions as hallucinations, but argued again that defendant did not appear irrational on the day of the killings. There is no reasonable possibility that the jury interpreted the instruction to preclude it from considering defendant's delusions.[8]

B. Substantial Evidence to Support Sanity Verdict

Defendant contends the evidence is insufficient to support the jury's finding that she was sane when she killed her children.

If a defendant pleads both not guilty and not guilty by reason of insanity, the trial is bifurcated. In the guilt phase of the trial, which occurs first, the defendant is conclusively presumed to have been legally sane at the time of the offense. (§ 1026, subd. (a); *People v. Elmore*, *supra*, 59 Cal.4th at pp. 140-141.) If the defendant is found guilty, the trial proceeds to the sanity phase, in which the defendant has the burden to

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[8] We are unpersuaded by defendant's argument that our Supreme Court's decision in *People v. Elmore* (2014) 59 Cal.4th 121, 136, footnote 7 indicates that the term "delusion" includes hallucinations, but not vice versa, and that the terms are therefore not interchangeable for purposes of CALCRIM No. 627. On this record, there is no basis to conclude the jury did not understand the instruction to include defendant's claimed delusions that she and the girls were at risk of harm.

prove "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§§ 25, subd. (b); 1026, subd. (a); *Elmore*, *supra*, 59 Cal.4th at p. 141.) Our Supreme Court has interpreted this statutory language to mean that insanity can be shown under either the "nature and quality" prong or the "right from wrong" prong of the test. (*People v. Skinner* (1985) 39 Cal.3d 765, 775-777 (*Skinner*).) The court has also held that "a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is unlawful." (*Id.* at p. 783.)

As defendant points out, each of the experts who testified concluded defendant was not able to understand that her actions were legally or morally wrong. However, "expert testimony, even if uncontradicted, is not binding on the trier of fact, and may be rejected, *especially where experts are asked to speculate about a defendant's state of mind at the moment the crime was committed*. . . . The trier of fact may consider the reasons given for expert opinions, and may weigh testimony with all of the evidence including the circumstances before, during, and after the offenses." (*People v. Green* (1984) 163 Cal.App.3d 239, 243-244, italics added.) As our Supreme Court has stated, " 'However impressive [a] seeming unanimity of expert opinion may at first appear . . . our inquiry on this just as on other factual issues is necessarily limited at the appellate level to a determination whether there is substantial evidence in the record to support the jury's verdict of sanity . . . under the law of this state. [Citations.] It is only in the rare case when "the evidence is uncontradicted and entirely to the effect that the accused is insane" [citation] that a unanimity of expert opinion could authorize upsetting a jury finding to the contrary.' [Citation.] Indeed we have frequently upheld on appeal verdicts which find a defendant to be sane in the face of contrary unanimous expert opinion. [Citations.]" (*People v. Drew* (1978) 22 Cal.3d 333, 350, superseded by statute on other grounds as stated in *Skinner*, *supra*, 39 Cal.3d at pp. 768-769.) The chief value of an expert's testimony " 'rests upon the *material* from which his opinion is fashioned and the

reasoning by which he progresses from his material to his conclusion.' " (*Drew*, at p. 350.)

One more prefatory note: A defendant may not be found insane solely on the basis of addiction to, or abuse of, intoxicating substances. (§ 29.8.) This provision "makes no exception for brain damage or mental disorders caused solely by one's voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic [brain] damage or a settled mental disorder which persists after the immediate effects of the intoxicant have worn off." (*People v. Robinson* (1999) 72 Cal.App.4th 421, 427.) Pursuant to this rule, the jury was instructed that "[i]f the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, and that settled mental disease or defect combined with another mental disease or defect, that may qualify as legal insanity. A settled disease or defect is one that remains after the effects of the drugs or intoxicants has worn off." (CALJIC No. 3450.)

On this record, we conclude that the jury could have found that defendant did not meet her burden to show she was insane at the time of the crimes. Because the defendant has the burden of proof on the issue of insanity, "the question on appeal is not so much the substantiality of the evidence favoring the jury's finding as whether the evidence contrary to that finding is of such weight and character that the jury could not reasonably reject it." (*People v. Drew*, *supra*, 22 Cal.3d at p. 351; accord *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1119 (*Duckett*).) Defendant had a long history of drug use, particularly abuse of methamphetamine. She had used methamphetamine on a nearly daily basis from age 18 to 25 and had been using it in the weeks preceding the killings, up to at least four days beforehand, during the time she expressed fears of Paulson and others. Dr. Shields acknowledged that paranoia is a common side effect of ongoing methamphetamine use, that long-term drug use can cause delusions, and that long-term drug use can cause mental problems well after someone uses the drug. There was also

evidence from which a jury could conclude that the expert opinions did not take sufficiently into account the overlap between the times defendant was using drugs and the times she suffered delusions. Defendant expressed fear of Paulson and others in late September 2010, at a time there is evidence she was using methamphetamine. She thought someone had poisoned her pizza on the day she admitted to last smoking methamphetamine. In 2012, defendant used cocaine and was treated for a possible overdose; she was paranoid and delusional and stated gangs were out to kill her for "snitch[ing]" on a boyfriend 10 years previously. Dr. Stewart testified that defendant's substance abuse history played a role in the crimes, although he did not believe it was the primary cause of her altered mental state. Dr. Nakagawa testified that defendant's drug use could have contributed to the onset of psychosis, although she believed defendant had a disorder with psychotic features independent of the drug use. She also acknowledged that defendant's delusions a few days before the killings, after which she drove the girls home from Roxanne's house in the middle of the night, were induced by methamphetamine. Even in the face of the unanimous expert opinions, the jury could rationally reject those opinions and find that defendant's long-term and recent drug use, singly or in combination, caused any psychotic symptoms she was experiencing at the time of the killings and that defendant had not met her burden to show she was legally insane.

The record also contains evidence from which the jury could conclude that defendant knew the nature and quality of her acts and that her actions were both legally and morally wrong. She told Dr. Nakagawa she began planning to kill the girls about two days before she did so. Her own explanation of events indicates that she intended to kill them. She told a cousin on the day of the killings, "You are going to hate me." On the telephone after the killings, she told Paulson to tell the girls "it was an accident" if they survived. There was also evidence that defendant was overwhelmed by the demands of caring for the girls and wanted to be young and free and to "party." This evidence could support a finding that defendant not only knew the nature of her acts but also knew they were both legally and morally wrong when she committed them.

We are not persuaded otherwise by defendant's reliance on *Duckett*, *supra*, 162 Cal.App.3d 1115. In *Duckett*, a divided court concluded the jury could not reasonably reject the three experts' unanimous opinions of defendant's insanity where there was evidence that defendant reported he saw demons; that he was obsessed with the victim and believed she was a witch who was practicing voodoo on him; that he had a long history of chronic paranoid schizophrenia characterized by disordered thoughts, delusions, hallucinations, inappropriate affect, and bizarre behavior; that while in the hospital, he developed a "delusional system" within two weeks of being taken off medications on an experimental basis; and that before the offense, he had ceased taking his medications. (*Id.* at pp. 1120-1123.) Additionally, the defendant had previously shot other victims; for these crimes, he had been found legally insane, and was confined to a mental hospital for five years. Within a month of his release, he shot and killed the victims in his current case. (*Id.* at p. 1118.) Here, the evidence of persistent insanity and delusions was far less compelling. Moreover, the evidence here was susceptible to an interpretation that defendant's delusions stemmed from her drug use, which also distinguishes this case from *Duckett*.

People v. Samuel (1981) 29 Cal.3d 489 is similarly distinguishable. There, the evidence of incompetence was overwhelming: as our high court has recently explained, " 'Five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three psychiatric technicians testified to Samuel's incompetency, and four psychiatric reports were admitted into evidence. [Citation.] Each witness and every report concluded Samuel was incompetent to stand trial. [Citation.] In response, the prosecution offered no expert testimony and only two lay witnesses, neither of whom contradicted any of the defense testimony. [Citation.] . . . Prosecution witnesses merely testified regarding Samuel's escape from Patton State Hospital and his ability to perform routine manual tasks.' [Citation.] On that record, we found that no reasonable trier of fact could reject the defense evidence of incompetency. [Citations.]' " (*People v. Mendoza* (2016) 62 Cal.4th 856, 882, citing *Samuel*, at p. 506.) The question before the experts here was not defendant's current competence to stand trial, but her mental state at

the time of the crimes, and for the reasons we have discussed, the jury could reasonably reject their opinions.

C. Sanity Instruction

The trial court instructed the jury pursuant to CALCRIM No. 3450 as follows: "You have found the defendant guilty of murder and inflicting injury on a child under eight causing death. Now you must decide whether she was legally sane at the time she committed the crime. [¶] The defendant must prove that it is more likely than not that she was legally insane when she committed the crimes. [¶] The defendant is legally insane if: [¶] First, when she committed the crimes, she had a mental disease or defect. [¶] And secondly, because of that disease or defect she was incapable of understanding the nature and quality of her acts, or was incapable of knowing or understanding that her acts were morally or legally wrong. [¶] None of the following qualifies as a mental disease or defect for purposes of an insanity defense: Personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts. [¶] If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, and that settled mental disease or defect combined with another mental disease or defect, that may qualify as legal insanity. A settled disease or defect is one that remains after the effects of the drugs or intoxicants has worn off. [¶] You may consider any evidence that the defendant had a mental disease or defect before the commission of the crimes. If you are satisfied that she had a mental disease or defect before she committed the crimes, you may conclude that she suffered from the same condition when she committed the crimes. You must decide whether that mental disease or defect constitutes legal insanity."

Defendant contends this instruction suffers from three flaws. First, she points to the portion of the insanity test referring to her understanding that the acts were "morally or legally wrong," and argues that the jury could have understood that phrase to mean "morally *and* legally wrong." Second, she argues that the instruction did not make clear that her incapacity to understand right from wrong did not refer to a *general* incapacity so to understand, but to her capacity "in respect of the 'very act' charged." Third, she

contends the paragraph listing the conditions that would not support a finding of insanity—including adjustment disorder—should have been omitted because it could confuse and mislead the jury.

We reject each of these contentions. First, defendant forfeited her first two challenges by failing to raise them at trial. (See *People v. Andrews*, *supra*, 49 Cal.3d at p. 218 ["Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"]; *People v. Tuggles*, *supra*, 179 Cal.App.4th at pp. 364-365.)

In any case, we find her arguments on these issues entirely unpersuasive. As to the first argument, as we have noted, our high court has held that "a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is unlawful." (*Skinner*, *supra*, 39 Cal.3d at p. 783.) Defendant argues that the jury might have misinterpreted the phrase "legally or morally wrong" in the instruction to mean "morally *and* legally wrong" and as a result might have concluded defendant must be considered sane if she knew the killings were unlawful, whether or not she was capable of understanding their moral wrongfulness. For this contention, she relies on cases noting that the words "and" and "or" are sometimes carelessly used in an interchangeable manner. (See *People v. Horn* (1984) 158 Cal.App.3d 1014, 1027-1028 and cases cited therein; *Skinner*, *supra*, 39 Cal.3d at p. 769.) But defendant offers no basis other than speculation that the jury adopted this strained reading of the instruction.

We similarly find meritless defendant's second contention—that the instruction failed to inform the jury that she had to be incapable of understanding the wrongfulness of the "very act" charged. (See *People v. Horn*, *supra*, 158 Cal.App.3d at pp. 1024-1025 ["[T]he wrongfulness . . . had to be in relation to the very act with which the defendant was charged"].) The instruction referred to defendant's capacity to know or understand "that *her act* was legally or morally wrong." (Italics added.) The only reasonable interpretation of this language is that it refers to the offenses with which defendant was charged.

We likewise reject defendant's contention that the instruction contained surplus language that confused and misled the jury, specifically, the paragraph stating that various conditions, including adjustment disorder, were insufficient to establish insanity.[9] Defendant points out that the only indication she had an adjustment disorder was found in jail records discussed by the mental health experts, which were not admitted for their truth; rather, the jury was instructed, "Doctors John Shields, Pablo Stewart and Janice Nakagawa testified that in reaching their conclusions as expert witnesses they considered statements made by mental health providers, jail staff, police officers, friends and relatives of the defendant, and the defendant herself, including texts and e-mails. You may consider these statements only to evaluate the expert's opinion. *Do not consider these statements as proof that the information contained in the statements is true.*" (Italics added.) In closing argument, the prosecutor pointed out that while cross-examining the experts, she had confronted them about the fact that the jail records showed defendant was being treated for adjustment disorder.

Because the evidence of adjustment disorder was not admitted for its truth, defendant argues, the instruction referring to it was not responsive to the evidence and was likely to confuse the jury. We disagree. The jury was instructed that in evaluating the expert's opinions, it could consider the material upon which the experts relied, and that material included the diagnosis of adjustment disorder. Nor do we see any possibility of confusion. Defendant's theory of the case was that she suffered from a mental disease with psychotic, delusional features; the prosecution's theory was that there was no evidence defendant was suffering delusions on the day of the killings and that, if she was, they were a result of her drug use. There is no basis to conclude that the listing of conditions insufficient to support a finding of insanity misled the jury in any way.

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[9] Defendant objected to this portion of the instruction at the beginning of the sanity phase of the trial. Although she did not renew her objection after evidence had been presented, we will not treat the issue as forfeited.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

I concur:

Ruvolo, P.J.

CONCURRING AND DISSENTING OPINION OF STREETER, J.

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. The distinction may seem like a matter of semantics, but it has substance. Both forms of delusion are recognized as psychoses in the scientific literature. (See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000), p. 324 (DSM-IV-TR) [drawing distinction between "bizarre" delusions which are not based in reality and "nonbizarre delusions" which are reality-based].)[1] I part ways with the majority because I think the semantics mattered in this case. McCarrick's guilt phase defense was an attempt to limit her culpability to second degree murder. Because CALCRIM No. 627[2]—which framed that defense for the jury—speaks solely in terms of "hallucinations," the People were able to argue in closing that she was not hallucinating on the day she killed her children, and so there was nothing in the evidence to negate premeditation and deliberation. 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.

I.

The language of CALCRIM No. 627 has its genesis in *People v. Padilla* (2002) 103 Cal.App.4th 675, 677–678 (*Padilla*), a case involving a prisoner, Padilla, who killed his cellmate by gouging his eyes out. At trial, Padilla tried to present "the testimony of

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[1] "Delusions are deemed bizarre if they are clearly implausible, not understandable, and not derived from ordinary life experiences. (e.g., an individual's belief that a stranger has removed his or her internal organs and replaced them with someone else's organs without leaving any wounds or scars.) In contrast, nonbizarre delusions involve situations that can conceivable occur in real life (e.g. being followed, poisoned, infected, loved at a distance, or deceived by one's spouse or lover.)" DSM-IV-TR, at p. 324.

[2] See CALCRIM No. 627, New January 2006, Revised February 2015.

two psychologists [to explain] that he committed a retaliatory homicide after hallucinating that [the cellmate] had killed [his] father and brothers." (*Id.* at p. 677.) The court excluded the testimony at the guilt phase, but allowed it at the sanity phase. (*Ibid.*) On appeal from his first degree murder conviction, Padilla argued it was error to exclude the testimony during the guilt proceedings. He contended, first, that the testimony was relevant to a defense of sudden provocation or passion, which would have eliminated malice entirely and reduced the crime from murder to manslaughter, and, second, that it was admissible to negate premeditation and deliberation, which would have reduced his culpability for murder from first to second degree. The Court of Appeal rejected the former point, but agreed with the latter. (*Id.* at pp. 677–678.)

The opinion in *Padilla* explains that a "hallucination is a perception with no objective reality. (American Heritage Dict. (4th ed. 2000) p. 792 ['[p]erception of visual, auditory, tactile, olfactory, or gustatory experiences *without an external stimulus'* (italics added)]; Oxford English Dict. (2d ed.1989) p. 1047 ['apparent perception (usually by sight or hearing) of an external object *when no such object is actually present*' (italics added)]; Webster's 3d New Internat. Dict. (1986) p. 1023 ['perception of objects *with no reality'* (italics added)].) A perception with no objective reality cannot arouse the passions of the ordinarily reasonable person." (*Padilla*, *supra*, 103 Cal.App.4th 675, 678–679.) With this definition in mind, the court turned to Padilla's two cited points of error, holding as follows. First, "[f]ailing the objective test, [a] hallucination cannot as a matter of law negate malice so as to mitigate murder to voluntary manslaughter—whether on a 'sudden quarrel or heat of passion' theory of statutory voluntary manslaughter [citations] or on a 'diminished actuality' theory of nonstatutory voluntary manslaughter [citations]." (*Padilla*, *supra*, 103 Cal.App.4th at pp. 678–679.) Second, a hallucination—as a subjective phenomenon playing out in the defendant's mind—can "negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*Id.* at p. 677.). This second prong of the holding in *Padilla* is the

animating principle behind CALCRIM No. 627, which instructs juries they may "consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation." [3]

II.

Also relevant here, although tangentially, is *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 (*Mejia-Lenares*). In *Mejia-Lenares*, the appellant, Mejia-Lenares, was convicted of second degree murder after "he fatally stabbed Harry Howard out of fear that Howard was transforming into the devil and wanted to kill him. Appellant conceded that he just imagined Howard was turning into the devil . . . ." (*Id.* at p. 1444.) Like Padilla, Mejia-Lenares tried to use his hallucinations to defeat malice outright, thereby reducing his crime from murder to manslaughter, but rather than argue provocation or passion, which was Padilla's defense, Mejia-Lenares argued imperfect self-defense. "[A] reasonable person would not have perceived the circumstances as life-threatening," Mejia-Lenares contended, but in his case, "because of his mental disease," he "actually but unreasonably believed Howard was threatening his life and so he needed to defend himself by using lethal force." (*Id.* at p. 1445.) The Court of Appeal rejected this argument, extending the first prong of *Padilla*'s holding to imperfect self-defense. (*Id.* at p. 1446.)

At the time, the language of CALJIC No. 8.73.1, the predecessor to CALCRIM No. 627, embodied only *Padilla*'s second prong—which remains the case today in both forms of this pattern instruction—thus permitting juries to consider evidence of hallucination as it may be relevant to the degree of a murder. Appellant Mejia-Lenares tried to claim CALJIC No. 8.73.1 should have been modified in his case to permit

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[3] CALCRIM No. 627 is a substantively identical restatement of CALJIC No. 8.73.1, which was introduced in 2003. The sole authority cited in the Use Note for CALJIC No. 8.73.1 is *Padilla*, *supra*, 103 Cal.App.4th 675, which was decided in late 2002. (See Use Note to CALJIC No. 8.73.1 (7th Ed. 2003).)

consideration of hallucinations not just in determining the degree of murder, but also in determining the issue of malice aforethought as a predicate whether murder may be found at all. The Court of Appeal rejected this contention, explaining: "To allow a true delusion—a false belief with no foundation in fact—to form the basis of an unreasonable-mistake-of-fact defense erroneously mixes the concepts of a normally reasonable person making a genuine but unreasonable mistake of fact (a reasonable person doing an unreasonable thing), and an insane person. Thus, while one who acts on a delusion may argue that he or she did not realize he or she was acting unlawfully as a result of the delusion, he or she may not take a delusional perception and treat it as if it were true for purposes of assessing wrongful intent. In other words, a defendant is not permitted to argue, 'The devil was trying to kill me,' and have the jury assess reasonableness, justification, or excuse as if the delusion were true, for purposes of evaluating state of mind." (*Mejia-Lenares*, *supra*, 135 Cal.App.4th at p. 1456.)

Our Supreme Court recently adopted the holding of *Mejia-Lenares* and embraced its reasoning in *People v. Elmore* (2014) 59 Cal.4th 121, 130 (*Elmore*), a case in which the defendant, Elmore, who, "by all accounts, [was] mentally ill," "had repeatedly been institutionalized and diagnosed as psychotic." "On the day of the killing [Elmore] . . . became fidgety and anxious" and "[a]t one point . . . began to crawl under cars as his family and a friend tried to speak with him." (*Ibid.*) He then went out on the street with a paint brush handle honed into a sharp weapon-like object, and, without warning or provocation, suddenly accosted an unsuspecting passerby on the sidewalk, Ella Suggs, who did not know Elmore and never said a word to him. Elmore stabbed Suggs to death with the paint-brush handle. (*Ibid.*) At trial, he gave an incoherent and confused account of his actions, explaining that " 'somebody [said] something violent' " to him on the street, but he could not say who it was or whether it was a man or woman. (*Id.* at p. 131.)

The question in *Elmore* was, as it had been in *Mejia-Lenares*, "whether the doctrine of unreasonable self-defense is available when belief in the need to defend

oneself is entirely delusional." (*Elmore*, *supra*, 59 Cal.4th at p. 130.) Adopting the holding of *Mejia-Lenares*, the Court said no, explaining that "[h]ere, defendant claims his request for an instruction on unreasonable self-defense should have been granted, even though his perception of a threat was entirely delusional." (*Id.* at p. 134; see *id.* at p. 138 [referring to "purely delusional perceptions of threats to personal safety"].) The Court explained that "[t]he line between mere misperception and delusion is drawn at the absence of an objective correlate. A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One who sees a snake where there is nothing snakelike, however, is deluded. Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*Id.* at p. 137.)

III.

Elmore and *Mejia-Lenares* involved, respectively, an "entirely delusional" belief, "divorced from the circumstances," and not grounded on an "objective correlate" (*Elmore*, *supra*, 59 Cal.4th at p. 137), and "a perception of facts not grounded in reality" (*Mejia-Lenares*, *supra*, 135 Cal.App.4th at p. 1453). They do not address whether a defendant laboring under a subjective misperception of reality may use that type of delusion to argue she did not actually deliberate or plan a homicidal act.

Padilla does address that question, and, quite properly, the trial court considered its applicability here after entertaining argument specifically focused on whether, under the second prong of *Padilla*, McCarrick would be allowed to try to negate premeditation and deliberation based on testimony from various percipient witnesses who observed her bizarre and increasingly irrational behavior in the days and weeks before the killings. With the preliminary observation that "we are in a very tricky area," the court ruled that she would be allowed to do so. This ruling was unquestionably correct, fully in line not just with *Padilla* but with what has come to be called the defense of "diminished actuality," since that defense put to the test whether the People proved McCarrick " 'actually formed' " the specific intent requisite for first degree murder. (*People v. Vieira* (2005) 35 Cal.4th 264, 292, quoting *People v. Coddington* (2000) 23 Cal.4th 529,

582, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see Cal. Pen. Code, § 28; *People v. Mills* (2012) 55 Cal.4th 663, 671 (*Mills*).)

Where the trial court went wrong was in limiting *Padilla* to its facts. It is understandable why the court did so, because *Padilla* is a hallucination case and because the language of CALCRIM No. 627 speaks only of hallucinations. But the rationale for CALCRIM No. 627, articulated in *Padilla* itself, is not confined to mental disturbance as it happened to be manifested in that case (or for that matter in *Elmore* or *Mejia-Lenares*.)[4] Since all forms of delusion and hallucination involve subjective disturbances within the mind, there is no reason a defendant should be limited to arguing mental delusion as the basis for a diminished actuality defense only in a situation where she has acted under the influence of some imagined or manufactured version of reality, to the exclusion of delusionary thinking more broadly defined. In my view, CALCRIM No. 627 is flawed because it limits diminished actuality defenses based on mental disturbance to hallucinations. If we were to reach the guilt phase instructional issue McCarrick has raised here—and I think we should—I would therefore hold it was error not to modify CALCRIM No. 627 sua sponte to encompass all forms of mental delusion, including hallucinations.

Because it is rare that the difference matters, courts do not draw a crisp distinction between "hallucinations" and "delusions." Some of the reported cases use the term "delusion" in a manner that appears to equate it in meaning with "hallucination,"[5] others

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[4] CALCRIM No. 627, as revised in February 2015, cites as authority not only *Padilla*, but *Mejia-Lenares* and *Elmore* as well. (Use Note to CALCRIM No. 627 (Feb. 2015 Rev.).)

[5] E.g., *Elmore*, *supra*, 59 Cal.4th at p. 146; *Mejia-Lenares*, *supra*, 135 Cal.App.4th at pages 1444, 1454; see also *People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1080, 1084 (defendant experienced "irrational delusions" as evidenced by statements that "she started seeing her children as birds on the day in question and 'didn't know they were children at that time' " and "just wanted to kill the birds because she felt they were an evil force").

use it in its broader sense to mean misperceptions of objective reality,[6] and others seem to use both terms and both concepts interchangeably.[7] Even cases that commit definitively to one of these two terms, upon probing, are not so clear. For example, the majority seems to suggest that, although the *Padilla* court used only the term "hallucination," it might have meant something broader because there was "no indication the defendant was suffering under a visual or auditory hallucination in which he believed he was seeing or

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[6] E.g., *People v. Wetmore* (1978) 22 Cal.3d 318, 321 (*Wetmore*) (in burglary case against defendant with a "long history of psychotic illness" who "entered an apartment under a delusion that he owned that apartment and thus did not enter with the intent of committing a theft or felony," conviction reversed on ground that excluded psychiatric evidence of mental illness was admissible to negate specific intent), superseded by statute as explained in *Mills*, *supra*, 55 Cal.4th at page 671.

[7] E.g., *People v. Leeds* (2015) 240 Cal.App.4th 822, 825–828 (reversing sanity verdict for instructional error where defendant, who mistook his father for an intruder, shot him to death and then chased down and killed two of his father's employees, believing them to be assassins sent by the Mexican Mafia; defendant had a "well-documented history of delusions and hallucinations," claimed to have seen helicopters in the sky and missiles being fired, displayed "fearful and panicky demeanor just before the killings, and [had a] false belief that his father was brandishing a pistol when he kicked open the door to the back office"); *People v. Nicolaus* (1967) 65 Cal.2d 866, 873, 875 (defendant described by a psychiatrist as being "delusional" and suffering from "visual and auditory hallucinations" when he killed his three children, "frequently made irrational statements; [said] he was like God; [said] he could perform miracles and control the world;...believed devoutly in Nazism as a way of life, sometimes...reacted abnormally and violently to commonplace occurrences; . . . believed everyone was against him; . . . felt his mother-in-law was trying to break up his marriage and made violent threats to her"; first degree capital murder convictions reduced to second degree on automatic appeal to California Supreme Court), disapproved on other grounds in *Wetmore*, *supra*, 22 Cal.3d at pages 323–325 and footnote 5; *People v. Wells* (1949) 33 Cal.2d 330, 344–345, 354 (life prisoner who possessed "abnormal fear for his personal safety," causing him to "react to [a perceived threat] more violently and more unpredictably than the same stimulus applied to a normal person," even though "laboring under...some insane delusion or hallucination," was still capable of the "malice aforethought" necessary to support conviction for assaulting a guard, thus subjecting him to a capital sentence under section Penal Code section 4500; conviction and sentence affirmed on automatic appeal to California Supreme Court), disapproved on other grounds in *Wetmore*, *supra*, 22 Cal.3d at pages 323–325 and footnote 5.

hearing the actual killings." (Maj. opn., *ante*, at p. 21, fn. 7.) I question this interpretation of the case,[8] but would suggest that the fact we read the case so differently provides yet another illustration of the uncertain meaning of the labels "hallucination" and "delusion" as used in case law.

In the end, not much can be gleaned from how we appellate judges use the terms "delusion" and "hallucination," since appellate usage typically tracks the choice of terminology by testifying alienists in the cases under review, often where both phenomena were involved and there was no reason to make a distinction.[9] The lack of terminological precision in the case law simply underscores why, to eliminate any confusion in future applications of CALCRIM No. 627 (or its CALJIC counterpart), we should address whether this pattern instruction should have been modified here to cover not just hallucinations, but all forms of delusionary thinking, whether based on a false or

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[8] As I read *Padilla*, there was no "actual killing," which is why appellant Padilla's description of that supposed event is described as a hallucination.

[9] From what little evidence there is in the published cases of how CALCRIM No. 627 and CALJIC No. 8.73.1 are used in practice, there is some indication that trial courts recognize the need to modify it where, as here, reality-based delusions are involved, or are mixed with non-reality based delusions. In *People v. Gana* (2015) 236 Cal.App.4th 598, 601 for example, the defendant, Gana, was convicted of first degree murder for shooting her husband to death and the willful, deliberate and premeditated attempt to shoot her two sons. She had breast cancer, her mental state was affected by chemotherapy drugs, she was suffering from major depression; and believed her family could not live without her, and thus felt she needed to kill them so " 'we can all die together.' " (*Id.* at p. 605.) For weeks before the killing, Gana "had suicidal thoughts and developed a plan to kill her husband and children before taking her own life. [She] told the investigators she heard a voice in her head telling her that she needed to carry out her scheme." (*Id.* at p. 603.) At trial she claimed she did not premeditate and deliberate, and CALJIC No. 8.73.1 was one of the jury instructions given. (*Id.* at pp. 604–605.) The Court of Appeal described the instruction as follows: "CALJIC No. 8.73.1 (evidence of *hallucination or delusion* may be considered 'on the issue of whether' defendant 'killed or attempted to kill with or without deliberation and premeditation and/or lying in wait')." (*Id.* at p. 605, italics added; see also *id.* at p. 614 [quoting what appears to be prosecutor's paraphrase of CALJIC No. 8.73.1: "If you find it to be true that the defendant suffered from a *hallucination and/or delusion*, you may consider the impact of this hallucination and/or delusion, if any"], italics added.)

manufactured perception of objective reality or some distorted perception of real events. This case illustrates how consequential the issue can be, if left to juries to decipher without specific guidance.

IV.

The majority suggests counsel on both sides and the court agreed that delusions and hallucinations are one and the same. I read the record somewhat differently. In pretrial argument on a motion in limine concerning the applicability of *Mejia-Lenares*—an argument McCarrick lost when the trial court ruled, correctly, that her irrational fears could not support a claim of imperfect self-defense—her counsel was quite clear that these fears were not "completely delusional as they were in *Mejia-Lenares.*" Later, during the guilt phase trial, when the admissibility of McCarrick's fears to negate premeditation and deliberation under the second prong of *Padilla's* holding arose, counsel did, it is true, seem to accept the idea that delusions and hallucinations are interchangeable, but she did so only after the court sounded a note of skepticism about the appropriate terminology, interjecting "I don't know if we call it a delusion," and then immediately asking whether "we call it a hallucination?" Although the People pin blame on the defense for equating delusions and hallucinations, the quote from McCarrick's counsel to which they cite is a *response* to the court's inquiry during this colloquy, and appears to be nothing more than an effort to fit the evidence within a reading of the law the court seemed inclined to take—and eventually did take.

Who originally came up with the notion that the term "hallucinations," alone, may be used to describe the evidence of McCarrick's paranoid delusions is not definitively clear in the record, but the sequence of events suggests it is more fairly attributable to the People than to the defense. The specific issue under discussion when this point of terminology surfaced was the admissibility of proffered defense testimony from Paulson and "three or four other witnesses who would testify that Ms. McCarrick reached out to them, either spoke to them or sent them test messages that she was afraid of Mr. Paulson and that he was going to hurt—kill her and hurt the girls." The People insisted that this evidence "doesn't rise to the level of a hallucination . . . . Hallucination, as I said in

People versus Padilla . . . [¶] . . . [¶] . . . it takes it right from the dictionary. It's some kind of belief that you are seeing something, hearing something . . . that's not there. That's not based on reality. And I don't think fear . . . [is] hallucination. . . . [H]er fear is based on paranoia . . . ." [10] While the trial court ultimately ruled for the defense on the evidentiary point then under discussion, deciding to allow testimony about McCarrick's irrational fear of Paulson as it bore on her diminished actuality defense, it did so only within the confines of the People's legal argument—which incorrectly limited the second prong of *Padilla's* holding to hallucination cases. The court ruled: "I am allowing evidence of hallucination and if part of that—if the argument ultimately is fear induced by these is what caused her to not be able to form the ability to premeditate, that can be the argument, I suppose. *But the evidence will be as to the actual hallucination.*" (Italics added.)[11]

It may be that later, at the close of the guilt phase evidence, when the instructions were argued and settled, it would have been wise for McCarrick's counsel to propose a pinpoint modification to CALCRIM No. 627, making clear that it covers the type of delusions shown by the evidence in this case. But her failure to make such a request should not come at the price of forfeiture. Her substantial rights were affected by the instruction (Pen. Code, § 1259; see *People v. Gray* (2005) 37 Cal.4th 168, 235), and in any event, any effort to seek a modification would likely have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; see *People v. O'Connell* (1995) 39 Cal.App.4th

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[10] The prosecution argued "[t]hat is not a hallucination. That is paranoia, but there is a difference. Hallucination is seeing things, hearing things. I mean, it's right in that *Padilla* case.")

[11] The court also ruled, "I am going to allow you to bring in evidence of hallucination on the issue of ability to deliberate and premeditate, but that is as far as it goes." It noted "there is no question that hallucination, evidence of hallucinations can have a bearing and is relevant on the issues of premeditation and deliberation, and that is supported by . . . this *Padilla* case." And again, it said, "I'm going to allow at least a good portion of this evidence, provided it does in fact show the defendant was suffering from hallucinations about this time."

1182, 1190 [applying "the principle of law that excuses parties for their failure to raise an issue at trial where to do so would have been an exercise in futility" where defendant failed to request clarifying modification of challenged pattern instruction after trial court had unequivocally rejected legal argument supporting the clarification].) By the time the guilt phase instructions were argued and settled, the trial court had already ruled, unequivocally, and unduly narrowly, in my view, that *Padilla* applies only to hallucinations. Since the court had already announced its interpretation of *Padilla*, McCarrick was not required to seek reconsideration. At that stage, given what the evidence showed—paranoid delusions based on a misperception of actual facts—the court had a sua sponte duty to correct its own error and add clarifying language to make sure the jury understood CALCRIM No. 627 applies to any form of delusionary thinking, including hallucinations.

As the majority points out, neither side drew any distinction between delusions and hallucinations in closing argument. (Maj. opn., *ante*, at p. 20.) But everything that happened after the trial court announced its ruling on the scope of the guilt phase evidence of premeditation and deliberation hinged on the court's narrowly framed ruling. If McCarrick had evidence that she was suffering from "actual hallucinations" (she had none), she was allowed to present it. And if she wanted to argue the hallucination instruction (she had no evidence to do so), she was free to try. Straitjacketed in this manner, counsel did the best she could in closing, attempting to argue to the jury that the hallucination instruction was "very important for you because it's clear that Ms. McCarrick was perceiving things that weren't real." McCarrick should not be penalized on appeal for her counsel's effort to abide by the ground rules the trial court set. (See *People v. Calio* (1986) 42 Cal.3d 639, 643 [" 'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' "].)

V.

The People contend that, by not taking issue with defense counsel's attempt to argue to the jury that McCarrick's delusions qualified as hallucinations, they in effect "resolve[d] [the] ambiguity in favor of" the defense. (*Middleton v. McNeil* (2004) 541 U.S. 433, 438.) To the contrary, they exploited the ambiguity. In response to McCarrick's argument, all the People had to do was point out that there was no evidence of hallucinations, which, predictably, is exactly what they did when they stated, "There is not one piece of evidence that she was under any form of hallucination on October 12, 2010 . . . ." The point 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.

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Reversal is required where there is a "reasonable likelihood that the jury misapplied or misconstrued" the trial court's instructions or the underlying law. (*People v. Crew* (2003) 31 Cal.4th 822, 848.) The toxic combination of potentially ambiguous instructions and misleading arguments by the prosecutor requires reversal when it is likely the jury was misled. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 995, 1035–1040; *People v. Roder* (1983) 33 Cal.3d 491, 503–505 & fn. 13.) In their closing reply before the jury, the People's use of the literal terms of CALCRIM No. 627 was warranted, since it was based on the court's announced view of the law—and thus I do not mean to suggest prosecutorial misconduct—but their argument was highly likely to mislead because it invited the jury to give no weight to the evidence of mental disturbance that McCarrick presented.

The resulting prejudice seems plain, whether the instructional error here is viewed as rising to the level of federal constitutional magnitude or simply state law error. While I have no quarrel with the majority's conclusion that the evidence is sufficient to sustain the jury's rejection of McCarrick's sanity phase defense, I cannot agree that "[t]here is no

reasonable possibility that the jury interpreted [CALCRIM No. 627] to preclude it from considering defendant's delusions" at the guilt phase. (Maj. opn., *ante*, at p. 21.) In my view, it is not only reasonably possible CALCRIM No. 627 short-circuited McCarrick's guilt phase defense in that way, it is "reasonably probable [she] would have obtained a more favorable result in the absence of error." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The most intuitive, everyday understanding of the term "hallucination," as evidenced by the dictionary definitions quoted in *Padilla*, is that it is limited to a situation in which a person perceives something with no objective reality. Perhaps this jury rejected McCarrick's guilt phase defense on the merits for lack of credibility after concluding that whatever mental disturbance she suffered from in the weeks before the killings was transient and had dissipated by the day of the crimes, which is one reading of the People's final pitch in their closing reply. More likely—because the evidence overwhelmingly points to profound, longstanding mental illness here, even if McCarrick was sane in the *M'Naghten* sense—that defense failed on a point of semantics: She suffered from delusions, not from hallucinations.

Accordingly, I join in Sections I and II.B of the majority's opinion, but must respectfully dissent from Section II.A.

Streeter, J.

Trial Court:	Solano County Superior Court
Trial Judge:	Honorable Peter B. Foor
Counsel for Appellant:	James Kyle Gee, under appointment by the First District Appellate Project
Counsel for Respondent:	Kamala D. Harris, Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Rene A. Chacon, Supervising Deputy Attorney General, Joan Killeen, Deputy Attorney General

Court of Appeal, First Appellate District, Division Four - No. A136822

S239355

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MONICA McCARRICK, Defendant and Appellant.

The petition for review is denied.

Werdegar and Cuéllar, JJ., are of the opinion the petition should be granted.

SUPREME COURT
FILED

MAR 15 2017

Jorge Navarrete Clerk

Deputy

DOCKETED
SAN FRANCISCO
MAR 16 2017
By
No. S239355/04/22

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MONICA MCCARRICK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MONICA MCCARRICK, Defendant	Case No.: FCR279982 MOTION IN LIMINE REGARDING DEFENDANT'S PROPOSED JURY INSTRUCTIONS Date: May 4, 2012 Time: 8:30 a.m. Dept. 17 Trial Date: June 5, 2012:

The Defendant, MONICA MCCARRICK, hereby makes this motion *in limine*, requesting a ruling on jury instructions on the grounds that an *in limine* ruling is necessary to the preparation and presentation of the Defendant's case.

STATEMENT OF FACTS

Monica McCarrick is charged with two counts of California Penal Code Section 187(a) (first degree murder) and two counts of California Penal Code Section 273ab (assault on a child causing death) in connection with the death of her two twin three-year old daughters—Lily and Tori McCarrick. She is also charged with a special circumstance per Penal Code § 190.2(a)(3).

Prior to this incident on October 12, 2010, Ms. McCarrick had no history of violent crime. In fact, she had been a victim of domestic violence on multiple occasions. When Ms. McCarrick was thirteen, she dated a nineteen year old man in Pleasant Hill who forced her to have sex. When the defendant was twenty-four, she entered a seven-month relationship with an older man named Ronald who beat her up physically. After Ronald, Ms. McCarrick started a relationship with Mike Ball, the father of her two daughters. The relationship failed after 17 months because Mr. Ball cheated on her.

Most recently, Ms. McCarrick reconnected with a former college boyfriend from 2000, Robert Paulson, on Facebook in October of 2009. They were engaged to be married and, at Mr. Paulson's behest, Ms. McCarrick moved herself and her daughters to California in August of 2010. The engaged couple moved to Concord to live with Mr. Paulson's mother Roxanne. Ms. McCarrick describes the initial time spent at Roxanne's house as isolating because Roxanne would insult Ms. McCarrick's appearance and intelligence. While Ms. McCarrick tried to confide in her future mother-in-law about the problems she was having with Robert's hostile friends, the defendant felt betrayed upon discovering that Roxanne may have shared this information with these friends.

According to Ms. McCarrick, Robert's friends were unwelcoming, mean and downright scary. She describes his friends as enjoying drinking and shooting guns. On one occasion in late August of 2010, they invited the couple to a party and told them that it was "kid-friendly." However, when Ms. McCarrick and her fiancé arrived, a group of Mr. Paulson's friends blew smoke into her daughter's face. Ms. McCarrick also observed Mr. Paulson's friends post inappropriate jokes about her daughters on Facebook.

In addition to the hostility Ms. McCarrick felt from Mr. Paulson's mother and friends, her fiancé showed signs of disturbing violence in a short story that the defendant found on his computer. Before her discovery of the story, Ms. McCarrick noticed that her future husband acted differently around his friends. She described him as "a really mean person" who received strange and unexplained nicknames like "Rapert" from his friends. In mid-September, Ms. McCarrick, after her fiancé had given her his computer username and password, found an electronic copy of a short story entitled "The Beachcomber." The story focused on a "noble sailor" who stumbles upon his wife sleeping with another man. In retaliation for the adultery, the sailor kills the lover in front of his wife and then chokes his wife and "slowly watch(es) the life drain from her eyes." Years later, a group of teenagers break into the sailor's home and one girl finds a photo of the deceased wife and believes the woman looks exactly like her. Once the sailor sees that the teens have entered his home, he decides to kill them, saving his murder wife's doppelganger for last. The text states:

> He now knows he must relive the moment he grabbed his wife's neck and squeezed until there was nothing left. He will save her for last... He drives an old harpoon [sic] the stomach of the girl on top of the boy. He then peels her limp corpse from atop the shocked male who is slowly drenched in her blood. He throws a rope around his neck and pulls it tight. Throwing the line over a pulley he yanks the man from a lying position to a hanging one and yanks the rope hard. His big arms with the pulley quickly lift the man up and then the rope looses slack you hear the man's neck pop and see his body go limp. Two down, seven to go.

Ms. McCarrick was startled by the violence and the similarities between the short story and her own life. Mr. Paulson dated a woman named Hillary right after his first relationship with Ms. McCarrick in 2000 and she looked exactly like Ms. McCarrick. The defendant read the story as a threat—her fiancé wanted to kill both her and his ex-girlfriend Hillary. Ms. McCarrick confronted him about the short story and he told her that she "better lose it." He also told her that he wrote it

one month before he contacted her on Facebook in 2009. He never denied that the story was based on his relationship with Ms. McCarrick.

The discovery of "The Beachcomber" made Ms. McCarrick afraid for her life and the lives of her daughters. On October 8, 2010, she stayed with Roxanne Paulson and left in the middle of night afraid that she and her daughters had been drugged with pizza that Ms. Paulson gave them for dinner. Ms. McCarrick felt constantly watched and worried that Roxanne, Mr. Paulson or his friends might be plotting against her. Ms. McCarrick experienced hallucinations and paranoia that manifested itself in the way she watched television and read children's books—she believed that the images and words were warning her that she and her children would be ambushed, tortured, raped and killed. For instance, she watched an episode of "Dora the Explorer" with her daughters and her future mother-in-law and the end mentioned "two down, seven to go"—the final lines of "The Beachcomber."

Her worries and fear motivated her to call her mother in San Diego and other friends inquiring about whether they could care for Lily and Tori so that they would be protected from the conspiracy against her. However, nobody was able to look after them. On the morning of October 12, Ms. McCarrick recalls speaking to her fiancé on the phone and trying to bargain with him to not to send her daughters away where they would be sold into the sex trade as slaves. She imagined her daughters being kept in a cage for the rest of their lives where they would be repeatedly raped and tortured.

On the evening of October 12, 2010, Ms. McCarrick believed that the people who wanted to kidnap her and her daughters were on their way. When Lily and Tori awoke from a nap, Ms. McCarrick placed them in their high chairs and gave them Cheerios. She believed that an army of men who wanted to rape, torture and kill her daughters would arrive at any moment. She even

claims she saw them outside of her window. According to the defendant, she did not know what to do—if she did not do anything, she 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 Mr. Paulson's Japanese katana sword.

Immediately after waking up in the hospital, she assumed she had been kidnapped and placed in a torture chamber. However, as the reality of what had happened materialized, Ms. McCarrick now only feels remorse. She was initially suicidal in the days after her daughters' deaths but now believes that killing herself would place her in hell far away from Lily and Tori.

On September 2, 3 and 6 of 2011, Dr. Janice Y. Nakagawa, a licensed psychologist, interviewed Ms. McCarrick at Solano County Main Jail. In her report, Dr. Nakagawa wrote, "...[T]he data indicate [Ms. McCarrick] having been confronted with and even in which she believed she was exposed to a severe threat to her, a traumatic experience that precipitated intense horror and fear on her part." Ultimately, Dr. Nakagawa diagnosed the defendant with either Bipolar Disorder with Psychotic Features or Psychotic Disorder, Not Otherwise Specified (NOS). The doctor also stated in the report: "Records do support that she was not under the influence of drugs on the day of the killing... Her decision to take the course leading to the instant offenses was a direct result of her delusions and paranoia." Dr. Nakagawa concluded, "Based on all data... Ms. McCarrick... was incapable of knowing or understanding the nature and quality of her acts and distinguishing right from wrong at the time of the commission of the offenses."

CALCRIM 571 IS AN ACCURATE STATEMENT OF THE LAW AND THE COURT MUST INSTRUCT ON THE DOCTRINE OF IMPERFECT DEFENSE OF ANOTHER

1. The Jury Instruction is Appropriate in Ms. McCarrick's Case and is Essential to Her Defense that Lethal Force was Necessary to Protect Her Daughters from a Greater Harm.

CALCRIM 571's instruction on "Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense" states:

> A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because she acted on imperfect defense of another.
>
> If you conclude the defendant acted in complete defense of another, her action was lawful and you must find her not guilty of any crime. The difference between complete defense of another and imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable.
>
> The defendant acted in imperfect defense of another if:
>
> 1. The defendant actually believe that her daughters were in imminent danger of being killed or suffering great bodily injury; AND
>
> 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, BUT
>
> 3. At least one of those beliefs was unreasonable.
>
> Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.
>
> In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.
>
> [If you find that the defendant received a threat from someone else that she reasonably associated with her daughters, you may consider that threat in evaluating the defendant's beliefs.]
>
> [Great bodily injury means significant or substantial physical injury.]
>
> The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder.

California courts have found that a killing is voluntary manslaughter instead of homicide when there is no malice aforethought. (*People v. Flannel* (1979) 25 Cal.3d 668, 682.) As long as it is genuine, regardless of its reasonableness, the belief negates the mental state of malice for a

murder conviction. (*Id.*) In *People v. Uriarte*, California's first published case on the imperfect defense of another, the appellate court held that the defendant did not merit a jury instruction on this defense because defense counsel failed to show that (1) the danger was imminent and (2) the lethal force was necessary to prevent death or great bodily injury to his wife. (*People v. Uriarte* (1990) 223 Cal.App.3d 192, 197, cited with approval in *People v. Randle* (2005) 35 Cal.4th 987, 996.) Unlike *Uriarte*, Ms. McCarrick can demonstrate that she unreasonably yet honestly believed that lethal force was necessary to prevent her toddler daughters from suffering a life of torture, rape and painful murder. She can also show that she believed this force was imminent (as discussed in Part 2 of this motion).

Under *People v. Barton*, "when the evidence raises a question as to whether all of the elements of the charged offense were present," the trial court is obligated to instruct on the lesser-included offense. (*People v. Barton* (1995) 12 Cal.4th 186, 194-95.) Therefore, Ms. McCarrick respectfully requests the lesser charge of voluntary manslaughter under the Penal Code section 187 charges. She is lawfully merited the CALCRIM 571 jury instruction and request for the lesser-included offense.

As CALCRIM 571 indicates, the reasonableness of the circumstances is seen from the perspective of the defendant. (CALCRIM 571; *People v. Genovese* (2008) 168 Cal.App.4th 817, 830 quoting *People v. Randle* (2005) 35 Cal.4th 987, 999-1000.) Under the mistake-of-fact doctrine, the jury should "consider all the circumstances as they were known and appeared to the defendant." (*Genovese, supra* at 830; CALCRIM 571.) Ms. McCarrick is clear about her concern for the pain and suffering her young daughters would have felt at the hands of her fiancé's co-conspirators. She still maintains that she foresaw torture and rape and believed the only choice that would minimize her daughters' suffering was a mercy killing.

The defendant is not alone in her treatment of rape as a serious crime that creates great bodily injury. As Justice White explained in his plurality opinion in *Coker v. Georgia*, "[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim... Short of homicide, it is the 'ultimate violation of self.' It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage." (*Coker v. Georgia* (1977) 433 U.S. 584, 597-98.) Ms. McCarrick viewed the imminent evils of rape, torture and potential painful murder of her two young daughters. Unreasonably but genuinely, she thought that deadly force was the only way to save her daughters from their future life of unimaginable pain and suffering. Therefore, the necessity element of the CALCRIM 571 jury instruction is satisfied.

2. The Peril that Ms. McCarrick Thought Her Daughters Faced on October 12, 2010 was Imminent, and Not Future, Harm.

The other significant element of CALCRIM 571 that Ms. McCarrick can satisfy is "imminent peril." The definition of imminent peril is "peril" that "must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with." (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 disapproved on unrelated grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.) In *Aris*, the female defendant was a victim of domestic violence at the hands of her husband. (*Id.*) After he fell asleep, she shot him. (*Id.*) The appellate court held that giving the jury instruction on improper self defense and imminence was correct. (*Id.*) In contrast, a defendant who attempted to introduce a jury instruction on improper defense of another was denied when the murder victim,

his girlfriend's mother, slept soundly in a location far from her abused daughter. This unreasonable belief was found on a harm that was *not* imminent and, thus, the instruction was inappropriate. (*People v. Michaels* (2002) 28 Cal.4th 486, 530.)

It is clear that the peril Ms. McCarrick thought she and her daughters faced was "imminent" because she remembers sensing and seeing an army of men arriving to rape and torture her daughters. The defendant believed they were outside of her home and had to be instantly dealt with. Unlike the defendant in *Michaels*, the force of the imminent peril was not miles away. (*See Michaels, supra* at 501-03.) Instead, Ms. McCarrick felt desperate and firmly believed that the army was about to force down her door, kidnap her and her daughters, and separate them before turning them into slaves for rape and torture. She could not leave to get help because they were already outside, watching her home, preparing to enter. Therefore, the imminent peril element of the CALCRIM 571 jury instruction is satisfied.

3. There is Evidence Substantial Enough to Merit Consideration that Ms. McCarrick is Guilty of Voluntary Manslaughter.

Ms. McCarrick's unreasonable yet genuine belief in the necessity to use lethal force in order to protect her daughters from imminent peril provides substantial evidence to instruct on voluntary manslaughter. The trial court has a *sua sponte* duty to instruct the jury on imperfect defense of another whenever "evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act" in the defense. (*People v. Barton* (1995) 12 Cal.4th 186, 201; *see People v. Manriquez* (2005) 37 Cal.4th 547, 581.) The CALCRIM 571 jury instruction does not present an actual defense but a lesser-included crime of voluntary manslaughter. (*Barton, supra* at 200.) In other words, "the trial court must instruct on [the doctrine of imperfect defense of another], whether or not instructions

are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter." (*Manriquez, supra* at 581.) In order to determine whether the evidence is "substantial enough" in Ms. McCarrick's case, the trial court should look at the elements that the evidence satisfies.

First, Ms. McCarrick unreasonably believed that lethal force was necessary to prevent the future rape and torture of her twin daughters and herself. (*See infra* Part 1.) Second, Ms. McCarrick unreasonably believed that the army of men was right outside her door and that the peril was "imminent." (*See infra* Part 2.) Therefore, the evidence demonstrates that all three elements of the improper defense of another are satisfied: imminent peril, necessary lethal force and unreasonable belief. (CALCRIM 571.) Without a doubt, the trial court should instruct the jury on the doctrine of improper defense of another in Ms. McCarrick's case.

IN ADDITION TO THE VOLUNTARY MANSLAUGHTER INSTRUCTION UNDER CALCRIM 571, MS. MCCARRICK REQUESTS THE LESSER *RELATED* OFFENSE OF INVOLUNTARY MANSLAUGHTER UNDER PENAL CODE SECTION 273AB.

Involuntary manslaughter, Penal Code § 192(b), is a lesser related offense to the crime of Assault on a Child Causing Death. (*Orlina v. Superior Court* (1999) 73 Cal. App. 4th 258, 262 (emphasis added).) While Penal Code section 273ab discusses an assault "by means of force that to a reasonable person would be likely to produce great bodily injury," the definition of involuntary manslaughter under Penal Code section 192(b) describes a killing "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*Orlina, supra* at 261; Cal. Penal Code section 273ab; Cal. Penal Code section 192(b).)

As such, involuntary manslaughter is a lesser related offense, not a lesser included offense, of Penal Code section 273ab. (*Orlina, supra* at 261-62.) Given the facts of this case, where Ms. McCarrick acted in an actual but unreasonable belief that her actions was necessary to protect her daughters, it is appropriate for the court to instruction on involuntary manslaughter as a lesser related offense.

CONCLUSION

Because there is substantial evidence that Ms. McCarrick killed her daughters based on the actual but unreasonable belief in the necessity to defend against imminent great bodily injury, she lacked malice aforethought and is entitled to a jury instruction on the imperfect defense of another as to all charged offenses. Ms. McCarrick also merits a jury instruction on involuntary manslaughter as a lesser included offense to Penal Code section 187 and a lesser related offense of Penal Code section 273ab.

Dated: May 3, 2012

Respectfully submitted,

ELENA M. D'AGUSTINO
Chief Deputy Public Defender
Attorney for Defendant
MONICA MCCARRICK

MS. RAY: That's fine.

THE COURT: Will that work for the time being?

MS. D'AGUSTINO: That is fine. I do think I can understand the possible relevance of the historical drug use. I don't see the relevance at all of the recent.

THE COURT: Obviously have to discuss all that.

MS. D'AGUSTINO: The Court's order today is do not mention it?

THE COURT: Right, and if there is going to be additional objections, particularly with the subsequent allegations of subsequent use, we'll have to take those up. So that's the order at this point. Now, the last motion that we have in these motions of the 30th is to -- this is puzzling. I don't know of authority to federalize objections. I understand what you're asking here. You want the Court to deem objections to hearsay, relevance or 352 objections to be deemed to include objections under the 5th, 14th, 6th Amendments?

MS. D'AGUSTINO: Yes so I don't have to state all of those objections each time.

THE COURT: To each objection?

MS. D'AGUSTINO: Yes.

THE COURT: Okay. We will deem your objections made on the basis of hearsay, relevance or prejudicial fact outweighing probative value under Evidence Code 352 to be deemed to include an objection under the 5th, 6th and 14th Amendments.

MS. RAY: Has the Court had an opportunity to read

take up the matter of Monica McCarrick. We have Ms. D'Agustino for Ms. McCarrick and Ms. Ray for the People.

(The defendant enters the courtroom.)

THE COURT: All right. We have the defendant present, as well.

The first matter I would like to take up at this time is the in limine motion of the defendant entitled "Motion Regarding the Defendant's Proposed Jury Instruction," specifically the request for the Court's ruling on CALJIC 571, voluntary manslaughter, imperfect self-defense as a lesser included, and I have read the authorities cited by the defendant and the People's response.

Do you have anything else you want to add to this, Ms. Ray?

MS. RAY: Yes, if I may. First of all, your Honor, the only way any self-defense instruction, imperfect or otherwise comes before the Court and where the Court can consider it, and there has to be substantial evidence before the Court can give a lesser included, is if the defendant testifies and puts that at issue. And what's important to remember, even though the defendant has given statements to experts, those statements in and of themselves are still hearsay. They can rely on hearsay, but they can't testify to the underlying hearsay, so we can't back door the defendant's statement by allowing

experts to say, "Well, she had this imperfect self-defense theory, or this delusional theory," and so therefore the imperfect self-defense becomes appropriate.

So I think it's, one, tying the Court's hands by asking the Court to rule ahead of time on imperfect self-defense without the defendant testifying, but if the Court is going to rule, I don't think it's appropriate, because the case law, not only in the cases that I cited, but People versus Bobo which was a case very similar in facts to this case, they also said voluntary manslaughter doesn't apply when someone is acting under a delusion. So if she testified, and if she said she was under a delusion, then she still doesn't get to the imperfect self-defense.

THE COURT: Do you have anything else you want to add, Ms. D'Agustino?

MS. D'AGUSTINO: I would want to respond initially by saying that the standard is not that there is substantial evidence of the defense. There just has to be -- it can be circumstantial. It can be some evidence. It's not substantial evidence. It just has to be a possible, plausible defense, and the case law is clear that the defendant doesn't have to testify to establish self-defense or mental state. It can be based on circumstantial evidence as the instructions says.

I brought in another motion in limine about Ms. McCarrick's evidence of -- her mental state coming in through hearsay statements, and I think the Court did preliminarily rule that that would come in, so I don't think the Court really has to consider the prosecution's argument that Ms. McCarrick has to testify. I am asking for a preliminary ruling because it does affect the type of evidence that I present in the first phase of the trial.

The justification for Ms. McCarrick's actions are not completely delusional as they were in the Mejia-Lenares case, or the other case that the prosecution cited. Her actions were based on actual events and actual things that occurred which she misinterpreted, she unreasonably interpreted, and that is the whole crux of the imperfect self-defense, that it was an unreasonable interpretation of the circumstances. So I think the instruction is justified under those circumstances, under the circumstances of this case, and obviously, as the evidence comes in, the Court could change its ruling, but I think the facts are pretty much, at least for the first part of the trial, not in dispute as to what had occurred, and think the Court can make a ruling today as to whether that instruction is going to be given.

THE COURT: All right. Is this matter submitted?

MS. RAY: Yes.

MS. D'AGUSTINO: Yes.

THE COURT: In People versus Viramontes the Supreme Court decision in 2001 at 93 Cal -- pardon me, not Supreme Court, a Court of Appeal's case at 93 Cal.App.4th 1256 does acknowledge, first of all, that in most cases the defendants have taken the stand to establish their claims at self-defense based on threats made from the victim or others by means of their own testimony. This attempt to use the victim here in a claim of honest, but imperfect, at defense of others, which is what I understand the thrust here is, is really, it appears to the Court, to be unique.

I read a couple of cases with similar fact situations, the earliest of which was People versus McQuiston, a Los Angeles case from the 2nd District in 1970, found at 12 Cal.App.3d 548. In that case the defendant killed not only his two daughters, but also his wife, and he claimed at trial that the reason he had to kill the daughters after he killed the wife was because these daughters were essentially socially immature, and they were also of a mixed parentage. I guess it was an interracial marriage, and he felt that it would be too traumatizing on the daughters to go on living after he had killed their mother, knowing that he himself was not going to be around to raise them either. So that was his distorted thinking, and that case did not deal with a request for involuntary, but

rather dealt with a motion after the jury's finding to have the Court rule as a matter of law that the daughters killing could only be second degree.

The Court denied the motion. It found that the fact that there was ample evidence, essentially from the defendant's own mouth, much as we have here, that there was planning and consideration given to the killing of the children, justified the jury's finding of premeditation and deliberation. And in a related case, which was People versus Cleaves, a 1991 case at 229 Cal.App.3d 367, that didn't really deal with -- well, it dealt with a mercy killing, where the defendant claimed that he killed the victim because the victim had AIDS. The victim felt that he was dying, and just needed a little assistance. He didn't want to go into the final stages of AIDS and needed some assistance, so the defendant, in essence, held him down on the bed, and also had tied him up in a fashion that ultimately caused his death by strangulation. He didn't actually strangle the victim. The way he tied him up, in accordance with the victim's wishes, culminated in the victim strangling himself, but he could only do that if he could remain on the bed, and to prevent him from falling off the bed the defendant held him on the bed. In that case the Court had sought, or the defendant had sought a lesser included instruction of manslaughter, which the Court denied. The request was

similar, although they didn't phrase it in terms of requesting an imperfect self-defense, they wanted the Court to fashion a manslaughter instruction because for the reason that the victim -- pardon me, the defendant had been trying to save the victim from a bizarre tortured death, by this strangulation that the victim chose, and the Court rejected all of that.

And there's a number of other cases as well, both in this jurisdiction and other jurisdictions that I have reviewed, none of which accept that a defendant can knowingly and intentionally kill a victim to allegedly save that victim from a worse fate, which is what we are dealing with here. The Court has not found any support for this theory in the law, and I'll just say in thinking this matter through, if this were to be allowed, anyone, at any time, who had the feeling, for whatever reason, that somebody would be better off dead, could just kill them, and then if tried for murder could claim that they had an imperfect self-defense. Well, they were actually just wrong about it. I don't think that's the law.

The law with regard to murder is that if there is malice, the killing is murder, and if there is malice with premeditation and deliberation, it's first degree murder. I do feel that these issues may have some relevance in the sanity trial, if we get to that. I certainly think that in terms of the defendant's ability to weigh and consider the

alternatives, and understand the moral wrongfulness of her act, these beliefs, mistaken as they may have been, may be a defense if they are the product of a mental disease, rather than the use of drugs or voluntary intoxication.

The bottom line is, I'm going to deny the request for the lesser, for instructing the jury on manslaughter, on the basis that there was an imperfect defense of others belief held by the defendant.

Similarly, I'm going to deny the second request for the lesser related offense of involuntary manslaughter pursuant to 273a(b). This is not -- this offense is not a lesser included of murder, and at least at the outset here, I don't know of any facts that would justify that ruling, so at this point I'm going to deny them both.

I'll say absolutely that I am not going to allow the lesser of voluntary to the theory of imperfect defense of others.

With regard to the involuntary request, I will allow you to ask the Court to reconsider that, depending upon the state of the evidence, but at this time I'm going to disallow it.

The second motion was to exclude the testimony of the prosecuting witness Daisy Switzer, and again, I have read both of those authorities that have been submitted.

Ms. D'Agustino, do you have anything else

you want to offer in this matter?

MS. D'AGUSTINO: Well, my basis for requesting her exclusion was that I had not received her report yet. I received the report at 1:30 on Friday, which I have been working diligently to process. There are, in my opinion, a lot of inaccuracies in her factual statements, one, and if not inaccurate, misleading factual statements. So I am hoping by the time she will be due to testify, which will probably be a couple weeks from now, I will have an opportunity to go through and get all of that done. I would still ask the Court to consider excluding the witness based on the late disclosure of the report.

THE COURT: I'm going to deny the request. I feel that, first of all, there is much in that witness's report, some of it that only deals with events that recently occurred, and some of the reports apparently have not yet even been received.

As to the accuracy of the report, whether or not it contains inconsistencies or inaccurate statements, these are matters which not only the witness can be cross-examined about, but you have your experts that you can share this report with. I think you have several weeks, at a minimum, that you will be able to have your witnesses review -- for which your witnesses have time to review this report, and not only testify as to any disagreements they may have in

the factual portions of it, but the doctors' findings, as well.

If you need additional time, Ms. D'Agustino when we come to that, I would consider that.

MS. D'AGUSTINO: Okay.

THE COURT: So that is my ruling with regards to Ms. Switzer.

Preliminarily on a different topic here, we had 206 prospective jurors. We have remaining jurors, after these hardships, I have forgotten the exact number, but those remaining total 76, so I think we are going to have to have a second panel, which I think we are going to need between 80 and a hundred, at a minimum.

MS. RAY: I agree. I think based on what occurred, and the reaction in the jury room, I think we'll lose a lot to cause.

THE COURT: Well, I am sure there are going to be a substantial number of challenges for cause and that doesn't begin to get into both sides right to 20 preempts each, so that is another 40 prospective jurors. My clerk is making copies of the names of the jurors requesting hardship, and as soon as we get those back in here, I'd like to go through these hardships with you folks.

I just want to go back on the other ruling for a moment. When we started out we were talking about this procedural problem, with this request at

this time, because the People's position that the defendant had to testify before the Court could consider such an instruction. I agree with Ms. D'Agustino, that while in most occasions the defendant has testified, that this is not absolutely necessary. There can be other situations where the defense has admissible evidence of a defendant's state of mind other than from the defendant's own statements. I didn't spend a lot of time on that part of the argument because it's going to be my ruling that this defense does not apply in this case.

MS. RAY: I don't know if I need to make a motion, but does the Court want me to provide citations where the experts cannot state the hearsay statements? I mean, that is a very settled course of law. They can't testify to hearsay. They can rely on it, but they can't testify to the underlying hearsay. It's under 803, I believe, or 801 of the Evidence Code, but that has been the state of law, and that is what I said the other day, unless the People open the door to the hearsay statements and start cross-examining on, whoever the proffer is of the expert, can't just have people expound to hearsay. Their experts can't do that. That is well settled in the Evidence Code that they can't do that.

MS. D'AGUSTINO: If I can respond to that, I am not planning to proffer hearsay in the trial on guilt or innocence through expert testimony at this

point. I do plan to offer it through witnesses who received phone calls, text messages, other communications from my client as evidence of her state of mind as relevant to premeditation, deliberation and malice, and that's what I laid out in my motion.

THE COURT: And you are allowed to do that, without a doubt.

MS. RAY: I was just trying to make it clear if I needed to file something on the experts.

THE COURT: No, I will make the preliminary ruling at this time that there is to be no statements elicited from the experts relating to the defendant's commentary or explanation for these events, without counsel reviewing this matter further with the Court.

MS. RAY: And I had provided the Court the Sharp case on Friday which I think straightens out finally this issue between the contradiction between burden and 1054.3(b), and I had told the Court that if it becomes necessary I would ask for a break in the proceedings so that my psychologist can interview the defendant. I believe that is the state of the law now. I think it's cleared up now.

THE COURT: I have read the case, and what I gained from the case is this is within the Court's discretion.

MS. RAY: Right, and which is what I said to the Court on Friday.

THE COURT: Well, you will have an

reasonable inferences into consideration, there is substantial evidence to support such a finding and it would not be reversed for insufficient evidence on appeal.

So your motion will be denied.

MS. RAY: There is one other legal issue at this time that I would like to bring up.

THE COURT: Just a moment, please. Do you have any other motions you wish to make?

MS. D'AGUSTINO: No.

THE COURT: All right. Ms. Ray.

MS. RAY: The Court had deferred on the issue of the defendant's drug use until the point where the People were going to bring it to the Court's attention that it would become necessary for me to cross-examine or bring up the issue. I would just point out that during the opening of the defense she said that many witnesses would come forward and talk about that they believed the defendant was acting crazy. Many of those witnesses actually said that they believed she was using drugs again. So I think now that the case is going into a mental phase, so to speak, for the guilt phase of this case, I think that the fact that she makes numerous references to Mr. Paulson about using or getting drugs, other people believe that she is using, including Mr. Paulson. I think now it does become relevant. It does explain her behavior, her irrational behavior, and I think at

this point it's becomes relevant and I would ask that the Court to allow me to go into that issue.

THE COURT: Well, I clearly think the issue is relevant in the sanity phase, but here we are simply trying to determine whether or not, as I understand the issues being raised by the defense at this time, is whether the defendant was capable of deliberating, premeditating and harboring malice aforethought.

MS. RAY: Well, I think the concern I have is it's been represented that all these people think she is crazy and what a lot of them say is we think she is using drugs again because we know her behavior in the past when she is using drugs and she is acting like that again. And so I think the problem for the People is, if we get up here and argue this case the jury is going to be saying why is she acting irrational during these periods with Mr. Paulson where she is accusing him of cheating on her and being irrational?

Well, there is also in those same groups of texts is her comments about using and smoking and he says that means methamphetamine, and it does explain her irrational behavior. I think it's unfair to the People if the Court says, well, it can come up in the sanity phase, but we can't bring it up in this part because I think the jury should see the whole entire picture.

THE COURT: But what is the relevance at this phase?

MS. RAY: Well, I think that the defense is about to put people on that are going to say she is crazy and I don't think that's what they're is saying. I think that I should be able to cross them and say, no, actually what she is acting like is she is under the influence, or she acts irrational when she is under the influence of narcotics; not that she is crazy. And if they are going to be able to lay opinions such as that, I think I should be able to cross-examine on that issue.

MS. D'AGUSTINO: If I could respond?

THE COURT: Yes --

MS. D'AGUSTINO: I would like to initially start by saying I think that the prosecutor is misstating the evidence. I don't believe Mr. Paulson ever thought that Ms. McCarrick was under the influence or using drugs. He was confronted with a lie by the detectives saying, "We found an empty vial in the house, was she using?" And he said, "I don't know what she was doing." So he never said I know she was using. I think she was using." He did describe her behavior as irrational.

I am not going to ask for anybody's opinion as to what caused -- I'm not going to ask anybody's opinion was she crazy, was she not crazy, was she high. I am asking for their observations, what they

observed, what she said, that is all I am asking for. I am not asking for anybody's opinions. And I would dispute that -- I would just dispute the facts as they have been stated by the prosecutor, so I am not disputing that.

I would point out if this were the defense, if she were high, then we would get the voluntary intoxication instruction, so I'm not sure what they think the benefit is of getting that evidence out here. I am not asking for that instruction. That's not the defense.

And I did want to bring this up because, and we can address this other issue later, but I am calling an emergency room doctor to testify tomorrow. I wanted him to simply state that she did not have any drugs in her system so I don't have to call him again in the second part of the trial, so I wanted to address that, as well.

MS. RAY: May I be heard?

THE COURT: Yes.

MS. RAY: From the transcript of Mr. Paulson's statement he says that he believes that she was relapsing. There is a comment about she says to him, "I want to stay thin and you said it was okay to use." He says that means she was smoking meth. When she would talk about smoking, there is one point where she says, "The girls are asleep and I am dying to smoke." And he says that he believes that she was

going out to smoke methamphetamine. And then he talks about her taking her methamphetamine -- or his words, I'm sorry, "amphetamine-based ADD meds and that she would be all over the place when she took them and that she would use anything to stay thin."

I mean, the problem is that they are going to put these people up to talk about how irrational she was acting while Mr. Paulson was gone. I don't think it was because she was crazy, I think it was because she was using. So I don't think it's fair the jury should have some belief that she has some fixed mental state at this point went she clearly doesn't.

MS. D'AGUSTINO: I would like to say that I dispute those. I have had all of Mr. Paulson's statements transcribed and nowhere in there does he say the things that -- and I would like to see their transcripts and compare them to mine so that I can see which one is accurate.

And I don't think it's relevant to -- you know the cause of her behavior is not relevant when the jury is deciding could she premeditate and deliberate. If it was because of the mental illness, if it was because she was hallucinating, if it was because she was intoxicated, that doesn't matter. All that matters is whether they determine whether that her behavior indicates that she was unable to deliberate or premeditate.

THE COURT: Ms. Ray, I think that is the

law, that for purposes of premeditation and deliberation, for those purposes alone. Whether or not she is -- I mean, what the issue really was, one of the jury instructions permitted is this instruction relating to hallucinations, and according to the use notes this is not -- this is inadmissible to negate malice, but is admissible to negate deliberation and premeditation.

MS. RAY: No, I agree with that. That's hallucinations, and the Court is allowing the defense to put on hearsay evidence to bring in her hallucinations. The problem is, is that they are also going to put witnesses up to say that she was acting -- first of all, they represented to the jury that these people thought she was crazy. That is not what they said. A lot of them said they thought she was using meth, so that --

THE COURT: No --

MS. RAY: Can I finish?

THE COURT: No, excuse me. If the questions are asked, or if the witnesses indicate that, you are going to have a chance to cross-examine the witnesses.

MS. RAY: And that is what I'm saying, is that what happens when Mr. Paulson is gone, is this up and down behavior, and the People's argument is the up and down behavior is not because of mental illness; it's because of methamphetamine use. So unless we are only going to talk about the day in question and that

morning when he is on the stand in this part, then I think it is relevant because I think it's unfair for me not to be allowed to cross-examine on the issues that he says to the detective that he says that she is using, and that, you know, she has got this up and down behavior, or he believes she is using, and I think it is right for cross-examination. Otherwise the jury is left in their mind that she has been crazy, acting crazy all this time.

THE COURT: Do you have any authority that allows the People to make such a request in the guilt phase?

MS. RAY: Well, I can get some. The Court asked me to bring this up when it was time for me to cross-examine on this issue when the defense put the mental state at issue.

THE COURT: Ms. Ray, we have taken this whole issue up because we talked about the recent Supreme Court case, the recent case giving the People the right to have the defendant examined on the sanity issue.

MS. RAY: Right.

THE COURT: And the question of sanity is not relevant at this stage of the proceedings, so I think if that issue comes up, your position is to simply object to it.

MS. RAY: Okay. Well, then I would ask Mr. Paulson's testimony be limited to the date in

question, October 12th, because I think beyond that, if the jury hears about this up and down behavior there is going to be an assumption the defendant was mentally ill the entire time he was gone.

THE COURT: Well, what I'm going to do is this, I'm just going to tell both parties at this stage, we are not getting into the issue of sanity at this time. It simply has nothing to do with the issues at this point.

MS. D'AGUSTINO: I was planning to address some things that had been going on in the month prior, because it all led up to what happened on October 12th.

THE COURT: But that is not relevant to harboring malice, and I am not going to permit this sort of two bites of the apple. The insanity is appropriate, and I agree that it is appropriate for the sanity phase, and it may be that the Court will permit the People to have a competent alienist examine the defendant, as well, but we are not there yet.

And in 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.

MS. RAY: The concern the People have is there is a conversation, I don't know the exact date, but it is a few days before the incident, where the defendant tells a friend of hers that the fiance is

home. In other words, the inference is that she is hallucinating that he is home. There is also information that that is when she was using. That is why I'm saying that, and I think this is the People's concern, that this is going to be -- these kinds of issues are going to open the door, because if she is using, she could be hallucinating as well. And obviously I could use that in rebuttal but then I would argue it's not a hallucination in the sense that it lasted until October 12th, so that is the People's concern. That person isn't testifying today, but that issue may come up.

THE COURT: Well, counsel, I don't think the cause of her hallucinations, if she had hallucinations at the time these events occurred, is relevant.

MS. RAY: I agree with the Court, but I would put on medical testimony that says once she is off the meth, a few days later she is no longer having that same hallucination. My guess is they are going to try to stretch out this, my fiance is here hallucination, to October 12th, because she is still under this -- she is still so mental she is still hallucinating on October 12th.

MS. D'AGUSTINO: 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, and that's the extent of it. The fact she was accusing her fiance of planning to kill her in late September I think is relevant to what was going on on October 12th because that was what she thought on October 12th, and that is indicated in the messages to other people. I don't see how it affects the prosecution's case. I am not putting on any doctors to say -- at this stage of the trial, to say it was caused by mental illness and I'm not putting anybody on to say it was caused by drugs. It's just coming in as this is what she was saying. So whether it was caused by mental illness or caused by drugs, it doesn't matter from the prosecution's point of view or from the jury's point of view as to the determination they have to make.

THE COURT: I think the 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 she 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 knowingly deciding to do the act, knowing 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.

MS. D'AGUSTINO: Well, I think her mental state is relevant in both phases. And I could put on testimony -- I could put on psychological testimony to say that, you know, based on her mental illness, at this stage of the trial based on her mental illness, it's likely, you know, that she didn't have the ability to premeditate, she didn't have the ability to deliberate. That is something that I considered doing, and if the Court is inclined to not allow me to present my case then I might be put into a position where I will do that now.

MS. RAY: Your Honor, I don't think -- the medical experts can't testify to the ultimate issue. They can testify to her mental state at the time, and I think that is the appropriate way. I should say in the cases that I have read where insanity has been an issue, the defense puts on a psychologist in the guilt

phase to attack the mental state. They can't say whether she premeditated or deliberated. That is the ultimate issue for the jury, but that's usually how it goes in.

And I think the Court sees the concern the People have, is they want to put in all this evidence about what she was like in this time frame but they don't want me to be able explain away some of that. And I could in rebuttal put on medical evidence that says, yes, they hallucinate when they are high or they hallucinate and act paranoid when they are under the influence of the methamphetamine, and then it goes away. And then I would argue that she doesn't have any methamphetamine on board on the day in question and therefore it had gone away. And so that's where I think that that's where this becomes a big issue.

MS. D'AGUSTINO: Well, the fact that that would contradict their expert for the sanity phase which is that she was going through withdrawal and that caused her delusional behavior. So, I mean I am not sure why the prosecution would want to put on evidence now that would support giving another defense instruction, which is voluntary intoxication, which would then contradict their argument in the sanity phase that she was, in fact, experiencing delusions through the drug use.

THE COURT: Well, I'm going to allow evidence of hallucinations if there is some evidence

that these hallucinations prevented the defendant from deliberating and premeditating. But, if you open this door, and I think it does get opened up if you get into this, that I think it's legitimate grounds for the People to go into the fact that the defendant fully understood the nature and quality of her acts in killing the children. She knew that. And that is the only thing that is at issue, whether she premeditated. She thought about it. She waited and decided whether or not to do it. And if she did that, if the jury finds that that's true, that is first degree murder.

Now, the 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.

MS. D'AGUSTINO: The evidence I am planning to present does have to do with what was going on on October 12th. I believe that by showing the things that were going on before October 12th, it lends credibility to what happened on October 12th; that this wasn't just out of the blue.

THE COURT: Well, I just don't understand how that is helpful to your client, if she has been thinking about it for days, killing the children.

MS. D'AGUSTINO: That is not what I am planning to present evidence on. I am planning to present evidence of her fear. The fear that she had

of her fiance, her accusing him of --

THE COURT: But that is not relevant. There is no defense of others involved here. Now we are really getting back to the defense of others or mistaken that reasonable -- pardon me, unreasonable and mistaken belief and that is not relevant.

MS. D'AGUSTINO: I think it's -- it may not be relevant as far as the Court has disallowed that defense, but I think it is relevant to show what her state of mind was on October 12th; that she was experiencing fear. The fear doesn't give her a defense in the sense of a lesser offense of manslaughter, but it gives her an insight into her state of mind and how that fear was affecting her state of mind.

THE COURT: Well, like I said, I will allow you to bring it up as it affects her ability to premeditate and deliberate. But we are not going into causes at this point, it's absolutely not relevant as to what caused any of this at this stage.

Ms. Ray, I am not going to grant your request at this point to examine the defendant. If we get to the sanity phase, I think your request may have merit.

MS. RAY: And that is when I would make the request, your Honor. I think that is when she puts her sanity at issue.

THE COURT: Then I will entertain that

motion at that time.

MS. RAY: Thank you.

THE COURT: I just want to make it clear, the evidence at this time -- I am going to allow, if we get into fear, or if we get into emotions, the questioning as to the defendant's understanding of the acts themselves, what she was doing, because that is where we are at this time.

MS. D'AGUSTINO: Well, your Honor, I --

THE COURT: The nature and quality of her act.

MS. D'AGUSTINO: I understand the Court's ruling. Is the Court ruling that I can't bring in testimony about things that she said to people two weeks prior about her fear; is that the Court's ruling today?

THE COURT: I just don't know how that's -- I am not going to make a blanket ruling that you can't do that. I don't see how that supports the defendant's position that she did not premeditate or deliberate these killings. I think that almost supports the other side, that she had been struggling with this issue for a week or more and over this period of time decided this was her best alternative. That is clearly premeditation and deliberation.

MS. D'AGUSTINO: I understand that is how the Court would look at it. I would argue it differently to the jury.

THE COURT: Well, I mean, I am not going to tell you and I am not going to restrict you on your defense as it relates to premeditation and deliberation. You can put on evidence. If there is an objection as to relevance I will listen to it.

MS. D'AGUSTINO: The problem is, I'm you know, this is first coming up now and I am about to present my case. I'm going to ask the Court for a few minutes to consider. I also have witnesses traveling and if those witnesses, they don't have knowledge of what happened on October 12th and if the Court is going to disallow them then --

THE COURT: They may well be relevant a little later down the line if we get there.

MS. D'AGUSTINO: Well, I was planning to present them in this phase of the trial, and so I would like the Court to make a ruling one way or another if I am allowed to present evidence that she was experiencing fear of her fiance in the weeks prior, because that does have a big impact on the timing of this case and how I present the rest of my case when I present my case today.

THE COURT: Now, how does her fear of her fiance -- I mean, is the argument because she had fear, that she wasn't deliberating and premeditating?

MS. D'AGUSTINO: Yes.

THE COURT: Well, if that is your argument, I guess you are entitled to make that argument. I

will let you make the argument if that is what you wish to do.

All right. Do you want some time, a little bit of time?

MS. D'AGUSTINO: If I could have a few minutes.

THE COURT: Can we get started at quarter to?

MS. D'AGUSTINO: Yes, that's fine.

THE COURT: Ms. Ray?

MS. RAY: Yes, thank you.

(Recess taken.)

THE COURT: All right. We are going to continue on now in the matter of People versus Monica McCarrick. We have our jurors back. Counsel are back. The defendant is back.

Ms. Ray, you have rested at this time?

MS. RAY: Yes.

THE COURT: Ms. D'Agustino, are you prepared to proceed?

MS. D'AGUSTINO: I am, your Honor.

THE COURT: You may call your first witness.

MS. D'AGUSTINO: I would like to recall Jennifer Green.

JENNIFER GREEN

called as a witness on behalf of the Defendant, having been previously sworn, testified as follow, to wit:

A. Yes, I was.

Q. What was her name?

A. Jill Hermans.

Q. Where was she living in late 2009?

A. She was living at my mother's house.

Q. And you were living there, as well?

A. No, I was not.

Q. When did you move out of the house?

A. I moved out of the house, it was -- it was so long ago. Um, it was quite a few months after me and Jill had separated. She was supposedly going to school and trying to find a job, so she stayed with my mom and I moved to Sacramento with one of my co-workers.

Q. So in late 2009, Jill was still living in your mother's house?

A. Yes.

Q. What was your relationship with Jill at that point?

A. She was a friend.

Q. Was there a time when she -- well, did Monica know about the situation with Jill?

A. Yes, she did.

Q. Was there a time when Jill took her life?

A. Yes, there was.

Q. When was that?

A. April 18th, 2009.

Q. Was it 2009 or --

A. 2010, I'm sorry, yeah.

Q. And where did that occur?

A. At my mom's house.

Q. And that was with one of your firearms?

A. Yes, it was.

MS. RAY: Objection. Relevance.

THE COURT: Sustained.

MS. RAY: And I would ask this line of questioning cease at this point.

THE COURT: Well, I don't really see the relevance, so I'm going to sustain the objection.

MS. D'AGUSTINO: Could we approach?

THE COURT: Yes.

OUTSIDE THE PRESENCE OF THE JURY

MS. D'AGUSTINO: The relevance is when this happened in April my client knew about it and was very understanding and supportive, but in September and October she changed her attitude and was accusing him of having killed her.

THE COURT: In September and October?

MS. D'AGUSTINO: She started accusing Mr. Paulson of having killed this woman so it shows --

THE COURT: I understand how all this is relevant in the sanity phase, but I am having trouble understanding it here.

MS. D'AGUSTINO: I think it's relevant to the fear that she had.

THE COURT: But fear in and of itself is not relevant to anything. This is not an imperfect self-defense that I am allowing.

MS. D'AGUSTINO: I understand that.

THE COURT: The issue is whether she premeditated and deliberated and had malice.

MS. D'AGUSTINO: I think the fear is relevant to how she was feeling. What was her state of mind on October 12th, if she was afraid that she was going to die, even though it's not a defense --

THE COURT: That is all relevant to her sanity, but I just don't see how it's relevant to the issue of whether or not she intended to kill the children, whether or not she weighed the decision to do that before she killed them, and premeditated and deliberated her act, and that's really all that is relevant at this stage.

MS. D'AGUSTINO: So the Court is not going to allow me to present evidence that she had these fears prior to October 12th that she was going to be killed? That is what I plan to present through this witness and through some of the other witnesses.

MS. RAY: That is not a hallucination. That is a paranoia, but there is a difference. Hallucinations is seeing things, hearing things. I mean, it's right in that Padilla case.

THE COURT: I really don't think the defendant's paranoia in and of itself is relevant in

these proceedings. I think what is relevant in these proceedings is whether or not the defendant was able to harbor malice, and premeditate and deliberate. And I know I keep saying that over and over, but that is really what we are dealing with here.

MS. D'AGUSTINO: I think fear can affect your ability to do those things.

THE COURT: Well, do you have any authority for this type of a defense?

MS. D'AGUSTINO: I think it's presenting evidence of her mental state, and the fact that she was acting bizarrely, having these strange fears and I think that is relevant to the premeditation and deliberation.

THE COURT: I understand that having hallucinations is perhaps acting bizarrely if the evidence is that she had no idea what she was doing, but I mean --

MS. D'AGUSTINO: Well, if the Court wants to litigate this further I would ask for a little bit of time, maybe come back this afternoon and have the jury come back tomorrow.

MS. RAY: I think they are arguing imperfect self-defense as it goes to premeditation and deliberation. Fear is a self-defense argument or defense of others' argument.

MS. D'AGUSTINO: I think I can present mental state evidence even though it doesn't go that

far.

THE COURT: Do you want to bring me some case law?

MS. D'AGUSTINO: I would like an opportunity to.

THE COURT: All right. Then I will ask you to be back here at 1:00, and that will give us half-an-hour and I will have the jury back at 1:30.

MS. D'AGUSTINO: All right.

IN OPEN COURT

THE COURT: Ladies and gentlemen, there is a legal issue here that absolutely needs to be resolved before we go further, so I'm going to give the attorneys a little time to do some research and we are going to meet at 1:00 o'clock and discuss the matter. I'm going to recess you until 1:30, and we will be ready to go at 1:30. Thank you.

Please remember my admonition not to form or express any opinions about the case or to discuss with anyone the subject matter of the trial.

Sir, you may step down until 1:30, please.

(The jurors left the courtroom.)

THE COURT: All right. The record will reflect that our jury has left the courtroom at this time.

MS. RAY: Can I just put one thing on the record?

THE COURT: Not yet. My concern is this:

At this point in our guilt phase we are discussing whether or not there is proof of murder, and if so, the degree. I'm going to let in all evidence relating to those issues. However, murder is defined as the defendant committing an act that caused the death of another, and that when the defendant acted, she acted with malice. That is murder. Malice is further, expressed malice is defined as unlawfully intending to kill.

Now, assuming there is evidence of murder, the only other decision the jury is making at this time is whether or not it's first degree murder or second degree murder. First degree murder includes our definition of second degree, and the People, in addition, need to prove that the defendant -- at the time the defendant acted, she acted willfully, deliberately and with premeditation.

Premeditation is -- well, willfully is proof by the intent to kill. Deliberation is if the defendant acted carefully, having weighed considerations for and against her choice, and knowing the consequences decides to kill. Premeditation is simply that she decided to kill before the act was committed. That instruction goes on to say that the length of time a person spends considering whether to kill or not does not determine whether the defendant has acted with deliberation and premeditation. There is also a portion of this instruction that indicates

that the defendant does not have to harbor malice. She does not have to have any ill will towards the victims.

I have already ruled that I am not going to permit the final defense, or the defense of others on an unreasonable or a mistake of facts -- reasonable belief in the mistake in facts. That is not applicable in a situation where the -- in this situation. As I ruled the other day, if that were applicable, anybody walking down the street that thought they could do somebody a favor by cutting their throat could get out of murder by simply saying, "I guess I was mistaken, but I thought I was doing them a favor."

So I am having trouble, Ms. D'Agustino, understanding where the fear comes into this portion of the defense. I do understand all of this with respect to the sanity phase. I absolutely do. But when we are deciding whether or not the defendant has committed the elements of murder and first degree murder has been established, I don't see any case authority that allows the bringing in of fear by itself to mitigate a defendant's appreciation of the consequences of their act. I understand that hallucination may have some effect on premeditation.

But I guess my concept of what is happening here came from your opening statement. In your opening statement you took the position that the

defendant was killing to save the children from a worse fate. This may well fall into -- a sanity may well be a defense in a case like this, but I don't see that questioning the defendant -- pardon me, questioning witnesses at this point as to the defendant's state of mind at other times, how that relates to the guilt phase.

MS. D'AGUSTINO: I believe the evidence will show, that I can present, that will show 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 jury that that fear clouded her judgment, clouded her ability to make rational decisions. And not rational -- and not sane versus insane, but affected her ability to premeditate and deliberate and so she acted rashly because of the fear.

MS. RAY: I didn't mean to interrupt the Court when we first came back on, but the court reporter didn't get what I said, so I'm going to say that so that it's clear. I think that that's again arguing imperfect self-defense as it goes to premeditation and deliberation. Fear is a self-defense argument or defense of others argument. I don't see, and I know the Court will give us time to look at that, where that comes into play for

premeditation and deliberation. That is not a hallucination; that's an irrational fear which is exactly what imperfect self-defense is.

So I think that the defense is trying to bring in the same evidence under imperfect self-defense to negate something that it's not relevant to.

MS. D'AGUSTINO: I believe that it is relevant. Her state of mind is relevant. It's whatever her state of mind is, whatever causes it. As to the Court, and the People are aware --

THE COURT: Not whatever causes it. This is where I think you are absolutely wrong. We are not dealing with the sanity phase here, so it doesn't matter what caused this. It doesn't matter whether this was entirely caused by drugs, or entirely caused by a mental defect or disease or some combination. That is not what we are dealing with at this stage in the proceedings. Do you agree with that?

MS. D'AGUSTINO: I do agree with that, yes.

THE COURT: So, what we are dealing with here is whether or not the defendant premeditated, deliberated, and as I said before, premeditation is simply whether she acted willfully. And that is by definition whether she intended to kill.

MS. RAY: And I think the reason why fear becomes an issue in cases is that it takes a murder to a manslaughter based on somebody's reasonable or

unreasonable, depending on the circumstances, fear. And so, therefore, when it's a self-defense or defense of others it becomes relevant. It is not relevant in this case. It doesn't rise to the level of a hallucination, and I think that's where the defense is trying to make it in to a hallucination. It doesn't rise to that level. Hallucination, as I said in People versus Padilla which is --

THE COURT: I'm going to read Padilla. I have it right here.

MS. RAY: Okay. And it takes it right from the dictionary. It's some kind of belief of that you are seeing something, hearing something, and I think it uses a couple others, that's not there. That's not based on reality. And I don't think fear, that is not one of the things that they includes for hallucination. So her fear is based on paranoia which is what we discussed earlier.

I will look for some cases as well on the issue, if I can find something to bring to the Court.

THE COURT: All right. Counsel, I would like to see you back at 1:00 o'clock. Thank you.

(Noon recess.)

AFTERNOON SESSION

THE COURT: All right. We are going to go back on the record in the matter of the People of the State of California versus Monica McCarrick. We have the defendant and counsel present. Our jury is not present.

We are here to take up the matter of the evidence of the defendant's fear, as it was generally termed, whether or not this should be permitted at this stage in the proceedings.

Ms. D'Agustino, you are going to have to give me some idea about what witnesses you intend to call and what you are going to be establishing with this testimony.

MS. D'AGUSTINO: The evidence comes from several witnesses. Robert Paulson would testify that Ms. McCarrick told him that she thought he wanted to kill her and they argued about it over and over again, and it's evidenced in some of the text messages and he talked about it at length.

THE COURT: When is she alleged to have first said this?

MS. D'AGUSTINO: Late September, I think around the 25th, or it might have been the 29th of September.

THE COURT: And you are saying they argued about this; that her belief that he wanted to kill her?

MS. D'AGUSTINO: Yes, and also to hurt her daughters.

THE COURT: Okay. He wanted to kill both her and the daughters?

MS. D'AGUSTINO: It's not clear if he wanted -- what Monica McCarrick believed was that he wanted to steal the girls and --

THE COURT: Who is going to say that?

MS. D'AGUSTINO: I don't think anybody is going to say that in this part of the trial.

THE COURT: Well, that could be a problem.

MS. D'AGUSTINO: I am not planning to necessarily go into that, but it was clear from the interviews with Mr. Paulson, Ms. McCarrick made it clear to him that she believed that he wanted to kill her and hurt the girls and that is what he would testify to.

There are three, three or four other witnesses who would testify that Ms. McCarrick reached out to them, either spoke to them or sent them text messages that she was afraid of Mr. Paulson and that he was going to hurt -- kill her and hurt the girls.

THE COURT: So this is the delusion or -- I don't know if we call it a delusion, we call it a hallucination? This is her --

MS. D'AGUSTINO: Her belief.

THE COURT: Her belief at that period of time?

MS. D'AGUSTINO: Yes, I think it qualifies as a hallucination. It's a perception that's not based on objective reality which is what the jury instruction says.

THE COURT: Yes.

MS. D'AGUSTINO: I think it's also relevant because it shows that she is not planning to kill her daughters. It shows that she is concerned about her daughters' safety. So that argues against the planning and the deliberating and the lack of motive which are relevant to whether someone premeditated.

And I also think it's relevant because it lends credibility to her bizarre behavior on October 12th. This wasn't in a vacuum where she was normal, normal, normal and then one day acting strange, but it was building up and came to a head on that day. And I think that it gives credibility to what happened, and it's something the jury would find relevant in determining whether she premeditated or deliberated.

THE COURT: Ms. Ray.

MS. RAY: Well, your Honor, Ms. D'Agustino said this is stuff that happened the end of September, it didn't happen near October 12th. And I was going through the text messages to see if there was anymore conversation regarding that, just to make sure, but -- there is conversation about her wanting to go to Vegas. This is her conversations with him; that she is talking about -- well, that he publicly acts like

he doesn't love her, but privately worships her. I mean, there is no more context regarding this fear of him hurting her or someone else. And I would say at the end of September, and I think it's like September 25th or 28th, there is conversations about that exact -- that she finds the manuscripts and believes that it has to do with her, but then those conversations stop. And in fact I think in some of the text messages, and there is a bunch, that is why I am having trouble finding them all, he says that he is glad that she has gotten past that.

But there is no conversation again near October 12th about -- in fact on October 11th, which is the day before, she said, "Have a wonderful assessment," which is referring to what he is going through at work. "I miss you." There is some conversation about what she is eating. And it's also the time when she is saying things like, "You wanted me to stay thin. You okayed me to use." That she wants to go to martial arts school, and then this comment about, "Anything I can do to honor my family," but that is not about this unreasonable fear.And then she makes some comments about him being at a strip club, and then he is watching the movie Enough. I mean, that is basically what is happening. There is nothing near the time that shows evidence of a delusional belief at that time regarding this unreasonable fear of Robert Paulson harming her or the

kids.

MS. D'AGUSTINO: She did continue to talk about it in the first few days of October with her mother, and with -- I believe with Pamela Topping. However, for some reason I can't find that exact --

THE COURT: Are these proposed witnesses you are bringing in?

MS. D'AGUSTINO: Yes. And I believe Mr. Paulson would testify that it didn't stop completely. It was one day it was normal, one minute it was normal, and the next minute it was a lot of drama and chaos. That is how he described their relationship and the conversations that were going on during this period of time; that it was not -- it would go back and forth.

THE COURT: Did either of you have any more law or cases you wanted the Court to review?

MS. RAY: No, not specifically on this issue. And I mean, I am sure, as the Court did and everyone did, is I looked up diminished actuality, diminished capacity, it doesn't exist any longer, and unreasonable fear, and tried to put the two together and there is nothing that comes up. However, under Penal Code Section 28, which says that evidence of a mental disease or defect can be brought in to negate specific intent, premeditation and deliberation, that is the state of the law. However, this is not bringing in evidence of a mental disease. This is

bringing some hallucination that she was having at the end of September.

And I think that those issues may come into the sanity phase, because it shows this long-term behavior, but again, I don't think it's relevant in this part of the trial. And I think in Padilla, and I know the Court read it, it's a little lacking in facts, but it sounds like he was under that hallucination at the time of the killing, and that came out -- what the issue there was, they didn't allow the psychologist to testify in the guilt phase. So she is not trying to put a psychologist on to say what hallucinations she may or may not have had at the time of the crime. We are doing this through people that talked to her at the end of September and the beginning of October. But there is no evidence that this was going on at the time, on October 12th whatsoever.

MS. D'AGUSTINO: Well, that is actually false because the text messages do reflect her fear and her belief that something -- that they were going to be harmed. They are pretty irrational. But one of them says -- asks -- in one of them Ms. McCarrick asks Mr. Paulson to say that defending the bunnies is the number 1 most high on her priority list. And she also, you know, the last text is, you are separating them, question mark. So I think that shows that the delusion was continuing. That is some evidence,

whether the jury considers it -- if there is some evidence that the delusion was continuing on October 12th.

So I think it's relevant. I think the Padilla case supports my position that it's relevant. The Padilla case says that hallucinations negate deliberation and premeditation so as to reduce first degree to second degree murder, and that is a subjective test. And that was a case that was reversed, because the Court wouldn't allow that testimony to be brought into Court. And when you consider the factors that have been held to be relevant in deciding whether somebody premeditated or deliberated, these hallucinations are relevant to those factors.

THE COURT: All right, is the matter submitted?

MS. D'AGUSTINO: Yes.

MS. RAY: Well, I would like to comment on -- that's not what those text messages say. It says her, quote, and obviously we are talking about auto correct because they talk about the spell correcting going on in these text messages. It says: Say, quote, "Michael Ball, my name is Rapert, R-a-p-e-r-t. Paulson. Let the bunnies go forever so we can keep what's ours and say that defending then, t-h-e-n, is the number 1 most high on your priority list." There is a lot of conversation on October 12th

about her saying to Mr. Paulson about contacting Michael Ball and giving up his parental rights. That is not hallucinating.

THE COURT: Okay.

MS. RAY: I mean, we can argue this -- there is no evidence of hallucination on that day through these witnesses.

THE COURT: Is the matter submitted?

MS. RAY: Yes.

THE COURT: First of all, there is no question that hallucination, evidence of hallucinations can have a bearing and is relevant on the issues of premeditation and deliberation, and that is supported by the cases we have all read including this Padilla case, as well as the CALCRIM instructions 627, to be specific.

I'm going to allow you to present evidence, what you claim is hallucinations, on this issue, Ms. D'Agustino. Ms. Ray, you will have an opportunity to cross-examine these witnesses fully. And I will consider -- we'll see how things are going here, but I'm going to allow at least a good portion of this evidence, provided it does in fact tend to show the defendant was suffering from hallucinations about this time. I think there is an inference that can be made if there is evidence that she had these hallucinations within a day or two. I don't know exactly when, but I think these are factual matters

for the jury to determine. Whether or not any of this has any bearing, even assuming she did, as I indicated before, I think we are in a very tricky area because the argument certainly can be made that she was deliberating this entire time. This isn't -- I mean, it would be much clearer if the hallucinations had to do with a misunderstanding as to the act that she was committing or she didn't understand who these acts were directed at were her children. But that's not the nature of these hallucinations, supposedly.

As I understand it, these hallucinations had to do with her belief that the children were in imminent peril of being kidnapped and tortured, and therefore this was her alternative as she saw it. I don't know what evidence there is of that at this point in particular, but you can bring all that out.

Finally, I want to say, I think because deliberation and premeditation is subjective, as pointed out, that's what the case law indicates, why the case law indicates hallucinations can have a bearing on that ability. This is not an objective standard, but a subjective standard.

MS. RAY: And I would just point out, just to make the record clear is, I think again this goes to the Mejia-Linares standard that this is a fear, an unreasonable fear which is not admissible, because that would be imperfect self-defense, and I just want to make the record clear.

THE COURT: Well, I am allowing evidence of hallucination and if part of that -- if the argument ultimately is fear induced by these is what caused her to not to be able to form the ability to premeditate, that can be the argument, I suppose. But the evidence will be as to the actual hallucination.

All right. Are we all on the same page here?

MS. D'AGUSTINO: Yes.

MS. RAY: Yes.

THE COURT: How many witnesses do you have, time-wise?

MS. D'AGUSTINO: The timing for this afternoon I have Mr. Paulson, Roxanne Paulson and Margaret McCarrick. I don't have anyone after that. And then tomorrow morning we have two witnesses. One of the doctors from John Muir, and Pamela Topping. And then the other problem is my other two witnesses won't be available to testify until Friday morning.They were unable to change their plans.

THE COURT: Do you have enough to keep us busy this afternoon?

MS. D'AGUSTINO: We may not get to 4:00, but we'll get close.

THE COURT: All right. Then we'll get started at 1:30.

(Recess taken).

THE COURT: All right. We are going to go

during your deliberations or let it influence your decision in any way.

The People are not required to prove that the defendant had a motive to commit the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

If the defendant tried to hide evidence, that conduct may show that she was aware of her guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.

Homicide is the killing of one human being by another. Murder is a type of homicide. The defendant is charged with murder.

The defendant is charged in Counts 1 and 2 with murder in violation of Penal Code Section 187 subdivision (a). To prove the defendant is guilty of this crime, the People must prove that:

First, the defendant committed an act that caused the death of another person.

And secondly, when the defendant acted, she had a state of mind called malice aforethought.

There are two kinds of the malice

aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with express malice if she unlawfully intended to kill. The defendant acted with implied malice if she intentionally committed an act.

Secondly, the natural and probable consequence of the act was dangerous to human life.

Thirdly, at the time she acted, she knew her act was dangerous to human life.

And fourth, she deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes the death is committed. It does not require deliberation or the passage of any particular period of time.

If you decide the defendant committed murder you must then decide whether it is murder of the first or second degree.

The defendant is guilty of first degree murder if the People have proved that she acted willfully, deliberately and with premeditation. The defendant acted willfully if she intended to kill. The defendant acted deliberately if she carefully weighed the considerations for and against her choice and, knowing the consequences, decided to kill.

The defendant acted with premeditation if she decided to kill before completing the act that caused the death.

The length of time that a person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

The requirements for second degree murder based on express or implied malice were just explained in the previous instruction which is CALCRIM 520.

Ladies and gentlemen, these instructions are numbered and you will see this is the instruction just before this and it was murder with malice aforethought.

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than second degree murder. If the People have not met this burden you must find the defendant not guilty of first degree murder.

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.

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

For each count charging murder, you will be given a verdict form for guilty and not guilty of first degree murder and second degree murder.

You may consider these different kinds of homicide in whatever order you wish, but I can accept the verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder.

As with all the charges in this case, to return a verdict of guilty or not guilty you must all agree to that decision.

Follow these directions before you give me any completed and signed final verdict form. Return the unused verdict forms to me unsigned.

If you all agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict