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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KELLI JEAN NUNEZ et al., Defendants and Appellants.	A107302 (Contra Costa County Super. Ct. No. 05-030031-9)

Kelli Nunez and Richard Peterson (collectively "appellants") were convicted, following separate jury trials, of one count of conspiracy to commit contempt of court, two counts of child abduction, and two counts of child custody deprivation. All counts were related to appellants' participation in the abduction and concealment of Nunez's two daughters from their father, who had legal custody. On appeal, Peterson contends the trial court (1) erred when it found that he was mentally competent to stand trial, and (2) violated his state and federal constitutional rights to the effective assistance of counsel when it denied his attorney's motion to withdraw.

In addition, both appellants contend (1) the trial court erred when it instructed the jury that appellants had the burden of proving, by a preponderance of the evidence, an element of the statutory defense to the charge of child custody deprivation, and (2) the imposition of aggravated and/or consecutive sentences based on factors not found by a jury beyond a reasonable doubt violated their due process rights.

Finally, Nunez also contends (1) the trial court erroneously excluded evidence that the girls had said their father abused them, evidence of abuse by the girls' father dating

more than one year before the abduction, as well as evidence related to Nunez's Uniform Commercial Code (UCC) filing; (2) she was wrongfully convicted of violating Penal Code section 278[1] because that section applies only to people with no right to custody who abduct a child; (3) the trial court erroneously imposed a consecutive sentence on the conspiracy count, where the conspiracy and substantive offenses had the same objective and intent; and (4) the trial court erred in refusing to grant her pretrial confinement credit for the time she spent jailed for civil contempt.

We shall remand the matter with instructions to the trial court to stay imposition of Nunez's sentence on the conspiracy count, pursuant to section 654, and grant Nunez pretrial confinement credit for the time she spent in custody for civil contempt. We shall otherwise affirm the judgments.

PROCEDURAL BACKGROUND

Nunez, Peterson, and codefendant Florencio Maning were charged by indictment with one count of conspiring to commit contempt of court (§ 182, subd. (a)(1)); two counts of child abduction (§ 278); and two counts of child custody deprivation (§ 278.5, subd. (a)). Nunez was also charged with one count of soliciting to commit murder (§ 653f, subd. (b)).

Proceedings against Peterson were suspended due to questions about his competency to stand trial.

Nunez and Maning were tried together. Following a jury trial, both were found guilty as charged, except that Nunez was found not guilty of the solicitation count. On July 19, 2004, the trial court sentenced Nunez to a total term of five years eight months in state prison.[2] Nunez filed a notice of appeal on July 20, 2004.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Maning was sentenced to a total prison term of nine years four months. He appealed separately, and we addressed his contentions in a nonpublished opinion, filed on December 6, 2005. (*People v. Maning* (Dec. 6, 2005, A103918).)

Peterson ultimately was found competent and, following a separate jury trial, he was found guilty as charged. On July 16, 2004, he was sentenced to a total term of four years in state prison. He filed a notice of appeal on August 6, 2004.

FACTUAL BACKGROUND

The charges in this case related to the abduction and concealment of Nunez's two daughters from their father, who had legal custody of them. Codefendant Maning was the leader of an organization, California Family Advocacy Council (CFAC), which was dedicated to advocating for parents who believed they had been wrongly denied custody of their children, and Peterson was the leader of a similar group, Klout for Kids. Peterson and Maning were charged with assisting Nunez in planning and participating in the abduction and concealment of the two girls.[3]

Prosecution Case

Judge Craddick, who presided over the Nunez divorce action, testified at Peterson's trial regarding the family court events leading up to the abduction.[4] She described the litigation between Daniel Nunez and Kelli Nunez as "[v]ery high conflict, very hostile. In court a lot. Various allegations being made primarily by Ms. Nunez against Mr. Nunez of emotional abuse, sexual abuse, physical abuse of the children." It seemed that, "when there were things going against Ms. Nunez in terms of what she wanted that she would raise allegations of abuse, [¶] . . . perhaps to gain an upper hand in the litigation, either to obtain more child support . . . or perhaps she just hated him so much that she wanted to have full custody of the children whereas they had joint custody."

There were nine or ten referrals to Child Protective Services (CPS) during the course of the case regarding Nunez's abuse allegations; CPS found all of the allegations to be unsubstantiated. Judge Craddick subsequently ordered the parties not to raise such

[3] Unless otherwise noted, the evidence discussed in this part of the opinion was admitted at both trials.

[4] Judge Craddick did not testify at Nunez's trial.

allegations with the court without first addressing them with the special master she had appointed.[5] However, Judge Craddick never told the parties they could not report abuse allegations to the police.

In April 2001, the parties had a dispute regarding what elementary school the girls would attend. After investigating, the special master recommended that they attend the school closest to Daniel Nunez because it was the better school. That same month, Nunez raised allegations of abuse.

In December 2001, Judge Craddick adopted the recommendations of the special master and the custody evaluator that both parents share legal and physical custody equally, with each parent having the children 50 percent of the time. In late December, Nunez violated the order that the parents share the two-week holiday equally by keeping both girls for the full two weeks. Daniel Nunez filed a contempt charge against Nunez based on this violation; a hearing was set for May 8, 2002.

In April 2002, after Judge Craddick returned from medical leave, she learned that, on March 29, 2002, a judge unfamiliar with the case had granted Nunez's ex-parte request for a temporary restraining order (TRO) against Daniel Nunez and had given her sole legal and physical custody of the children. On April 10, 2002, Judge Craddick granted Daniel Nunez's motion to dissolve the March 29 order. She then reinstated joint custody, including the 50-percent timeshare, but ordered that Nunez's visitation would have to be supervised through an organization called Safe Exchange, pending an April 19 hearing.[6] Judge Craddick was not in family court on April 19; the judge in court that day

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[5] The special master subsequently resigned because Nunez was "uncooperative, . . . hostile, belligerent," and "refused to pay her fee, because she didn't like the [special master's] recommendations."

[6] Judge Craddick explained that "professional supervised visitations means there's someone there all the time with the parent to make sure they don't do anything inappropriate. It doesn't prevent their visitation, . . . but it makes sure the children aren't further harmed by conduct of one parent or the other."

maintained Judge Craddick's April 10 order and set the matter for May 14, 2002, when Judge Craddick would be present.

Daniel Nunez, the father of the two girls who were abducted, testified that he and Nunez married in 1995 and had two daughters together, "Jane Doe I" and "Jane Doe II," who were seven and five years old, respectively, at the time of trial. Nunez's daughter from a previous marriage, L., also lived with them during the marriage. Daniel Nunez began divorce proceedings in 1998; the most contentious issue was child custody. Initially, the parents shared custody of the two girls equally.

In 2001, Nunez alleged that Daniel Nunez had abused Jane Doe II, after Nunez allegedly found a small bruise on Jane Doe II's arm, welts on her buttock, and a bruise on her eye. Daniel Nunez denied inflicting those injuries and stated that he and his girlfriend, Sharon Neff, did not believe in corporal punishment as a form of discipline. Nunez's allegations came to the attention of the trial court, and were investigated.

On April 26, 2002, the two girls' daycare provider, May Yen, called Daniel Nunez to tell him that Nunez was leaving the school with the girls. Daniel Nunez drove to the preschool, calling 911 on the way there. He did not speak to or see his daughters again until November 3, 2002. During the six months they were missing, he was devastated and frantic about finding them. He enlisted the help of all organizations he could find that help locate missing children, engaged a number of private investigators to help in the search, and stayed in regular contact with law enforcement. He also contacted the media, and Dan Noyes of television station KGO in San Francisco prepared a news story on the abduction, which aired on November 2, 2002. On November 3, 2002, Dan Noyes and the district attorney called Daniel Nunez and told him that his daughters were at the news station. At the time of their abduction, Jane Doe I was six years old and Jane Doe II was four years old.

May Yen testified that, on April 26, 2002, Nunez and her 13-year-old daughter, L., came to the girls' school and each went into a different classroom. Yen told her assistant to stop them and then called Daniel Nunez, as he had asked her to do if Nunez came to the school. Nunez came into Yen's office and Yen said she could not take the girls.

Nunez showed her some papers, saying they gave her the right to take her daughters. Nunez and L. took the girls to a car in the driveway; a stocky man was in the driver's seat. When they had the girls inside, Nunez said "go, go," and the driver sped away. Yen never saw any sign that the two girls had been abused.

Nancy Levine, a teacher at the preschool, testified that she too never saw any signs that the girls had been abused or neglected. Some weeks before the abduction, Nunez told Levine about her problems with custody. When Levine hugged Nunez and said she was sorry, Nunez said, "he's going to pay for it."

Mark Ernst, lead investigator in the case for the district attorney's office, testified that, a few days after he learned that Jane Doe I and Jane Doe II had been abducted from their school, he received a voice mail message from Nunez, in which she said that she had not "stolen" her children, but had legally taken them because she had filed a "UCCi filing" with the Secretary of State claiming her children as property. Nunez also told Ernst to stop "wasting" his time because she had acted legally in taking the children.

At Peterson's trial, Ernst also testified that when he interviewed Peterson, Peterson said he had driven the car used to take the children from the daycare center. Ernst also learned that two of Peterson's children from a prior marriage had been removed from his custody.

Valerie Blackmore, Nunez's former neighbor, testified that she became friendly with Nunez, and their children played together. Blackmore saw bruises on the girls, but never learned where they came from. Nunez talked to Blackmore about custody issues, and complained that the judge favored Daniel Nunez. After Nunez got involved with a child advocacy group, she became more aggressive. She described a group that would help a parent get their kids and take them "underground." At one point, Nunez told Blackmore that she had found someone to kill her ex-husband in exchange for her truck.

On April 26, 2002, Nunez told Blackmore that she and her friend, Rich Peterson, were going to get her kids that day because she had had enough and just wanted her kids. On cross-examination, Blackmore acknowledged she had told police both that Nunez had said she was taking the kids because they were being abused and nobody was listening to

her, and that she had seen bruises on Jane Doe II after a visit with Daniel Nunez. Blackmore also testified that Nunez had said Peterson had obtained a "UCC-1" document for her that gave her the right to take custody of her children.

Judy DeLarosa, Nunez's mother, testified that, after Nunez abducted the girls, she called DeLarosa and told her that she had taken the girls on vacation. Peterson later called DeLarosa and said that Nunez and the girls were flying into San Francisco that night. At the airport, Delarosa saw Nunez and L., but did not see Jane Doe I or Jane Doe II. Nunez said the two girls were " 'being well taken care of.' " DeLarosa did not ever recall seeing any marks or bruises on Jane Doe I or Jane Doe II.

Lana Jo Hescock testified that she met Maning through her involvement with a group called Klout for Kids, a group headed by Peterson, which was comprised of parents who believed the courts had wrongly denied them custody of their children. Florencio Maning spoke at the group meetings and explained the law to the parents, as well as how to proceed in their cases. On one occasion, Maning asked Hescock to do a favor for Peterson, explaining that "[t]hese girls had been abused by their father. We're trying to get them away from their father. And we're trying to hide them from their father, so they couldn't get back into the system and abuse them [*sic*]."

The next day, Peterson called and asked Hescock to pick up the two girls at the San Francisco airport at around midnight, which she did. The next day Peterson gave her $100. The girls stayed with Hescock for one night and then she took them to Susan Newman's house, as Peterson instructed her to do. Hescock saw the girls twice after that, once at a birthday party and once when Maning and his girlfriend, Kathie Bettencourt, asked her to baby-sit them.

Susan Newman was a parent involved with Maning's advocacy group in San Jose. In April 2002, Peterson asked Newman to take care of Jane Doe I and Jane Doe II because their mother was in jail for drunk driving. The girls stayed with her for three weeks, and then Newman took them to Peterson at Maning's office, as instructed by Peterson.

Gloria Kathleen Bettencourt (known as Kathie) was a member of Maning's advocacy group. She met him and Nunez in approximately June 2000, when her parental rights were being terminated. On one occasion, Bettencourt gave Nunez some UCC paperwork regarding her (Bettencourt's) children. At one point, Maning and Peterson told the group about a mother who was in jail for drunk driving, and the father was trying to manipulate this to get custody. At group meetings, pictures were shown "of some very bruised little girls." The two girls later briefly stayed with Bettencourt over two weekends, at Peterson's request.

Over the next several months, Peterson and Maning arranged for various advocacy group members and associates to take care of the girls for short periods of time.

Michael Frame, the private investigator for Daniel Nunez's lawyer, testified that, on October 24, 2002, he met with Maning, in an attempt to find out where the two girls were being kept. Maning, who had made several statements on television implying that he was involved in their concealment, told Frame it had been a "mistake" to take the girls. Maning denied being involved in taking them, but said that he wanted to assist in the return of the children and that he was "60 percent sure" he knew where they were located.

Maning also said he would not disclose the whereabouts of the girls unless Nunez was released from jail, the girls were placed in foster care, and the abuse allegations were independently investigated. Maning said he would talk to Richard Peterson and then contact Frame. After Frame did not hear back from Maning, he called Maning first on October 25, and again on October 31, 2002. On both occasions, Maning said he had not been able to reach Peterson and that he believed Peterson was out of town.

Steve Talley and his wife became involved in Maning's advocacy group because Talley's wife was in a custody battle with the father of her children. Talley noticed that Maning was controlling and dominating with members of the group and that he was verbally abusive to his girlfriend, Kathie Bettencourt. After he "started taking a hard look at the situation," Talley talked to Bettencourt about a plan to "grab the children." In

order to get Maning to turn the children over to him and his wife, Talley told Maning that he was going to rent a home in Gilroy where he could hide the girls.

Talley met KGO reporter Dan Noyes at Maning's office, where Noyes came to learn about the group for an investigative report he was preparing. On November 3, 2002, after Noyes's television newscast aired, Talley took the girls to the KGO station in San Francisco and turned them over to Noyes.

Stipulations

During Nunez's trial, the parties stipulated to several matters, including, inter alia, the following: Judge Craddick was the judge assigned to the Nunez divorce action. Judge Craddick utilized several experts to address Nunez's allegations of child abuse, including Dr. Marlene Becking, Dr. Teresa Schuman, and Dr. Shary Nunan, who served as special masters and custody evaluators. Judge Craddick found there was no evidence that Daniel Nunez was at risk for being physically abusive, and issued an order admonishing Nunez not to make any allegations of abuse unless the allegations were first addressed by the special master.

On March 29, 2002, while Judge Craddick was on medical leave, Nunez filed an application for a TRO, which was granted by Judge Libby. On April 10, 2002, Judge Craddick entered an ex-parte order dissolving the TRO and setting the matter for hearing on April 19. "In addition, Judge Craddick took custody from Kelli Nunez temporarily, giving her only supervised visitation for at least the next ten days." She did so because Nunez filed an ex-parte order without addressing her allegations to a special master, the allegations were all from 2001 and had been previously addressed in 2001, and the TRO seemed retaliatory for a visitation dispute in late 2001. On April 19, the case came before Judge Cram, who kept in place Judge Craddick's order regarding supervised visitation only, pending a hearing before Judge Craddick on May 14, 2002.

Defense Case

At Nunez's trial, Nunez testified that Daniel Nunez filed for divorce in October 1998. The parties were awarded "50/50" custody. In April 2001, Jane Doe II came home from her time with Daniel Nunez with welts on her buttocks and bruises on

her arm. Nunez reported the matter to the police and also brought it to the attention of the family court. A few months later, she saw that Jane Doe II had a swollen eye. Almost every time Jane Doe I and Jane Doe II came back into Nunez's custody, they told her that Daniel Nunez and his girlfriend Sharon had been hurting them. Nunez reported the abuse and the girls' statements to the special master and the court, but did not feel they were adequately addressed.

In late 2001, Nunez cofounded a group called "Moms for Justice." Nunez was referred to Peterson, with whom she met several times, and Peterson introduced her to a San Jose advocacy group for parents whose children had been abused by their spouses. A speaker at a group meeting (Tony Godspeed) talked about the UCC filing strategy, in which a parent files forms and declares a child as his or her property, which gives that parent sole custody. Nunez was desperate and she paid the man $1,000 to help her complete and file the UCC paperwork. Nunez also met several times with codefendant Maning in San Jose and brought the two girls there to meet him. The girls told Maning they were being abused while in their father's care.

In late March 2002, Nunez filed an application for a TRO against Daniel Nunez based on the girls' complaints of abuse, which had not been addressed by the court. After she obtained the restraining order, Nunez did not turn the children over to Daniel Nunez at the next scheduled time. Judge Craddick dissolved the TRO on April 10, 2002, and the police came and took Jane Doe I and Jane Doe II. Nunez then learned that Judge Craddick had ordered that she could only visit the girls by making an appointment at Safe Exchange and visiting with them at Safe Exchange's office, under the supervision of a staff person there, at a cost of $110 for a two-hour visit. At an April 19 hearing, Judge Cram kept Judge Craddick's order in place and set the matter for a hearing before Judge Craddick in mid-May.

Nunez talked to the girls every evening and they complained of abuse. On April 22, 2002, Nunez drove to Sacramento and filed her UCC forms with the Secretary of State; she received the file-stamped forms back on April 24, 2002. Nunez believed the UCC forms gave her custody of the children.

On April 26, 2002, Nunez went to the girls' daycare center, gave a copy of the UCC papers to the director, May Yen, and told her the papers showed that Nunez had custody of the two children. Yen asked Nunez not to take the children, but Nunez took them anyway. Peterson was waiting in his car, and he drove them around the block to Nunez's van. Nunez got gas and started driving toward Arizona. She left the state because she was taking the girls on vacation to visit her brother, sister, and nephews. She also took the girls because she did not want them to be abused any more; she was trying to protect them. She was not trying to get back at her ex-husband. She only wanted him to take anger management and parenting classes. Nunez did express a desire at various points to see Daniel Nunez dead.

As Nunez drove cross-country with her daughters, she got into a car accident in Missouri and gave a false name to the paramedics. She gave a false name because she had learned from her mother that Mr. Ernst from the district attorney's office was looking for her for kidnapping the girls, and Nunez did not want them to go back to their father where there would be further abuse.

Nunez eventually arrived in New Jersey, at which time, on Peterson's advice, she returned to California with the children. On May 7, 2002, she and the girls took a plane to San Francisco airport, where Peterson told her to give Jane Doe I and Jane Doe II to Lana Hescock while she "got the court matters straightened out." At the airport, Hescock took the two girls, and Nunez left with her daughter, L., and her mother.

On May 8, 2002, Nunez went to the prescheduled hearing in Judge Craddick's courtroom. When Nunez refused to give the location of the children, Judge Craddick put her into custody for civil contempt of court. Nunez did not want to tell the judge that Hescock had the girls because she did not want them returned to their father until the abuse allegations were investigated. While Nunez was in jail, Peterson visited her regularly and also helped her with her legal case. He never told her where the girls were being kept. Peterson continued to tell her that the UCC form she had filed gave her custody of the children, and she continued to believe him.

On cross-examination, Nunez said she believed the UCC form gave her "[s]ole 100 percent custody" of the girls because they were now her property under the common law. She also believed the UCC trumps or preempts civil and family law. She never asked Judge Craddick about the UCC form before she took the children. Nor did she ever independently attempt to ascertain the effect of the UCC filing; she just did what Tony Godspeed and Peterson told her to do. Nunez would not respect the authority of Judge Craddick regarding the UCC because she did not believe the judge was qualified to make decisions on that issue. Nunez also agreed that on April 10, 2002, when Judge Craddick dissolved the TRO, she also took custody away from Nunez.

After she was jailed for civil contempt, Nunez told the authorities she would reveal the girls' location if they were put in foster care and stayed there until the abuse allegations and the UCC were properly investigated.

Anthony Souza, a Contra Costa County sheriff's deputy, testified that, on April 26, 2001, Nunez brought Jane Doe II to him. He performed an examination and saw bruising on the underside of her upper left arm, as well as bruising and red marks to her left buttock. The marks on the buttock appeared to be from spanking and the marks on the arm had the outline of fingers and a hand.

Peterson did not testify at his trial. Nunez, however, did testify for the defense at Peterson's trial. Her testimony was similar to the testimony she gave at her own trial. Anthony Souza, the sheriff's deputy who investigated Nunez's April 2001 abuse allegation, again testified about his observations of Jane Doe II's injuries.

Rebuttal

During Nunez's trial, Inspector Mark Ernst testified on rebuttal that he visited Nunez in custody on September 18, 2002, and Nunez said that she would not reveal her children's whereabouts unless she was given custody of them.

DISCUSSION

I. *Trial Court's Finding that Peterson was Mentally Competent to Stand Trial*

Peterson contends the trial court erred when it found that he was mentally competent to stand trial.

A. *Trial Court Background*

Over the course of the criminal proceedings in the trial court, Peterson filed numerous bizarre motions, in which he claimed that he was not subject to prosecution for various reasons and alleging, for example, that members of the judiciary had an "inherent conflict of interest," based on the Trial Court Funding Act; Contra Costa County judges were "unregistered foreign agents" and "members of the Masonic Order;" and the judges had not "provided proof of a Treaty of Annexation with California state to contact Secured Party [i.e., Peterson]"; nor had they provided proof that the United Kingdom was not the real party in interest in the proceeding. Peterson copyrighted his name, stating that "[t]he person known as RICHARD HARRY PETERSON (and all derivatives thereof) is a fiction without physical form or substance" and that the name "is now My private property and cannot be used without My prior written consent." Peterson also filed a civil complaint in United States District Court, which named Contra Costa County, the judges who had presided over his criminal proceedings, a deputy district attorney, and his court-appointed counsel as defendants, and which alleged, inter alia, that the defendants had falsely arrested and imprisoned him in violation of the "Rights of Men" and various Amendments to the United States Constitution. In addition, Peterson filed an action in admiralty against one of his court-appointed attorneys and a deputy district attorney in United States District Court, in which he alleged, inter alia, that the judges, prosecutors, and court-appointed attorneys involved in his case were "acting as agents for a foreign principal."

At a hearing on May 29, 2003, Peterson's then-attorney, Jack Weiss, informed the trial court that he had a doubt as to Peterson's competency, under section 1368, subdivision (b). He further stated that Peterson disagreed and believed he was competent. The trial court suspended criminal proceedings and appointed two psychologists, Dr. Jules Burstein and Dr. Paul Good, to evaluate Peterson's competency.

During the subsequent court trial regarding his competency, Peterson repeatedly stated that he refused to answer any questions posed by his attorney or the district attorney and that he would not cooperate or participate in the proceedings. He did,

however, state that he was competent and that there was nothing to show his incompetence.

Dr. Jules Burstein testified at the competency trial and Dr. Burstein and Dr. Paul Good both submitted written reports. The two experts had spoken to defense counsel, had reviewed documents, and had unsuccessfully attempted to interview Peterson, who read from a prepared statement during each meeting and refused to stop talking or to interact with either psychologist.

In light of the unsatisfactory interview, Dr. Burstein "provisionally" found that Peterson suffered from a paranoid personality disorder, which "is characterized by pervasive distrust and suspiciousness of other people so that their motivations are seen as malevolent even when there's no justification for it." He based this conclusion on "the babblings and the ramblings and the incoherence," both verbal and written, of Peterson. Burstein also believed that, due to a lack of trust and cooperation, Peterson could not collaborate with defense counsel in providing a coherent defense. Dr. Burstein therefore believed that Peterson "was probably incompetent to stand trial."

Dr. Good was unable to render an opinion as to Peterson's competency due to Peterson's refusal to participate in the interview.

Eight declarations from people who knew Peterson were submitted on his behalf. Both counsel stipulated to the admissibility of the declarations and the trial court considered them in reaching its competency determination. The declarations, primarily from neighbors and friends who had known Peterson for many years, uniformly stated that he was an intelligent man who, as one declarant put it, "fully understands the risks, benefits, and reasonable alternatives and probable consequences involved in each decision that he would be called upon to make." Each declarant expressed shock and dismay that Peterson's competency to stand trial was in question.

The trial court ultimately found Peterson competent to stand trial. The court explained the basis for its ruling: "Mr. Peterson strongly disputed that he is incompetent. . . . [¶] Mr. Peterson presents himself well. He is articulate, very polite in court, appears

to be intelligent and learned. He clearly is able to understand the nature and purpose of the proceedings and . . . he fully comprehends his own status in these proceedings.

"It is also abundantly clear that the Defendant possesses some character traits that are difficult and at [times] are troublesome. He has strong opinions in certain areas. Witness Burstein stated 'unwilling' Defendants frequently have a personality disorder or a paranoid disorder. However, that is not a *sine quo non* for finding that a Defendant is necessarily incompetent to stand trial. [¶] . . . [¶]

"I find that Mr. Peterson has the ability to cooperate with and to assist his attorney. The fact that Mr. Peterson has chosen not to assist his attorney, when he has the ability to do so, does not mean that he is incompetent to stand trial. It does, however, increase the burden on trial counsel. [¶] I am confident that defense counsel will be able to fully and adequately represent Mr. Peterson and to fully protect his right to a fair trial.

"In this case, the Defendant has the burden to establish by a preponderance of the evidence that he is not competent to stand trial. In this case, lack of competency has not been established."

B. *Legal Analysis*

"A person cannot be tried or sentenced while mentally incompetent. (§ 1367, subd. (a).) A defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (*Ibid*; [citation].) A defendant's trial while incompetent violates state law and federal due process guarantees. [Citations.] A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. (§ 1369, subd. (f); [citations.].) On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the finding on competency. [Citation.] Evidence is substantial if it is reasonable, credible and of solid value. [Citation.]" (*People v. Dunkle* (2005) 36 Cal.4th 861, 885.)

In the present case, two experts evaluated Peterson for the competency proceedings. Neither expert was able to actually interview Peterson, who read from a

prepared statement during each attempted interview and refused to answer any questions. In light of Peterson's lack of cooperation, Dr. Burstein "provisionally" concluded that Peterson suffered from a paranoid personality disorder and found it "probable" that Peterson was incompetent to stand trial. Dr. Good declared himself unable to render an opinion as to Peterson's competency due to Peterson's failure to cooperate.

On the other hand, Peterson, who testified at the competency trial, strongly disputed the allegation of incompetence and the trial court found that he was articulate and appeared to be intelligent, and that he was able to understand the nature and purpose of the proceedings. In addition, numerous declarations from people who had known Peterson for some years were admitted at the trial. As previously discussed, the declarations uniformly stated that Peterson was an intelligent, thoughtful, and articulate man, and expressed shock and dismay that his competency to stand trial was in question.

Peterson's testimony and demeanor, as discussed by the court in its decision, and the declarations from people who know Peterson, provide substantial evidence to support the finding that Peterson was competent to stand trial. Contrary to Peterson's assertion, the trial court was not required to accept the opinion of Dr. Burstein even though no expert had testified that Peterson was competent. (See *People v. Marshall* (1997) 15 Cal.4th 1, 31 [" 'Of course, the jury is not required to accept at face value a unanimity of expert opinion: "To hold otherwise would be in effect to substitute a trial by 'experts' for a trial by jury . . . ." ' [Citations.]"].) This is particularly true in light of the provisional nature of Dr. Burstein's opinion that Peterson was incompetent. (See *id.* at pp. 31-32 ["The value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion"].) Peterson's lack of cooperation with defense counsel and his bizarre written and verbal conduct do not change this conclusion. (See *People v. Medina* (1995) 11 Cal.4th 694, 735 ["more is required to raise a doubt of competence than the defendant's mere bizarre actions or statements, with little reference to his ability to assist in his own defense"]; *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112 [" '[T]he test, in a section 1368 proceeding, is competency to cooperate [with counsel], not cooperation.' [Citation.]"].)

Accordingly, Peterson's claim that the trial court erred in finding him competent to stand trial cannot succeed.

II. *Trial Court's Denial of Peterson's Counsel's Motion to Withdraw*

Peterson contends the trial court violated his state and federal constitutional rights to the effective assistance of counsel (see U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) when it denied his attorney's motion to withdraw, based on a total breakdown in the attorney-client relationship.

A. *Trial Court Background*

On January 25, 2004, Peterson's fourth attorney,[7] Maurice Moyal, filed a motion to withdraw as Peterson's counsel due to Peterson's refusal to communicate or cooperate with him. Moyal filed a second motion to withdraw on March 4, and a supplemental declaration on March 11, 2004, again citing Peterson's refusal to communicate or cooperate with him, and declaring a conflict of interest as Peterson had filed a lawsuit against Moyal. The trial court denied both motions.

During trial, Peterson refused to follow Moyal's advice to testify in his own defense.

B. *Legal Analysis*

A determination whether to grant an attorney's motion to withdraw as counsel is within the sound discretion of the trial court. (*People v. McKenzie* (1983) 34 Cal.3d 616, 629.)

Here, at the time his attorney, Maurice Moyal, moved to withdraw, Peterson had already demonstrated a refusal to cooperate with any counsel, and had also stated that he did not wish to represent himself. The record does not reflect any question about the

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[7] Peterson's first attorney had asked to be relieved due to a conflict of interest and his second attorney had asked to be relieved because Peterson did not want the attorney to represent him. The trial court granted the motion to withdraw of Peterson's third attorney, Jack Weiss, after the competency hearing, based on the conflict of interest created by Peterson's filing of a lawsuit against him.

adequacy of Moyal's representation. Rather, Peterson's refusal to cooperate with Moyal had made such representation extremely difficult.

The case of *People v. Michaels* (2002) 28 Cal.4th 486, 522, is pertinent to the facts of this case. In that case, counsel agreed with the defendant, who had filed a *Marsden*[8] motion for substitution of counsel, that he should be relieved because their relationship had completely broken down and the defendant refused to speak with him. Our Supreme Court held that substitution of counsel was not warranted in that "[n]othing in the record here shows that Grossberg [trial counsel] was incompetent or would not provide adequate representation if he received defendant's cooperation. But it is clear that he and defendant were in a conflict that could imperil Grossberg's ability to provide effective representation. . . . [¶] But that does not demonstrate an 'irreconcilable conflict' that would require the trial court to replace appointed counsel. Defendant cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove that attorney. ' "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment . . . ." ' [Citations.]" (*Id*. at p. 523.)

Here, Moyal stated that he could not represent Peterson effectively when Peterson refused to cooperate with him, or even talk to him. In addition, after Peterson sued Moyal in the United States District Court, Moyal stated that he believed Peterson's conduct was "deliberate," and that every time the case was ready to go to trial, he "just sues his attorney." In addition, when it denied the request to withdraw, the trial court noted that courts must "recognize the danger of implying [that] criminal defendants can simply manufacture conflict by initiating lawsuits against their attorneys . . . . [¶] This court will not grant the request for withdrawal of attorney based on the lawsuit that has been filed."

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[8] *People v. Marsden* (1970) 2 Cal.3d 118.

We conclude Peterson has not demonstrated an irreconcilable conflict that required the trial court to grant Moyal's motions to withdraw. (See *People v. Michaels*, *supra*, 28 Cal.4th at p. 523.) Rather, the record plainly demonstrates that Peterson steadfastly refused to cooperate with *any* counsel and that appointing new counsel would have been an act of futility on the part of the trial court. Hence, there was no abuse of discretion in the court's denial of counsel's motions to withdraw, and Peterson's constitutional claim that he was denied effective assistance of counsel must fail. (*People v. McKenzie*, *supra*, 34 Cal.3d at p. 629.)

III. *Alleged Instructional Error Under CALJIC No. 9.71.5*

Both Nunez and Peterson contend the trial court erred when it instructed the jury, pursuant to CALJIC No. 9.71.5, that appellants had the burden of proving, by a preponderance of the evidence, the good faith element of the statutory necessity defense, under section 278.7.[9] In fact, according to appellants, because that element of the necessity defense is relevant to whether they acted with malice, and because malice is an element of the offenses of child abduction and child custody deprivation (see §§ 278, 278.5), the instruction improperly relieved the prosecution of proving every element of the charged offenses beyond a reasonable doubt.[10]

Section 278 provides for the punishment of "[e]very person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian . . . ."

Section 278.5 provides for the punishment of "[e]very person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation . . . ."

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[9] Nunez also apparently challenges the trial court's instruction pursuant to the common law necessity defense.

[10] In their opening briefs, appellants rely for this proposition on a case in which review has since been granted. (See *People v. Neidinger* (2005) 127 Cal.App.4th 1120, rev. granted July 13, 2005, S133798.)

Section 7, subdivision (4), provides that "[t]he words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."[11]

Finally, section 278.7 provides a defense to charges under section 278.5, in specific, limited circumstances. Specifically, that section provides, inter alia, that "[s]ection 278.5 does not apply to a person with a right to custody of a child who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child." (§ 278.7, subd. (a).)[12]

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[11] CALJIC No. 9.72, which was given to the jury in this case, similarly instructs that, "[a]s used in the crime of child abduction: [¶] . . . [¶] 'Maliciously' means with intent to vex, annoy, or injure another person, or to do a wrongful act."

[12] Section 278.7 further provides: "(b) Section 278.5 does not apply to a person with a right to custody of a child who has been a victim of domestic violence who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child. 'Emotional harm' includes having a parent who has committed domestic violence against the parent who is taking, enticing away, keeping, withholding, or concealing the child.

"(c) The person who takes, entices away, keeps, withholds, or conceals a child shall do all of the following:

"(1) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing, make a report to the office of the district attorney of the county where the child resided before the action. The report shall include the name of the person, the current address and telephone number of the child and the person, and the reasons the child was taken, enticed away, kept, withheld, or concealed.

"(2) Within a reasonable time from the taking, enticing away, keeping, withholding, or concealing, commence a custody proceeding in a court of competent jurisdiction . . . .

"(3) Inform the district attorney's office of any change of address or telephone number of the person and the child.

"(d) For the purposes of this article, a reasonable time within which to make a report to the district attorney's office is at least 10 days and a reasonable time to commence a custody proceeding is at least 30 days. This section shall not preclude a person from making a report to the district attorney's office or commencing a custody proceeding earlier than those specified times; [and]

CALJIC No. 9.71.5, which is based on the provisions of section 278.7, provides, inter alia: "A good faith reasonable belief of harm is a defense to a claimed violation of Penal Code § 278.5. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely:

"1. [A.] The person who abducted the child had a right to custody of the child; [¶] . . . [¶]

"2. That person had a good faith and reasonable belief that the child if left with [the other person] . . . would suffer immediate bodily injury or emotional harm . . . ."[13]

"(e) The address and telephone number of the person and the child provided pursuant to this section shall remain confidential unless released pursuant to state law or by a court order that contains appropriate safeguards to ensure the safety of the person and the child."

[13] CALJIC No. 9.71.5 provides in full: "A good faith reasonable belief of harm is a defense to a claimed violation of Penal Code § 278.5. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely:

"1. [A.] The person who abducted the child had a right to custody of the child;

"[[B] That person also previously had been a victim of domestic violence;]

"2. That person had a good faith and reasonable belief that the child if left with [the other person] [(name)] would suffer immediate bodily injury or emotional harm;

"3. A. That person thereafter made a report to the office of the district attorney of the county where the child resided before this action was filed within a reasonable time after the abduction;

"B. That report included the abductor's name, the then current address and telephone number of the child and the abductor, and the reasons the child was abducted; [and]

"4. That person must have commenced a custody proceeding in a court [of competent jurisdiction] within a reasonable time after the abduction[; and

"5. That person must have informed the district attorney's office of any change of address or telephone number for [himself] [herself] and the child].

"['Emotional harm' includes having a parent who has committed domestic violence against the person who is abducting the child.]

"A reasonable time within which to make a report to the district attorney is at least ten (10) days, and a reasonable time to commence a custody proceeding is at least thirty (30) days. These time limitations do not preclude a person acting before ten or thirty days respectively have passed after the abduction."

A. *Trial Court Background*

Before Nunez's trial, the prosecutor asked that evidence that Daniel Nunez abused the two girls be excluded as irrelevant. Initially, the court agreed, expressing doubt about whether such evidence was relevant because there was no showing that Nunez had complied with the requirements of section 278.7, which provides a defense based on a good faith belief in imminent harm to the children. Nunez's counsel responded that even if the evidence at trial failed to establish that Nunez had complied with section 278.7's reporting requirements, evidence of abuse would still be relevant to the malice element of sections 278 and 278.5. In particular, counsel argued, such evidence could negate the prosecutor's theory that Nunez took the children "basically to vex and annoy, to get back at the ex-husband." After the court did some additional research, it concluded that, even if Nunez did not meet all of the requirements listed in the applicable jury instruction—CALJIC No. 9.71.5—the section 278.7 defense still would be relevant to whether Nunez acted with malice, i.e., with intent to "vex, annoy, or injure" (§ 7, subd. (4)) her ex-husband when she abducted and concealed the children.

Nunez's counsel later requested that the court give CALJIC No. 9.71.5, regarding the statutory necessity defense (§ 278.7), without requesting any modification.

At Peterson's trial, CALJIC No. 9.71.5 was given on the trial court's motion, apparently without objection or request for modification.

B. *Invited Error*

As a preliminary matter, respondent asserts that appellants have waived any claims of instructional error, under the doctrine of invited error, because they specifically requested CALJIC No. 9.71.5, which they now claim should not have been given without modification.

Our Supreme Court has explained that "invited error will be found 'only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction.' [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 830.)

In the present case, we find that the invited error doctrine applies to Nunez because her counsel requested that the court give CALJIC No. 9.71.5 and the record

reflects a deliberate tactical purpose on counsel's part in requesting the instruction. Indeed, during the pretrial hearing, counsel acknowledged that, under CALJIC No. 9.71.5, Nunez would have the burden of proof, by a preponderance of the evidence, regarding all of the facts necessary to establish the elements of the section 287.7 statutory defense. Counsel argued that, pursuant to CALJIC No. 9.71.5, she should be able to present evidence at trial regarding Nunez's "good faith reasonable belief that the children were in danger," pursuant to the statutory defense, which she believed was relevant regardless of whether the jury determined that Nunez satisfied all of the elements of the defense. Although the trial court initially was skeptical that the statutory defense was applicable, after hearing counsel's argument and researching the issue, the court concluded that the abuse evidence was relevant, even if Nunez could not prove all of the elements of the defense.

The record thus plainly reflects that Nunez's counsel made a deliberate tactical choice in requesting CALJIC No. 9.71.5; indeed, her argument helped to convince the trial court to give the instruction. Whether or not this tactical choice was mistaken is not relevant to our invited error determination. As our Supreme Court explained in *People v. Cooper*: "[T]he record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice." (*People v. Cooper, supra*, 53 Cal.3d at p. 831.)

Hence, because Nunez invited the error complained of on appeal, we shall not address the merits of her claim.[14]

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[14] Moreover, even were we to address the merits of Nunez's claim, the claim would fail due to her inability to show prejudice from the alleged instructional error. That is because, while the good faith element of the necessity defense arguably could be relevant to the "wish to vex, annoy, or injure" portion of the definition of malice in

On the other hand, we find that the invited error doctrine does *not* apply to Peterson, whose counsel merely failed to object to the giving of the instruction without modification, and the record does not demonstrate that his counsel had a clear tactical reason for his failure to object. Thus, as to Peterson, because the record does not show " 'that counsel acted for tactical reasons and not out of ignorance or mistake' [citations]" (*People v. Cooper*, *supra*, 53 Cal.3d at p. 830), we shall address the merits of his claim.

C. *Legal Analysis*

The California Supreme Court has explained that, in reviewing claims of instructional error under California law, the question is "whether there is a reasonable likelihood that the jury misconstrued or misapplied the words" of the instruction. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

In the present case, Peterson argues that the court erroneously placed the burden on him, under CALJIC No. 9.71.5, to prove, by a preponderance of the evidence, the good faith element found in section 278.7, the statutory necessity defense. According to Peterson, this misallocation of the burden of proof "misled the jury by implying that [Peterson's] belief that child abuse was occurring could not negate the malice requirements of sections 278 and 278.5. The result shifted the burden of proof and created hopelessly conflicting instructions on the element of malice . . . ."

"In *People v. Tewksbury* (1976) 15 Cal.3d 953, [our Supreme Court] discussed the degrees of burdens of proof which may be placed on a defendant in a criminal case. '[W]hen there is placed upon an accused the burden of interjecting a factual contention which, if established would tend to overcome or negate proof of any element of the crime charged as otherwise established by the People, the accused need only raise a reasonable

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section 7, it plainly is not relevant to the "intent to do a wrongful act" portion of that statute. As we discuss in the text in part III.C., *post*, with respect to Peterson, appellants' conduct in this case plainly shows that they were aware that taking the girls constituted a wrongful act, and further demonstrates a lack of belief that the UCC filing entitled Nunez to custody. Hence, the requirement that Nunez prove a good faith belief of imminent harm, under CALJIC No. 9.71.5, by a preponderance of the evidence, could not have undermined the jury's findings regarding malice. (See also pt. V.A., *post*.)

doubt as to the existence or nonexistence of the fact in issue.' (*Id*. at p. 963.) Examples of such instances include unconsciousness and alibi defenses. ([*Ibid*.]) On the other hand, defendants may be required to prove by a preponderance of the evidence defenses 'which raise factual issues collateral to the question of the accused's guilt or innocence and do not bear directly on any link in the chain of proof of any element of the crime.' (*Id*. at p. 964.) Among such instances are entrapment defenses and challenges to testimony as being hearsay or that of an accomplice. (*Id*. at pp. 964-968.)" (*People v. Figueroa* (1986) 41 Cal.3d 714, 721.)

Turning to the merits of Peterson's contention, we find no instructional error for the simple reason that evidence of Peterson's "good faith and reasonable belief" that Jane Doe I and Jane Doe II would "suffer immediate bodily injury" (§ 278.7, subd. (a)) was not relevant to whether he acted with malice when he participated in the abduction and concealment of the two girls. That is because any evidence regarding Peterson's good faith belief that abuse had occurred did not negate the element of malice, as to Peterson, where the question was whether he had intentionally committed a "wrongful act" as described in subdivision (4) of section 7. (See *People v. Figueroa*, *supra*, 41 Cal.3d at p. 721, quoting *People v. Tewksbury*, *supra*, 15 Cal.3d at pp. 964-968.)

Several cases discussing the relationship between malice and crimes committed with "noble" motives are relevant to Peterson's argument. First, in *People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 3, the defendants were convicted of, inter alia, obstruction of a street and/or sidewalk during an antinuclear protest. On appeal, the appellate department of the Superior Court rejected the defendants' claim that the trial court had a sua sponte duty to instruct the jury that a good faith belief in their actions would negate malice, stating: "It is naivete to infer that the jury was not aware of the defendants' purpose in blocking traffic. The verdict form contained a finding of willfully and maliciously obstructing free movement. One does an act 'willfully' when he intends to do such act; and *one does an act 'maliciously' when he intends to do such act and knows that it is a wrongful act, i.e., one banned by law*. In this case, the defendants' intention to obstruct the street and sidewalk was done with the knowledge that such

obstruction was a wrongful act. However laudable the defendants' motives may be, it was not required of the trial judge to *sua sponte* instruct on a matter which was not a negation of the elements of the offense. [Citation.]" (*Id.* at p. 7, first italics added.)

Similarly, in *People v. Man* (1974) 39 Cal.App.3d Supp. 1, 4-5, the appellate department of the Superior Court distinguished an unlawful act done with "good intentions," as had occurred in that case, from an unlawful act done with a truly mistaken belief or ignorance of the law, explaining that only the latter would negate malice since " 'mistake of fact . . . disproves *any* criminal intent.' " The court concluded that the standard instructions on malice accurately presented the issues to the jury. (*Ibid*.)

In *People v. Bohmer* (1975) 46 Cal.App.3d 185 (*Bohmer*), the defendant was convicted of maliciously placing an obstruction on a railroad track. The appellate court rejected his contention that the trial court improperly refused to instruct the jury in a way that would allow it to determine if the defendant's actions were intended only as a symbolic protest. (*Id*. at p. 190.) The court stated that the defendant had "confused the motive behind the doing of the act with the intent with which it was done. The reasonableness of protest against war in general, or the war in Vietnam in particular, is irrelevant. The price to be paid by those whose protest for the sake of a cause professed by them to be noble involves the criminal destruction of or interference with the property of others, is to accept the penalties fixed by the law." (*Ibid*.)

In finding no misinstruction of the jury, the *Bohmer* court explained that the malice required to be guilty of the crime in question was "that which would negate an accidental and unintended obstruction, such as might result if a vehicle being driven across the tracks should stall or overturn, and, before it could be moved off, should cause a train to slow down or stop." (*Bohmer, supra*, 46 Cal.App.3d at p. 191; cf. 1 Witkin, Cal. Criminal Law (3rd ed. 2000) Defenses, § 249, p. 616 ["Unless the case comes within one of the recognized excuses, such as mistake of fact or law . . . , it is no defense that the criminal act was done with a moral purpose, or was dictated by religious convictions or social custom"].)

Likewise, in the present case, while Peterson may have been motivated to participate in the abduction and concealment of the two girls by his belief that the girls had been abused, that belief does nothing to negate the element of malice. The evidence adduced at trial showed that Peterson helped Nunez to spirit the two girls away from their daycare center and played a lead role in keeping the girls in hiding for almost six months, including paying various advocacy group members to care for them.[15] This evidence plainly shows that Peterson was aware that he was committing a wrongful act when he assisted in the abduction and concealment of Jane Doe I and Jane Doe II. (See § 7, subd. (4).)

Consequently, because Peterson's necessity defense could not negate an element of the crime (i.e., malice), he properly bore the burden of proving by a preponderance of the evidence that he met the elements of that defense. (See *People v. Figueroa*, *supra*, 41 Cal.3d at p. 721, quoting *People v. Tewksbury*, *supra*, 15 Cal.3d at pp. 964-968.) There was no instructional error. (See *People v. Clair*, *supra*, 2 Cal.4th at p. 663.)

IV. *Imposition of the Upper Term and Consecutive Sentences*

Nunez contends the trial court erroneously sentenced her to the aggravated term on count two and Peterson contends the court erroneously sentenced him to consecutive terms on counts two and three based on factors not found by a jury beyond a reasonable doubt. According to appellants, these sentencing decisions violated their constitutional rights under the United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakeley*).

In *People v. Black* (2005) 35 Cal.4th 1238, 1244 (*Black*), our Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." In reaching this conclusion, the *Black* court expressly stated that, under California's sentencing system, "the upper term is

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[15] As with Nunez, these acts also show Peterson's lack of belief that Nunez's UCC filing entitled Nunez to full custody of her daughters.

the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], *Blakely*, and [*United States v.*] *Booker* [(2005) 543 U.S. 220]." (*Black*, *supra*, 35 Cal.4th at p. 1254.)

Black is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we reject appellants' contention that the imposition of upper term and consecutive sentences violate *Blakely*.[16]

V. *Exclusion of Evidence Regarding Abuse of Jane Doe I and Jane Doe II by Their Father and Regarding Statements Related to the UCC Filing*

Nunez contends the trial court erred, and deprived her of her due process right to a fair trial, when it refused to permit witnesses who had cared for Jane Doe I and Jane Doe II to testify that the girls had said their father had physically abused them, limited evidence of abuse to one year before Nunez took the girls, and excluded certain testimony related to the UCC filing process.

A. *Evidence of Abuse*

Nunez contends the trial court erred when it refused to allow, on hearsay grounds, three of the people who had cared for Jane Doe I and Jane Doe II after they returned to California to testify that the girls had told them that they were physically abused by their father. She also contends the court erred in limiting to one year the period of time during which the alleged abuse could be the subject of testimony.

We need not decide whether these claims have merit because we conclude that, even assuming the court erred in refusing to admit the evidence in question, Nunez was not prejudiced by the error. First, with respect to the argument that the evidence would support Nunez's claim of a good faith belief in the danger of imminent harm for purposes of the necessity defense, it is undisputed that Nunez did not satisfy most of the

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[16] We recognize, however, that the reasoning of *Black, supra,* 35 Cal.4th 1238 is now before the United States Supreme Court in *Cunningham v. California*, No. 05-6551, certiorari granted February 21, 2006, ___ U.S. ___, 2006 WL 386377, originally an unpublished opinion by Division Five of this court (A103501), filed April 18, 2005.

requirements for that defense, including the reporting requirements. Hence, even with additional evidence of abuse to support her good faith belief, neither the common law nor the statutory necessity defense would have been available to her. (See § 278.7.)

Second, the excluded evidence of abuse would *not* have negated the malice element in the charged offenses because, even if it could have been relevant to whether Nunez was attempting to "vex, annoy, or injure" her ex-husband, it plainly was not relevant to whether she had intentionally committed a "wrongful act." (See § 7, subd. (4); see also, e.g., *People v. Weber*, *supra*, 162 Cal.App.3d Supp. at p. 7 ["*one does an act 'maliciously' when he intends to do such act and knows that it is a wrongful act, i.e., one banned by law*"], italics added; cf. pt. III.B. & pt. III.C., *ante*.)

The evidence was overwhelming that Nunez realized that the abduction and concealment of her children was illegal. For example, after Judge Craddick ruled that she could not have more than 50-percent custody, she began talking to her neighbor, Valerie Blackmore, about taking the children underground. In addition, shortly after Judge Craddick issued an order stating that she was limited to supervised visitation pending a hearing on the matter, Nunez spirited Jane Doe I and Jane Doe II away from their daycare center; fled across the country with them; falsely identified herself to police after she was in an automobile accident; handed the girls over to members of her group who were to take them into hiding, before turning herself in to law enforcement; and repeatedly refused to disclose where the girls were being hidden.

Consequently, we find that any alleged errors concerning the exclusion of abuse-related evidence were harmless. (See *People v. Watson* (1956) 46 Cal.2d 818.)[17]

B. *Evidence Related to the UCC Filing*

Nunez also contends the trial court erred when it refused to permit testimony related to the UCC process.

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[17] We disagree with Nunez's assertion that the excluded testimony was so vital to her defense that any error constituted a violation of her due process rights, requiring utilization of the *Chapman* standard for assessing prejudice. (See *Chapman v. California* (1967) 386 U.S. 18.)

Although Nunez's mother, Judy DeLarosa, was permitted to testify that Nunez had told her about taking a class to learn about using the UCC to get custody, the trial court sustained hearsay objections to questions regarding whether Peterson had told DeLarosa about the UCC strategy, whether DeLarosa believed the UCC strategy was lawful, and whether Nunez had told her that she (Nunez) believed that filing the UCC form gave her custody. The trial court also sustained a hearsay objection that barred Inspector Ernst from answering a question regarding whether Peterson had referred to the UCC and whether he had told Ernst, "I promise you these children were mine. I wouldn't tell you where they are." According to Nunez, the trial court should have permitted DeLarosa and Ernst to answer these questions since the questions did not call "for the trier of fact to believe the truth of the matter asserted by the declarant" and since the questions supported and corroborated "the fact that [Nunez] had been convinced that the strategy was legitimate, and was very much under Peterson's spell."

As with the excluded evidence of abuse, even were we to entertain the questionable proposition that the court erred in refusing to admit the testimony concerning the UCC process, Nunez cannot show any prejudice from exclusion of this evidence. That is because there was overwhelming evidence presented at trial that Nunez was aware of the wrongfulness and illegality of her conduct when she took the girls from their daycare center, fled with them across the country, and sent them "underground" into hiding. In addition, Nunez was permitted to testify about her beliefs regarding the legal effects of filing the UCC documents. It is not reasonably probable that the verdicts would have been different had the court permitted this additional testimony regarding the UCC process. (See *People v. Watson*, *supra*, 46 Cal.2d 818.)

VI. *Nunez's Conviction Under Section 278 for Abducting her Children*

Nunez was charged with two counts of child abduction, under section 278, and with two counts of child custody deprivation, under section 278.5. She was convicted of all four counts, and the trial court sentenced her to four years—the aggravated term—on

one of the counts under section 278.[18] Nunez contends she was wrongfully convicted of and sentenced for a violation of section 278, which carries a maximum four-year sentence, because that section applies only to people with no right to physical custody who abduct a child. According to Nunez, she should have been prosecuted solely under section 278.5 for depriving Daniel Nunez of his custody rights, for which the maximum term is three years, because that section applies to custodial parents who abduct their child.

Nunez further contends the stipulation that Judge Craddick's April 10, 2002 order temporarily "took custody" from Nunez, when in fact she retained custody, was entered into in error, and therefore should be disregarded. She also contends the trial court improperly took judicial notice of counsel's stipulation when Judge Craddick's order itself was the only proper subject of judicial notice. She asserts that this "judicial notice" was in effect a jury instruction that directed a verdict on the element of the section 278 offense requiring proof that Nunez was a person "not having a right to custody." Finally, Nunez contends defense counsel rendered prejudicially ineffective assistance by stipulating that Judge Craddick's order took away Nunez's custody rights, failing to prepare Nunez to testify on this issue, and failing to object when other witnesses opined that Nunez's custody rights had been revoked.

A. *Trial Court Background*

On April 10, 2002, Judge Craddick entered an order dissolving the TRO and sole custody order Nunez had obtained on March 29, 2002, during Judge Craddick's absence. The order also provided, inter alia: "All prior custody and visitation orders remain in full force and effect, except [Nunez] shall have no visitation pending the hearing [on April 19, 2002] unless supervised through Safe Exchange."

[18] She was also sentenced to one year, consecutive on the other section 278 count; the section 278. 5 counts were stayed pursuant to section 654.

During trial, Nunez's counsel stipulated, inter alia, that, on April 10, 2002, "Judge Craddick took custody from Kelli Nunez temporarily, giving her only supervised visitation for at least the next ten days."

During jury deliberations, the jury requested "6 copies of instructions, all exhibits, 6 copies of all stipulations and judicial notices." In response, the court reporter read the stipulations to the jury. In addition, the court read two statements that were the subject of judicial notice, including the following: "In April 2002, Judge Craddick of the Contra Costa County Superior Court signed an order to show cause dissolving the TRO from 3/29/02, and temporarily terminating the custody rights of Kelli Nunez, ordering that she, quote, shall have no visitation except supervised through Safe Exchange . . . pending the hearing on 4/19/02, unquote."

During Peterson's trial, Judge Craddick testified that, when she dissolved the TRO, she reinstated the previous joint legal and physical custody order, but required that any visitation by Nunez be supervised by Safe Exchange pending a hearing on April 19, 2002. On April 19, another judge presided at the hearing; that judge maintained Judge Craddick's order pending another hearing on May 14, 2002.

B. *Legal Analysis*

As previously noted, section 278 provides for the punishment of "[*e*]*very person, not having a right to custody*, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian," while section 278.5 provides more generally for the punishment of "[*e*]*very person* who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation . . . ." (Italics added.)

The basic question raised by Nunez is whether she was a person with a right to custody, which would preclude her conviction and sentencing under section 278. Several of the definitions provided in section 277 are relevant to this question.

Subdivision (e) of section 277 provides that "[a] 'right to custody' means the right to the physical care, custody, and control of a child pursuant to a custody order as defined

in subdivision (b) . . . ." (§ 277, subd. (e).) Subdivision (b) defines "court order" or "custody order" as "a custody determination decree, judgment, or order issued by a court of competent jurisdiction, whether permanent or temporary, initial or modified, that affects the custody or visitation of a child, issued in the context of a custody proceeding. An order, once made, shall continue in effect until it expires, is modified, is rescinded, or terminates by operation of law." (§ 277, subd. (b).) Subdivision (h) provides: " 'Visitation' means the time for access to the child allotted to any person by court order." (§ 277, subd. (h).)

The case of *People v. Mehaisin* (2002) 101 Cal.App.4th 958 (*Mehaisin*), sheds light on whether, under Judge Craddick's interim order, Nunez was a person "with a right to custody." In *Mehaisin*, the defendant claimed the trial court erred when it excluded evidence and argument supporting a statutory necessity defense under section 278.7, which may only be invoked by persons with a right to custody. (*Mehaisin*, at p. 962.) The appellate court rejected the defendant's assertion that, although his wife was granted temporary custody of the children pending further proceedings, he was granted a full month of overnight visitation, which effectively gave him "physical care, custody, and control" of the children during that period, and he therefore had a "right to custody" within the meaning of section 277, subdivision (e). (*Mehaisin*, at pp. 963-964.)

In concluding that the defendant was not a person with a "right to custody" for purposes of section 278.7, the court discussed the way in which courts determine whether a parent in fact has physical custody of a child, explaining: "Courts 'look[] at the existing de facto arrangement between the parties to decide whether physical custody is truly joint or whether one parent has sole physical custody with visitation rights accorded to the other parent.' [Citation.]" (*Mehaisin*, *supra*, 101 Cal.App.4th at p. 964.) In determining whether the defendant had joint physical custody, the court found that the defendant did have a significant period of physical custody. (*Ibid.*; see Fam. Code,

§ 3004.)[19] However, it also found that the trial court's order did not purport to assure frequent or continuing contact with both parents (see Fam. Code, § 3004), but, rather, gave the father a single period of exclusive physical contact. "Thus, the de facto arrangement between the parents was sole custody and one period of liberal visitation, not joint physical custody." (*Mehaisin*, at p. 964.)

The court also stated: "In any event, defendant absconded with the children *after* his period of visitation ended, not *during* the period. Assuming, for purposes of argument, that defendant had joint physical custody of the children until February 2, 1998, his right to custody ended on that date and section 278.7 provides no defense to his withholding of the children thereafter." (*Mehaisin*, *supra*, 101 Cal.App.4th at p. 964, fn. omitted.)

In the present case, although, on April 10, 2002, Judge Craddick reinstated the previous custody order that provided for joint physical custody of the children, she also added a restriction to Nunez's exercise of her joint custody, ordering that Nunez was limited to supervised visitation pending the next hearing. We conclude that, even if the limitation of supervised visitation did not change the character of the order to that of sole physical custody to Daniel Nunez, the order had the de facto *effect* of temporarily modifying the prior court order by giving sole physical custody to Daniel Nunez, with limited, supervised visitation accorded to Nunez. (See *Mehaisin*, *supra*, 101 Cal.App.4th at p. 964.)

That is because, while Judge Craddick testified that, in theory, Nunez could have exercised her 50-percent timeshare under her order if she could pay for the visits to be supervised by Safe Exchange, the reality was Nunez was able to spend very little, if any, time with the girls between April 10, 2002—the date of the order—and April 26, 2002, when she took the girls from their daycare center. As Nunez testified, while she talked to

[19] Family Code section 3004 provides: " 'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents . . . ."

the girls every night on the telephone, she was only permitted to visit with them at Safe Exchange, under the supervision of a staff person there, at a cost of $110 for a two-hour visit. Nunez did not testify to any visitation with the girls during this time period.

Thus, because the custody order did not purport to assure frequent or continuing contact with both parents, the de facto arrangement was sole physical custody to Daniel Nunez, with supervised visitation for Nunez. (See *Mehaisin*, *supra*, 101 Cal.App.4th at p. 964, citing Fam. Code, § 3004.) Moreover, when Nunez took the children, she did so in violation of the custody order permitting only supervised visitation; hence, she cannot argue that she had "the right to the physical care, custody, and control" of the children (§ 277, subd. (e)), at the time she removed them from their daycare center. (See *ibid.*)

In conclusion, because Nunez was not a person with a right to custody, for purposes of section 278, she was properly convicted and sentenced under that statute.[20] Accordingly, counsel did not improperly stipulate that Judge Craddick's order temporarily took physical custody from Nunez, and the trial court did not prejudicially err in taking judicial notice of the effect of that order.[21] For the same reason, Nunez's ineffective assistance of counsel claim cannot succeed.

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[20] Nunez asserts that following the reasoning of the appellate court in *Mehaisin* could cause the phrase "right to custody" to be read too narrowly, which would discourage parents from rescuing their children from abusive situations. (See § 278.7.) However, a determination of what a de facto custody arrangement consists of must be made on a case by case basis, and we do not profess to state a broad rule on this subject. Instead, we find that in the particular circumstances of this case, where the order of supervised visitation resulted from Nunez's attempts to manipulate the system, Nunez cannot claim she was a person with a right to custody, for purposes of avoiding a conviction or sentence under section 278.

[21] Even assuming the court was without authority to take judicial notice of the terms of the stipulation under Evidence Code section 452, subdivision (d) or (h), we do not agree with Nunez that the court in effect directed a verdict on an element of section 278. The court's words were quite similar to the language of the stipulation, and correctly stated that Nunez did not have a right to custody, for purposes of section 278.

VII. *Consecutive Sentence on the Conspiracy Charge*

Nunez contends the trial court erred when it imposed a sentence on the conspiracy count for contempt of court consecutive to the child abduction and child custody deprivation counts because the conspiracy had the same objective and intent as those two counts.[22] (See § 654.)

"Because of the prohibition against multiple punishment in section 654, a defendant may not be sentenced 'for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense.' [Citations.] Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out [citation]. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses. [Citations.]" (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616, fn. omitted (*Ramirez*); accord, *People v. Vargas* (2001) 91 Cal.App.4th 506, 570-571 (*Vargas*).) The trial court's finding on this question must be upheld if supported by the evidence in the record. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

In the present case, the trial court imposed a consecutive eight-month sentence for Nunez on the count of conspiring to commit contempt of court (§ 182, subd. (a)(1)) (for violating the court's custody order),[23] finding that the conspiracy was "independent of" the substantive offenses of child abduction and child concealment (§§ 278, 278.5).

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[22] This contention is not relevant to Peterson since, at sentencing, the trial court stayed the sentence on the conspiracy count, pursuant to section 654.

[23] Respondent does not dispute Nunez's assertion that the conspiracy charge was based only on Nunez's alleged violation of the written custody order.

We agree with Nunez that the trial court should have stayed the sentence on the conspiracy count pursuant to section 654. The conspiracy count was based on Nunez's conspiring with codefendants Peterson and Maning to keep Jane Doe I and Jane Doe II hidden from their father, in violation of the trial court's custody order. Because the conspiracy alleged and the two substantive crimes involved the same intent and objective, i.e., to remove and conceal the girls from their father, separate punishment is not permitted. (See *Ramirez*, *supra*, 189 Cal.App.3d at pp. 615-616; *Vargas*, *supra*, 91 Cal.App.4th at pp. 570-571.)

In *Ramirez*, the defendants were sentenced for conspiracy to commit murder and for the substantive offenses of robbery, sex offenses, and attempted murder. The trial court stayed only the attempted murder sentence, under section 654. (*Ramirez, supra*, 189 Cal.App.3d at p. 616.) A panel of this Division held, inter alia, that, "[s]ince the evidence necessarily shows an agreement to commit sex offenses as well as murder . . . , punishment for both the sex offenses and the conspiracy violated the prohibition of section 654 . . . despite the fact that only conspiracy to commit murder was charged." (*Id*. at p. 617.)

In *Vargas*, the defendant was sentenced consecutively both for the offense of murder and the conspiracy to commit murder. (*Vargas, supra*, 91 Cal.App.4th at p. 570.) These consecutive sentences did not violate section 654 because there was strong evidence that the defendant's gang "conspired to kill not only [the victim], but other persons as well, in addition to the gang's overriding conspiracy" to "establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members by killing members who break its rules." (*Id.* at pp. 553, 571.)

Here, the sole agreement between Nunez, Peterson, and Maning, either alleged or supported by the evidence, was a conspiracy to abduct and conceal Jane Doe I and Jane Doe II from their father, in violation of the court's custody order. Unlike in *Vargas*, there was no evidence of a larger conspiracy with additional objectives beyond those contained

in the two substantive crimes of which Nunez was convicted. Contrary to respondent's assertion, the fact that there was some evidence that Nunez had a grudge against Daniel Nunez and Judge Craddick does not support an implied finding of a broader conspiracy to defy judicial authority in custody matters or punish her ex-husband; it merely shows another possible motive on Nunez's part beyond that of protecting the girls from alleged abuse by their father. The conspiracy charged and the relevant evidence all related to a single objective: to hide the girls from their father.

Consequently, Nunez cannot be punished for both the conspiracy to abduct and conceal the girls and the identical substantive crimes. (See *Ramirez*, *supra*, 189 Cal.App.3d at pp. 615-616.)

VIII. *Pretrial Custody Credit for the Time Spent in Custody for Civil Contempt*

Nunez contends the trial court erred in refusing to grant her pretrial custody credit, pursuant to section 2900.5, for the time she spent jailed for civil contempt.

A. *Trial Court Background*

Nunez appeared in Judge Craddick's courtroom on May 8, 2002, and was immediately confined to jail, pursuant to a civil contempt order, due to her refusal to disclose the whereabouts of her two daughters. Thereafter, Judge Craddick brought Nunez back to court on a weekly basis for approximately two months to ask if she had changed her mind. Nunez repeatedly refused to disclose the girls' location, stating that she did not know where they were.[24] Nunez remained jailed pursuant to the civil contempt order until at least November 4, 2002, after the two girls were returned to their father.

On November 6, 2002, Nunez was formally arrested. The conspiracy count set forth in the indictment listed, as one of three overt acts alleged with respect to Nunez, that Nunez "refused to tell the court the location of Jane Doe I and Jane Doe II and as a result was taken into custody May 9, [*sic*] 2002."

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[24] A May 14, 2002 order further reflects that, on that date, Nunez refused to disclose the children's location, citing her Fifth Amendment right against self-incrimination.

B. *Legal Analysis*

Section 2900.5 provides in relevant part: "(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, . . . prison, . . . or similar residential institution, all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment . . . .

"(b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subds. (a) & (b).)

According to Nunez, because her civil contempt confinement was "attributable to proceedings related to the same conduct" for which she was ultimately convicted (§ 2900.5, subd. (b)), she is entitled to credit for the period she was in custody for civil contempt.[25]

The California Supreme Court has stated, with respect to determining entitlement to credit under section 2900.5: "As with many determinations of credit, a seemingly simple question can reveal hidden complexities. Although the statutory language in section 2900.5, 'may appear to have meaning which is self-evident, the appellate courts have had considerable difficulty in applying the words to novel facts.' [Citation.] 'Probably the only sure consensus among the appellate courts is a recognition that section 2900.5, subdivision (b), is "difficult to interpret and apply." [Citation.] As we have noted, in what is surely an understatement, "[c]redit determination is not a simple matter." ' [Citation.]" (*In re Marquez* (2003) 30 Cal.4th 14, 19.) Our Supreme Court went on to observe that proper resolution of a case such as this rests on "familiar

[25] Respondent argues Nunez waived this issue by failing to raise it at the sentencing hearing. However, defense counsel briefed the issue in his sentencing memorandum and briefly averred to it at the sentencing hearing. This was sufficient to preserve the issue for appeal.

principles: We assign the statutory language its plain and commonsense meaning, attempting to effectuate the Legislature's intent. [Citation.]" (*Id*. at pp. 19-20.)

The present case certainly involves the sort of "novel facts" mentioned in *In re Marquez*. First, we agree with respondent that the contempt under which Nunez was held was primarily coercive in nature, and therefore *was* civil, rather than criminal, contempt. (See *In re Ivey* (2000) 85 Cal.App.4th 793, 803 ["Coercive penalties that may be avoided by compliance with the order and are designed to achieve the object of the order remain civil in nature"]; *People v. Batey* (1986) 183 Cal.App.3d 1281, 1289 [civil contempt proceeding was coercive in nature and did not constitute punishment for purposes of double jeopardy clause].)

However, Nunez was in custody for civil contempt for refusing to disclose the location of her two daughters. Once the two girls were turned in to authorities, Nunez was immediately and inevitably arrested and charged with, inter alia, child abduction and child custody deprivation, as well as conspiracy to commit contempt of court (for violating a court order). These charges, of which she was ultimately convicted, involved the same conduct—violating a court order and unlawfully withholding or concealing the whereabouts of the children—as did the civil contempt. Indeed, one of the overt acts alleged in the conspiracy count was Nunez's refusal to disclose the girls' whereabouts to Judge Craddick.

Therefore, looking to the language of section 2900.5 and the Legislature's clear intent that a defendant receive credit where "the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted" (§ 2900.5, subd. (b)), we find that section 2900.5 is applicable to the unusual circumstances of this case, in which the civil contempt was based on facts intimately related to and inseparable from the offenses of which Nunez was ultimately convicted. (See *In re Marquez*, *supra*, 30 Cal.4th at pp. 19, 21 ["although section 2900.5 does not expressly limit credit to situations where the custody is 'exclusively' attributable to a charge of which a defendant is later convicted, 'it is clearly provided that credit is to be

given “only where” custody is related to the “same conduct for which the defendant has been convicted” ’ ”].)[26]

Consequently, Nunez is entitled to credit for the period of civil contempt confinement.[27] We shall remand the matter to the trial court to recalculate the number of credits to which Nunez is entitled, from May 8, 2002, when she was placed in custody for civil contempt, until her arrest on criminal charges on November 6, 2002.[28]

DISPOSITION

The Nunez matter is remanded to the trial court with directions to (1) stay imposition of Nunez’s sentence on count one (conspiracy to commit contempt of court), pursuant to section 654; (2) grant Nunez pretrial confinement credit for the time she spent in custody for civil contempt; and (3) issue a corrected abstract of judgment for Nunez. The judgments are otherwise affirmed.

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[26] *In re Marquez*, *supra*, 30 Cal.4th 14, involved a set of facts distinct from the present case. In that case, the petitioner claimed that once his first conviction was reversed and the case dismissed, the time he spent in custody from the date of the first sentence to the date he was sentenced in a second case became attributable to the second case. (*Id.* at p. 19.) The Supreme Court held that the petitioner was entitled to the additional credit. (*Id*. at p. 24.)

[27] On appeal, Nunez also claims that she is entitled to credit for the civil contempt custody due to the erroneous continuation of the confinement after she invoked her Fifth Amendment right against self-incrimination. Having already determined that, under the exceptional circumstances of this case, Nunez is entitled to credit for the civil contempt confinement pursuant to the terms of section 2900.5, we need not address this alternative theory.

[28] At that time, the trial court will also have the opportunity to address Nunez’s claim that the court mistakenly failed to include credit for February 29, 2004 (Leap Year day).

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.