In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES McDOWELL, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S085578

Los Angeles County Superior Court
Case No. A379326
Hon. William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In 1984, a jury convicted appellant Charles McDowell, Jr., and returned a death verdict for the murder of Paula Rodriguez. This Court affirmed the judgment and death sentence in its entirety. (*People v. McDowell* (1988) 46 Cal.3d 551.)

In 1989, this Court denied appellant's first petition for writ of habeas corpus. (*In re McDowell*, S011634 [Sep. 21, 1989, order denying petition].) And in 1992, this Court denied appellant's second petition for writ of habeas corpus as untimely. (*In re McDowell*, S024033 [Jul. 9, 1992, order denying petition].)

Appellant then collaterally challenged his conviction and sentence in federal court. In 1995, after an evidentiary hearing, the district judge denied habeas corpus relief. In 1997, a panel of the Ninth Circuit Court of Appeals unanimously affirmed the denial of relief on appellant's guilt-phase claims, and in a 2-to-1 vote, denied appellant relief from the death sentence on the asserted ground that the trial court erred in failing to correct jury misapprehension as to what factors may be considered in mitigation. (See *McDowell v. Calderon* (9th Cir. 1997) 107 F.3d 1351.) However, later that year, an en banc panel of the Ninth Circuit concluded, in a 7-to-4 vote, that the asserted error regarding mitigation warranted reversal of appellant's death sentence. (See *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833 (en banc).)

Retrial of the penalty phase commenced in the superior court in July 1999. (2CT 306.) On August 26, 1999, the trial court declared a mistrial when the jury indicated that it was hopelessly deadlocked. (6CT 1555-1556.) A second retrial of the penalty phase began in November 1999. (6CT 1651.) On December 1, 1999, the jury returned a verdict of death. (11CT 3030-3031.) On January 26, 2000, the judge denied appellant's

motion to modify the verdict, and imposed the death sentence. (11CT 3038-3044.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. PROSECUTION CASE-IN-CHIEF

A. Facts and circumstances of the crime

The prosecution produced the following evidence of the crime. In 1982, Frank and Diane Bardsley lived on North Curson Avenue in the Hollywood Hills. To the north of the Bardsleys lived Theodore and Dolores Sum; to the south lived Lee D'Crenza and appellant. (37RT 5344, 5271, 5360-5362; 38RT 5501-5502.) On several occasions, over a period of months, appellant came to the Bardsleys' home and asked to use their telephone. (38RT 5510.) On May 19, 1982, Dolores Sum saw appellant at the top of the Bardsleys' property looking into their house. When appellant saw that Dolores had seen him, he hid behind a bush and then ran back into D'Crenza's house. (37RT 5251; 38RT 5404.)

In 1982, 28-year-old Paula Rodriguez worked as a housekeeper for the Bardsleys. Paula[1] would come to the Bardsleys' house every Thursday, often bringing her daughters, nine-year-old Maria Elena and two-year-old Valeria. (37RT 5271, 5285; 38RT 5501-5503, 5587; 39RT 5612, 5631.) On Thursday, May 20, 1982, Paula brought only Valeria. (39RT 5602.) In the early afternoon hours of May 20, the Sums heard terrible screams coming from the Bardsleys' house. The Sums called the Bardsleys' house

[1] To avoid confusion in referring in referring to various members of the Rodriguez family, respondent will use first names when referring to members of that family. Respondent will do the same when referring to the Sum and McDowell family members.

to see what was wrong, but heard only screaming before the call was disconnected. The Sums went to investigate. (37RT 5246-5247.)

When Theodore reached the Bardsleys' front door, he found that it was unlocked, which was unusual. Knowing that Paula cleaned the house on Thursdays, Theodore opened the door, took a step in, and called "Paula, where are you?" When he called out a second time, appellant appeared, naked and bloody, and made a sudden upward thrusting motion to 73-year-old Theodore's neck. After the blow, Theodore's neck felt hot. He then saw that appellant had a knife in his hand. When appellant raised the knife again, Theodore pushed him, knocking him off balance. Theodore went outside, closed the front door, and ran home with his wife to call the police. When he got home, Theodore saw that he was bleeding profusely from his neck. An ambulance soon arrived and Theodore was taken to the hospital, where he stayed for three days. The wound on Theodore's neck was eight to nine inches long, going from one side of his neck to the other.

Los Angeles Police Officers Glenn Plahy and Mike Perez arrived at the Bardsleys' residence at 1:43 p.m. Officer Plahy discovered Paula's body in a room to the right of the front door. Officer Perez meanwhile went upstairs to search for other victims and suspects. He returned with Valeria, who was unharmed. (38RT 5497-5499.)

Detective Henry Petroski arrived on scene at around 2:30 p.m. (37RT 5261.) Upon entering the Bardsleys' residence, he noticed that the doorknob to the front door had punched a hole in the wall, causing him to conclude that the door had been opened forcefully. (37RT 5266, 5328.) Paula's body was in the living room. Her skirt had been pulled up, her panties cut, and her legs spread. Blood was all over the room—on the blinds, on the walls, on the carpet, on the sofa, on the telephone, and on a painting. There was a pack of True cigarettes and a cigarette lighter on the floor. (37RT 5266-5268; 38RT 5507-5508.) Neither Paula nor the

Bardsleys smoked. (38RT 5504.) Appellant's fingerprints were discovered on the bloody telephone and on the inside of the Bardsleys' front door. (37RT 5308-5311, 5314.)

The autopsy revealed that Paula had suffered four stab wounds. The fatal stab wound went through her chest and hit her aorta. This wound would have caused her to die within a minute. There was another stab wound to the same area, but it was superficial. Another superficial stab wound, consistent with a defensive wound, was found on her inner forearm. Paula also suffered a deep stab wound to the right part of her abdomen, but given the lack of bleeding caused by the wound, it appears that Paula was dead or dying by the time this wound was inflicted. (38RT 5571-5573.)

The medical examiner also found two cuts to both sides of Paula's throat. These cuts were consistent with control wounds, i.e., wounds suffered when someone puts a knife to another person's throat to control her actions. (38RT 5575-5577.) Paula also suffered more than 15 cuts to her hands that were consistent with defensive wounds. Her right thumb was fractured. (38RT 5584-5585.)

While observing the Bardsleys' residence, Detective Petroski noticed a blood trail leading out of the Bardsleys' house. Detective Petroski followed the blood trail south to D'Crenza's house. (37RT 5271, 5285.) On D'Crenza's kitchen floor, there was a bloodstained knife. There were also bloodstains in the kitchen sink, on a linen closet, in a bedroom, and on the handles and wall of the shower. Detective Petroski observed a bloody pair of men's shorts on the vanity in the bedroom and a blood-soaked roll of masking tape in the dining room. True cigarettes lay in an ashtray in D'Crenza's living room. (37RT 5291-5294, 5345-5346; 38RT 5597.)

Detective Petroski noticed that the blood trail continued out of D'Crenza's house and to the south. He followed the trail to Curson Terrace, a small residential street with a lot of foliage. The trail ended on

the driveway of 7640 Curson Terrace. As Detective Petroski was circling the last blood drop with a piece of chalk, a voice from a nearby bush said, "Don't shoot me, don't shoot me," and something to the effect of "I'm bleeding" or "I give up." Detective Petroski withdrew his gun and ordered the person out of the bush. The person said that he could not get out because he was stuck. Shortly thereafter, two police officers arrived and pulled appellant out of the bush. His hands were cut and bleeding. Once out of the bush, appellant yelled, "Hey, I'm good for a rape in Florida, too." (37RT 5295-5299.)

Los Angeles Police Officer Roger Michel was assigned to ride with appellant to the hospital. While en route to the hospital, appellant pleaded with Officer Michel to shoot him. (38RT 5526-5527.) Appellant also made numerous statements about the murder of Paula, telling Officer Michel that he was surprised at Paula's strength and the fight she had given him. He also said that he had "hurt the girl" because he had worked on D'Crenza's house all day, but D'Crenza had not appreciated his work. Appellant further told Officer Michel that, while watching a television program the day before, he had felt a force come over him. Appellant explained that when the feels this force, he cannot control it, and that he was feeling this force when he "hurt the girl." (38RT 5531-5532, 5553.)

At the hospital, when a member of the Los Angeles Police Department's Scientific Investigation Division observed appellant's hands, appellant said, "That would be my blood. Her blood would be on my stomach." Appellant told Officer Michel that he was using an alias because he was wanted for rape in Florida, and that he had previously been in mental institutions, but that he had "played games" to get out. Appellant said that he was a habitual criminal, and if Officer Michel did not shoot him, he "would just go out and do it again." (38RT 5532-5534.) Appellant

also told Officer Michel that he was a "Hitler buff" who "followed the stories of Hitler and his career in the military." (38RT 5559.)

In 1984, appellant was convicted of murdering Paula, attempting to murder Theodore, attempting to rape Paula, and burglarizing the Bardsleys' residence. (38RT 5402-5403.)

The prosecution produced further evidence that tended to show, contrary to appellant's suggestions, that appellant was not intoxicated at the time of Paula's murder. According to Officer Michel, during the ride to the hospital, appellant did not appear to be under the influence of anything. (38RT 5527.) Moreover, when Detective Petroski saw appellant at the Hollywood police station, appellant did not appear to be under the influence of anything. (37RT 5300.)

B. Evidence of other crimes

The prosecution also produced other aggravating evidence. When appellant's sister, Teressa R., was a child, appellant made her urinate in his mouth. (41RT 5962; see also 42RT 6194-6197 [court rules that appellant making Teressa urinate in his mouth constitutes criminal activity involving the use of force within the meaning of Penal Code section 190.3, subdivision (b)].) Appellant married 14-year-old Rebecca K. in 1975. While they were married, appellant beat her, choked her, made her have sex with him while he put a knife to her throat, gave her razor blades and told her to cut her wrists, and put items in her rectum. (38RT 5460-5462.) Appellant told Rebecca that these sex acts were enjoyable to him. (38RT 5491.) Rebecca did not want to engage in these sex acts, but appellant was violent and controlling, and she did not know how to stop them. (38RT 5463.)

At some point in time after they were married, appellant and Rebecca lived with the McDowell family in Florida. While there, appellant would attack and assault Rebecca. Thomas McDowell, appellant's brother,

recalled one incident where appellant grabbed Rebecca's hair and dragged her along the ground. (42RT 6143.)

On February 24, 1977, four-year-old Curtis M. lived in a trailer park in Jacksonville, Florida, with his parents. Appellant and his wife lived in the same trailer park. Curtis knew appellant and his wife; they were friends of his family. On the afternoon of February 24, Curtis was playing in front of his trailer when appellant asked Curtis if he wanted to earn a quarter. Since Curtis wanted the quarter, he went with appellant to appellant's trailer. (38RT 5406-5409.)

Appellant told Curtis to go to his bedroom because he had something for him to do. When appellant locked the door, Curtis became afraid. Appellant told Curtis to take off his clothes, and then appellant took off his own clothes. Appellant put on a condom and lubricated it. He told Curtis to suck his penis, and Curtis complied. Appellant then sucked Curtis's penis. Appellant then told Curtis to lie on the bed on his stomach. When Curtis complied, appellant inserted his penis into Curtis's rectum. Appellant had sex with Curtis for approximately thirty minutes. After Curtis got dressed, appellant gave him a quarter. Curtis went home and told his parents, who called the police. Appellant was arrested and later convicted of lewd and lascivious conduct. (38RT 5403, 5410-5413, 5462-5463.)

After the Curtis M. incident, appellant was committed to Florida State Hospital in Chattahoochee. While appellant was confined there, Rebecca divorced him. She, however, remained in hiding for several years because she believed that appellant would kill her if he found her. (38RT 5462-5464.)

In 1981, after he had been released from the hospital, appellant was living in Margate, Florida, with his brother, Ronald McDowell. On one occasion when Thomas and appellant's mother, Shirley McDowell, were

visiting them, appellant and Ronald got into a fight. Thomas left with appellant and they went to a bar. (41RT 5912-5914; 42RT 6141-6142.) At the bar, appellant told Thomas that, if it was the last thing he ever did, he would definitely kill Rebecca. He further told Thomas that he would kill him if Thomas gave him a reason. (42RT 6144.) In Thomas's estimation, appellant "was like an animal really, full of hate, like a bobcat or a lion that's been shot . . . ." (42RT 6147.) Thomas continued, "I mean it's just like he was wild. He was just ready to get someone. I knew he was going to get someone. He was going to hurt somebody, you could see it." (42RT 6148.)

After the fight with Ronald, appellant moved out and began living in a tent near the house of Patricia R. in Pompano Beach, Florida. Patricia lived in the house with her six-year-old son Paul, her friend Diane, and Diane's son. On the night of July 29, 1981, Patricia was home with Paul; Diane and her son were out of town. Appellant knocked on the door and told Patricia that he had been mugged and needed to use her phone to call police. When Patricia allowed him into the house, she noticed that appellant was not wearing anything except tennis shoes. Appellant asked for a towel to cover himself. He then picked up the phone and appeared to have a conversation with police. (38RT 5431-5435; 41RT 5914.)

After requesting a pair of shorts, appellant asked Patricia if he could stay in the house while he waited for the police. Patricia agreed, but then noticed that appellant was wearing jewelry. Now nervous, Patricia asked appellant why he was wearing jewelry if he had just been mugged. Appellant told her that the muggers were in a hurry and did not take everything. Patricia asked when the police would arrive. Appellant said that they would arrive in a while, and told her that she did not have anything to worry about. (38RT 5435-5436.)

Appellant came over and sat on the couch next to Patricia, turned her face toward his, told her that he would like to make love to her, and tried to kiss her. Patricia declined, telling appellant that she was seeing somebody. Nervous about appellant's sexual overture, Patricia excused herself, called her friend Carol, and asked Carol to call her back. Patricia then asked appellant to wait outside for the police. When appellant had left, Patricia called Carol, told her what had happened, and asked if she and Paul, who had been put to bed prior to appellant's arrival, could spend the night with her. While she was on the phone, appellant yelled through the window, "Hey, you know, lady, don't get all upset now. Nothing is going to happen." (38RT 5420-5421, 5437-5438.)

Patricia woke Paul and had him change his clothes. As they were approaching their car, appellant, now completely naked, jumped out from behind the car and grabbed Patricia. He told her that if she was not going to do it his way, then he was going to do it his way. Paul started running and screaming. Appellant told Patricia to get Paul or he would kill him. And appellant told Paul that he would kill him and his mother if he "didn't shut up." Paul then stopped running. Appellant told Patricia that she was going to do what appellant wanted her to do, and that if she refused, he would kill her, and then "do it" to her son, and then kill him. Patricia took Paul back into the house. (38RT 5423-5425, 5438-5439.)

Appellant told Patricia to put Paul in his bedroom and to call Carol and tell her that she had changed her mind and was not coming. When Patricia had done as appellant requested, appellant told her to take her clothes off and go into the other bedroom. Over a period of approximately two hours, appellant inserted his penis into her vagina, forced Patricia to insert her fingers into his rectum, made Patricia perform oral sex on him, directed her to fondle his testicles, made her crawl on the floor "like a dog" and sodomized her as she did so, shaved her pubic hair, and inserted the

razor into her rectum. Appellant told Patricia not to cry, and warned her if she did, he would do it to Paul and then kill him. (38RT 5439-5444, 5448.)

During these acts, Carol would periodically call to see why Patricia had changed her mind; she thought that something was not right. Appellant made Patricia answer the phone and stood near her as she spoke. During one conversation, Carol asked Patricia if "that guy" had left. Patricia said "no," alerting Carol that she was in trouble. (38RT 5441.) Later the police called and asked if the perpetrator was still there. Patricia said yes. (38RT 5448-5449.)

When Patricia hung up the phone, appellant made her perform oral sex on him. He instructed her to hold the semen in her mouth when he ejaculated, and then put it in his mouth. However, as soon as appellant ejaculated, Carol called again, and appellant told Patricia to swallow it and answer the phone. When Patricia ended the phone call, appellant told her to go outside and get his cigarettes. As appellant smoked a cigarette, he told Patricia to make him a glass of tea. Patricia poured appellant a glass of tea and moved to hand it to him, but appellant instructed her to put a paper towel around the glass. When Patricia asked him if that was to conceal his fingerprints, appellant said yes, and explained that he had "done enough time" to know "all the tricks." Appellant then took Patricia's keys and locked the deadbolt on the door. He handed the keys back to Patricia and told her to wash them off so that his fingerprints would be removed. Appellant then forced Patricia back into the bedroom for more sex acts. (38RT 5450-5452.)

Shortly thereafter, Patricia saw headlights in her driveway. Appellant pushed Patricia toward the front door, and assuming that it was Carol, told Patricia to "get out there and make that cunt leave." When Patricia saw that it was her ex-brother-in-law, she ran to the car, told him that she had been raped, that the rapist was still in the house, and that she needed to get Paul

out of the house. Patricia then ran to Paul's bedroom window, broke it, and pulled Paul out of the window. In the process, she lacerated her legs. As they drove away, they passed police cars. They then returned and Patricia told the police what had happened. Police searched the house, but appellant was no longer there. (38RT 5452-5455.)

C. Victim impact evidence

Finally, the prosecution produced evidence of the impact of Paula's death on her husband, Jose Rodriguez, and her daughters, Maria Rodriguez and Valeria Andrade. Jose had been married to Paula for nine years. Jose has suffered every minute since Paula died. His family is not well; they are not united at all. Jose thinks about Paula every day. (39RT 5600-5601, 5608.)

Maria was nine years old when her mother died. She misses her mother and thinks about her every day. She and her mother had talked about how they would celebrate Maria's fifteenth birthday party, but because her mother was killed, she ended up not having a fifteenth birthday party at all. Maria is not married and does not want to have children because she does not want them to suffer the way she is suffering and will suffer for the rest of her life without her parents. After her mother's death, Maria "had a problem" with her father and other members of her family. She is now not close with her father at all. (39RT 5630-5633.)

Valeria has very little memory of her mother, but misses her. She sometimes imagines what her life would be like had her mother lived. She wonders if she would not be so estranged from her older sister. (39RT 5611-5612.)

II. DEFENSE CASE-IN-CHIEF

A. Family history

The defense presented evidence pertaining to appellant's dysfunctional and violent family life and upbringing. Shirley was 15 years old when she married appellant's father, Charles McDowell, Sr., in 1952. She gave birth to appellant the following year at age 16. Charles Sr. began beating appellant when he was three weeks old because he would cry at night. When appellant was two years old, he wet his bed every night. Every morning, Charles Sr. would beat appellant for wetting the bed and rub his nose in the urine. One time, when two- or three-year-old Ronald wet his pants, Charles Sr. pinched his penis so hard that Ronald needed an operation. On another occasion, when appellant was about five years old, after he and Ronald set the doghouse on fire, Charles Sr. took their clothes off and held them over the fire. (41RT 5904-5909, 5916.)

Roberta Williams, appellant's paternal aunt, saw that the McDowell children frequently had bruises and marks where Charles Sr. had hit them or used a belt on them. On one occasion, when appellant was about five years old, after he and Ronald threw pebbles at a pony, Charles Sr. beat them in the face, to the point of bloodying their noses. He then dared them to cry. (41RT 5861-5862, 5867-5869.)

Appellant received the worst of Charles Sr.'s beatings. (42RT 6108.) When Charles Sr. would beat his sons, he would often use a belt, but sometimes a hickory or his hands. These beatings left welts. Charles Sr. would continue the beating until the urge passed him. Charles Sr.'s beatings were unpredictable; it was impossible for the children to know what would trigger them. A beating of one child would often lead to the beating of another child. One time, at the dinner table, when appellant and

Charles Sr. got into a disagreement, Charles Sr. threw a fork at appellant. The fork lodged itself in the skin of appellant's fingers. (42RT 6110-6113.)

Another time, Charles Sr. broke wind at the dinner table, and then backhanded Thomas, knocking him out of his seat. On another occasion, when Thomas was four years old, Charles Sr. jerked Thomas off a piano stool, threw him to the ground, and stomped on his right side. As a result, Thomas suffered broken ribs and developed a disease called leg perthes, which required him to be in a body cast for one and a half years. Even after Thomas was placed in the cast, Charles Sr. continued beating him. (42RT 6114-6118.) On one occasion, Charles Sr. was attempting to teach Ronald homonyms. Every time Ronald spelled the word wrong, Charles Sr. would hit him in the back of the head with his fist. (42RT 6127-6129.) Every time a child brought home a report card, it did not meet Charles Sr.'s expectations, and Charles Sr. would beat that child. (42RT 6132.)

In 1969, when Charles Sr. was painting the house, his youngest child, three-year-old Carol, spilled his paint. Charles Sr. pushed Carol's face into the spilled paint. Shirley wrestled Carol away from Charles Sr. and tried to clean her face, but Charles Sr. followed Shirley intent on wresting Carol away from her. Appellant, however, struck Charles Sr. in the head with a two-by-four, and ran out of the house. Charles Sr. chased appellant and eventually caught him. Charles Sr. grabbed him by the throat, lifting his feet off the ground. Ronald begged for Charles Sr. not to kill appellant. (42RT 6119-6122.)

The McDowell family moved from South Carolina to Pompano Beach, Florida, in 1969. Bonnie Haynes lived three houses away from the McDowells in Pompano Beach and interacted with them. (40RT 5822-5823, 5825; 42RT 6101.) Haynes would see bruises on appellant's and Ronald's arms and back. (40RT 5832.) They said that their father had inflicted the bruises. On one occasion, Ronald was working in the yard

without his shirt on. He was sunburned. Haynes saw Charles Sr. slap Ronald's sunburn. (40RT 5835-5836.) On another occasion, Teressa ran into Haynes's house and asked her to hide her from her father. Charles Sr. was right behind her and he was angry. (40RT 5846-5847.)

Williams, Thomas, and Haynes never saw Charles Sr. hug or kiss appellant. They never heard him praise appellant; he talked to appellant in a violent, derogatory manner, constantly criticizing him and telling him that he was dumb and ignorant. (40RT 5840-5841; 41RT 5874; 42RT 6137.) Charles Sr. created in appellant the belief that he was no good and going to hell. (40RT 5843.)

Charles Sr. was also abusive to Shirley. He would beat her in front of the children. He would typically beat her with a belt, often using the belt buckle. He would also beat her with his fists. Charles Sr. "busted" and bloodied Shirley's nose on several occasions. (42RT 6108-6110.) When Shirley would intervene on behalf of a child, Charles Sr. would start beating her. (42RT 6112.) Charles Sr. once pointed a gun at Shirley. (42RT 6126.) Charles Sr. was also verbally abusive to Shirley, telling her that she was filthy and nasty, that she stank, that she was lazy, and that she did not know how to do anything. (41RT 5871.)

Shirley was a poor mother to appellant. When appellant was approximately four days old, Shirley brought him to the house of Williams's mother. Appellant was constantly crying, and Shirley kept putting a bottle in appellant's mouth. When Williams's mother opened the bottle, she saw that the milk was curdled and could not get through the nipple. When Williams's mother cleaned the bottle, appellant went to sleep. There were also times where Williams saw that appellant's bottom was bloody because he had worn a dirty diaper for a long period of time. When appellant was older, Williams saw Shirley beat him with a broom, slap him in the face, and beat him with her fist. (41RT 5875-5877.)

Neither Williams nor Thomas ever saw Shirley show any love or affection to appellant. They never saw Shirley hug or kiss appellant, or praise him. Thomas could not recall any positive interaction between appellant and their parents. The older appellant grew, the more violent Shirley became. When the family lived in Florida, Shirley briefly left Charles Sr. five or six times. When she did so, she would take the four younger children with her, and leave appellant and Ronald with Charles Sr. (41RT 5875, 5878; 42RT 6123, 6137-6138.)

Religion was one of the focal points of McDowell family life. Charles Sr. forced the family to go to church every time the doors were open. He also provided religious instruction to the family at home. If anyone showed any type of resistance to Charles Sr.'s preaching, he or she would be beaten. When Shirley fell asleep once during Charles Sr.'s sermon, he beat her. (41RT 5905; 42RT 6124-6125.) Charles Sr.'s religious instruction was forceful and condemning; it was never loving. The scriptures Charles Sr. quoted never dealt with love or joy; they always concerned hell and damnation. Charles Sr. would regularly tell his children that they were going to hell. Charles Sr., however, portrayed himself as godlike and perfect. (40RT 5843-5844; 41RT 5873, 5911-5912.) After Carol was hit and killed by a car, Charles Sr. would gather the family, place a picture of Carol on the coffee table, and read the pastor's eulogy. Charles Sr. would tell the children that Carol's death was their fault. This would upset the children and make them cry. (40RT 5827-5829.)

Charles Sr. began sexually molesting Teressa prior to her earliest memories. At their house in South Carolina, the closet in the bedroom of Charles Sr. and Shirley and the closet in Teressa's bedroom shared a wall. Charles Sr. made a hole in the wall and would come through the hole every night into Teressa's room. Charles Sr. would molest Teressa until he

ejaculated. He would then start crying and ask for forgiveness. (41RT 5910, 5946-5950; 42RT 6104-6106.)

Shirley bought groceries for the family on Saturdays. Teressa would beg to go with her every Saturday, but she was never allowed to go. Instead, Teressa and her siblings would work in the yard. At some point every Saturday, Charles Sr. would call Teressa inside and make her watch out the window while he molested her. (41RT 5953-5954.) One time, when Thomas was about four years old, he was home alone with Charles Sr. and Teressa. He opened the door to his father's bedroom and saw that both Charles Sr. and Teressa were naked. Charles Sr. was holding Teressa in his arms. When Thomas opened the door, Charles Sr. tried to run and hide so that Thomas would not see him. (42RT 6134-6135.)

Teressa had to be home everyday to kiss Charles Sr. when he arrived home from work. If she was not, "there would be hell to pay" for the entire family. Teressa was expected to kiss Charles Sr. in the way that a wife kisses her husband. Teressa told her mother that she did not want to kiss her father, but Shirley told her that she had better do it so that the rest of the family could have peace that night. (41RT 5951-5953.) At some point, Shirley had to stay in the hospital. While Shirley was in the hospital, Teressa had to sleep with Charles Sr. as if she were the mother of the family. (41RT 5955.) One night, when Teressa was 16 years old, Shirley caught Charles Sr. in Teressa's bedroom. When Shirley turned on the lights, Charles Sr. jumped behind the bed. (41RT 5910, 5957-5958.)

Charles Sr. was very suspicious of Teressa and her siblings' interactions with her. Charles Sr. would collect Teressa's panties and ask her about the stains on them. Charles Sr. would always accuse his sons of having sex with Teressa. (41RT 5910-5911.) Teressa and appellant were not allowed to talk to each other; if they did, their father would suspect that they were having sex. They were not allowed to touch each other or pass

each other in the hallway. (41RT 5955-5956.) Charles Sr. would not allow his sons to use the bathroom in the middle of the night because he believed that they were trying to see Teressa. (40RT 5846.)

When Teressa was 17 years old, she felt something come over her and decided to kill her father. She retrieved a pistol from her parents' bedroom and planned to kill Charles Sr. when he walked in the door. Shirley, however, stopped her. When Shirley asked Teressa why she wanted to kill Charles Sr., Teressa told her about the sexual abuse. Shortly thereafter, Charles Sr. moved out of the house. (41RT 5956, 5958-5959.)

One night, after Charles Sr. had moved out, Rebecca was spending the night with Teressa. Around midnight, Teressa and Rebecca caught Charles Sr. outside their window, trying to hear what they were talking about. When Rebecca was 16 years old, after appellant had been committed to the state mental institution, Charles Sr. helped Rebecca move closer to appellant. As they were driving toward Chattahoochee, Charles Sr. made a pass at Rebecca. He pulled the truck over, grabbed Rebecca's face, and tried to kiss her. When Rebecca asked what he was doing, Charles Sr. responded, "You're my daughter-in-law. It's all right." Rebecca rebuffed his advance. (38RT 5472-5477.)

When appellant was nine or ten years old, his uncles began forcing themselves upon him homosexually. After that, similar incidents occurred between appellant and his employers, schoolmates, and members of his boy scout troop. (40RT 5736-5738; 42RT 6161, 6165-6166.)

B. Performance in Mentally Disordered Sexual Offender Program

Appellant also presented evidence that he performed well in Florida's Mentally Disordered Sexual Offender Program. That program sent persons who had been charged with sexual offenses and been found to have a mental disorder that manifested itself in a sexual way to a state mental

hospital. In 1977, Robbie Edwards was a psychiatric nurse in appellant's unit at Florida State Hospital in Chattahoochee. (40RT 5703-5706.) In Edwards's opinion, appellant did very well in the program, earning grades of "very good" and "excellent." (40RT 5716.) Edwards believed that appellant genuinely wanted help and benefited from the program. (40RT 5720.) In 1979, Edwards and the staff recommended that appellant be returned to court because he no longer met the definition of an offender under the Florida statute. (40RT 5731.)

C. Intoxication Evidence

Appellant also produced evidence suggesting that he may have been intoxicated at the time of Paula's killing. Roger Meunier, a friend of D'Crenza's, knew appellant in 1982. (40RT 5765-5767.) Meunier observed appellant using marijuana, blotter acid, and LSD. Appellant began coming to Meunier's place of business with increasing frequency to ask for money to buy drugs. Meunier tried to put a stop to appellant's behavior by telling him that nobody could do that amount of acid "without flipping out." Appellant would show up at Meunier's place of business in the morning and he would already be high. Appellant came to Meunier's place of business within three days of May 20, 1982. (40RT 5770-5774.)

Speare Primpas, an attorney, met appellant in 1981. At the time, both Primpas and appellant were involved in illegal drug use. Appellant was a heavy user of cocaine, marijuana, and MDA, using them on a daily basis. Primpas and appellant would stay up for four of five days at a time doing drugs. Most of the time appellant was under the influence. (40RT 5783-5788.)

On May 20, 1982, Primpas received a call from a detective informing him that they had someone in custody who said that Primpas was his attorney. When Primpas arrived at the police station, detectives told him that appellant was a suspect in a murder case and allowed Primpas to meet

with him in an interview room. Primpas asked appellant what had happened. Appellant responded, "Well, I assaulted this woman." When Primpas informed appellant that he had been charged with first degree murder, appellant's face went white, he put his head between his legs, and he started to cry. To Primpas, it appeared that appellant was high and had not slept for three or four days. (40RT 5788-5791.)

D. Behavior in custody

Finally, appellant presented evidence that he was a conforming inmate who caused no problems for staff or other inmates at San Quentin. Daniel Vasquez served as warden of San Quentin State Prison for ten of the years that appellant was housed there. According to Vasquez, appellant conformed very well to the rules and regulations of prison, receiving only one minor rule infraction. (42RT 6045-6048.) If appellant continued with his same behavior, he would be an asset to the prison because a conforming inmate is a positive influence on other inmates. If appellant were given a life-without-the-possibility-of-parole sentence, it would be more likely that he would be at risk than to pose a risk because (1) he is a self-admitted homosexual, (2) he molested a child, (3) his murder victim was Hispanic, and (4) he is small in stature. (42RT 6053-6056.)

III. PROSECUTION REBUTTAL

Teressa told Los Angeles Police Detective Michael Gannon that appellant was "evil and mean." Teressa also said that, after appellant was convicted, he wrote her letters threatening to kill her and her family, and to kill Rebecca. Detective Gannon asked for the letters, but Teressa said that she had destroyed them. (42RT 6089-6092.)

Michael Pickett, a regional administrator for the California Department of Corrections, supervises 12 wardens of northern California prisons. (43RT 6223-6224.) Pickett does not believe that appellant would

be an asset if he were released into the general population. (43RT 6228.) According to Pickett, it is premature to classify appellant as prey or victim if he were moved to the general population. There are a lot of homosexuals in state prison and the fact that appellant's murder victim was Hispanic would not, in and of itself, cause any problem for appellant in the general population. If appellant's history were to become a problem, he could be moved to a facility where there are other inmates with similar problems. (43RT 6232-6233.)

ARGUMENT

I. THE RETRIAL OF THE PENALTY PHASE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant first contends that "the long-delayed and repeated retrial of the penalty phase" violated his state and federal constitutional speedy trial rights, his rights to due process, and his right to freedom from cruel and unusual punishment. (AOB 48-69.) Respondent submits that the retrial of the penalty phase did not violate appellant's constitutional rights.

A. Relevant Proceedings

Appellant murdered Paula on May 20, 1982, and was arrested later that day. (37RT 5260, 5266-5267, 5299.) After a jury convicted him of that crime and others, he was sentenced to death on October 23, 1984. (20-ART 2506, 2533.) This Court affirmed the conviction and sentence on August 25, 1988. (*People v. McDowell*, *supra*, 46 Cal.3d 551.) Appellant filed his first state petition for writ of habeas corpus in this Court on August 18, 1989. That petition was denied on September 21, 1989. (1CT 52-53.) On December 20, 1990, appellant filed a federal petition for writ of habeas corpus in the United States District Court. On October 1, 1991, the district court granted appellant's motion to stay the proceedings in that court while

he exhausted other claims in this Court. (1CT 59-62.) On December 2, 1991, appellant filed a second petition for writ of habeas corpus in this Court. That petition was denied as untimely on July 9, 1992. (1CT 54-55.) On May 7, 1993, appellant filed an amended petition for writ of habeas corpus in the United States District Court. (1CT 63.) On November 30, 1995, after a lengthy evidentiary hearing, the district court denied appellant's amended petition for writ of habeas corpus. (1CT 74, 76.)

Appellant appealed to the Ninth Circuit Court of Appeals, filing his opening brief on March 18, 1996. (1CT 86.) On February 26, 1997, a panel of the Ninth Circuit Court of Appeals unanimously affirmed the denial of relief on appellant's guilt-phase claims, and in a 2-to-1 vote, denied appellant relief from the death sentence on the asserted ground that the trial court erred in failing to correct jury misapprehension as to what factors may be considered in mitigation. (*McDowell v. Calderon*, *supra*, 107 F.3d 1351.) However, on November 24, 1997, an en banc panel of the Ninth Circuit concluded, in a 7-to-4 vote, that the asserted error concerning mitigation warranted reversal of appellant's death sentence. (*McDowell v. Calderon*, *supra*, 130 F.3d 833.) On April 27, 1998, the United States Supreme Court denied the prosecution's petition for writ of certiorari. (*Calderon v. McDowell* (1998) 523 U.S. 1103 [118 S.Ct. 1575, 140 L.Ed.2d 807.) Consequently, on September 15, 1998, the federal district court granted appellant's amended petition for writ of habeas corpus with respect to his death sentence. (1CT 1-2.)

The prosecution elected to retry the penalty phase. (1CT 7.) Prior to the retrial, appellant moved to preclude the prosecution from again seeking the death penalty, arguing that the "unconscionable delay" between the first trial and the retrial violated appellant's constitutional rights. (1CT 29-170.) The trial court denied the motion. (1CT 171.) Retrial of the penalty-phase commenced in the superior court on July 28, 1999. (2CT 306.) On August

26, 1999, the trial court declared a mistrial when the jury indicated that it was hopelessly deadlocked. (6CT 1555-1556.) A second retrial of the penalty-phase began on November 2, 1999. (6CT 1651.) On December 1, 1999, the jury returned a verdict of death. (11CT 3030-3031.) On January 26, 2000, the judge denied appellant's motion to modify the verdict, and imposed the death sentence. (11CT 3038-3044.)

B. The Retrial of the Penalty Phase Did Not Constitute Cruel and Unusual Punishment

Appellant first claims that the "state's repeated retrials of [appellant] after lengthy delays for which he was not responsible" violated "the proscriptions against cruel and unusual punishment articulated in Article 1, section 17 of the California Constitution and in the Eighth Amendment to the United States Constitution." (AOB 53.) Appellant, however, fails to cite any cases supporting his position. And with good reason—it appears there are no cases holding that a lengthy delay before execution constitutes cruel and unusual punishment under the state or federal Constitution. (See *Allen v. Ornoski* (9th Cir. 2006) 435 F.3d 946, 958-960 [defendant's claim that execution after a long tenure on death row is cruel and unusual punishment "is devoid of support in federal or state law"]; see also *Knight v. Florida* (1999) 528 U.S. 990 & 993 n.4 [120 S.Ct. 459, 145 L.Ed.2d 370] (conc. mem. opn. of Thomas, J., from denial of petn. for writ of cert.) [Justice Thomas "is unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed" and "is not aware of a single American court that has accepted such an Eighth Amendment claim."].)

Indeed, this Court has repeatedly held that the delay inherent in the capital appeals process is not a constitutional defect, but instead a constitutional safeguard, because it assures careful review of the

defendant's conviction and sentence, and that consequently these delays do not amount to cruel and unusual punishment under the state or federal Constitution. (*People v. Anderson* (2001) 25 Cal.4th 543, 606; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Hill* (1992) 3 Cal.4th 959, 1014, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *Chambers v. Bowersox* (8th Cir. 1998) 157 F.3d 560, 568, 570 [noting that death row delays do not constitute cruel and unusual punishment because delay results from the "desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone's life"].)

Appellant seeks to distinguish his situation by pointing out that he ultimately prevailed on one of his claims and succeeded in obtaining a reversal of his initial death sentence. (AOB 54-55.) This distinction, however, does little, if anything, to advance his claim of cruel and unusual punishment. *People v. Anderson*, *supra*, 25 Cal.4th 543, is instructive on this point. In that case, the defendant was sentenced to death in 1979. In 1987, this Court affirmed the guilt judgment, but reversed the death sentence due to instructional error. The prosecution elected to retry the penalty phase and, in 1991, the defendant was again sentenced to death. (*Id.* at p. 559.)

On appeal, the defendant claimed that his execution after two decades of confinement on death row would be cruel and unusual punishment. This Court rejected that claim, concluding that "an argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606.) This Court further noted that, since it had affirmed the guilt judgment and special circumstance findings in its

initial review of the case in 1987, the "defendant has had no conceivable complaint about his extended incarceration awaiting appeal, because life without possibility of parole was the minimum sentence he faced." (*Ibid.*)

This case bears a strong resemblance to *Anderson*. Both appellant and the defendant in *Anderson* were successful in persuading a higher court to reverse their death sentences on grounds of instructional error, and were then retried and again sentenced to death. *Anderson* makes clear that a death sentence reversal and penalty retrial sandwiched between two lengthy stays on death row does not render the death penalty cruel and unusual punishment. This is especially true in cases such as this where appellant cannot complain about his extended incarceration, because life without the possibility of parole was the minimum sentence he faced.

Appellant attempts to escape the logical force of this reasoning by placing great emphasis on the "agony" he has suffered as a result of his prolonged stay on death row. (AOB 53-56.) But again, his argument is unpersuasive. While this Court has acknowledged "the significant stress faced by prisoners on death row," it has rejected the notion that "their fate is worse than death, which [this Court has] long recognized as a constitutional punishment." (*People v. Ochoa* (2001) 26 Cal.4th 398, 464.) Thus, neither Petitioner's prolonged stay on death row nor its accompanying "agony" amounts to cruel and unusual punishment.

Appellant faults the prosecution for failing to "acknowledge" the instructional error made by the trial court in 1984 and seek a modification of appellant's sentence from death to LWOP. (AOB 55.) His criticism is absurd. Until the en banc Ninth Circuit panel found instructional error in 1997, every court that had ruled on appellant's claim of instructional error—the trial court, this Court, the federal district court, and even the three-judge Ninth Circuit panel—had rejected it. Even the en banc panel was badly split on the issue, with four of the eleven judges ruling that there

was no instructional error.[2] Not only would it be unheard of for the prosecution to concede error as to instructions that four courts had ruled were proper, doing so arguably would have violated the prosecution's ethical responsibilities. (See *People v. Vasquez* (2006) 39 Cal.4th 47, 65 [zealous advocacy forms essential part of prosecutor's proper duties].)

Appellant further claims that, given the delay, his death sentence no longer serves the legitimate penological justifications of retribution and deterrence. (AOB 57-59.) This Court has flatly rejected an identical claim:

> The delay of which defendant now complains does not prevent the fulfillment of either [deterrence or retribution]. Insofar as defendant complains of the extreme discomfort he suffers as a result of his uncertainty regarding execution, that discomfort would enhance the deterrent effect of the death penalty by increasing the penalty imposed for the commission of capital crimes. By contrast, an announcement by this court that any defendant whose automatic appeal has been pending for many years is exempt from subsequent execution would eviscerate any possible deterrent effect of a death sentence, for it would probably never be imposed.
>
> Similarly, executing defendant, notwithstanding the period that has elapsed since his conviction and sentencing, would further the retributive purpose of capital punishment. Insofar as the "just des[s]erts" theory holds certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier. Furthermore, defendant, by delaying his execution for these past nine years, has already reduced the full retributive function of execution, and indefinitely rendered his status more like that of a life prisoner, his objective at trial. To bar his execution would

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[2] In his dissent, Judge Kozinski wrote: "This is, so far as I know, the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." (*McDowell v. Calderon, supra*, 130 F.3d at p. 843 (dis. opn. of Kozinski, J.).)

> further frustrate the retributive function of capital punishment. [¶] . . . We therefore conclude that execution notwithstanding the delay associated with defendant's appeals furthers both the deterrent and retributive functions; shielding defendant from execution solely on this basis would frustrate these two penological purposes.

(*People v. Ochoa*, *supra*, 26 Cal.4th 398, 463-464, internal footnotes and citations omitted; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 45.)

For these reasons, appellant's death sentence does not constitute cruel and unusual punishment under the state or federal Constitution.

C. The Retrial of the Penalty Phase Did Not Violate Appellant's Federal Speedy Trial or Due Process Trial Rights

Appellant also contends that the delay of 15 years between the imposition of the death penalty in 1984 and the 1999 retrials violated his federal speedy trial and due process rights. (AOB 59-69.) This claim, however, contravenes *United States v. Ewell* (1966) 383 U.S. 116 [86 S.Ct. 773, 15 L.Ed.2d 627]. Moreover, even if the claim survives *Ewell*, and the balancing test described in *Barker v. Wingo* (1972) 407 U.S. 514 [92 S.Ct. 2182, 33 L.Ed.2d 101] must be applied, an analysis of the *Barker* factors confirms that appellant's constitutional rights were not violated.

1. Appellant's Position Contravenes United States Supreme Court Authority

Appellant's claim that his speedy trial rights were violated is in direct conflict with the United States Supreme Court's reasoning in *United States v. Ewell*, *supra*, 383 U.S. 116. In *Ewell*, the defendant moved to have his conviction vacated when an intervening court decision gave him legal cause to do so. When the prosecution filed a new complaint, the defendant moved to have it dismissed on speedy trial grounds. (*Id.* at pp. 118-119.) The United States Supreme Court rejected that claim, stating:

> It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. [Citations.] The rule of these cases, which dealt with the Double Jeopardy Clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. [Citation.] These policies, so carefully preserved in this Court's interpretation of the Double Jeopardy Clause, would be seriously undercut by [an] interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction].

(*Id.* at p. 121.)

Accordingly, after the Ninth Circuit reversed appellant's death sentence, the prosecution had the right to retry the penalty phase "in the normal course of events." Appellant does not argue that the retrial after the death sentence reversal did not occur in the normal course of events. Nor could he, given that the retrial occurred 10 months after the issuance of the writ of habeas corpus, and he personally agreed to all of the time waivers during that period (21RT 2547-2548, 2553, 2555, 2558). (See *People v. Anderson*, *supra*, 25 Cal.4th at p. 603 [no violation of speedy trial rights where retrial was held three years after reversal of death sentence and defendant personally waived all delays except for one].)

Because the prosecution had the right to retry the penalty phase after the reversal of appellant's death sentence, and it did so in the normal course of events, appellant's claim that the retrial violated his speedy trial rights must be summarily rejected.

2. Appellant's Speedy Trial Claim Likewise Fails Under the *Barker* Test

In *Barker v. Wingo*, *supra*, 407 U.S. 514, the United States Supreme Court analyzed the right to a speedy trial guaranteed to the accused by the

Sixth Amendment to the United States Constitution and explained the criteria by which the speedy trial right is to be judged. The Supreme Court rejected bright-line tests, stating it found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." (*Barker v. Wingo*, *supra*, 407 U.S. at p. 523.) The Supreme Court announced a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." (*Id.* at p. 530.) This test "compels courts to approach speedy trial cases on an ad hoc basis" balancing four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. (*Ibid.*) No one of those factors is a necessary or sufficient condition to finding a due process violation. (*Id.* at p. 533.) "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." (*Ibid.*)

a. Length of Delay

In *Barker v. Wingo*, *supra*, 407 U.S. 514, the United States Supreme Court described the length of the delay as a "triggering mechanism," explaining: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." (*Id.* at p. 530.) Appellant claims that the 15-year delay between the imposition of his death sentence in 1984 and the penalty-phase retrials in 1999 triggers inquiry into the other three parts of the test. (AOB 61.) His analysis fails from the start.

Appellant's speedy trial claim does not date back to the time he was sentenced to death in 1984, but instead began to run after his federal petition for writ of habeas corpus was granted on September 15, 1998. Logic dictates that, until the writ issued, appellant had no right to a trial, much less a speedy trial. Moreover, such a conclusion is consistent with the United States Supreme Court's pronouncements in *United States v.*

Ewell, *supra*, 383 U.S. 116, and *United States v. Loud Hawk* (1986) 474 U.S. 302 [106 S.Ct. 648, 88 L.Ed.2d 640], that it did not want to give the Speedy Trial Clause an interpretation that would raise a Sixth Amendment obstacle to retrial following a successful attack on a conviction. (*United States v. Loud Hawk*, *supra*, 474 U.S. at p. 313; *United States v. Ewell*, *supra*, 383 U.S. at p. 121; see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 603 ["With respect to the penalty retrial, defendant does not argue that his speedy-trial rights attached any earlier than the issuance of our remittitur in [the prior case reversing defendant's death sentence]."]; Pen. Code, § 1382, subd. (a)(2) [defendant must be brought to trial within 60 days after issuance of writ granting new trial].)

Appellant does not argue that the 10-month delay between the issuance of the writ and his first retrial was presumptively prejudicial. Nor could he, plausibly. In *Doggett v. United States* (1992) 505 U.S. 647 [112 S.Ct. 2686, 120 L.Ed.2d 520], the United States Supreme Court noted that, depending on the nature of the charges, lower courts had generally found delays to be presumptively prejudicial as they approached a year. (*Id.* at p. 652, fn. 1.) However, the more complex the case, the more time must pass before the delay may be declared presumptively prejudicial. (*Barker v. Wingo*, *supra*, 407 U.S. at pp. 530-531.)

Here, not only does the 10-month delay in this case fall short of the *Doggett* one-year benchmark, but this case was indisputably complex—it involved a 17-year-old murder and other aggravating evidence that was even older, 15 boxes of materials that defense counsel needed to review (21RT 2554), and out-of-state witnesses who proved difficult to locate and bring to court (see 21RT 2557). Under these circumstances, the 10-month delay in this case was not presumptively prejudicial, and consequently this Court need not inquire into the remaining *Barker* factors.

b. Reason For the Delay

Assuming arguendo that the delay triggers inquiry into the remaining *Barker* factors, those factors likewise militate against a finding of a Speedy Trial Clause violation. In *United States v. Loud Hawk*, *supra*, 474 U.S. 302, the United States Supreme Court described the second *Barker* factor, the reason for the delay, as the "flag all litigants seek to capture." (*Id.* at p. 315.) Here, contrary to his assertion, this factor does nothing to tilt the balance in appellant's favor.

The primary reason for the 15-year delay of which appellant complains was the state and federal courts' exceptionally thorough review of his claims on direct and collateral review. Had the review been less thorough, appellant would likely have been executed by now. As this Court explained, the capital appeals process is not a constitutional defect, but instead a constitutional safeguard, because it assures careful review of the defendant's conviction and sentence. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606; see also *Chambers v. Bowersox*, *supra*, 157 F.3d at pp. 568, 570 [noting that death row delays result from the "desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone's life"].) In *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, the Fifth Circuit stated:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.

(*Id.* at p. 439.)

Appellant, like White, benefitted from the careful, meticulous, expensive, and laborious process of appellate and habeas review, eventually obtaining a reversal of his initial death sentence. Surely the government's desire to insure that appellant received a fair trial in accordance with constitutional safeguards is a compelling justification for the delay under the *Barker* test. Moreover, this Court has never recognized "the existence of a 'right to a speedy appeal' as an offshoot of the United States Constitution Sixth Amendment's right to a speedy trial." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1098.)

Also instructive on this point is *United States v. Loud Hawk*, *supra*, 474 U.S. 302. In that case, the defendants filed pretrial, interlocutory appeals, and then argued that the resulting trial delay gave rise to a speedy trial violation. The United States Supreme Court rejected the claim, stating:

> [D]elays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court.

(*Id.* at p. 316.) The Court cited with approval the following passage from *United States v. Auerbach* (5th Cir. 1969) 420 F.2d 921, 924:

> "Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon."

(*United States v. Loud Hawk*, *supra*, 474 U.S. at pp. 316-317.)

Although *Loud Hawk* concerned interlocutory appeals, its reasoning would seem to apply with even greater force to post conviction appeals, given that a convicted defendant has no "right" to a trial, much less a speedy one. Here, appellant does not allege an unreasonable delay caused by the prosecution in his appeals or a wholly unjustifiable delay by the

appellate court, and neither is apparent from the record in this case. As Justice Thomas stated, appellant cannot "avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." (*Knight v. Florida*, *supra*, 528 U.S. at p. 990 (conc. mem. opn. of Thomas, J., from denial of petn. for writ of cert.) For these reasons, appellate delays stemming from appellant's desire to challenge his conviction and sentence do not weigh in favor of his speedy trial claim.

c. Appellant's Assertion of His Speedy Trial Rights

The third *Barker* factor is the defendant's assertion of his *speedy trial* right. This factor "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right," and a defendant's "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." (*Barker v. Wingo*, *supra*, 407 U.S. at pp. 531-532.)

Perhaps tacitly acknowledging that he never asserted his right to a speedy trial until just weeks before his 1999 retrial, appellant attempts to conflate his assertion of instructional error with his assertion of his right to a speedy trial. (AOB 62.) His effort is unpersuasive. The United States Supreme Court made clear in *Barker* that it is "*the defendant's assertion of his speedy trial right*" that counts, not his assertion of some other error. (*Barker v. Wingo*, *supra*, 407 U.S. at p. 531-532, emphasis added.) If this were not so, any error in a case on appeal could be automatically converted into a speedy trial claim in contravention of the policies set forth in *United States v. Ewell*, *supra*, 383 U.S. at page 121 and *United States v. Loud Hawk*, *supra*, 474 U.S. at page 313.

It appears that appellant asserted his right to a speedy trial no sooner than May 27, 1999, the date he filed his motion to preclude the prosecution

from seeking the death penalty in the retrial. (1CT 29.) In *White v. Johnson*, *supra*, 79 F.3d 432, the Fifth Circuit stated:

> Throughout [the appellate and habeas] process White has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition. [¶] . . . White made no effort to inform the Texas courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that White would be grateful for or, at least, indifferent to the delay.

(*Id.* at p. 439.)

Here, appellant, like White, never requested expedited review of his appellate or habeas claims, and the courts reviewing those claims cannot be faulted for assuming that appellant—facing execution—would be grateful for the delay. In essence, appellant wants to have his cake and eat it too. He has already benefitted from a meticulous review process that has delayed his execution for decades. Now, having never complained about the delay until after the reversal of his death sentence, he wants the very delay that saved his life for decades to void his death sentence altogether. Such a result would be manifestly unfair. Appellant's failure to assert his speedy trial right until the eve of his retrial should be fatal to his speedy trial claim. (See *Barker v. Wingo*, *supra*, 407 U.S. at p. 532.)

d. Prejudice to Appellant

Prejudice for purposes of the *Barker* speedy trial analysis is assessed "in the light of the interests of defendants which the speedy trial right was designed to protect." (*Barker v. Wingo*, *supra*, 407 U.S. at p. 532.) These are: (1) preventing oppressive incarceration of the defendant while awaiting trial; (2) minimizing the defendant's anxiety and concern due to the continuing pendency of unresolved criminal charges; and (3) limiting the possibility that the defense will be impaired. (*Ibid.*)

Here, appellant's incarceration during the pendency of his appeals and habeas petitions could not be considered "oppressive" because the judgment of guilt and the special circumstance findings had been affirmed by every court. As a result, appellant "had no conceivable complaint about his extended incarceration . . ., because life without possibility of parole was the minimum sentence he faced." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606.)

Furthermore, at least until late 1997, when the Ninth Circuit reversed his death sentence, appellant could not have had "anxiety and concern due to the continuing pendency of unresolved criminal charges" because the charges against him had been resolved in 1984, and the jury's resolution of those charges had been upheld by every court. If anything, the Ninth Circuit's death-penalty reversal should have helped to alleviate "the significant stress" he faced on death row. (See *People v. Ochoa*, *supra*, 26 Cal.4th at p. 464.) Accordingly, appellant has failed to show that he suffered the first two types of prejudice discussed in *Barker*.

As to the third type of prejudice, any impairment of appellant's defense was slight, and does not establish a speedy trial violation. Appellant first complains that two mitigation witnesses who testified at his first trial—his mother Shirley and his uncle Marshall Brakefield—had since died. (AOB 64.) But their testimony from the earlier trial was available to be read to the jury, and Shirley's prior testimony was in fact read during the defense's case-in-chief. (See *Cousart v. Hammock* (2d Cir. 1984) 745 F.2d 776, 778 ["Cousart was not prejudiced by the delay in securing a retrial since the transcript of previous testimony by any missing witnesses was available"].)

Appellant, however, claims that, had Shirley not died, he would have amplified her testimony at the retrial by having her testify not only that Charles Sr. whipped appellant, but that he did so with such force that it

broke the skin, leaving cuts, sores, welts, and blisters. (AOB 64.) Respondent submits that appellant suffered no prejudice from the absence of this testimony because it would have been merely cumulative to the testimony of other witnesses at the retrial. For instance, appellant's brother Thomas testified that Charles Sr.'s whippings would leave welts, and that appellant received the brunt of Charles Sr.'s physical abuse. (42RT 6108, 6110-6111.) Neighbor Bonnie Haynes also testified that she saw bruises on the McDowell boys, and that they told her Charles Sr. had whipped them. (40RT 5832, 5835-5836.) And aunt Roberta Williams testified that Charles Sr. was very violent toward his children, and that she would often see "marks" where Charles Sr. had used a belt on them.[3] She also witnessed an incident where Charles Sr. beat five-year-old appellant in the face until his nose started to bleed. (41RT 5866-5869.)

Additionally, there was testimony that Charles Sr. held five-year-old appellant naked over a fire to punish him (41RT 5909), threw a fork through appellant's hand at the dinner table (42RT 6113), jerked four-year-old Thomas from a piano stool, threw him to the floor, and stomped on him, breaking his ribs and causing him to be in a body cast for a year and a half (42RT 6114-6117), and pushed three-year-old Carol's face in paint after she accidentally spilled it (42RT 6119-6120). Given the overwhelming amount of evidence relating to Charles Sr.'s physical abuse that appellant placed before the jury, the additional testimony from Shirley would have added little, if anything, to his mitigation case.

Appellant further complains that "the emotionally-flat reading into the record of prior testimony . . . is no adequate substitute for the actual

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[3] Moreover, defense counsel, in his closing argument, let the jury know that appellant was "beaten with buckles until [his] flesh broke and they were blistered." (43RT 6374.)

physical presence of these witnesses at trial." In so arguing, appellant tacitly raises the possibility that the jury would have found Shirley's in-court testimony to be more "credible" and "powerful" than a reading of her prior testimony. (AOB 64-65.) However, the United States Supreme Court has stated that the mere "possibility of prejudice is not sufficient to support [the] position that . . . speedy trial rights [are] violated." (*United States v. Loud Hawk*, *supra*, 474 U.S. at p. 315.) Here, it is simply impossible to know whether, and to what extent, in-court testimony from Shirley would have enhanced appellant's mitigation case.[4]

Even if we were to assume that Shirley's in-court testimony would be more credible and powerful than a reading of her prior testimony, such an assumption does not end the inquiry. "[D]elay is a two-edged sword," affecting the prosecution as well as the defense. (*United States v. Loud Hawk*, *supra*, 474 U.S. at p. 315.) In this case, three of the prosecution's witnesses, Lee D'Crenza, Theodore Sum, and Averil M., had also died. As with Shirley's testimony, it is easy to speculate that Theodore's in-court testimony about appellant's vicious attempt to murder him (and particularly his ability to show the jury the eight- or nine-inch scar on his neck he received as a result of the attack) and Averil's in-court testimony concerning appellant's sexual assault of her son would have been more credible and powerful than the "emotionally-flat reading into the record" of their prior testimony. Thus, the passage of time could have adversely affected the prosecution's case as well.

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[4] *Coddington v. State* (Okla.Crim.App. 2006) 142 P.3d 437, is distinguishable for this very reason. In that case, the court was able to compare the videotape of the testimony of the defendant's mother with a reading of a transcript of the testimony. (*Id.* at p. 458.) Here, there is no way to compare Shirley's hypothetical testimony at the 1999 retrial with her 1984 testimony.

Appellant further claims that he wanted to introduce the testimony of three other dead witnesses—brother Ronald and uncles William Brakefield and Hugh Tilley—who did not testify in the 1984 trial. Appellant does not specify the testimony from his uncles that he would have liked to introduce, but asserts that he would have introduced Ronald's statements that (1) Charles Sr. shot the family puppy while Ronald held it on a leash; (2) men in the neighborhood would have sex with appellant when he was a boy, and when Charles Sr. found out about it, he beat appellant; and (3) appellant tried to hang himself when he was seven or eight years old. (AOB 66.) Respondent submits that, given the evidence presented, this testimony would not have appreciably helped appellant's mitigation case.

With respect to Ronald's statement about Charles Sr. shooting the family dog, it is not clear that this testimony would have been admissible in the first place. (See 42RT 6130 [court limits questioning of Thomas to incidents where appellant was present].) There is no indication that appellant was present when Charles Sr. shot the dog. (See 1CT 139-140.) Even if the testimony were admissible, appellant's case-in-chief was saturated with testimony describing Charles Sr.'s unbelievably cruel and violent behavior toward his family. That Charles Sr.'s cruelty extended to animals would hardly have come as a surprise to the jury.

As to Ronald's statement that appellant, as a boy, had sex with men, Thomas testified that appellant was sexually molested by his uncles (42RT 6161) and Edwards testified that appellant's medical history indicated that he had been sexually abused by his uncles, employers, schoolmates, and members of the Boy Scout troop. (40RT 5736-5737.) The fact that appellant had sex with other men would not have added anything appreciable to the evidence presented on this subject. Moreover, given the testimony that Charles Sr.'s beatings were frequent, and without rhyme or

reason (42RT 6111), the fact that Charles Sr. would beat appellant for having sex with men would surely not have surprised the jury.

Finally, given how vividly the defense depicted appellant's traumatic and depressing childhood—frequent and severe beatings by his father and mother, no love, praise, or affection from either, constant criticism, sexual molestation by his uncles, hypocritical sermons from his father where he was routinely told he was going to hell—it is unlikely that the evidence of appellant's suicide attempt would have significantly altered the jurors' picture of his early life. To the contrary, it appears the jury agreed with the prosecutor's argument that appellant, not his troubled childhood, was to blame, and he needed to pay for murdering Paula. (See 43RT 6308-6309.)

Appellant appears to argue that the prosecution used the delay to its advantage by suggesting to the jury that appellant had previously received the death penalty, but it had been reversed by "liberal judges." (AOB 67.) Such an inference, however, cannot be gleaned from the prosecutor's comments. He merely told the jury, "We want a verdict in this case to resolve this case. It's too old and it needs to be resolved by the 12 of you." (43RT 6249.) It appears the prosecutor was merely encouraging the jury to come to a unanimous decision, something the previous jury was unable to do. Defense counsel, however, clearly used the delay to appellant's advantage in his closing argument, appealing to the jurors for leniency on the ground that for "[t]he last 14 years . . ., [appellant] caused absolutely no problems." (43RT 6332.) Such an argument would not have been possible absent the delay. Thus, it is far from clear that the timing and procedural history of the case worked to appellant's disadvantage.

Lastly, appellant claims that he was prejudiced because the two retrials allowed the prosecution to learn the exact "contours of [appellant]'s mitigation case, and the weaknesses in its own aggravation case as previously presented." (AOB 68.) However, this argument is not

persuasive, as the retrials also permitted appellant to learn the exact contours of the prosecution's aggravation case, and the weaknesses in his own mitigation case as previously presented.

Accordingly, for the reasons discussed, any prejudice suffered by appellant as a result of the delay was far outweighed by the other *Barker* factors. Appellant's rights under the Sixth Amendment Speedy Trial Clause were not violated.

D. Appellant's Speedy Trial Rights Under The California Constitution Were Not Violated

A speedy trial claim under the California Constitution requires a showing of prejudice. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 605; *People v. Martinez* (2000) 22 Cal.4th 750, 766-768.) If the defendant establishes prejudice, the court determines the existence of a violation by weighing this prejudice against the justification for the delay. (*People v. Martinez*, *supra*, 22 Cal.4th at pp. 766-767.) "Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. By the same token, the more reasonable the delay, the more prejudice the defense would have to show to require dismissal." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915.)

Here, assuming arguendo that appellant has shown that he was prejudiced by the delay, any prejudice he suffered was far outweighed by the government's justification for the delay: its desire to make sure that appellant received a fair trial with constitutionally mandated safeguards before it executed him. As a result, appellant's state constitutional speedy trial claim fails.

II. THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JURORS F6136 AND R9529 FOR CAUSE

Appellant claims his death sentence must be reversed because the trial court committed error when it excused for cause two prospective jurors, Juror F6136 and Juror R9529,[5] on the grounds that the jurors' views on the death penalty would substantially impair their performance as jurors. (AOB 70-102.) This claim lacks merit and must be denied.

A. Relevant Proceedings

Prior to voir dire, defense counsel requested that he be able to requestion a prospective juror after the prosecutor questions her. The prosecutor voiced his concern that this procedure would create a "ping-pong effect" with the prospective jurors taking different positions depending on which party was questioning them. The trial court acknowledged that "some jurors will twist in the wind just the direction the attorney wants them to go," but reminded the parties that the court makes the final credibility determination as to the prospective jurors. The trial court stated: "And I do my best to try to assess what they're really saying rather than just the words they use or what their last statement is . . . ." (35RT 4851-4853.)

1. Juror F6136

In her questionnaire, when asked about her general feelings about the death penalty, Juror F6136 wrote that she "hope[d] it will be abolished some day." However, she claimed that she was only "moderately against" the death penalty. Informed that appellant had already been found guilty of first degree murder with special circumstances, Juror F6136 stated that she

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[5] To avoid confusion, respondent will follow appellant's convention of referring to the prospective jurors in question by their individual juror numbers. (See AOB 71, fn. 30.)

would not always for or against death. In a case that involved the special circumstance of murder in the commission of attempted rape, Juror F6136 stated that she could impose the death penalty depending on the aggravating evidence to be offered. In such a case, she could also impose the sentence of life without the possibility of parole. Juror F6136 "disagree[d] somewhat" with the statements "Anyone who intentionally kills another person should always get the death penalty" and "Anyone who intentionally kills another person should never get the death penalty." She answered "yes" to the question "Can you fairly and impartially evaluate the evidence and set aside any moral, religious, or personal views or beliefs you may have about the death penalty to render a verdict in accordance with the law?" (6CT 1692-1697.)

On voir dire, the trial court asked Juror F6136 if, given her hope that the death penalty would be abolished, her statement that she was moderately against the death penalty was an understatement. Juror F6136 responded that she felt life without the possibility of parole was a greater penalty. The trial court then asked her if it was her realistic assessment that she was moderately against the death penalty, and not strongly against it. Juror F6136 responded, "I don't feel strongly about it. I am not strongly in favor or opposed to it. I must say I have also limited information about it, so." After explaining the factors the jury would be considering in the penalty phase, the trial court asked Juror F6136 to explain her statement that she hoped the death penalty would be abolished some day. Juror F6136 responded that she wrote that because she had read that the death penalty was not a deterrent to crime. Juror F6136 thought that it was realistic and possible for her to vote for death. (35RT 4921-4925.)

When the prosecutor questioned Juror F6136 the next day, the following exchange occurred:

[Prosecutor]: I'm going to get, as [defense counsel] did, because of the time limitations directly to the ultimate issues in this case. [¶] [Juror F6136], as far as your position on the death penalty.

[Juror F6136]: Yes, sir. I question the value of the death penalty as a deterrent for crime. I have more questions than answers myself, limited information, but I really wonder the value of the death penalty as a deterrent of crime.

[Prosecutor]: You understand it's the law in the state of California?

[Juror F6136]: Yes, I do.

[Prosecutor]: You've indicated that you've lived in a number of various jurisdictions, and I would believe that some of them do not have a death penalty; is that right?

[Juror F6136]: That's correct.

[Prosecutor]: Your statement, which I think sort of surprised the court and also surprised me, your statement was your general feelings about the death penalty was that, "Hope it will be abolished some day." [¶] Is that right?

[Juror F6136]: Again if it has no value as a deterrent of crime, I think it has no point to continue.

[Prosecutor]: And is that your belief, that it has no value and therefore no point?

[Juror F6136]: As a deterrent of crime, yes, sir.

[Prosecutor]: And you then respond to the next question about your opinion regarding the death penalty that you are moderately against.

[Juror F6136]: As a member of this society, I understand it is a part of the rules of the game, so, for example, in this court if you and the judge would give me instructions, I would abide by those instructions.

[Prosecutor]: Well, let me, in response to another question about the death penalty, it says, "When the defendant is sentenced to death, what does that mean to you?" [¶] And your

response to that was, "A terrible sentence." [¶] Now, there are some people that are abolitionists as far as the death penalty are concerned, and that is a legislative function. [¶] Do you understand that?

[Juror F6136]: Uh-huh.

[Prosecutor]: And the real question is, is with your position—do you understand this is a penalty phase trial only?

[Juror F6136]: I do understand that.

[Prosecutor]: And you have to make a decision on the penalty to be imposed. You do not decide guilt. That has already been decided.

[Juror F6136]: I understand that.

[Prosecutor]: Do you think that because of your feelings about the death penalty, that it will impair or influence to any substantial degree your ability to decide this case on the issue of punishment?

[Juror F6136]: It could.

[Prosecutor]: And that it would affect your ability to be fair and impartial to the prosecution in this case because you favor life without the possibility of parole?

[Juror F6136]: It could be.

(36RT 5006-5008.)

At side bar, anticipating the prosecutor's challenge for cause as to Juror F6136, defense counsel argued:

> I think the wrong question was put to her. [¶] The proper question is whether her views would prevent or substantially impair, and the question [the prosecutor] put to her is whether they would substantially impair or influence, and I don't think there's room in the law to excuse somebody because their views might have some influence.

(36RT 5021.) The prosecutor recollected differently, and argued that Juror F6136 had said she was substantially impaired, and therefore should not be

on the jury. (36RT 5021.) When defense counsel reminded the court that Juror F6136 had stated in her questionnaire that she could impose the death penalty, the trial court ruled:

> Yes. Initially I was confused by the answers she gave in the questionnaire, and I had some doubt about it, especially given that one statement. But based on the answers she's given orally, it did seem to me that she was substantially impaired, and I will allow the challenge for cause.

(36RT 5021.)

2. Juror R9529

In her questionnaire, when asked about her general feelings about the death penalty, Juror R9529 wrote that she "really [did not] believe in the death penalty," and that she was "moderately against" it. Informed that another jury had found appellant guilty of first degree murder with special circumstances, Juror R9529 was asked if she would always vote against death, no matter what evidence might be presented. Juror R9529 circled "No," put a question mark by it, and then crossed out the question mark. (6CT 1772-1773.)

In response to another question, Juror R9529 wrote, "I don't believe that people should decide if someone should die whether they are doing the killing physically or verbally." Asked if she could impose the death penalty in a case that involved the special circumstance of murder in the commission of an attempted rape depending on the aggravating evidence to be offered, Juror R9529 circled "No," but wrote, "I don't know I would have to hear the aggravating evidence first." When asked if she could impose the sentence of life without the possibility of parole in such a case, Juror R9529 circled "Yes." (6CT 1774-1775.)

Juror R9529 "disagree[d] somewhat" with the statements "Anyone who intentionally kills another person should always get the death penalty" and "Anyone who intentionally kills another person should never get the

death penalty." (6CT 1775-1776.) She answered "Yes" to the question "Can you fairly and impartially evaluate the evidence and set aside any moral, religious, or personal views or beliefs you may have about the death penalty to render a verdict in accordance with the law?" (6CT 1777.)

On voir dire, noting Juror R9529's apparent hesitation in stating that she would not always vote against the death penalty, the trial court asked her if it was "a realistic, practical possibility in your mind that you would vote for the death penalty, depending on the aggravating and mitigating circumstances that are presented in this case?" Juror R9529 responded, "I think if I had to, that yes, I could. If it was up to me, no, I wouldn't want to." (36RT 5067-5068.) The trial court then explained:

> Okay. Had to is never appropriate. No juror is going to be told you have to vote for the death penalty. That's one of the things that will not occur in this trial. [¶] As I've indicated, there is no burden of persuasion. Neither side has an obligation to prove that a particular penalty is necessary, and you will never be instructed that if you find any of these factors or all of them that you must vote for the death penalty. So you're not going to have to vote for the death penalty. [¶] In that case would you ever vote for the death penalty?

(36RT 5068.) Juror R9529 responded, "I'm not sure. I really don't." (36RT 5068.)

When the prosecutor questioned Juror R9529, the following colloquy took place:

> [Prosecutor]: Juror [R9529], you indicated on your questionnaire that, "I really don't believe in the death penalty. Life in prison would be more of a punishment." [¶] Is that your state of mind?
>
> [Juror R9529]: Was that my state of mind? Yeah, when I filled out the questionnaire.
>
> [The Court]: Is it still your state of mind?

[Juror R9529]: No, no, not after hearing everything here today, no.

[Prosecutor]: You also say, "I don't believe that people should decide if someone should die, whether"—I can't read your next word—something "doing the killing physically or verbally." [¶] I haven't quoted you exactly correctly, but the substance of what you are saying, it seems to me, that people, jurors, shouldn't decide whether someone lives or dies, that that is not something that you could do. [¶] Is that what you were saying at the time?

[Juror R9529]: Yes.

[Prosecutor]: Do you believe that today?

[Juror R9529]: No. I believe today that I could make a decision on death or life in prison after I heard everything, after I heard all the circumstances.

[Prosecutor]: Well, you have said you don't believe in the death penalty. Is that right?

[Juror R9529]: Well, at that time—well, no, I didn't believe in the death penalty, no. I didn't believe in it.

[Prosecutor]: Your answer to another question on page 15, 55, "When defendant is sentenced to death, what does that mean to you?" [¶] And you say, "They got off easy."

[Juror R9529]: Yeah. I would think spending your life in prison actually—well, if it was me, I think I would rather die than spend my life in prison.

[Prosecutor]: Well, the court's informed you that as far as the gravity of the penalties, the more severe the penalty is the death penalty, and then the other choice, which the jury has to make, is if they determine—if you determine that death is not appropriate, then it's life without the possibility of parole. [¶] Do you understand that?

[Juror R9529]: Yes.

[Prosecutor]: And you understand that the more serious of the two penalties is the death penalty?

[Juror R9529]: Yes, I understand that.

[Prosecutor]: So again to get to the bottom line, do you think that you could impose the death penalty if you don't believe in it?

[Juror R9529]: You're kind of confusing me.

[Prosecutor]: I'm not trying to. I'm trying to have you answer.

[Juror R9529]: You're asking me if I could sentence someone to death if I don't believe in it. When I was filling that out, I never thought about whether or not I could or not, so I was just answering the questionnaire. [¶] At this point, yeah, I think I would have to make the decision that I thought was right.

[Prosecutor]: And that could include the death penalty?

[Juror R9529]: Yes.

(36RT 5086-5088.)

The prosecutor challenged Juror R9529 for cause, stating:

As far as [Juror R9529] is concerned, she got very angry with me, which I thought was pretty interesting when I asked her questions about the death penalty. [¶] When her initial answers were that she was against the death penalty, that she couldn't impose the death penalty and that she would not impose the death penalty, and that was basically the same questions that the court asked and got the same answers and then she changed her position. I think that the court should conclude that she is substantially impaired . . . .

(36RT 5092.)

Defense counsel objected to the challenge, stating:

I believe her answers are that she could impose the death penalty if it was required. The anger I think comes from the way [the prosecutor] addressed her. It appeared, and I can see why she would think that, he was speaking down to her or questioning her intelligence, so I think that's what happened. [¶] . . . [¶] She never said that she could not vote for the death penalty. In fact, many times she said that she could if she thought that it was

what the case required, and that's all that should be required of anyone.

(36RT 5093-5094.)

The trial court sided with the prosecutor, ruling:

> But as far as [Juror R9529] is concerned, just judging on the answers, not that she gave to [the prosecutor] but that she gave to me, I do think she's substantially impaired as to the penalty. There wasn't too much question about that in giving the answers that she did and confirmed in the questionnaire. [¶] Initially saying she doesn't believe in it, she's moderately against it. She said as to always vote against death, she circled no, but she put a question mark by that, and that's really the nature of her position. [¶] She also said on page 15 could you impose the death penalty, she circled no. She said she'd have to consider the aggravating circumstances. [¶] So although there's some ambiguity in what she said, it's clear to me that she is substantially impaired, and I will allow the challenge for cause as to her.

(36RT 5094.)

B. The Applicable Law

"The state and federal Constitutions guarantee a criminal defendant the right to a trial by an impartial jury." (*People v. Martinez* (2009) 47 Cal.4th 399, 425.) Under *Wainright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], the appellate court reviews the record to determine whether it fairly supports the trial court's determination that the excused juror's views on the death penalty would have prevented or substantially impaired the performance of his or her duties as a juror. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1233.)

The trial court has broad discretion in assessing the qualifications of jurors challenged for cause. (*People v. Hamilton* (2009) 45 Cal.4th 863, 889.) "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. Rather, it is sufficient that the trial judge is left with the definite impression that a prospective

juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498, internal quotation marks and citations omitted.)

"Reviewing courts defer to the trial court on the essentially factual question of the prospective juror's true state of mind." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 426.) When a prospective juror gives conflicting or equivocal answers to questions directed at their potential bias or incapacity to serve, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind. (*Ibid.*) "[W]hen there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" (*Uttecht v. Brown* (2007) 551 U.S. 1, 7 [127 S.Ct. 2218, 167 L.Ed.2d 1014], quoting *Wainright v. Witt*, *supra*, 469 U.S. at p. 434.)

When a prospective juror gives equivocal or conflicting answers regarding her ability to impose the death penalty, the trial court's determination as to her true state of mind is binding on the appellate court if supported by substantial evidence. (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 889-890.) "When a prospective juror has made statements that tend to support the trial court's conclusion that the juror is not qualified, '[t]he fact that [the juror] also gave statements that might have warranted keeping [her] as [a juror] does not change [the] conclusion' that substantial evidence supports the trial court's ruling." (*People v. Martinez*, *supra*, 47 Cal.4th at pp. 431-432, quoting *People v. Thornton* (2007) 41 Cal.4th 391, 414.)

C. The Record Fairly Supports the Trial Court's Findings That Jurors F6136 and R9529 Were Substantially Impaired

Contrary to appellant's assertion (AOB 70-95), substantial evidence supports the trial court's findings that the views of Jurors F6136 and R9529 on the death penalty would have substantially impaired the performance of their duties as jurors. An examination of the entire voir dire and the trial court's post-trial remarks (see AOB 95-102) does not change this conclusion.

1. Juror F6136

Juror F6136 responded to the first question concerning her feelings on the death penalty by writing in her questionnaire that she hoped it would be abolished some day. (6CT 1692.) On questioning by the prosecutor, she made it clear that she believed the death penalty served no purpose and should be discontinued because it did not act as a deterrent to crime. (36RT 5007.) She then candidly acknowledged that these feelings could "impair or influence to a[] substantial degree [he]r ability to decide this case on the issue of punishment," and that her favoring of life without the possibility of parole could "affect [he]r ability to be fair and impartial to the prosecution in this case." (36RT 5008.) These acknowledgments amply support the trial court's determination that Juror F6136's views would substantially impair the performance of her duties as a juror. (See *People v. Bramit*, *supra*, 46 Cal.4th at p. 1234 [where prospective juror did not know if she could return death verdict, removal was proper]; *People v. Griffin* (2004) 33 Cal.4th 536, 559-560 [same].)

Appellant focuses on other statements of Juror F6136 indicating that she could impose the death penalty and that she would be able to follow the law. (AOB 86-88.) This focus, however, is misplaced. As noted above, when a prospective juror has made statements that tend to support the trial

court's conclusion that the juror is not qualified, the fact that the juror also gave statements that might have warranted keeping her as a juror does not change the conclusion that substantial evidence supports the trial court's ruling. (*People v. Martinez, supra*, 47 Cal.4th at pp. 431-432.)

Indeed, this case bears a strong resemblance to *People v. Smith* (2003) 30 Cal.4th 581. In *Smith*, one of the excluded prospective jurors "answered in the affirmative when the district attorney asked whether the knowledge that the case might require a decision on the death penalty would 'substantially impair [her] ability to act as a juror in this case.' She later told the court that her views 'could' interfere with her ability to perform her duty as a juror." (*Id.* at p. 602.) Although the prospective juror also made other statements that would have supported keeping her as a juror, this Court noted that "[t]he question before us as a reviewing court . . . is whether the evidence supports the actual ruling[], not whether it would have support [a] different ruling[]." This Court concluded that the record supported the trial court's finding that the prospective juror's views would substantially impair the performance of her duties. (*Ibid.*)

Similarly, in this case, although Juror F6136 made statements that would have supported keeping her as a juror, she, like the prospective juror in *Smith*, ultimately acknowledged to the prosecutor that her anti-death-penalty feelings could impair or influence to a substantial degree her ability to decide the punishment in this case, and could affect her ability to be fair and impartial to the prosecution. Accordingly, as in *Smith*, the record supports the trial court's finding that Juror F6136's views would have substantially impaired her performance as a juror.

At the very least, Juror F6136's acknowledgment introduced ambiguity into the issue of whether she could set aside her own personal feelings regarding the death penalty and "give the prosecution 'a fair hearing and a fair opportunity to at least persuade [her] to [vote for] the

death penalty.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 891.) In such circumstances, "'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7.)

Respondent disputes appellant's assertion that "Juror F6136 was consistent in her questionnaire and voir dire answers that she would be able to follow the law." (AOB 87, emphasis omitted.) While Juror F6136 originally indicated that she would be able to follow the law and impose the death penalty, she ultimately admitted that her feelings on the issue could impair or influence to a substantial degree her ability to decide the punishment in this case, and could affect her ability to be fair and impartial to the prosecution. It was entirely reasonable for the trial court to conclude that the latter statement conflicted with the former. Logically, if a juror acknowledges that her feelings could substantially impair or influence her ability to be fair to one side when deciding the punishment, then her assertion that she would be able to follow the law is highly dubious. When a juror makes conflicting statements such as these, the trial court's determination as to her true state of mind is binding on the appellate court. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 890.)

To the extent appellant argues that the trial court erroneously removed Juror F6136 due to her anti-death-penalty views, his claim is unavailing. It is true that jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Initially, Juror F6136 clearly stated that she could set aside her personal beliefs in deference to the rule of law, but then she muddied the waters considerably by acknowledging that her views could impair or influence to a substantial degree her ability to decide the

punishment in this case, and could affect her ability to be fair and impartial to the prosecution. Given Juror F6136's backtracking from her original statement, it is not at all "clear" that she was willing and able to set aside her personal beliefs in deference to the rule of law.

Finally, appellant attempts to show Juror F6136's lack of substantial impairment by strictly parsing the final questions put to Juror F6136, and arguing that she may not have been impaired by her anti-death-penalty beliefs, but merely influenced by them. Accordingly, he argues, her removal was inconsistent with *Adams v. Texas* (1980) 448 U.S. 38 [100 S.Ct. 2521, 65 L.Ed.2d 581]. (AOB 88-91.) Appellant's argument is unpersuasive for several reasons.

First, the problem in *Adams* was that the *court* used a constitutionally impermissible *standard* to remove jurors for cause. (*Adams v. Texas*, *supra*, 448 U.S. at p. 42.) Here, it is undisputed that the trial court used the correct standard. (See 36RT 5021 ["it did seem to me that she was substantially impaired, and I will allow the challenge for cause"].) Clearly, the trial court in this case was entitled to consider Juror F6136's answers to the prosecutor's questions in making its determination as to the juror's true state of mind. And, obviously, the trial court's determination that a juror is substantially impaired need not be based on an explicit statement from the juror that her views would "prevent or substantially impair" the performance of her duties as a juror. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1246 ["There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity."].)

Furthermore, the touchstone of the inquiry under the statute in *Adams* was whether the imposition of the death penalty "would have any effect at all on the jurors' performance of their duties." (*Adams v. Texas*, *supra*, 448 U.S. at p. 49.) Such a test operated to "exclude jurors who stated that they would be 'affected' by the possibility of the death penalty, but who

apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally," as well as jurors who "were unable positively to state whether or not their deliberations would in any way be 'affected.'" (*Id.* at pp. 49-50.) The United States Supreme Court found application of the statute to be unconstitutional because "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Id.* at p. 50.)

The prosecutor's questions in this case, unlike the offending statute in *Adams*, were much more narrowly circumscribed to the relevant issue—whether Juror F6136's anti-death-penalty beliefs gave rise to an inability on her part to render a verdict in accordance with the law. It strains credulity to suggest that Juror F6136 could have believed that the prosecutor, by including the phrase "influence to any substantial degree" in his question, was asking her if her anti-death-penalty views would invest her deliberation with greater seriousness or would involve her emotionally. The prosecutor's question was grounded in the notion that the juror's beliefs evinced a bias on her part that would greatly interfere with her ability to follow the law. This much is evident from the prosecutor's use of the word "impair" immediately prior to "influence," and the fact that the question was specifically directed at Juror F6136's "ability" to decide the issue. The prosecutor's follow-up question, concerning whether the juror's anti-death-penalty views would affect her ability to be fair and impartial to the prosecution, further clarified that the focus of the prosecutor's questions was Juror F6136's ability to decide the issue of punishment in accordance with the law, not whether the imposition of the death penalty would have "any effect at all" on the juror's performance of her duties.

Moreover, to the extent the focus of the prosecutor's question was ambiguous, as discussed above, the trial court was entitled to resolve the ambiguity in favor of the prosecution. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7; see also *People v. Bramit*, *supra*, 46 Cal.4th at p. 1236 ["even when the precise wording of a single question, and the answer given, do not compel a conclusion of substantial impairment, 'the need to defer to the trial court remains because so much may turn on a potential juror's demeanor'"].)

2. Juror R9529

In response to a question concerning her support or opposition to the death penalty, Juror R9529 wrote in her questionnaire, "I don't believe that people should decide if someone should die whether they are doing the killing physically or verbally." (6CT 1774.) When asked if she would always vote against death, Juror R9529 circled "No," but put a question mark next to it, and then crossed it out. (6CT 1773; 36RT 5067.) When asked if she could impose the death penalty in a case that involved the special circumstance of murder in the commission of an attempted rape, Juror R9529 circled "No," but wrote, "I don't know I would have to hear the aggravating evidence first." (6CT 1774.)

During voir dire by the trial court, Juror R9529 did little to assuage the trial court's concern that she would be able to vote for the death penalty in an appropriate case, telling the court that she thought she could vote for the death penalty "if [she] had to," but that [i]f it was up to [her], no, [she] wouldn't want to." The trial court explained to the juror that she would never "have to" vote for the death penalty, and asked her if she would ever do so. Juror R9529 responded, "I'm not sure. I really don't." (36RT 5067-5068.) This Court has repeatedly found that a prospective juror who did not know whether or not she could impose the death penalty may be excused for cause. (See, e.g., *People v. Bramit*, *supra*, 46 Cal.4th at p.

1234; *People v. Richardson* (2008) 43 Cal.4th 959, 986; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 559-560; *People v. Bolden* (2002) 29 Cal.4th 515, 535-537; *People v. Wash* (1993) 6 Cal.4th 215, 255.)

Again, appellant focuses on the portions of Juror R9529's questionnaire and voir dire where she indicated that she would be able to follow the law and impose the death penalty. However, as with Juror F6136, this focus is misplaced. When a prospective juror has made statements that tend to support the trial court's conclusion that the juror is not qualified, the fact that the juror also gave statements that might have warranted keeping her as a juror does not change the conclusion that substantial evidence supports the trial court's ruling. (*People v. Martinez*, *supra*, 47 Cal.4th at pp. 431-432; see also *People v. Griffin*, *supra*, 33 Cal.4th at p. 561 ["Contrary to defendant's suggestion, the fact that at some point each of these prospective jurors may have stated or implied that she would perform her duties as a juror did not prevent the trial court from finding, on the entire record, that each nevertheless held views . . . that substantially impaired her ability to serve."].)

This case bears a strong resemblance to *People v. Thornton*, *supra*, 41 Cal.4th 391. In that case, a prospective juror stated in her questionnaire that her religious beliefs precluded her from judging anyone and that she would always vote for life imprisonment without possibility of parole. On voir dire, however, the prospective juror stated that she could set aside her religious beliefs and vote to impose the death penalty on the defendant if persuaded it was warranted. She expressly retracted the choice she had made on her juror questionnaire that she would always vote for life imprisonment without possibility of parole. The trial court pronounced the prospective juror an "enigma," and excused her, stating that it lacked confidence the juror would follow the law. Deferring to the trial court's determination, this Court affirmed the excusal. (*Id.* at p. 418.)

Here, as did the prospective juror in *Thornton*, Juror R9529 appeared to take a firm position against imposing the death penalty, writing in her questionnaire, "I don't believe that people should decide if someone should die whether they are doing the killing physically or verbally." Her ability to impose the death penalty was further called into question when she told the trial court she was unsure if she could ever vote for it. However, like the prospective juror in *Thornton*, Juror R9529 abruptly changed course when questioned by the prosecutor, expressly retracted the statement she had made in the questionnaire, and asserted that she would be able to impose the death penalty. Given Juror R9529's conflicting and ambiguous statements, this Court, as it did in *Thornton*, must defer to the trial court's determination of the juror's true state of mind.

Appellant's claim that Juror R9529's "responses were more strongly death-qualified" than those of an erroneously excused prospective juror in *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622] (AOB 93), does not withstand scrutiny. While *some* of Juror R9529's statements may have been "more strongly death-qualified" than those of the prospective juror in *Gray*, others clearly were not. When a prospective juror has made statements that tend to support the trial court's conclusion that the juror is not qualified, the fact that she also made statements that would have warranted keeping her as juror does not render her excusal a constitutional violation. (See *People v. Martinez*, *supra*, 47 Cal.4th at pp. 431-432.)[6]

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[6] Moreover, given that "the issue before the court in *Gray* did not involve the determination of the correct standard for excusing a prospective juror under *Witt* at all, but rather the standard of prejudice that applies when a prospective juror improperly has been excused for cause under *Witt*" (*People v. Schmeck* (2005) 37 Cal.4th 240, 263), it is dubious whether *Gray* (continued...)

Lastly, appellant's criticism of the trial court for excusing Juror R9529, in part, on the basis of her answer to question 63 of the questionnaire (AOB 94) is unfounded. By circling "No," Juror R9529 indicated that she could never impose the death penalty in a case that involved the special circumstance of murder in the commission of attempted rape, no matter the aggravating circumstances. She then contradicted that answer with her written response of "I don't know I would have to hear the aggravating evidence first." (6CT 1774.) It is precisely this type of ambiguous response that necessitates a determination from the trial court as to the prospective juror's true state of mind. (See *Uttecht v. Brown*, *supra*, 551 U.S. at p. 7.)

For these reasons, the trial court's excusal of Juror R9529 was not an abuse of discretion.

3. An Examination of the Entire Record Does Not Show that the Excusals Were Improper

Finally, appellant asserts that an "examination of the entire voir dire and the trial court's improvident spontaneous post-trial remarks about jury selection are instructive in evaluating the trial court's excusals of [Jurors F6136 and R9529]." (AOB 95.) However, none of the points that appellant raises casts doubt on the propriety of the trial court's rulings.

Appellant first observes that, unlike the defendant in *Uttecht v. Brown*, *supra*, 551 U.S. 1, he objected to the trial court's excusals of the prospective jurors in question. (AOB 96-97.) While appellant's failure to object would have crippled his claim on appeal (see *People v. Hawthorne* (2009) 46 Cal.4th 67, 82-83), the fact that he objected, obviously, does not establish that the trial court erred.

(...continued)
provides any support to appellant regarding the propriety of the juror's excusal.

Appellant further claims that the trial court thwarted his "attempts to establish a voir dire process as fair and informative as the one that took place in *Brown*" by rejecting his "motions for individual voir dire about death-qualification issues, for sufficient time for attorney-conducted voir dire, and even for the ability to call prospective jurors by their names instead of jury numbers." (AOB 98.) These claims, however, do nothing to establish error on the part of the trial court. As appellant recognizes (AOB 98, fn. 34), this Court has held that it is not error to limit attorney voir dire time (*People v. Avila* (2006) 38 Cal.4th 491, 534-535) and it is not error to deny sequestered voir dire regarding death-qualification (*People v. Lewis* (2008) 43 Cal.4th 415, 493-495). Moreover, appellant did not suffer prejudice as a result of the prospective jurors being referred to by their jury numbers, and even if he did, it was completely mitigated by the trial court's instruction that such a procedure was not unusual or limited to this case. (See 35RT 4860.)

Appellant also complains that the jury selection in his case took only three days while the jury selection in *Brown* took two weeks. (AOB 98-99.) However, in making this point, appellant fails to take into account the 12-day interval between the time the venire first filled out their questionnaires and the time voir dire commenced. (See 34RT 4755-4756.) During this time period, the court and the attorneys had an opportunity to conduct a lengthy and substantial review of the prospective jurors' responses on the questionnaires, making the eventual process of jury selection much more efficient.[7] Moreover, in this case, neither side came

[7] Conversely, in *Brown*, it does not appear that the court or the parties had any appreciable time to review the juror questionnaires prior to commencement of voir dire. (See *Uttecht v. Brown*, *supra*, 551 U.S. at p. 13.)

close to exhausting its allotment of 20 peremptory challenges,[8] greatly reducing the time it took to complete jury selection in this case. Thus, any discrepancy between the time it took to select the jury in this case and the time it took to select the jury in *Brown* is not as large as it seems.

Appellant further complains that the trial court granted four of the prosecution's five challenges for cause to which appellant did not stipulate while rejecting "both" of his contested challenges for cause. (AOB 99-100.) Respondent will not engage in a comparative analysis of the challenges in question, as appellant has asserted that only two of these rulings (those as to Jurors F6136 and R9529) were erroneous. Respondent, does, however, note that, contrary to appellant's assertion, it appears that there was only one defense challenge for cause to which the prosecution objected.[9] (36RT 5019-5020.) And, even though he had 18 peremptory challenges available to him at the time he accepted the jury, appellant did not use one of them to remove the juror he challenged for cause.

Moreover, contrary to his assertion (AOB 100-101), the fact that the trial court denied appellant's challenge for cause as to an ostensibly pro-death-penalty prospective juror does not establish that the trial court was biased against appellant. The trial judge was in the best position to observe this prospective juror's demeanor and, even though he had "mark[ed] her for excusal based on the answers she gave in the questionnaire," he "accepted her answers as truthful as she gave them here orally that she can be fair as to the penalty." (36RT 5020.) The trial court is entitled to make

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[8] The prosecution used three peremptory challenges, while the defense used only two. (36RT 5037, 5062, 5108-5109.)

[9] Appellant cites to volume 36, page 5007, to support his assertion that the trial court rejected a second contested defense challenge for cause. (AOB 100.) That page, however, only contains the prosecutor's voir dire of Juror F6136.

this factual determination as to the juror's true state of mind. (*People v. Martinez*, *supra*, 47 Cal.4th at p 426.)

Indeed, the trial judge's evenhandedness on the issue of challenges for cause was powerfully demonstrated by its handling of the prosecutor's next challenge. After denying appellant's challenge to the prospective juror discussed above, the prosecutor moved to exclude a prospective juror who had indicated an anti-death-penalty bias in her questionnaire. The trial judge denied the prosecutor's challenge and, specifically equating this prospective juror with the one the defense had just challenged, the judge stated, "I believe that this juror's answers orally here were valid, and that although she does indicate a bias against the death penalty initially in the questionnaire, that that is not true." (36RT 5022.)

If the trial judge wanted to stack the jury with pro-death-penalty jurors, as appellant suggests (AOB 101-102), he would have declared this prospective juror biased, using the juror's questionnaire answers as legal cover. But it is apparent from the judge's rulings that he conscientiously observed the prospective jurors and based his for cause rulings solely on his impartial evaluation of the prospective jurors' true state of mind.

Finally, appellant proclaims the trial court's post-trial remarks as "stunning and candid statements of bias." (AOB 101.) Respondent disagrees. After the trial, the court stated:

> I have to credit you, Mr. Barshop, with having tried a more vigorous case the second time before this Court. You selected a better jury to begin with, but more importantly, I think the way you presented the evidence was more impassioned, not prejudicially so but more—less in a neutral fashion, which you did the first time. [¶] So perhaps the rest of you did not expect the verdict that came back from this jury, but I did. And I think that's the difference between the two. That first jury had, I believe, six jurors that did not really believe in the death penalty. They were neutral on the subject, and it's very difficult to draw

people with that attitude to unanimously agreeing to the death penalty.

(44RT 6453-6454.)

The trial court's post-trial remarks did not evince pro-prosecution bias, but rather reflect the court's analysis of the different verdicts in the two retrials. The court's observation that the prosecutor's superior performance in the second retrial made a difference in the outcomes of the two trials was not in any way improper. (See, e.g., *People v. Gragg* (1989) 216 Cal.App.3d 32, 45 [concluding that prosecutor's superior advocacy carried the day].) And the trial court's conclusion that jurors who "did not really believe in the death penalty" are less likely to return a death verdict is hardly remarkable.

Accordingly, an examination of the entire record confirms that the trial court did not err in excusing Jurors F6136 and R9529.

III. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE THAT RODRIGUEZ FAMILY BECAME ESTRANGED AS A RESULT OF PAULA'S DEATH

Appellant next contends that his state and federal constitutional rights were prejudicially violated by the admission of victim impact evidence concerning the estrangement of the Rodriguez family after Paula's murder, and by the trial court's instruction to the jury that Paula's family members would not be asked their opinion on the proper punishment in this case because their opinion was legally inadmissible. (AOB 102-123.) Like his other contentions, this one also lacks merit.

A. Relevant Proceedings

Prior to the first retrial, while discussing the admissibility of various photographs of Paula and her family, the court asked the prosecutor to identify the photographs and describe their significance to his case. The

prosecutor explained that victim impact evidence concerned the relationship of the victim to members of her family, and that Paula's death had caused "a complete break up of this . . . family unit." The prosecutor stated that Maria now has no contact with Jose at all because she blames him for Paula's death. (25RT 3377-3379.)

The prosecutor later explained that Maria does not speak to Jose because he told Paula to go to work the day she was killed. The prosecutor told the court that these crimes never end, and this was illustrated by the fact that Jose was recently in his office crying for an hour. At this point, defense counsel pointed out that Jose had remarried and speculated that the true cause of the estrangement between Jose and Maria was Jose's remarriage. Defense counsel argued that there had to be limits on victim impact evidence, and that this evidence of family turmoil was "certainly pushing the limits." The prosecutor responded that he was not planning to go into the "thought process" of why the family had broken up, just the fact that it had. (25RT 3382-3385.)

Later, defense counsel objected to a photograph apparently depicting Maria's tenth birthday party, asserting that the photograph would be misleading because Maria was expected to testify that Paula's death was devastating to her because a girl's fifteenth birthday carried great significance in their culture, and Paula was not there to share it with her. The prosecutor countered that Maria could testify that she was happy at her tenth birthday, but was not happy at her fifteenth birthday party because her mother was dead. (25RT 3388-3389.) The court ruled that the photograph was relevant, stating:

> Again this is victim impact evidence. This is a pebble dropped into a pond has a certain number of ripples. The fact that there are too many of them is not a reason to object to the fact that the pebble caused the ripple. This is a result of the homicide, that

these people have been devastated by this. Not just a dead person, it is a dead family.

(25RT 3389.)

Defense counsel told the court that, if the prosecutor, in his opening statement, intended to describe the impact of Paula's death on the Rodriguez family beyond the fact that it devastated them, he wanted to be heard before the opening statement so that the court to make a ruling as to the limits of victim impact evidence. The trial judge told defense counsel that he would be happy to look at any authority defense counsel provided him. The parties then discussed other matters. (25RT 3389-3390.)

Later, defense counsel requested that Rodriguez family members not be permitted to offer their opinions on the appropriate punishment for appellant. The prosecutor said that he was not planning to introduce such evidence, but requested that the trial court instruct the jury that family members are not permitted to offer their opinion on punishment. The court agreed to so instruct the jury, and defense counsel assented. The trial court stated that it would instruct the jury that family members' opinions were not admissible so that the jury would not speculate about the matter. (25RT 3419-3421.)

During trial, the prosecutor reminded the court that it had indicated it would instruct the jury that the family cannot offer their opinion on punishment. Defense counsel objected to any instruction on the matter unless the jury asked a question regarding it. The judge overruled the objection, explaining that he wanted the jury to know about the limitation so that they would not speculate about why the family did not say anything about it. (28RT 3897-3898.)

The prosecutor informed the court that he would be calling the Rodriguezes, but that he was going to limit their testimony to the fact that they missed Paula and the effect that it has had on their lives. Defense

counsel said that he understood the witnesses would testify about their sadness and that Paula's death affected their lives and the life of the family. His understanding was that the witnesses would not be asked about the "collateral aspects of the family turmoil," such as whether Maria hated Jose for making Paula go to work or because he remarried. The prosecutor clarified that he was not going to get into "the inner turmoil between the family," just the fact of the loss and how it affected each family member emotionally. (28RT 3904-3906.)

Maria testified that she missed her mother and thought about her daily. She and her mother were planning her fifteenth birthday party, which was special, and that she ended up not having a fifteenth birthday party. She did not want to have children because she did not want them to go through what she was going through. (28RT 3931.) Asked how Paula's death had affected him, Jose testified that, from the time of Paula's death, they had not been a happy family, that Maria "live[d] apart," and that appellant had not only murdered Paula, but also Jose and his daughters. (28RT 3934.) Valeria testified that she sometimes thought her life would be different if she had her mother with her. (28RT 3936.)

After the Rodriguezes testified, the trial court informed the jury that the court had not permitted any of the witnesses to express their feeling as to the appropriate penalty that had been imposed. The court said that their feelings were not an appropriate consideration because the jury needed to decide the penalty based on the evidence that had been presented. (28RT 3947.)

Prior to the second retrial, the court told the parties that they would have to decide whether all objections, motions, and rulings from the first retrial would apply to the second retrial. The prosecutor agreed to let stand "all the court's rulings and issues that we litigated," unless specifically revisited. Defense counsel clarified that objections to types of evidence and

motions involving types and categories of evidence would be incorporated from the first retrial, with the option to reopen them. The prosecutor stated that this was agreeable. (36RT 5208-5210.)

During Jose's testimony at the second retrial, the prosecutor asked him, "After the death of your wife Paula, did you become estranged with one of your daughters, Maria Elena?" Defense counsel objected. At a bench conference, defense counsel argued that this evidence was not allowed in at the first retrial, and that the parties had agreed to abide by the rulings in the first retrial unless there was advance notice of a change. Defense counsel asserted there was no reference to estrangement in Jose's prior testimony, and that the reason for that was because the defense had objected on the grounds that the estrangement was likely due to Jose's remarriage. Defense counsel stated that his objection was two-fold: He was objecting to the evidence, as well as to the manner in which it was "sprung" on the defense in violation of the agreement. (39RT 5603-5605.)

The prosecutor said he did not "know that we agreed to it in any form." He said that Maria was going to testify that she blames Jose for Paula's death because he told her to go to work the day she was killed. The prosecutor argued that this "splintering" of the family was relevant victim impact evidence. Defense counsel responded that, under *People v. Edwards* (1991) 54 Cal.3d 787, the prosecution was prohibited from probing "collateral issues stemming from the death of a loved one." Defense counsel further argued that Jose should not be able to speculate about the cause of his daughter's alienation when part of it had to do with his remarrying. (39RT 5605.)

The trial court agreed that if Maria's estrangement was the result of Jose's remarrying, then the testimony would not qualify as victim impact evidence. But if Maria blamed Jose for Paula's death and that was the cause of their estrangement, then it was victim impact evidence. The trial

court further stated that it did not recall a ruling in the first retrial, but it did remember that the evidence was not offered. The prosecutor confirmed that the evidence was not offered in the first retrial, but explained that the reason it was not offered was because he wanted to limit the testimony of each witness. Now, the prosecutor wanted to expand their testimony because he believed that they had a right to be heard. (39RT 5605-5606.)

The trial judge found it extremely significant that the family had been destroyed by the animosity that was generated in the wake of Paula's death, but concluded that if the animosity was the result of Jose's remarriage, then the evidence would not be relevant. The prosecutor confirmed that he had proof that, at least to some extent, Maria was blaming Jose for Paula's death. The prosecutor stated that he expected Jose to testify that his family was splintered, and that Paula's death had ruined all of their lives. The court overruled the defense objection, finding Jose's testimony to be fair and specific victim impact evidence. The prosecutor then asked Jose to tell the jury, in his own words, what Paula's death had meant to him. Jose responded, "It's affected me in the sense that I have suffered every minute since then, and our family is not well. We're not really united at all." (39RT 5606-5608.)

At a bench conference, the prosecutor then requested that the court instruct the jury that the family members could not tell the jury their feelings regarding appellant's proper punishment. Defense counsel objected that such an instruction would needlessly inject the question into the jurors' minds. The court disagreed, stating that the jury would wonder why no such questions were asked or why their opinions were not offered. Defense counsel argued that the court was just assuming the jurors would wonder why the opinions were not offered. The court agreed: "I certainly do assume that. I would wonder why they wouldn't express outrage and say this man should die. That's exactly what I would wonder, and I will

provide that to them. It is not legally admissible." Defense counsel objected on Eighth Amendment grounds, arguing that the instruction suggested that the family was of the opinion that appellant should be executed. (39RT 5609-5610.) The trial court disagreed, stating:

> No, it doesn't suggest that, and you're going to in your phase of the case going to offer the evidence by the family members as much as they detest a lot of what he's done, that they don't think he should die for it. [¶] The balance is not there, and the reason for it is it's not admissible, and I'm going to tell them why.

(39RT 5610.) The court then told the jurors that family members' opinions about the penalty that should be imposed in this case were not legally admissible, and they would not be asked questions about it. (39RT 5610-5611.)

During Valeria's testimony, the prosecutor asked her if she thought about what her life would be like if her mother had lived. Valeria responded, "Sometimes I think my life wouldn't be the same as it is right now. I wouldn't be so estranged like I am from my sister." (39RT 5612.) Maria testified that she did not want to marry or have children because she did not "want them to suffer the same way I'm suffering now and for the rest of my life without my parents." (39RT 5632.) Maria said "yes" when the prosecutor asked her if she had a problem with her father and other members of her family after her mother died. She confirmed that she was "not at all" close to her father now. (39RT 5633.)

B. The Trial Court Did Not Err with Respect to the Admission of Victim Impact Evidence

Appellant claims that the trial court erred in allowing the prosecution to present victim impact evidence regarding the estrangement of Maria from her family. He further claims that the timing of the introduction of this evidence deprived him of sufficient notice of aggravation and to the

effective assistance of counsel in how to address it. (AOB 109-115.) Both of these claims are unavailing.

1. The Testimony Regarding Maria's Estrangement from Her Family Was Proper Victim Impact Evidence

In the penalty phase of a capital trial, evidence showing the direct impact of the defendant's acts on the victim's family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*People v. Dykes* (2009) 46 Cal.4th 731, 781.) Indeed, "[t]he federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

In *Payne*, the United States Supreme Court determined that the state should not be prevented from demonstrating the loss to the victim's family which has resulted from the defendant's homicide. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) The high court ruled that "[a] State may legitimately conclude that evidence about . . . the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) The rationale behind allowing victim impact evidence is that "'[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to h[er] family.'" (*Id.* at p. 825.)

"State law is consistent with these principles. Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a

circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1056-1057.) "Victim impact evidence is admissible under California law provided it 'is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.'" (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 102.) Furthermore, "[t]he 'circumstances' of the crime under section 190.3, factor (a) are not merely the immediate temporal and spatial circumstances of the crime, but extend to that which surrounds the crime materially, morally, or logically." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 926.)

Appellant claims that the Rodriguez family's "long-term estrangement," "nearly two decades removed from the crime," was too "attenuat[ed] in time" to be admissible as victim impact evidence. (AOB 110.) This argument is nonsensical. If anything, the longstanding nature of the rift between Maria and Jose powerfully illustrates "the unique loss" suffered by the Rodriguez family as a result of appellant's decision to kill Paula.

People v. Hamilton, *supra*, 45 Cal.4th 863, proves this point. In that case, the defendant argued that evidence regarding the continued depression and suffering of the murder victim's husband for over 16 years after his wife's death, along with details of the husband's use of alcohol near the end of his life and the circumstances of the his death, exceeded the scope of permissible victim impact evidence. This Court rejected the defendant's claim, concluding that the evidence of the family's continued suffering was properly admitted, as it reminded the jury that the victim was an individual whose death represented a unique loss to her family. Clearly, if evidence of the husband's alcohol use and death 16 years after the murder of his wife

was relevant and admissible in *Hamilton*, then so too was evidence of the 17-year-old rift that appellant opened between Jose and Maria.[10] (*Id.* at pp. 926-927; see also *People v. Brown* (2004) 33 Cal.4th 382, 397-398 [family members' testimony regarding residual and lasting psychological impact of murder committed 20 years earlier constituted proper victim impact testimony at penalty retrial].)

Moreover, this Court has rejected challenges to victim impact evidence concerning family estrangement. In *Hamilton*, in addition to the testimony discussed above, there was evidence that the victim's husband did not attend family reunions after his wife's death because the victim's sisters reminded him of his murdered wife, and that he lost custody of his sons (more than a decade after his wife's murder) due to his continued despair at his wife's murder. (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 923-924; see also *People v. Boyette* (2002) 29 Cal.4th 381, 441 [victim impact testimony that murder victim's father did not want to be around his other children because thought of losing another child was too painful to him].) Thus, evidence of the rift that Paula's murder opened between Jose and Maria was "not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (See *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 102.)

The fact that the defense theorized that the estrangement between Jose and Maria was the result of Jose's remarriage, and not the result of Maria

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[10] Appellant's citation to *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166 at pages 1203-1204 (AOB 110-111), regarding the admissibility of victim testimony on the long-range effects of the bombing, is wildly inapposite, as the portion of the opinion he cites involves guilt-phase testimony, not penalty-phase testimony. In that case, the Tenth Circuit rejected the defendant's claims related to the improper admission of victim impact evidence during the penalty phase. (*United States v. McVeigh*, *supra*, 153 F.3d at pp. 1218-1219.)

blaming Jose for making Paula go to work the day she died, does nothing to establish that the trial court erred. The prosecutor specifically affirmed to the trial court that he had proof that Maria was holding Jose responsible for Paula's death (39RT 5606), and nothing in the Rodriguezes' testimony contradicts his assertion. Absent evidence that the true cause of the estrangement was Jose's remarriage,[11] the defense's theory to that effect was not a basis to exclude the relevant, admissible victim impact testimony.[12]

For these reasons, testimony concerning the estrangement was not so unduly prejudicial as to render the trial fundamentally unfair, and the evidence was properly admitted as a circumstance of the crime under section 190.3, factor (a).

2. Appellant Received Adequate Notice of the Rodriguezes' Victim Impact Testimony

Appellant's claim that the prosecution provided him with no notice that it intended to introduce victim impact evidence of the Rodriguez family estrangement (AOB 113-115) merits little discussion. Section 190.3 [13] requires the prosecution to provide notice of evidence in

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[11] Appellant was free to ask Jose and Maria about the true cause of their estrangement outside the presence of the jury, and defense counsel indicated that he intended to (39RT 5607), but he never did.

[12] Appellant's citation to the discussion of victim impact evidence in *United States v. Copple* (3d Cir. 1994) 24 F.3d 535 at pages 545-546 (AOB 111) is entirely unhelpful to him, as that case was not a capital case.

[13] That section states, in pertinent part:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial.

aggravation, but it does not require production of it. (*People v. Scott* (1997) 15 Cal.4th 1188, 1219.) Hence, the prosecution is merely required to provide the defense with the name of a victim impact witness; it is not required to provide the defense with the content of a victim impact witness's testimony. (*People v. Wilson* (2005) 36 Cal.4th 309, 357; *People v. Benavides* (2005) 35 Cal.4th 69, 107; see also *People v. Cruz* (2008) 44 Cal.4th 636, 682-683 [rejecting lack of adequate notice claim where victim impact witnesses were placed on prosecution witness lists, defense was free to interview them, and trial counsel acknowledged the had received reasonable notice of their planned testimony].)

Here, it is not disputed the defense received notice that the Rodriguezes would offer victim impact testimony. Because the prosecution was not required to provide appellant with the specific content of their testimony, appellant's lack of notice claim fails from the start. In any event, as the family estrangement aspect of the Rodriguezes' testimony was extensively discussed prior to and during the first retrial, appellant cannot complain that he was unaware of it. (See 25RT 3377-3390; 28RT 3904-3906.) Under these circumstances, appellant was provided adequate notice of the Rodriguezes' victim impact testimony.

Appellant's real complaint appears to be that the prosecutor engaged in some kind of misconduct by eliciting the family estrangement testimony in the second retrial. (See AOB 114-115.) The record, however, does not support appellant's insinuation. Appellant acknowledges that, when the parties discussed the family estrangement evidence prior to the first retrial, the trial court never issued a ruling as to its admissibility. (AOB 106.) Indeed, the trial court's "pebble and ripples" analogy—to which appellant so frequently refers—strongly suggests that the trial court would have ruled the evidence admissible. However, for tactical reasons, the prosecutor decided to limit the Rodriguezes' testimony in the first retrial and did not

ask any questions pertaining to the estrangement. In the second retrial, the prosecutor reconsidered, deciding that the Rodriguezes had a right to be heard on this topic. (39RT 5605-5606.)

The prosecutor, obviously, had the right to present additional evidence in the second retrial. (See *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505.) And, as discussed above, the prosecutor fully complied with the notice requirements of section 190.3. Thus, the prosecutor's conduct was aboveboard.

To the extent appellant claims his federal constitutional rights were violated by the alleged lack of notice (AOB 115), his claims are forfeited by his failure to object on these bases below. (See *People v. Huggins* (2006) 38 Cal.4th 175, 238.) In any event, these claims hinge on appellant's ability to show that the prosecution failed to give him adequate notice of the Rodriguezes' victim impact testimony. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 136.) Because appellant was given adequate notice of the testimony, his federal constitutional claims necessarily fail.

In any event, even assuming that the notice of the victim impact testimony was inadequate, any error was harmless. "The purpose of the notice provision is to afford defendant an opportunity to meet the prosecutor's aggravating evidence." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1182.) When a defendant fails to request a continuance to meet the evidence, and does not explain how he could have rebutted or impeached the prosecution witnesses had he received notice earlier, any delay in notifying the defense of the evidence in aggravation is harmless. (*People v. Hinton* (2006) 37 Cal.4th 839, 900; *People v. Wilson*, *supra*, 36 Cal.4th at p. 357; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107.)

In this case, appellant never requested a continuance to allow him to meet the prosecution's aggravating evidence. Nor does he explain how he could have rebutted or impeached the Rodriguezes had he received notice

earlier. Moreover, although defense counsel spoke of conducting an Evidence Code section 402 hearing with the Rodriguezes to obtain more detailed information about the cause of their family estrangement (39RT 5607), he never actually followed through and requested one. This failure is significant, as it would seem the best way for appellant to ascertain the true cause of the rift between Maria and Jose would be to ask them about it under oath. The only inference that can be drawn from appellant's failure to conduct a foundational hearing, ask for a continuance, and offer any explanation as to how he could have rebutted or impeached the Rodriguezes' testimony had he received earlier notice is that appellant had concluded there was no way to effectively confront the testimony. (See *People v. Roldan* (2005) 35 Cal.4th 646, 734, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Accordingly, any error with respect to the allegedly late notice was harmless.

C. The Trial Court Did Not Err By Instructing the Jury on the Inadmissibility of the Rodriguezes' Opinions on Punishment

When the Ninth Circuit reversed appellant's death sentence in 1997, Judge Kozinski remarked that this was "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." (*People v. McDowell*, *supra*, 130 F.3d at p. 843 (dis. opn. of Kozinski, J.).) Now, appellant wants it to be the second as well. He argues that, although the trial court's instruction to the jury regarding the inadmissibility of the Rodriguezes' opinions on appellant's punishment was a correct statement of law, its delivery violated appellant's state and federal right to trial by jury. (AOB 115-121.) Appellant's claim lacks merit.

First, to the extent appellant claims the court's instruction violated his state and federal right to trial by jury (AOB 119-120), his claim has been

forfeited. At trial, appellant objected to the instruction, but only on Eighth Amendment grounds. (39RT 5610.) This objection failed to preserve his jury trial claims. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 415 [objection on Fifth Amendment right against self-incrimination grounds failed to preserve for appeal due process, fair trial, and Eight Amendment claims].)

In any event, appellant's claim is unavailing. In *People v. Thompson* (1988) 45 Cal.3d 86, the defendant claimed that the trial court erred in failing to instruct the jury to not consider the deterrent effect of the death penalty or the monetary cost to the state of execution or maintaining a prisoner for life. This Court ruled: "*Although it would not have been error to give this requested instruction to forestall consideration of deterrence or cost*, we conclude that its omission was not prejudicial." (*Id.* at pp. 131-132, emphasis added.)

Here, the court's instruction, like the proposed instruction in *Thompson*, served to forestall jury consideration of an irrelevant topic. As the trial court explained (39RT 5609-5610)—and the prosecutor experienced (25RT 3419-3420)—juries wonder why the victim's family members do not offer opinions on the appropriate punishment during their victim impact testimony. The court's instruction simply explained to the jury the reason family members do not opine on that issue, thereby directing jurors' consideration away from an irrelevant matter. Accordingly, the trial court's instruction in this case, like the proposed instruction in *Thompson*, was not error.

Moreover, appellant's claim that the jury understood the trial court's instruction to mean that the Rodriguez family wanted appellant to be executed (AOB 117-120) is grounded entirely in speculation. The court's instruction said no such thing; it merely informed the jury that the Rodriguezes would not be asked their opinions on the appropriate

punishment for appellant because their opinions were not legally admissible. Simply stated, the Rodriguezes' opinions on the proper penalty for appellant cannot be gleaned from the court's instruction. Accordingly, appellant's rights to a trial by jury could not have been implicated by the instruction.

Even more farfetched is appellant's contention that the instruction somehow "erected a barrier" which prevented the jury from considering his mitigating evidence. (AOB 120-121.) Even assuming arguendo that jurors interpreted the court's instruction to reflect the Rodriguezes' desire that appellant be executed, it does not logically follow that this interpretation would "prevent" them from considering appellant's mitigation evidence. As a result, appellant's rights under the Eighth and Fourteenth Amendments to have the jury consider his mitigating evidence were not abridged. Because appellant's assertions as to the jury's interpretations of the court's instruction are based on pure speculation, they should be summarily rejected. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 521 [rejecting as "pure speculation" unsupported assertion that instruction confused jury].)

Furthermore, the jury was properly instructed as to the factors it could consider in determining appellant's punishment. None of these factors included the Rodriguez family's opinion on the proper penalty. Indeed, the jury was specifically instructed: "Evidence has been introduced in this case which may arouse in you a natural sympathy for the victim or the victim's family. You may not impose the death penalty as a result of a purely emotional response to this evidence." (11CT 3013-3015; CALJIC No. 8.85.) Jurors, of course, are presumed to understand and follow the court's instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Under these circumstances, the trial court's instruction could not have been prejudicial error.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EXPERT TESTIMONY FROM A SOCIAL HISTORIAN

Appellant next contends that his state and federal constitutional rights were prejudicially violated by the exclusion of social historian expert testimony from Arlene Bowers Andrews. (AOB 124-154.) Respondent submits that the trial court did not abuse its discretion in excluding Andrews's testimony.

A. Relevant Proceedings

As discussed in detail below, the trial court permitted Andrews to testify in the first retrial. However, when the penalty phase was retried a second time, the court ruled that Andrews's testimony was not a proper subject for expert testimony under Evidence Code section 801, and excluded her from testifying in the second retrial.

1. Conference Prior to Andrews's Testimony at the First Retrial

During the defense case during the first retrial, the prosecutor requested an offer of proof as to the testimony of Andrews. Defense counsel replied that Andrews was a professor in the school of social work at the University of South Carolina with a master's degree in social work and a Ph.D. in psychology. Andrews had authored "numerous" books and articles concerning the effect of abuse in the family. Defense counsel clarified that Andrews was not a mental health professional, and he was not going to elicit from her any opinions on mental health issues. Andrews would testify that she had studied the McDowell family and had drawn conclusions as to whether the various forms of abuse suffered by appellant were major factors in the formation of appellant's character as an adult. The prosecutor objected to Andrews's proposed testimony, arguing that one does not need to be an expert to draw those conclusions. The trial court

overruled the prosecutor's objections, concluding that the effect of child abuse is a topic not usually understood by the jury. (31RT 4325-4328.)

The parties then discussed whether the prosecutor would be permitted to challenge Andrews's conclusions with damaging information contained in psychiatric reports that Andrews had reviewed. Defense counsel argued that the prosecutor should not be so permitted, because Andrews was testifying as a sociologist, not a psychologist, and her conclusions would be those of a social worker. The prosecutor disagreed, contending that Andrews would be testifying about psychological concepts. Defense counsel responded that Andrews did not have the credentials to opine on appellant's mental health; she would be testifying about the effect that the abuse suffered by appellant had on the development of his character. (31RT 4330-4335.)

2. The First Part of Andrews's Testimony at the First Retrial

Andrews initially testified that she conducted a social history assessment of appellant's family, looking at his social development, family environment, and community. Andrews was appointed to determine whether there were factors in appellant's family environment that may have affected his behavior as an adult. Andrews interviewed Charles Sr., Shirley, Teressa, Ronald, Thomas, Williams, appellant's sister Cathy, and his uncle Buddy Brakefield. She reviewed birth certificates, marriage certificates, death certificates, divorce records, medical and psychiatric records, school records, financial records, military records, law enforcement records, employment documents, investigator's reports, and declarations by family members. (31RT 4363-4367.)

Appellant's uncles on his mother's side were close in age to him and sexually molested him. (31RT 4372-4373.) Appellant's parents married in 1952 and divorced in 1975. Appellant was married for four years, but was

together for his wife for only two years. They had two children. (31RT 4374.) Charles Sr. beat Shirley while she was pregnant with appellant. Appellant's birth was difficult; he was born a month premature, and Shirley was hospitalized for three weeks because she hemorrhaged badly. Shirley did not want to be a mother and was unprepared for that role. She did not know how to take care of appellant. When appellant was a baby, Shirley was lonely and depressed because she was not near anyone who could help her raise appellant. Appellant cried a lot as a baby. When Shirley took him to the doctor, she found out that appellant was not being fed enough. Shirley learned how to feed appellant when he was six months old. (31RT 4378-4380.)

In assessing a child's early development, the parents' relationship is a very significant factor. In appellant's case, his parents' relationship was extremely hostile. Charles Sr. said that he became disappointed with Shirley about a week into their marriage. Shirley said that there was nothing she could do to please Charles Sr. and that he was mean and abusive to her. Charles Sr. would beat his wife and children almost on a daily basis. When a child witnesses violence between his parents, he does not learn how men and women appropriately relate and learns that violence is the way to handle a disagreement. The child also fears that he or his mother might be lost or hurt, creating a level of terror and a fear of abandonment. When parents are caught up in a violent relationship, they often neglect their children. (31RT 4381-4383.)

Andrews found a substantial history of severe physical abuse in the McDowell family. The abuse in the McDowell family was more constant than the abuse in other families; it was not tied to discipline and could occur at any time. The children had no clear sense as to why they were beaten; sometimes one child would be beaten for another child's bad behavior. The forms of the abuse (holding children over a fire, pushing a

child onto a board with a nail protruding from it, whipping with the buckle end of a belt) were unusual. The beatings often revolved around reading the Bible, constituting a form of spiritual abuse. They also often occurred during meal times, interfering with the children's social development. Charles Sr. would also often hit the children in front of other people. (31RT 4383-4386.)

Andrews also found instances of animal abuse. Ronald was particularly fond of the family dog, Blacky. One time, while Charles Sr. was beating Ronald, Blacky came through the screen door and jumped on Charles Sr. Blacky disappeared the next day and was never seen again. Charles Sr. also shot another dog in Ronald's presence. This sort of animal abuse creates an aura of terror regarding the power of the father and what could happen. (31RT 4386-4387.)

Andrews also found substantial evidence of sexual abuse in the McDowell family. This created a "sexualized environment." Appellant was very young when his uncles molested him, and his uncles, knowing that Charles Sr. would beat appellant if he knew about the sexual activity, threatened to tell Charles Sr. Charles Sr. also started molesting Teressa when appellant was young. By the time appellant was nine or ten years old, he was molested by other boys in the neighborhood, and then by men in the town of York, South Carolina. After doing chores for the men, the men would ask appellant to perform sex acts in exchange for money. (31RT 4387-4388.)

In analyzing appellant's development, Andrews also looked at his academic records. Appellant's grades were very low; he had to repeat first grade. Appellant did not finish high school. He mostly earned D's and F's, and a few C's. Appellant had behavioral problems at school. He was hyperactive, causing a teacher to use restraints on him. (31RT 4388-4389.)

3. Conference During a Break in Andrews's Testimony

During a break in Andrews's testimony, defense counsel reminded the trial court that it needed to resolve the issue of whether or not the prosecutor would be permitted to confront Andrews with the psychiatric reports. The trial court stated that it had yet to hear an ultimate opinion from Andrews, and asked defense counsel if Andrews would testify to appellant's mental state at the time of Paula's murder. Defense counsel responded in the negative, and told the court that Andrews's opinion would be that there was horrible abuse in the McDowell family, and that this abuse had a substantial impact on the development of appellant's character. (31RT 4396-4397.)

The trial court replied, "Substantial impact? The jury could figure that one out." The court then added, "I thought we were getting into something sophisticated. She's gone through a lot of things we've already heard from the actual witnesses, and if that's her opinion, we don't need an expert to say that." The court also stated, "Obviously what has been suffered by [appellant] would have a substantial impact on anybody." The court then asked defense counsel if he was going to elicit an opinion as to what the substantial impact was, or if Andrews's opinion would merely be that there was a substantial impact. (31RT 4397-4398.)

Defense counsel responded that Andrews would testify about the impact on appellant's social behavior, but that she would not testify about his mental state at the time of the crime. (31RT 4398.) The prosecutor then asked the trial court to strike Andrews's testimony as irrelevant, arguing that "it's hard to imagine why she's being called. She's not saying anything." The trial court agreed, but added that the defense had the right to present a wide range of mitigating evidence. The trial judge further

remarked that he did not think that "this kind of conclusion [would] make much difference one way or the other." (31RT 4399, 4401.)

In the context of deciding whether or not the prosecutor would be permitted to confront Andrews with the psychiatric reports, defense counsel explained that Andrews would be testifying as a "social scientist who is looking at what the man was exposed to as a child in the household and how that affected his character development and social behavior." In delaying a decision on the issue of impeachment with the reports, the trial court remarked that defense counsel was now talking about what the impact of the abuse was, not just that there was an impact. (31RT 4406-4407.)

4. The Second Part of Andrews's Testimony

Andrews then resumed her testimony, stating that, in conducting a family social history study, she looks to see how the dynamics of the family affected each family member. In the case of the McDowell family, Ronald died at the age of 40. He had been homeless, and in and out of the hospital for alcohol and heroin addiction. He had never married or formed a lasting relationship. Teressa has serious stress reaction problems, and does not like to leave her house. Thomas spent a large part of his adult life incarcerated for rape. Cathy lives in a rundown trailer which she rarely leaves. She cannot keep a job. She sleeps during the day because she cannot sleep at night. Belinda died when she was five years old. (31RT 4411-4412.)

Andrews found it remarkable that appellant did not have any form of social support. Shirley was being battered and was too emotionally exhausted to protect appellant. The siblings did not form a support group because they were in conflict with each other. When the school sent someone to the McDowell home, Charles Sr. interrogated the person about her religious beliefs and told his family that she was a Communist. By the time their church intervened, appellant was already out of the house. (31RT 4413-4415.)

Andrews concluded that appellant had suffered chronic physical abuse, sexual abuse, emotional abuse, and emotional neglect on a very severe level, and that this had a serious effect on appellant's social development. Specifically, appellant was a loner who coped by using alcohol and other drugs. Drug abuse is common among abused children. Appellant molested Teressa, Thomas, and Cathy, and then became very promiscuous. This is common among sexually abused children. Appellant was unable to form consistent friendships over time, sustain a marriage or other healthy relationship, finish school, or keep a job for very long. He was also prone to violence. (31RT 4415-4417.)

On cross-examination, Andrews testified that she was testifying as a social worker, and not a psychologist. (31RT 4423-4424.) She agreed with the prosecutor's characterization of her ultimate conclusion as "if you have a bad childhood, it can affect you as an adult," but noted that she had added details. (31RT 4430.) She later stated that "there were some clear linkages between what happened in childhood and how [appellant] behaved as an adult." (31RT 4435.)

5. Subsequent Discussions

After Andrews's testimony, the parties discussed an instruction informing the jury that the facts recited by Andrews were limited to show the basis of her opinion, but were not offered for the truth of the matter asserted. When defense counsel suggested that such an instruction was unnecessary, the trial judge disagreed, stating that Andrews had recited a lot of information that was inappropriate and unnecessary to her conclusion. The judge stated that Andrews had drawn "a conclusion that we all might draw that this difficult family life had an impact on him, and then she elaborated as to what the impact was, and we probably could have figured that out for ourselves as well." The judge further commented, "I think we have enough from what we already heard to draw those

conclusions and for her going back in family history and so forth. I think it brought in a lot of information that was not necessary and tended to be cumulative and was not reliable." (32RT 4494-4496.)

The prosecutor opined that the only purpose of Andrews's testimony "was to get a lot of hearsay before the jury." When defense counsel objected, the trial judge stated that much of Andrews's testimony was entirely hearsay, and not supported by the evidence in this case. The judge further stated that he was not sure that an expert was needed to draw the conclusions Andrews had in this case. The judge thought that, given the testimony of the family and neighbors in this case, the jury "had more than enough to draw those conclusions." (32RT 4496-4497.) Had the judge fully understood the nature of Andrews's testimony, he probably would not have permitted her to testify. (32RT 4555.)

After appellant's first retrial ended in a hung jury, the prosecutor asked the trial court to exclude Andrews's testimony in the second retrial, arguing that she had not testified to anything that was not "common sense." When the judge indicated that he did not vividly recall her testimony, the prosecutor said that the matter was not urgent; it was just something he wanted the court to consider. (34RT 4739-4740.) During jury selection in the second retrial, the prosecutor again reminded the court to rule on the admissibility of Andrews's testimony. The court, with defense counsel's assent, declined to rule on the matter because prospective jurors were waiting in the hall. (35RT 4581.)

6. The Trial Court's Ultimate Ruling

Before the defense presented its case-in-chief, the parties engaged in an extensive argument over the admissibility of Andrews's testimony. (39RT 5641-5664.) Characterizing her testimony as "people that have bad childhood may have bad adulthood . . . whereby they do criminal acts because of their childhood," the prosecutor argued that Andrews would not

testify to anything that required expert testimony. The prosecutor also worried that Andrews's testimony would allow the jury to hear unfettered hearsay from people the prosecutor would not be able to cross-examine. (39RT 5642.)

Defense counsel claimed that the prosecutor's characterization oversimplified Andrews's testimony, and did not fairly depict the various conclusions she gave over the course of her testimony. The trial court, however, reminded defense counsel that Andrews basically admitted that the prosecutor's characterization of her testimony was correct. Defense counsel responded that, although Andrews essentially agreed with the prosecutor's characterization, she added that her testimony contained details, and the details were what was important. (39RT 5643-5645.)

The trial court replied that the details either repeated other witnesses' testimony, unfairly emphasizing that testimony, or involved hearsay that was not subject to corroboration. The trial court recognized that an expert could rely on hearsay, but stated that the value of the expert's opinion depends on its reasoning and the evidence on which it relies. The court said that the defense could not "just bring in blatant hearsay through . . . expert testimony like it's being done here." (39RT 5645-5646.)

Defense counsel agreed that the portion of Andrews's testimony that relied on hearsay was subject to an admonition, but argued that the fact she relied on hearsay did not provide a basis to exclude her testimony outright. Defense counsel then stated the applicable law regarding the admission of expert testimony, and attempted to explain why Andrews's testimony qualified as proper expert testimony. In defense counsel's view, Andrews had provided proper expert testimony on: the capacity of appellant's parents to provide elemental care and attention to him; the kind of impact this care has on a child; the relationship between appellant's mother and father; the effect that a violent parental relationship would have on a child;

the severity of the abuse in the McDowell family; animal abuse and its effect on children; the sexualized environment of the McDowell household; the lack of any type of social support for appellant and why that is significant; and the types of personality characteristics that develop when one endures the type of abuse present in the McDowell household. (39RT 5646-5651.)

Defense counsel further indicated that he planned to expand Andrews's testimony and have her testify: that the McDowell case was one of the worst cases of abuse she has ever studied; why that is so; that the sexualized environment of the McDowell household stemmed from the father's deviancy; that appellant had no normal role models for proper sexual behavior while he grew up; that the economic subculture of the McDowells contained a statistically high incidence of criminal conduct; that children in appellant's position grow up with conflicted feelings about their abuser and themselves; and that appellant seeking out his father after all the abuse he suffered at his father's hands is not statistically unusual. (39RT 5649-5653.)

In response, the prosecutor reiterated that a number of witnesses were expected to testify about appellant's upbringing, and that therefore Andrews's testimony was unnecessary. Defense counsel replied that he would agree not to call Andrews if the prosecutor agreed to concede that appellant acted the way he did because his childhood twisted his character and destroyed his capacity to know normal from abnormal. The court then asked defense counsel if the testimony of Haynes, Williams, Thomas, and Teressa did not explain how bad appellant's childhood was. Defense counsel responded that these witnesses' testimony explained a bad childhood, but they did not put it in perspective like Andrews would. (39RT 5655-5658.)

The trial court cited *People v. Rowland* (1992) 4 Cal.4th 238 at page 278 for the proposition that the background of the defendant's family is material only to the extent that it relates to the background of the defendant himself. The court noted that the defense would present four witnesses to testify about appellant's terrible upbringing, and that the jurors would be able to evaluate that testimony without the help of an expert. The court found that Andrews's testimony relied on hearsay, reiterated the testimony of the defense witnesses, provided a professional summary of appellant's evidence, and emphasized how bad the other children were treated, which, in the court's view, was not relevant to this case. According to the court, the bottom line was whether an expert was needed to testify that appellant was affected by his family life. The court ruled that, pursuant to Evidence Code section 801, the answer was no. The judge further indicated that, had he known the precise contours of Andrews's testimony, he would not have allowed her to testify in the first retrial. The court also noted that appellant himself could testify as to the effect his childhood had on him. (39RT 5658-5661.)

B. Applicable Law

"Expert opinion testimony is admissible only if it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Watson* (2008) 43 Cal.4th 652, 692, quoting Evid. Code, § 801, subd. (a).) "[A]lthough ordinarily courts should not admit expert opinion testimony on topics so common that persons of ordinary education could reach a conclusion as intelligently as the witness, experts may testify even when jurors are not wholly ignorant about the subject of the testimony." (*People v. Prince* (2007) 40 Cal.4th 1179, 1222, internal citations and quotation marks omitted.)

"Although an expert may base an opinion on hearsay, the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*People v. Pollack* (2004) 32 Cal.4th 1153, 1172, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 919.) "[P]rejudice may arise if, under the guise of reasons, the expert's detailed explanation [brings] before the jury incompetent hearsay evidence." (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1325, internal quotation marks omitted.)

"'When expert opinion is offered, much must be left to the trial court's discretion.'" (*People v. Pollack* (2004) 32 Cal.4th 1153, 1172, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 403.) In determining whether to admit expert testimony, the trial court has broad discretion, and an appellate court may not interfere with that discretion unless it is clearly abused. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196; see also *People v. Johnson* (1993) 19 Cal.App.4th 778, 790 [appellate court gives great weight to trial judge's decision as to admission of expert testimony].)

C. The Trial Court Did Not Abuse Its Discretion in Excluding Andrews's Testimony

Andrews conceded that her ultimate conclusion was that a person's bad childhood could affect him as an adult. (31RT 4430.) The proposition that a person's upbringing could affect his later life is clearly not so far beyond the common experience that expert testimony was required. Indeed, Andrews's ultimate opinion in this case appears to be more obvious than expert opinions excluded in other cases on grounds they were not sufficiently beyond the jurors' common experience. (See, e.g., *People v. Moya* (1960) 53 Cal.2d 819, 822 [religious conversion could lead to rehabilitation]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 786 [imprisoned inmate felons sometimes lie].)

Appellant likens this case to *People v. Smith* (2005) 35 Cal.4th 334. His comparison, however, is inapt. In *Smith*, the prosecution called a psychologist to testify about the three stages that children go through during a "sadistic molestation." This Court rejected the defendant's argument that the experiences of child victims of violent sexual assaults are not sufficiently beyond common experience that expert assistance is required, concluding that "a juror [could] try to imagine what it would be like for a child to experience such an assault, but this kind of imagining does not substitute for expert testimony." (*Id.* at p. 363.)

In *Smith*, the witness was a psychologist who gave expert testimony on a psychological concept. In this case, conversely, Andrews was a social worker.[14] Yet the opinions she offered were quintessentially psychological (e.g., the abuse appellant suffered as a child caused him to be a loner, turn to drugs, become promiscuous, etc.). In that respect, this case bears a much stronger resemblance to *People v. Watson* (2008) 43 Cal.4th 652.

In *Watson*, the defendant called a criminologist to testify about the defendant's background and explain why people with similar backgrounds turn to gangs and crime. In a hearing pursuant to Evidence Code section 402, the criminologist explained that he analyzed criminal defendants' backgrounds and identified mitigating factors by interviewing the defendants' friends and family members and reviewing social services, court, prison, and police records. The criminologist claimed that his expert testimony was necessary because, without it, jurors "might not be able to make the correlation between delinquency and being raised by a single

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[14] Although Andrews had a Ph.D in psychology, she and defense counsel asserted that she was testifying as a social worker, not as a psychologist, and that she did not have the credentials or background to render an opinion on appellant's mental health. (31RT 4326, 4335, 4423-4424.)

mother, living in poverty, being abandoned by a father, and having a negative male role model in the home." The criminologist acknowledged that he was not a psychologist and could not testify to the psychological profile of someone with defendant's history of poverty, but rather could only testify regarding the general population. This Court upheld the trial court's exclusion of the criminologist's testimony, ruling that the criminologist was not qualified to offer an expert opinion as to the psychological impact of the defendant's upbringing on his current behavior. (*People v. Watson*, *supra*, 43 Cal.4th at pp. 690-692.)

Here Andrews's testimony was similar to that of the criminologist in *Watson*. Like the criminologist, Andrews analyzed appellant's background by interviewing his family members and reviewing various records. She too was testifying to help jurors make the correlation between appellant's dysfunctional upbringing and his character as an adult. Because Andrews expressly admitted she was not testifying as a psychologist, she, like the criminologist in *Watson*, was not qualified to offer an expert opinion on the psychological impact of appellant's upbringing on his adult character.

In any event, even if Andrews were qualified to offer her psychological conclusions, the subject matter of her testimony in this case was fundamentally different from the subject matter of the expert testimony in *Smith*. In *Smith*, the psychologist testified about the three specific stages children go through during a sadistic molestation (sense of unreality, realization of danger, shame and increasing awareness they may be killed). Thus, the psychologist's testimony was tightly focused on a subject beyond the common experience of the ordinary juror—the precise thoughts of child victims while they are experiencing a very specific, and unusual, type of assault. The jurors in that case, having never been sadistically molested as children, would simply not have known much about a child's thought processes during such an experience.

In this case, on the other hand, Andrews seemed to merely identify broad character defects on the part of appellant (e.g., drug abuse, sexual promiscuity, violent nature, lack of success in school and work, etc.) and assert that they were caused by his violent and dysfunctional upbringing. Unlike the psychologically technical testimony at issue in *Smith*, the idea that appellant's character defects were the result of his upbringing was something the jury would intuitively know.

Abdul-Kabir v. Quarterman (2007) 550 U.S. 233 [127 S.Ct. 1654, 167 L.Ed.2d 585], also cited by appellant, is likewise distinguishable. In that case, a psychologist testified that he had administered an "extensive battery of psychological tests" on the defendant, and concluded that the defendant had impulse control problems resulting from "central nervous damage" as well as his painful background. (*Id.* at p. 240.) As was the case in *Smith*, this psychologically complex testimony stands in stark contrast to the commonsense conclusions offered by Andrews.

Appellant seizes on the following sentence in *Abdul-Kabir*:

> There is of course a vast difference between youth—a universally applicable mitigating circumstance that every juror has experienced and which necessarily is transient—and the particularized childhood experiences of abuse and neglect that *Penry I* and *Cole* described—which presumably most jurors have never experienced and which affect each individual in a distinct manner.

(*Id.* at p. 261.) But contrary to appellant's assertion, this sentence does not support the proposition that a trial court must allow an expert to testify about the effects of a defendant's traumatic upbringing. The admission of expert testimony was never at issue in *Abdul-Kabir*. The cited passage does not concern expert testimony, but rather "particularized childhood experiences of abuse and neglect." In this case, appellant was not prevented from presenting evidence relating to his childhood experiences of abuse and neglect—indeed, his mitigation case was composed of little else.

For these reasons, the trial court did not abuse its broad discretion in ruling that her testimony was not so far beyond the common experience of an ordinary juror that expert testimony was required.

This is especially true, given that the majority of Andrews's testimony was composed of massive amounts of inadmissible hearsay. "'[W]hile an expert may rely on inadmissible hearsay in forming his or her opinion [citation], and may state on direct examination the matters on which he or she relied, the expert may not testify as to the details of those matters if they are otherwise inadmissible.'" (*People v. Dean* (2009) 174 Cal.App.4th 186, 202, quoting *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 415.) In *Dean*, the Court of Appeal held that the trial court abused its discretion in permitting an expert, under the guise of supporting her opinion, to place before the jury incompetent hearsay evidence. (*Id.* at pp. 200-201; see also *People v. Vanegas* (2004) 115 Cal.App.4th 592, 598 [no abuse of discretion in prohibiting expert from testifying about hearsay statement].)

Here, virtually all of the "noncumulative" facts testified to by Andrews (see AOB 138-140) amounted to inadmissible hearsay. Moreover, the trial court specifically concluded that the primary reason the defense wanted to call Andrews was to put this hearsay before the jury. (39RT 5660; see also 39RT 5646 ["you can't just bring in blatant hearsay through an expert . . . like it's being done here"].) Accordingly, the trial court would have been acting well within its discretion to—and may have abused its discretion if it did not—exclude the portions of Andrews's testimony where she recited the inadmissible hearsay. While the fact that so much of Andrews's testimony was composed of inadmissible hearsay did not render her opinion inadmissible, it certainly weighed in favor of the

trial court's decision to exclude her testimony in its entirety.[15] Thus, for this reason as well, the trial court did not abuse its discretion in excluding Andrews's testimony.

Appellant further contends that the exclusion of Andrews's testimony violated his Eighth and Fourteenth Amendment rights to present all relevant mitigating evidence and to have the jury fully consider the mitigation evidence that was presented. (AOB 142-150.) His claim fails. In *People v. Watson*, *supra*, 43 Cal.4th 652, the defendant argued that the exclusion of the criminologist's testimony violated his constitutional right to present all relevant mitigating evidence at the penalty phase. This Court rejected that claim, noting that "'the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible.'" (*Id.* at pp. 692-693, quoting *People v. Smithey* (1999) 20 Cal.4th 936, 995.) Here, as discussed above, the trial court did not abuse its discretion, under the ordinary rules of evidence, in excluding Andrews's testimony.[16] Consequently, as in *Watson*, appellant's constitutional claims lack merit.[17]

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[15] To the extent that Andrews also recited reliable hearsay (i.e., facts about which other witnesses testified), Andrews was essentially functioning as an information "synthesizer," a role improper for an expert witness. (See *People v. Watson*, *supra*, 43 Cal.4th at pp. 690-692.) The trial court specifically opined that this practice unfairly emphasized those facts to the jury. (39RT 5645.)

[16] Although the defendant in *Watson* only claimed that the exclusion of the criminologist's testimony violated his Eighth Amendment right to "present" mitigating evidence, there is no reason why the state should be precluded from applying the ordinary rules of evidence to appellant's additional Eighth Amendment claim that the exclusion of Andrews's testimony violated his right to have the jury "fully consider" his mitigating evidence.

[17] In claiming that the timing of the trial court's decision to exclude Andrews's testimony prevented the jury from fully considering his

(continued...)

D. Any Error Was Harmless

In any event, even if the trial court abused its discretion in excluding Andrews's testimony, the error was harmless. "Penalty phase error is prejudicial under state law if there is a 'reasonable possibility' the error affected the verdict." (*People v. Watson*, *supra*, 43 Cal.4th at p. 693.) "This standard is identical in substance and effect to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]." (*People v. Watson*, *supra*, 43 Cal.4th at p. 693.)

There is no reasonable possibility that Andrews's testimony would have affected the jury's verdict. As discussed above, all of the "noncumulative" facts to which Andrews would have testified amounted to inadmissible hearsay that the trial court would have been well within its discretion in excluding. And even if the trial court permitted Andrews's testimony in its entirety, it is unlikely the additional facts that Andrews provided would have affected the jury's choice of punishment. The jury had already heard in great detail from Haynes, Williams, Thomas, and Teressa about appellant's violent and dysfunctional upbringing. There is no reason to suspect that a few more details would have overcome the heinous nature of appellant's killing of Paula and his sexual abuse of Patricia, Curtis, and Teressa.

(...continued)
mitigation evidence, appellant asserts that the prosecutor did not move to preclude Andrews from testifying until after the prosecution's case was finished. (AOB 149-150.) This assertion is factually inaccurate. More than a month before the second retrial began, the prosecutor requested that Andrews not be allowed to testify because "she testified to nothing in this case that wasn't common sense." (34RT 4739.) Then, during jury selection in the second retrial, the prosecutor reminded the trial court that it needed to rule on the admissibility of Andrews's testimony. (35RT 4851.)

Moreover, Andrews's ultimate conclusion—that some of appellant's character defects were the result of his abusive childhood—was one the jurors would have reached with or without Andrews's testimony. In defense counsel's closing argument, he thoroughly, and powerfully, detailed the connections between appellant's crimes and his dysfunctional and violent upbringing. (See 43RT 6342-6344, 6346-6354, 6358-6366, 6372-6376.) Among other things, defense counsel explained in moving terms the connection between: (1) the sexual abuse appellant suffered as a child and his sexual abuse of four-year-old Curtis (43RT 6346-6347), (2) the abuse that appellant witnessed his father inflict on his mother and appellant's violent, degrading treatment of women (43RT 6348-6351), (3) the beatings appellant suffered as a child and the uncontrollable rage he experienced as an adult (43RT 6353-6354), (4) appellant's dysfunctional childhood relationship with his mother and his hatred of women (43RT 6360-6361), (5) appellant's childhood and the rape of Patricia (43RT 6363-6366), and (6) appellant's background and the murder of Paula (43RT 6366).

Defense counsel further asserted that appellant's "behavior was born and bred and literally beat into" him (43RT 6351), and that the destruction of appellant's spirit, body, and mind "started in childhood at a time of innocence, at a time before he had any choice" (43RT 6373). Defense counsel concluded his argument by acknowledging that appellant had done horrible things, but asserted that "he did them as a byproduct of the horrendous things that were done to him." (43RT 6376.) Given that the main thrust of defense counsel's closing argument was appellant's difficult childhood and its effect on his later life, the jury was well aware of appellant's contention in this regard, even without the benefit of Andrews's commonsense conclusions. (See *People v. Page* (1991) 2 Cal.App.4th 161, 190 [any error in preventing expert from making connection between

general psychological principles and specific evidence in case was harmless where defense counsel made connection in closing argument].)

In arguing that he was prejudiced by the trial court's exclusion of Andrews's testimony, appellant places great emphasis on the fact that the jury in the first retrial (in which Andrews testified) could not reach a decision on his punishment while the jury in the second retrial (in which she did not) voted for death. (AOB 150, 154.) This circumstance in and of itself, however, does not establish prejudice. (See *People v. Saddler* (1979) 24 Cal.3d 671, 684 [instructional error harmless even though prior trial in which erroneous instruction was not given ended in hung jury].) Moreover, in this case, the trial court—an impartial observer of both retrials—concluded that the reason for the different results was not the presence or absence of Andrews's testimony, but rather the prosecutor's "more impassioned" presentation of the evidence in the second retrial and the differing compositions of the two juries. (44RT 6453.) Indeed, during the first retrial, the trial court opined that Andrews's testimony did not have "a lot of impact." (31RT 4399.) Thus, it appears that the absence of Andrews's testimony in the second retrial was not a significant factor in the jury's penalty determination.

Appellant further argues that the error was prejudicial because the jury deliberated for a relatively short period of time (two days). (AOB 151-152.) This argument is puzzling, as this Court has held that a short deliberation period is evidence of *a lack of* prejudice. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 684.)

Appellant also claims that he was prejudiced because the prosecutor used the trial court's exclusion ruling to his advantage in his closing argument. (AOB 152-154.) This argument is ironic, given that defense counsel chastised the prosecutor for spending less than one minute of his two-hour-plus closing argument discussing the mitigation evidence. (43RT

6316.) Thus, appellant cannot credibly argue that the prosecutor "focused" his remarks on the absence of expert social historian testimony. (See AOB 152.) Moreover, the prosecutor's arguments on this topic were essentially the same in the first and second retrials: appellant was responsible for his actions despite his difficult childhood. (See 33RT 4616-4617; 43RT 6308-6309.) Accordingly, the prosecutor did not exploit the absence of Andrews's testimony in a way that prejudiced appellant.

In sum, appellant savagely murdered Paula while attempting to rape her and attempted to murder Theodore when he came to her rescue. Less than a year earlier, he brutally raped Patricia in her own home. And before that, he sodomized four-year-old Curtis, abused Rebecca, and made Teressa urinate in his mouth. Given the heinous nature of these acts, and the fact that defense counsel's closing argument covered the same ground as Andrews's excluded testimony, there is no reasonable possibility that Andrews's testimony would have affected the jury's sentencing determination in this case. For the same reasons, any federal constitutional error was harmless under *Chapman*.

V. THE TRIAL COURT PROPERLY EXCLUDED THE HEARSAY DECLARATIONS OF RONALD AND SHIRLEY, AS WELL AS WILLIAMS'S TESTIMONY RELATING TO CHARLES SR.'S ABUSE OF HIS FATHER

Appellant next contends that his state and federal constitutional rights were prejudicially violated by the trial court's exclusion of the declarations of Ronald and Shirley, and by the exclusion of Williams's testimony about Charles Sr.'s violence towards his own father. (AOB 155-174.) Respondent submits that the trial court did not err in excluding this evidence.

A. The Trial Court Did Not Violate Appellant's Constitutional Rights by Excluding the Declarations of Ronald and Shirley

Appellant first claims that the trial court's exclusion of the declarations of Ronald and Shirley violated his rights to due process and to present all relevant mitigating evidence under the Eighth and Fourteenth Amendments. (AOB 155-170.) Respondent submits that appellant's constitutional rights were not violated by the exclusion of the declarations.

1. Relevant Proceedings

a. Ronald's Declaration

Prior to the second retrial in 1999, appellant moved to introduce Ronald's 1991 declaration. Ronald died in 1995. (6CT 1622-1643; 34RT 4739.) The trial court indicated that it understood that hearsay was admissible under certain circumstances in a penalty trial, but voiced its concern that the information contained in the declaration was so similar to the mitigation evidence already presented through Haynes, Williams, Thomas, and Teressa that it added little to the jury's understanding of appellant's background. After defense counsel listed some of the specific incidents that were not covered by the other witnesses' testimony, the prosecutor suggested that appellant himself was available to testify to those incidents. The trial court agreed, adding that appellant would be available for cross-examination while Ronald would not. (39RT 5635-5636.)

Defense counsel further argued that the declaration was reliable. The court responded that, under *People v. Champion* (1995) 9 .Cal.4th 879 at page 938, hearsay evidence was admissible if it was highly relevant and reliable. The court found that, given the substantially similar testimony of the other witnesses, the hearsay was not highly relevant. The court was also skeptical of the declaration's reliability, noting that it was prepared with the motivation of securing appellant a new trial. The court was also

troubled that the declaration was not subject to cross-examination. (39RT 5638-5639.)

Defense counsel argued that the evidence would aid the jury in its penalty determination. The court replied that much of the evidence had already been presented through other witnesses, and to the extent it had not, appellant could testify to it and make himself available for cross-examination. The court thought it was highly unfair to the prosecution for appellant to offer testimony that was not subject to cross-examination. The court also believed that, given the lack of cross-examination, the jury would have difficulty assessing the evidence. Furthermore, the court concluded that the evidence was "highly susceptible to exaggeration and outright fabrication" because it was given with the motivation to obtain a reversal of appellant's death sentence. (39RT 5640.)

Ultimately, the court denied the motion, finding that the evidence was cumulative, not highly relevant given the mitigating evidence, capable of being given by appellant himself, and not reliable due to the fact that it had been prepared with the specific motivation to encourage the grant of appellant's federal habeas petition. (39RT 5641.)

Near the end of appellant's mitigation case, defense counsel requested that the trial court reconsider its exclusion of Ronald's declaration, specifically requesting that paragraphs three (concerning animal abuse), four (concerning the molestation of Teressa), seven (concerning appellant's suicide attempt at age seven or eight), and eight (concerning appellant's drug use and his split-personality behavior) be presented to the jury. The trial judge considered permitting appellant to introduce paragraph seven, but ultimately denied the request because appellant could testify to the suicide attempt, and consequently the reason for introducing the hearsay was absent. The court was also troubled by the fact that the declaration was prepared by an attorney under circumstances that lacked trustworthiness,

given the motives involved in creating it. The court further noted that the declaration was not subject to cross-examination and that much of the information in the declaration had been presented through other witnesses. In the court's view, appellant had already presented "a tremendous amount of testimony" on appellant's background. (42RT 6182-6183.)

b. Shirley's Declaration

Shirley's testified at appellant's 1984 trial, and that testimony was read to the jury in appellant's retrials. Shirley died in 1997. (31RT 4343-4360; 41RT 5901-5916.) Prior to appellant's mitigation case in the second retrial, appellant moved to introduce Shirley's 1991 declaration that had been prepared in connection with appellant's federal habeas corpus proceedings. (11CT 2962-2990; 40RT 5676.)

The court asked the prosecutor for his response to the defense assertion that Shirley's declaration contained information not included in her 1984 testimony. The prosecutor indicated that he expected the defense mitigation witnesses to testify about many of the facts set forth in the declaration. The court agreed, and added that Shirley's declaration, like Ronald's, was prepared with the intent to secure appellant a new trial. The court also voiced its concern that the declaration was not subject to anyone perceiving the declarant at the time it was made and would not be subject to cross-examination. The court recognized that hearsay was admissible in a penalty phase, but considered the declaration to be highly dangerous for the reasons set forth above. The court further noted that some of Shirley's assertions in the declaration were double hearsay. (40RT 5677-5679.)

After some discussion on the specific points mentioned in the declaration, the prosecutor suggested that the defense proceed with the mitigation case with the understanding that the issue would be revisited if any areas in Shirley's declaration were not adequately covered. The court agreed with the prosecutor's proposal, and tentatively denied appellant's

request to introduce the declaration. The court indicated that the evidence appellant sought to introduce from the declaration needed to be significant and could not be cumulative; otherwise, according to the court, there would be no reason to introduce the hearsay. (40RT 5679-5681.)

Defense counsel asked the court if it considered evidence cumulative if one other witness testified to the evidence. The court responded in the affirmative, explaining that if the evidence had already been presented through a witness who was subject to cross-examination, there was no need to introduce the hearsay evidence. The court stated that the jury did not need to hear a repeat of testimony by way of a hearsay declaration that was not subject to cross-examination. The court repeated its concern that the declaration was not simply a narrative by Shirley, but instead "was set up by an attorney with a specific goal in mind." The court viewed it as unfair to introduce a declaration prepared under those circumstances. (40RT 5682-5683.)

Near the end of the mitigation case, defense counsel requested assistance from the court in helping the parties enter into a stipulation as to which parts of Shirley's declaration would be entered into evidence. Defense counsel requested that paragraphs three (concerning Charles Sr.'s abuse of Shirley shortly after their wedding), four (concerning Shirley's not wanting a child so early in her marriage), five (concerning Shirley's lack of prenatal care), six (concerning Charles Sr.'s beating of Shirley during her pregnancy), eleven (concerning Shirley's lack of mothering skills), fourteen (concerning appellant's hyperactivity and the school's efforts to control him), fifteen (concerning an effort by school psychologist to visit appellant's family), nineteen (concerning Charles Sr.'s animal abuse in the presence of the children), twenty-three (concerning Charles Sr.'s sexual abuse of Teressa), and twenty-five (concerning Shirley's observations of

appellant's drug use) be introduced. The prosecutor objected to all of this evidence, with the exception of paragraph six. (42RT 6179-6181.)

The court denied appellant's request, concluding that the evidence was dangerous in that it would be presented without cross-examination and was obviously prepared by someone other than the person who signed the declaration. The court found that the declaration lacked trustworthiness because it was designed by another person with the distinct purpose of convincing a court to grant appellant's petition for writ of habeas corpus. (42RT 6181-6182.) In light of the court's ruling, defense counsel chose not to offer the evidence contained in paragraph six. (42RT 6183.)

2. Applicable Law

"Although the Eighth and Fourteenth Amendments confer a right upon capital defendants to present all relevant mitigating evidence to the jury [citation], the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible." (*People v. Smithey* (1999) 20 Cal.4th 936, 995.) Put another way, neither this Court nor the United States Supreme Court "has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code." (*People v. Edwards* (1991) 54 Cal. 3d 787, 837.)

However, "a defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' and (2) there are substantial reasons to assume the reliability of the evidence." (*People v. Kaurish* (1990) 52 Cal.3d 648, 704, quoting *Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738].) But "if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the

accused due process of law." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 996.) Exclusion of evidence under this standard is reviewed for abuse of discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 320-322.) The opportunity for cross-examination is an important factor in determining whether otherwise inadmissible testimony should be admitted to ensure a defendant's right to due process of law. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 997, fn. 17.)

3. The Trial Court's Exclusion of the Declarations Did Not Violate Appellant's Constitutional Rights

Here, the trial court did not abuse its discretion in excluding the declarations because the information contained in them was neither highly relevant nor reliable. The declarations were not highly relevant to a critical issue in the penalty phase of appellant's case because they were cumulative to other evidence of appellant's violent and dysfunctional upbringing.

People v. Smithey, *supra*, 20 Cal.4th 936, and *People v. Loker* (2008) 44 Cal.4th 691, are instructive. In *Smithey*, the defendant offered the hearsay deposition testimony of his parole officer as mitigating evidence to show that his lack of mental health treatment was the fault of his parole officers. He claimed that the exclusion of this evidence violated his federal constitutional rights. This Court rejected that claim, concluding that the parole officer's testimony was not highly relevant to a critical issue at the penalty phase because there was ample evidence admitted at trial that showed the same circumstance. (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 996-997.) Similarly, in *Loker*, the trial court excluded hearsay evidence that one of the defendant's cousins had drawn a gun on a police officer. This Court ruled that the evidence was not highly relevant to a critical issue in the penalty phase because it was cumulative to other evidence that children from the trailer park in which the defendant grew up had committed crimes. (*People v. Loker*, *supra*, 44 Cal.4th at pp. 729-730.)

Here, by appellant's own admission, the declarations of Ronald and Shirley focused on the mental and physical abuse appellant suffered as a child, and his exposure to deviant sexual behavior. (AOB 155.) However, as the trial court correctly noted in denying appellant's motion to introduce the declarations, appellant had already presented "a tremendous amount of testimony" on these topics. (42RT 6183.) As fully set forth in the statement of facts, appellant's mitigation case included extensive testimony from Haynes, Williams, Teressa, Thomas, and Shirley[18] detailing Charles Sr.'s physical abuse of appellant and the other McDowell children from a very young age, Charles Sr.'s failure to show appellant any affection, Charles Sr.'s physical and verbal abuse of Shirley, Shirley's lack of mothering skills, Shirley's physical abuse of appellant, Shirley's failure to ever show appellant love or affection, Charles Sr.'s obsession with religion and his sermons in which he condemned his family to hell, Charles Sr.'s sexual molestation of Teressa, Charles Sr.'s unfounded accusations that his sons were having sex with Teressa, and the sexual molestation that appellant suffered as a child at the hands of his uncles and other men.

Given the voluminous amount of evidence appellant had already presented pertaining to the abuse he suffered as a child and his exposure to deviant sexual behavior, further evidence on those topics in the form of Ronald's and Shirley's declarations, like the excluded evidence in *Smithey* and *Loker*, could not be considered highly relevant to a critical issue in the penalty phase. Accordingly, the trial court did not abuse its discretion in excluding the declarations.

Appellant attempts to escape the logical force of this reasoning by pointing out that certain portions of the declarations were not technically

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[18] Shirley's testimony from appellant's 1984 trial was read into the record. (41RT 5901.)

"cumulative," given that some of the specific incidents mentioned in the declarations were not testified to by other witnesses. (AOB 168-169.) This argument is unpersuasive for several reasons. First, in the context of assessing a defendant's claim that he was unconstitutionally prevented from introducing mitigating evidence, this Court has held that there is no infringement of the defendant's constitutional rights when "all of the excluded evidence would only have served to corroborate other testimony informing the jury of the same *or comparable* facts." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178, emphasis added.)

Here, all of the "noncumulative" facts identified by appellant in Ronald's and Shirley's declarations (see AOB 168-169) related to his difficult childhood and were similar in sum and substance to the facts related by Haynes, Williams, Teressa, Thomas, and Shirley in their testimony at appellant's trial. Thus, the declarations merely corroborated the other testimony by informing the jury of comparable facts. As a result, they were not highly relevant to a critical issue in the penalty phase.

Specifically, with respect to Shirley's declaration, the facts that appellant isolates relating to Shirley's lack of prenatal care, appellant's premature birth, and Charles Sr.'s beating of Shirley while she was pregnant with appellant were irrelevant to any critical issue in the penalty phase. (See *People v. Williams*, *supra*, 40 Cal.4th at p. 320 [trial court properly excluded hearsay evidence that defendant's father punched his mother while she was pregnant with him in the absence of foundational medical testimony that defendant was injured as a result of punch].)[19] That

[19] In any event, the prosecutor agreed to stipulate that Charles Sr. beat Shirley during her pregnancy, but appellant's trial counsel chose, for tactical reasons, not to present that evidence. (42RT 6180, 6183; 11CT 2968.) Consequently, appellant cannot complain about the exclusion of this evidence on appeal.

Charles Sr. and Shirley did not want a child so early in their marriage was similarly irrelevant (see *ibid.* [hearsay evidence regarding father's act of violence toward pregnant mother not particularly probative of father's conduct toward defendant after he was born]), as was the evidence about a school psychologist visiting the McDowell home to try to help appellant (see *id.* at pp. 321-322 [trial court properly excluded hearsay evidence that defendant's grandmother offered him a better alternative that he was never able to take advantage of]). Evidence of appellant's hyperactivity and learning disabilities in first grade was comparable to Williams's testimony that appellant was an "active and mischievous" child. (41RT 5884.) And evidence of his teacher's attempts to control him, were, at best, tangential to his mitigation case. Accordingly, the trial court did not abuse its discretion in excluding any of this hearsay evidence.

With respect to Ronald's declaration, Ronald's statement about Charles Sr. shooting the family dog was irrelevant because there is no indication that appellant knew of the incident. (See *People v. Loker*, *supra*, 44 Cal.4th at p. 729 [evidence irrelevant where defendant failed to demonstrate he knew of incident].) There is no indication that appellant was present when Charles Sr. shot the dog. (See 6CT 1627-1628.) Even if the evidence were admissible, appellant's case-in-chief was saturated with testimony describing Charles Sr.'s unbelievably cruel and violent behavior toward his family. Evidence of Charles Sr.'s cruelty to animals was comparable to appellant's other evidence and merely tangential to his mitigation case.

As to Ronald's statement that appellant, as a boy, had sex with men, Thomas testified that appellant was sexually molested by his uncles (42RT 6161) and Edwards testified that appellant's medical history indicated that he had been sexually abused by his uncles, employers, schoolmates, and members of the Boy Scout troop. (40RT 5736-5737.) The evidence in

Ronald's declaration regarding appellant's sexual activity was comparable to the evidence already presented on this topic. Ronald's assertion that Charles Sr. beat appellant for this conduct was fully consistent with the plethora of evidence relating to Charles Sr.'s violent and abusive behavior.

Finally, given how vividly the defense depicted appellant's traumatic and depressing childhood—frequent and severe beatings by his father and mother, no love, praise, or affection from either, constant criticism, sexual molestation by his uncles and other men, hypocritical sermons from his father where he was routinely told he was going to hell—evidence of appellant's suicide attempt was merely tangential to the defense evidence relating to the physical and mental abuse appellant suffered as a child. The trial court did not abuse its discretion in excluding the declarations, and appellant's constitutional rights were not violated.

Furthermore, appellant's criticism of the trial court's working definition of "cumulative" is utterly baseless. As described above, defense counsel asked the court if it considered evidence cumulative if one other witness testified to the evidence. The court responded in the affirmative, explaining that if the evidence had already been presented through a witness who was subject to cross-examination, there was no need to introduce the hearsay evidence. The court further explained that the jury did not need to hear a repeat of testimony by way of a hearsay declaration that was not subject to cross-examination. (40RT 5682.) Appellant claims that the trial court's definition of cumulative cannot be correct because, "under the trial court's definition and ruling, a defendant would not be allowed to corroborate any fact by having multiple witnesses attest to it." (AOB 169.) Appellant does not cite any authority for this proposition, and with good reason: This Court uses the same definition of "cumulative" as the trial court. (*People v. Elliot* (2005) 37 Cal.4th 453, 483, fn. 11 ["Practically by definition, the facts conveyed in defendant's corroborated

statements were cumulative and thus properly subject to exclusion by the court."]; *People v. Smithey*, *supra*, 20 Cal.4th at pp. 996-997 [excluding as cumulative hearsay statements that "simply corroborated other testimony presented at trial"].) Moreover, corroboration of appellant's mitigating evidence was unimportant in this case, as the prosecutor did not dispute the existence of any of the incidents of abuse that appellant suffered as a child or his exposure to deviant sexual behavior. (See 43RT 6308 [prosecutor acknowledging in closing argument that appellant had a "bad childhood"].)

Finally, appellant claims that the declarations should have been admitted because only a few witnesses testified about appellant's childhood. (AOB 169-170.) Respondent disagrees. The trial court was correct when it stated that appellant had presented "a tremendous amount of testimony" on his background. (42RT 6183.)

Not only were the declarations of minimal relevance, but there were also substantial reasons to doubt their reliability. The trial court concluded that the declarations were unreliable because they were prepared with the distinct purpose of convincing a court to grant appellant's petition for writ of habeas corpus, overturn his death sentence, and award him a new trial. (39RT 5638-5641; 40RT 5677-5679, 5682-5683; 42RT 6181-6183.) The trial court's reliability determination in this case is supported by numerous decisions of this Court in which hearsay statements made in preparation for litigation or where the declarant had a motivation to exonerate the defendant were deemed unreliable under *Green v. Georgia*, *supra*, 442 U.S. 95. (See *People v. Elliot*, *supra*, 37 Cal.4th at p. 482; *People v. Weaver* (2001) 26 Cal.4th 876, 981; *People v. Stanley* (1995) 10 Cal.4th 764, 839; *People v. Livaditis* (1992) 2 Cal.4th 759, 780; *People v. Edwards* (1991) 54 Cal.3d 787, 820-821; *People v. Whitt* (1990) 51 Cal.3d 620, 643-644.)

Appellant claims that the declarations were reliable because many of the statements included therein were corroborated by the testimony of

family members who referred to the same events. (AOB 163.) To the extent that is true, the statements were properly excluded as cumulative. (See *People v. Elliot*, *supra*, 37 Cal.4th at p. 483, fn. 11.) To the extent that Ronald and Shirley included other incidents in their declarations, the trial court was well within its discretion in finding that these statements were "highly susceptible to exaggeration and outright fabrication" because they were given with the motivation to obtain a reversal of appellant's death sentence. (39RT 5640.)

Appellant claims that the motivation of Ronald and Shirley to help appellant is "a weak reason" to exclude their declarations because a determination of unreliability based on this motivation is one that could be "validly made about anyone testifying in mitigation." (AOB 163.) Appellant's argument is unpersuasive for the reason that other witnesses who *testify* in mitigation are subject to cross-examination—the "greatest legal engine ever invented for the discovery of truth." (*People v. Chatman* (2006) 38 Cal.4th 344, quoting 5 Wigmore on Evidence (Chadbourne rev. ed. 1974) § 1367, p. 32.) The declarations of Ronald and Shirley were not subject to cross-examination.

Appellant attempts to counter this argument by asserting that the prosecutor did not cross-examine Shirley when she testified at appellant's original trial in 1984. (AOB 164.) First, appellant is mistaken. The prosecutor did pose one question to Shirley on cross-examination. (41RT 5916.) But even if there had been no cross-examination, appellant's point does not withstand scrutiny. If the new information in Shirley's declaration were as dynamic as appellant suggests (AOB 168), surely the prosecutor would have wanted the opportunity to cross-examine her.[20]

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[20] Appellant's claim that the declarations were reliable because "the State of California" did not object to them in appellant's federal habeas (continued...)

Accordingly, for these reasons, the declarations of Ronald and Shirley were neither highly relevant nor reliable, and their exclusion did not infringe on appellant's constitutional rights.

Appellant claims that the "trial court also erred by mechanistically applying the rule against hearsay to defeat the ends of justice." (AOB 162, 164, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].).) In connection with this claim, appellant asserts that the trial court failed to take into account (1) the fact that Ronald and Shirley had died while appellant was pursuing his "valid claim" over the course of 15 years, (2) the trial court's exclusion of the declarations of Ronald and Shirley, coupled with its exclusion of Andrews's testimony, prevented the jury from hearing significant family history testimony, and (3) the evidentiary bind it created for appellant by suggesting he should testify himself if he wanted the mitigation evidence to be introduced. (AOB 164-167.)

Appellant's claim is unavailing. "[N]either due process nor *Chambers v. Mississippi* has led the high court to 'question[] the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted.'" (*People v. Yeoman*, *supra*, 31 Cal.4th at pp. 141-142, quoting *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].)

As to appellant's specific contentions, the fact that potential witnesses died before appellant was granted a retrial does not exempt him from the

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(...continued)
corpus proceedings hardly merits a response. The fact that a different prosecutorial agency in a different case in a different court did not object to the declarations simply has no bearing on the propriety of the trial court's reliability determination in *this* case.

rules of evidence. This is particularly true where, as here, the witnesses' testimony was largely cumulative to that of other witnesses. For the reasons discussed above, the trial court properly excluded Andrews's testimony, as well as the declarations of Ronald and Shirley. Moreover, appellant's mitigation case was saturated with evidence of his abusive and dysfunctional family history. And contrary to appellant's assertion, it was entirely proper for the trial court to factor into its analysis the fact that appellant was available to testify to the mitigation evidence he sought to introduce. (See *People v. Stanley*, *supra*, 10 Cal.4th at pp. 839-840 [in denying defendant's claim that evidence was admissible under *Green v. Georgia*, *supra*, 442 U.S. 95, court noted that "the defense was free to introduce competent evidence, including defendant's testimony"]; *People v. Edwards*, *supra*, 54 Cal.3d at pp. 820-821 [same].) Appellant's constitutional rights were not violated.

B. The Trial Court Properly Excluded Evidence Relating to Charles Sr.'s Violence Toward His Own Father

Appellant also claims that the trial court erroneously excluded evidence of Charles Sr.'s violence toward his own father. He claims that this ruling was erroneous under state evidentiary law, and also violated his rights under the Eighth and Fourteenth Amendments and their state constitution analogues. (AOB 170-172.) Respondent submits that the trial court properly excluded this evidence; it was irrelevant and not violative of appellant's constitutional rights.

1. Relevant Proceedings

Prior to Williams's testimony, defense counsel requested that Williams be permitted to testify about evidence suggesting that Charles Sr. was physically violent toward his own father, Floyd. Defense counsel argued that the evidence was relevant to establish Charles Sr.'s character

for violence and that appellant had been exposed to even more violence against other family members. (40RT 5759-5760.)

The trial court cited *People v. Rowland*, *supra*, 4 Cal.4th 238 at page 279 for the proposition that the background of appellant's family is material only to the extent that it relates to the background of appellant himself. The court indicated that the evidence would be admissible if the violence occurred in appellant's presence, but stated that the evidence would only be relevant if it impacted appellant. The court asked defense counsel if there would be evidence that appellant witnessed the violence. Defense counsel responded that Williams would not testify that she ever observed a beating; she would only testify that she observed evidence of the beating and confronted Charles Sr. about it. The trial court asked defense counsel, "So you want to speculate that [appellant] himself saw this?" Citing *In re Gay* (1998) 19 Cal.4th 771, defense counsel replied that he should be permitted to introduce the evidence as long as he could show that the abuse occurred during appellant's lifetime and under circumstances where evidence of the abuse would have been apparent to appellant. The trial court responded that defense counsel would be speculating that the abuse would be apparent to appellant. (40RT 5760-5762.)

The trial court concluded that the proposed evidence would require "guesswork on the part of the jury" that the abuse occurred and that appellant knew about it. The trial court stated that it would permit the evidence to be introduced to corroborate appellant's testimony, but in the absence of testimony by appellant, the trial court believed it was unfair to let the jury speculate that appellant was aware of it. (40RT 5763-5764.)

2. Applicable Law

"The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding 'any aspect of a defendant's character

or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) "Nonetheless, the trial court still '"determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury."'" (*People v. Williams*, *supra*, 40 Cal.4th at p. 320.) "[R]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*People v. Farley* (2009) 46 Cal.4th 1053, 1128, internal quotation marks omitted.)

3. The Trial Court Properly Excluded the Portion of Williams's Testimony Relating to Charles Sr.'s Violence Against His Father

In *People v. Rowland*, *supra*, 4 Cal.4th 238, this Court stated:

> [T]he background of the defendant's family is of no consequence in and of itself. That is because under both California law [citation] and the United States Constitution [citation], the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the "defendant's character or record" that "the sentencer . . . [may] not be precluded from considering"—not his family's. [Citations]. [¶] To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself.

(*Id.* at p. 279.)

In *In re Scott* (2003) 29 Cal.4th 783, this Court applied the above-quoted language from *Rowland* and concluded that the referee properly refused to admit "certain evidence regarding petitioner's family and conditions at home that were not linked to petitioner." (*In re Scott*, *supra*, 29 Cal.4th at p. 821.)

Similarly, in this case, the trial court properly refused to admit Williams's testimony relating to Charles Sr.'s violence toward his father. For that evidence to be relevant, appellant needed to demonstrate that he knew of it. (*People v. Loker*, *supra*, 44 Cal.4th at p. 729.) Here, appellant was unable, or unwilling, to do so, and, as a result, the trial court's decision to exclude the proposed testimony as irrelevant was correct.

In re Gay, *supra*, 19 Cal.4th 771, and *People v. Thornton*, *supra*, 41 Cal.4th 391, cited by appellant, are inapposite. In *Gay*, this Court ruled that a defendant's attorney was ineffective for, among other things, failing to uncover evidence that the defendant's father was abusive to the defendant and other family members. This Court noted that other members of the defendant's family had emotional problems, and stated that some of these "might be attributable to the unstable home life established by" the defendant's father. (*In re Gay*, *supra*, 19 Cal.4th at p. 813.) In *Gay*, the evidence that the defendant's father abused other family members was relevant to the unstable home life experienced by appellant. Here, conversely, there was no evidence that Charles Sr.'s violence toward his own father made appellant's home life more unstable, or for that matter, impacted him in any way. There was no evidence that he was even aware of it.[21]

In *People v. Thornton*, *supra*, 41 Cal.4th 391, the trial court excluded testimony pertaining to two incidents in which the defendant's stepfather struck the defendant's mother while the defendant was not present. Defense counsel argued that the incidents were relevant because spousal abuse affects children in a household who are being raised there whether or

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[21] Respondent notes that the trial court permitted appellant to present much evidence pertaining to Charles Sr.'s violence toward other family members that would have impacted the stability of appellant's home life. (See 41RT 5867-5869, 5905-5909, 5945; 42RT 6114-6122.)

not they are aware of particular incidents. This Court found that the trial court properly excluded the evidence because defense counsel made no offer of proof, did not attempt to lay any factual foundation for the view she expressed, and was not speaking on a subject on which judicial notice could be taken. (*Id.* at pp. 447-448.) In this case, appellant's trial counsel never argued that the abuse of appellant's grandfather impacted him even if he was unaware of it; to the contrary; he merely argued that the jury could infer that appellant was aware of the abuse. (See 40RT 5761.) And even if appellant's trial counsel had argued that the abuse affected appellant even though he was unaware of it, appellant's trial counsel, like defense counsel in *Thornton*, failed to make an offer of proof or attempt to lay a factual foundation for that theory of admissibility.

Because there was no link between Charles Sr.'s abuse of his father and appellant, the trial court's decision to exclude Williams's testimony on this topic was proper, and did not violate appellant's state or federal constitutional rights.

C. Even If the Trial Court Erred in Excluding the Evidence, Any Error Was Harmless

In any event, even if the trial court abused its discretion in excluding Andrews's testimony, the error was harmless. "Penalty phase error is prejudicial under state law if there is a 'reasonable possibility' the error affected the verdict." (*People v. Watson*, *supra*, 43 Cal.4th at p. 693.) "This standard is identical in substance and effect to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]." (*People v. Watson*, *supra*, 43 Cal.4th at p. 693.)

Here, as discussed above, the excluded evidence was largely cumulative of, and comparable to, the "tremendous amount" of family history evidence that appellant had already introduced. Moreover, because

the prosecutor did not challenge appellant's background evidence, the corroboration value of the excluded evidence was slight. Furthermore, as discussed above, the aggravating evidence in this case was powerful. Appellant savagely murdered Paula while attempting to rape her and attempted to murder Theodore when he came to her rescue. Less than a year earlier, he brutally raped Patricia in her own home. And before that, he sodomized four-year-old Curtis, abused Rebecca, and made Teressa urinate in his mouth. Under these circumstances, there is no reasonable possibility that the introduction of the excluded evidence would have affected the jury's penalty determination.

VI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT

Appellant next contends that the prosecutor committed misconduct during closing argument, and that the prosecutor's misconduct interfered with the jury's ability to fully consider appellant's mitigation evidence, in violation of the Eighth Amendment. Respondent submits that the prosecutor committed no misconduct, and that the jury's ability to consider appellant's mitigation evidence was in no way impaired.

A. The Prosecutor Did Not Commit Misconduct During His Closing Argument

Appellant claims that the prosecutor committed misconduct during his closing argument by: (1) misstating and oversimplifying capital sentencing law, (2) defining "sociopath" for the jury, and (3) including in his list of aggravating crimes the molestation of Thomas. (AOB 178-182.) Respondent submits that the each of these instances of alleged misconduct has been forfeited by appellant, is not meritorious, and/or was harmless.

> The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the

> trial with such unfairness as to make the conviction a denial of due process.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

1. The Prosecutor's Statements About Capital Sentencing Law

At the beginning of the prosecutor's closing argument, he reminded the jurors that appellant had already been convicted of first degree murder and that two special circumstances had been found true. (43RT 6250.) The prosecutor then read an instruction to the jurors informing them that, under these circumstances, the law called for a punishment of either death or confinement in the state prison for life without the possibility of parole. (43RT 6251-6252.)

The prosecutor continued:

> There are only two choices at that point in time. The minimum, the absolute minimum sentence which I put down here is life without the possibility of parole. If a defendant, if [appellant] has no history of criminality at all, period, not one day, the minimum sentence that he receives is life without parole. That's the law in this state.

(43RT 6252.) At this point, defense counsel objected on grounds that the prosecutor had misstated the law and that his comments were confusing to the jury. The trial court overruled the objection. (43RT 6252.)

The prosecutor went on to explain to the jury that the law expressed no preference as to which punishment was correct in this case, and that the punishment was something the jury would have to decide based on the aggravating and mitigating factors. The prosecutor then reiterated that, because appellant had been convicted of first degree murder with special circumstances, the minimum sentence he faced was life without parole. (43RT 6253.) He then stated:

> Therefore you have to consider what is the punishment for the aggravating criminal conduct? One, the sodomy of Curtis M[.] Two, the rape and kidnapping of [Patricia]. Three, the attempted murder of Theodore Sum. Four, the molestation of [Teressa]. Five, the assaults of [Rebecca]. These are all things that you need to consider to determine punishment.

(43RT 6253.)

At other points in his argument, the prosecutor asked, "What is the punishment for the rape of [Patricia]?" (43RT 6289); "And what is the punishment for [appellant]'s conduct in relation to [Patricia]?" (43RT 6295); and regarding the attempted murder of Theodore: "What is the punishment for that crime? Does it increase? Does it aggravate the crime of the killing of [Paula]? Of course it does." (43RT 6307).

At the outset, appellant's assertion of prosecutorial misconduct in connection with the prosecutor's comments regarding capital sentencing law has been forfeited. "[A]s a general matter a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct." (*People v. Ledesma* (2006) 39 Cal.4th 641, 740.)

Here, defense counsel objected to the prosecutor's statement that life without parole was the minimum sentence that appellant faced after being convicted of first degree murder with special circumstances. (43RT 6252.)

However, appellant appears to have abandoned this argument on appeal. (AOB 181.) Appellant only takes issue with the prosecutor's comments regarding the role of appellant's prior criminality in the jury's sentencing determination (AOB 180-182)—comments that were made after the trial court overruled his initial objection. Because appellant did not object to these later comments or request an admonition, his claims of prosecutorial misconduct involving them have not been preserved for appeal.

Even if these claims had been preserved for review, they are without merit. "[I]t is misconduct for the prosecutor to misstate the applicable law." (*People v. Boyette*, *supra*, 29 Cal.4th at p. 435.) Appellant claims that the prosecutor inappropriately concocted a "formula" ("conviction + need to punish for other bad acts = death penalty") that "discounted the moral evaluation of all of the evidence, and instead improperly suggested that the jury's task simply involved a scorecard." (AOB 181.) Respondent disagrees with appellant's characterization of the prosecutor's argument. The prosecutor did not offer a formula to the jury; he merely informed the jurors that they needed to consider appellant's criminal history in arriving at their penalty determination. (43RT 6253.) This argument is fully consistent with California law. (See Pen. Code, § 190.3, subd. (b) ["In determining the penalty, the trier of fact shall take into account . . . [t]he presence or absence of criminal activity by the defendant . . . ."].)

Moreover, the prosecutor's argument did not suggest to jurors that their "task simply involved a scorecard." In fact, the prosecutor explicit told them that this was not the case. First, the prosecutor quoted to the jury the portion of CALJIC No. 8.88 that reads: "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them." (43RT 6263.) He then explained:

> In other words, you don't—you don't say there's five aggravating factors, there's three mitigating factors, that the aggravating factors are the more important of the two. What you do is you balance them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

(43RT 6263.) There was no reasonable likelihood that the jury construed or applied the prosecutor's remarks in an objectionable fashion.

Appellant further claims that the prosecutor's argument: (1) incorrectly implied that past criminal conduct was the critical factor in determining appellant's punishment, (2) urged the jurors to focus on this evidence to the exclusion of everything else, and (3) improperly implied that the jury needed to punish appellant not only for Paula's murder, but also for his other crimes. (AOB 181-182.) To the extent these claims hinge on appellant's assertion that the prosecutor's argument reduced the jury's task to applying a simple formula, for the reasons discussed above, they lack merit. In any event, appellant's claims that the prosecutor's statements were "incorrect" and "improper" are just a matter of semantics. California law expressly provides for jury consideration of a defendant's prior criminal activity. (Pen. Code, § 190.3, subd. (b).) By arguing that appellant needed to be punished for his prior criminal activity, the prosecutor meant—and in all likelihood, the jury interpreted his comments to mean—that appellant's prior criminal activity made him more morally blameworthy, and therefore more deserving of the death penalty. This argument was proper. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1205-1206, 1214 [where evidence is admissible pursuant to section 190.3, subd. (b), prosecutor does not commit misconduct in emphasizing it].)

Finally, appellant also claims that the prosecutor's argument incorrectly implied that "factor (b)" evidence was necessarily aggravating. (AOB 181.) Respondent disagrees. The prosecutor did not tell the jury,

expressly or implicitly, that factor (b) evidence could never be mitigating; he merely argued that appellant's prior criminal activity involving force or violence or threats of it was aggravating. Such an argument does not constitute prosecutorial misconduct. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1155.)

Even assuming the prosecutor's argument did amount to misconduct, it was not prejudicial. "[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703, quoting *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190; 108 L. Ed. 2d 316].)

Here, the jury was instructed on how to properly evaluate the aggravating and mitigating factors (11CT 3013-3016, 3019-3020; 43RT 6392-6399, 6409-6411; CALJIC Nos. 8.85, 8.86, 8.87, 8.88), and told that it needed to accept and follow the law as it was stated to them by the trial court (11CT 3008; 43RT 6378; CALJIC No. 8.84.1). Any prejudicial effect of the prosecutor's statement was further lessened by defense counsel's argument, in which he stressed the proper application of the aggravating and mitigating factors and specifically urged the jurors to not latch onto the prosecutor's "simplistic formulas and catchy words." (43RT 6324-6326.) Accordingly, there was no reasonable possibility that the prosecutor's statements affected the jury's penalty determination. (See *People v. Bonin* (1988) 46 Cal.3d 659, 702, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [prosecutor's misstatement of law regarding aggravating and mitigating factors was neutralized by trial judge's instruction to jury to "accept and follow the rules of law as I state them to you"]; see also *People v. Seaton* (2001) 26 Cal.4th 598, 661

[prosecutor's misstatement of law during guilt-phase argument evaluated in terms of correct instructions given by trial court, and found to be harmless].)

2. Prosecutor's Statement Defining "Sociopath"

During Edwards's testimony, she stated that Dr. Miller, a court psychiatrist, had diagnosed appellant as having a "character disorder, sociopathic." (40RT 5724, 5745.) During his closing argument, the prosecutor referenced this diagnosis, and stated, "So what is a sociopath? It's an anti-social personality behavior that violates the rights—" At this point, defense counsel objected: "Excuse me, counsel. I'm going to object to this. There is no evidence as to these words. These are specialized words. Counsel is not permitted to make up a definition now and offer it to the jury." The trial court overruled the objection, commenting, "I doubt that it's made up." The prosecutor continued: "Behavior that violates the rights of others or criminal behavior, a disease against society." (43RT 6282-6283.)

Appellant claims that the prosecutor committed misconduct "when he became his own psychiatric expert witness" and defined "sociopath" for the jury. (AOB 178, 182.) This claim fails. *People v. Friend* (2009) 47 Cal.4th 1 is instructive. In that case, the defendant claimed that the prosecutor improperly offered his own opinion when he stated that the defendant had "an antisocial personality," and that he was a "sociopath," "without feeling." This Court rejected that claim, concluding that "the prosecutor was using language in common currency to describe his interpretation of the evidence, not improperly stating an expert opinion." (*Id.* at p. 84.)

Clearly, if the term "sociopath" is a word "in common currency," then its definition—which the prosecutor in this case got right[22] (see *People v. Blair* (2005) 36 Cal.4th 686, 715)—could not be so "technical and diagnostic" that expert testimony was needed before the prosecutor could mention it in his closing argument. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1026 [prosecutor may refer to matters not in evidence that are common knowledge].) No misconduct occurred.[23]

In any event, even if the prosecutor's definition was misconduct, it was not prejudicial. There was evidence that a psychiatrist had diagnosed appellant as a sociopath. (40RT 5724-5725, 5745.) And there was an abundance of evidence of appellant's sociopathic behavior—making Teressa urinate in his mouth, sodomizing Curtis, raping Patricia, attempting to murder Theodore, and killing Paula as he attempted to rape her. Against this backdrop, the fact that the prosecutor supplied the jury with the definition of "sociopath" is exceptionally insignificant. Thus, there is no reasonable possibility of a different verdict if the prosecutor had refrained from giving the definition.

3. Prosecutor's Reference to Appellant's Molestation of Thomas

Thomas testified that one time, when he was around 16 years old, appellant coerced him into engaging in anal sex. (42RT 6140-6141.) The

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[22] It appears that the prosecutor's use of the phrase "a disease against society" (43RT 6283) was not part of the definition of sociopath, but rather a comment on sociopaths' effect on society. The prosecutor's use of this phrase was not improper. (*People v. Williams* (1997) 16 Cal.4th 153, 221 ["Prosecuting attorneys are allowed a wide range of descriptive comment," including "colorful terms"].)

[23] Appellant's claim that the psychiatric report was made in 1970 when appellant "was younger than 18 years old" (AOB 182) is factually inaccurate. The report was from 1977, when appellant was 23 years old. (40RT 5736.)

trial court ruled that appellant's "coercion" did not amount to a threat of force or violence, and that consequently appellant's molestation of Thomas did not qualify as an aggravating factor. (42RT 6198.)

Near the end of the prosecutor's closing argument, he argued that just because someone had a bad childhood did not mean that he would necessarily have a bad adulthood, and that the person's bad childhood did not mean that he would inevitably turn out to be a murderer, rapist, kidnapper, or "sodomist." (43RT 6308-6309.) The prosecutor then stated:

> The testimony is that [appellant] sexually molested his sister. The testimony is [appellant] molested his brother. The testimony is that [appellant] molested Curtis M[.] The testimony is [appellant] raped [Patricia]. The testimony is [appellant] killed [Paula]. The testimony is [appellant] slit the throat of Theodore Sum because he liked and enjoyed it. Plus the testimony is that he was evil and mean. Don't blame someone, don't blame anyone other than where it belongs. Put this criminality exactly where it belongs.

(43RT 6309.) The prosecutor then urged the jury to blame appellant for his own criminality. (43RT 6309.)

After the prosecutor finished his argument, the court told the parties that it sounded like the prosecutor was making an aggravating factor out of appellant's molestation of his brother, which the court had previously ruled was not an aggravating factor. The trial judge stated that he assumed defense counsel did not object because the aggravating factors were explained in the instructions, but nonetheless asked defense counsel if wanted the court to do anything else. Defense counsel responded in the negative. (43RT 6311-6312.)

Appellant's assertion of prosecutorial misconduct in connection with the prosecutor's reference to appellant's molestation of Thomas has been forfeited. Appellant did not object to the reference when it was uttered. (43RT 6309.) And, shortly thereafter, even at the invitation of the trial

court, defense counsel expressly refused to object to the comment and request an admonition or any other corrective action. (43RT 6311-6312.) As a result, this claim of prosecutorial misconduct has not been preserved for appeal. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 740.)

Moreover, the claim is without merit. The prosecutor never referred to the molestation of Thomas as an aggravating factor. In context, it is clear that the reference was made to dispute appellant's claim in mitigation that his horrific actions were the result of his bad childhood. Indeed, immediately prior to listing appellant's misdeeds, the prosecutor argued that appellant's bad childhood did not mean that he would inevitably become a rapist, "sodomist," or murderer. (43RT 6308-6309.) And immediately after the "list," the prosecutor urged the jurors to blame appellant for his own criminality. (43RT 6309.) In referencing appellant's offenses, including the molestation of Thomas,[24] the prosecutor was trying to show that appellant's actions were caused by appellant's intrinsically evil nature, not his bad childhood. Because the prosecutor's reference to the molestation of Thomas was made in connection with his attack on appellant's claim in mitigation, the prosecutor's comment was not improper. (See *People v. Benson* (1990) 52 Cal.3d 754, 798-799 [prosecutor may refer to evidence that does not qualify as aggravating factor to disprove appellant's claim in mitigation].)

In any event, any error was harmless. As the trial court indicated in its comments to defense counsel, any confusion as to the aggravating factors would be cleared up by the court's instructions. (43RT 6311-6312.) The trial court then proceeded to instruct the jury on the applicable

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[24] Respondent notes that Thomas testified without objection that appellant coerced him into oral and anal sex when Thomas was a child. (42RT 6239-6241.)

aggravating factors, and appellant's molestation of Thomas was not included in the list. (11CT 3014-3015.) In fact, the jury was specifically instructed that "any other evidence you heard about the defendant's character and past behavior, no matter how reprehensible or offensive it may be to you, cannot be used as aggravation, that is, it cannot be used as a reason for imposing the death penalty." (11CT 3014-3015; 43RT 6395-6396; CALJIC No. 8.85.) Given that the prosecutor never identified the molestation of Thomas as an aggravating factor, and the court's instructions clarifying what qualified as an aggravating factor, there is no reasonable possibility that the jurors erroneously believed that the molestation of Thomas could be used as an aggravating factor.

B. The Prosecutor's Comments Did Not Preclude the Jury from Giving a Reasoned Moral Response to Appellant's Mitigation Evidence

Appellant also contends that the prosecutor's misconduct interfered with the jury's ability to fully consider his mitigation, in violation of the Eighth Amendment. (AOB 183-185.) This claim should be summarily rejected.

First, for the reasons discussed above, each of appellant's prosecutorial misconduct claims was either without merit or harmless. Moreover, appellant concedes that each of the alleged instances of misconduct related to the prosecution's aggravating evidence. (AOB 184-185.) Because the prosecutor's comments related to *aggravating* evidence, they in no way prevented the jury from giving a reasoned moral response to appellant's evidence in *mitigation*.

This case bears little resemblance to the United States Supreme Court cases cited by appellant. In *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231], the prosecutor minimized the jury's sense of responsibility for determining the appropriateness of death by

urging the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by another court. (*Id.* at pp. 323, 341.) Here, by contrast, the prosecutor's comments conveyed no similarly inappropriate message to the jury.

In *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 167 L.Ed.2d 585], *Brewer v. Quarterman* (2007) 550 U.S. 286 [127 S.Ct. 1706, 167 L.Ed.2d 622], and *Smith v. Texas* (2007) 550 U.S. 297 [127 S.Ct. 1686, 167 L.Ed.2d 632], the United States Supreme Court held that the special verdict questions posed to the jury failed to provide the jury with a vehicle for expressing its "reasoned moral response" to the defendants' mitigation evidence. (*Abdul-Kabir v. Quarterman*, *supra*, 550 U.S. at pp. 256-257; *Brewer v. Quarterman*, *supra*, 550 U.S. at pp. 292-293; *Smith v. Texas*, *supra*, 550 U.S. at pp. 301-302.) Conversely, in this case, neither the trial court's instructions to the jury nor the prosecutor's arguments in any way prevented the jury from considering appellant's evidence in mitigation. In fact, the trial court's instructions required the jury to consider and weigh the mitigating evidence in making its penalty decision. (See 11CT 3020; CALJIC No. 8.88.)

And lastly, the United States Supreme Court held in *Buchanon v. Angelone* (1998) 522 U.S. 269 [118 S.Ct. 757, 139 L.Ed.2d 702] that the Eighth Amendment does not require a trial court to instruct a capital jury on particular statutory mitigating factors. (*Id.* at p. 270.) Thus, *Buchanon* provides no support at all for appellant's contention that the prosecutor's comments in this case prevented the jury from giving a reasoned moral response to appellant's mitigation evidence. In sum, appellant has failed to establish that his Eighth Amendment right to have the jury fully consider his mitigating evidence was violated.

In any event, any error was harmless. For the reasons discussed above, the alleged instances of prosecutorial misconduct were not

prejudicial. Moreover, to the extent appellant claims that prejudice is demonstrated by the fact that the jury in the first retrial (in which the prosecutor did not make the challenged statements) could not reach a decision on his punishment while the jury in the second retrial (in which he did) voted for death (AOB 186), this circumstance in and of itself does not establish prejudice. (See *People v. Saddler*, *supra*, 24 Cal.3d at p. 684 [instructional error harmless even though prior trial in which erroneous instruction was not given ended in hung jury].) Moreover, contrary to appellant's assertion (AOB 187-188), the fact that the jury deliberated for a relatively short period of time is indicative of a lack of prejudice. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 684.)

VII. THE TRIAL COURT'S INSTRUCTION ON THE ELEMENTS OF THE UNADJUDICATED OFFENSES DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant next contends that he was denied his state and federal constitutional rights by the trial court's jury instructions on the elements of his prior unadjudicated acts of violence. (AOB 188-205.) Respondent submits that the trial court's instructions were proper and that any error was harmless.

A. Relevant Proceedings

At the jury instructions conference during the first retrial, the prosecutor requested, and the trial court agreed to give, instructions on motive and flight on the grounds they were relevant to the jury's determination of whether appellant had committed the prior crimes. (32RT 4500-4502.) While the parties were discussing the applicability of an instruction concerning an oral confession, defense counsel stated that appellant was conceding that he had committed the prior crimes and agreed to stipulate to the elements of those crimes. (32RT 4505-4506.) The trial court agreed "that the preferred procedure is not to over instruct" because

overinstruction could lead to confusion on the part of the jury. (32RT 4507.) The prosecutor also agreed that jury should be given "as few instructions as we can legally give and yet cover the areas." (32RT 4509.)

After some equivocation, the prosecutor requested that the court instruct the jury on the elements of appellant's prior crimes. (32RT 4511.) After discussion on the remaining instructions, the trial court asked defense counsel if he had any other objections to the prosecution's proposed instructions. In response defense counsel objected to CALJIC Nos. 3.31, 4.21, 10.00, and 10.20 (relating to appellant's prior crimes), stating:

> [N]ot only do I think it's as a matter of policy not a good idea to give them, I'm going to object to giving them in light of the fact I've indicated there's going to be no issue raised as to the commission of those offenses, and I think nevertheless giving those instructions now unfairly emphasizes those incidents.
>
> They're there, and I think counsel can argue them up and down the courtroom and emphasize them however strongly he wants, but when it's indicated there's going to be no issue that they were committed and nevertheless go through all of the elements with the jury in the form of instructions is—because it's unnecessary, it becomes unfair.

(32RT 4518.)

The trial court overruled defense counsel's objection, stating:

> I don't think it's unfair, because I think that the People's limitations of three factors in aggravation is what's unfair, and since they are limited to those, I think that's what they can hammer. That is what we've got. They don't have anything else but those three factors, which as I said before, I think is an unfair limitation.
>
> It's very impressive to me to see a defendant in court who is constantly committing crimes the moment he's out of prison, does it again, gets caught again, back in jail, back in prison, his entire life is this. It is an indication that the only thing we can do is stop it permanently.

> That to me is a very aggravating factor and it's not one the jury can consider. If it happens to come into evidence, the People can argue it, but they can't put in evidence that this guy's entire life, and I'm not talking about [appellant], is one of constant offenses. Whenever he gets the opportunity, he does it.
>
> And especially if they're egregious offenses where there's personal injury involved, rape or robbery, which is traumatic, or certainly murder, the jury should have all of that in hand, but they don't. So I think it's fair.
>
> And the other side of it is I don't see how you can tell the jury that they have to find these offenses beyond a reasonable doubt without telling them what they actually are, without telling what the elements are.
>
> So even though I recognize the appellate cases say it's unnecessary unless requested, I do think it's appropriate and certainly when requested, so I will give it over the defense objection.

(32RT 4518-4519.)

The trial court then proceeded to instruct the jury on the elements of sodomy and rape, general intent, and motive and flight. (6CT 1538-1539, 1542-1543.) After the jury in the first retrial was unable to reach a decision, while preparing for the second retrial, the parties agreed that all objections raised in the first retrial would be considered to have been raised in the second retrial as well. (36RT 5208-5210.) Prior to instruction in the second retrial, defense counsel and the court confirmed that all objections to instructions in the previous retrial were incorporated into the second retrial. (42RT 6198.) The trial court then instructed the jury on the elements of sodomy and rape, general intent, and motive and flight, as it had in the first retrial. (11CT 3012-3013, 3016-3017.)

B. The trial court properly instructed the jury on the elements of the unadjudicated crimes

Appellant's claim that the trial court erred in instructing the jury on the elements of the unadjudicated crimes merits little consideration. In *People v. Phillips* (1985) 41 Cal.3d 29, this Court expressly stated: "[I]f a defendant—or the prosecution—requests [an instruction on the elements of the alleged other crimes], they are entitled to have the jury informed of the elements of the alleged other crimes." (*Id.* at p. 72, fn. 25.) That is what happened here. The prosecution requested that the jury be instructed on the elements of the other crimes (32RT 4511), and the trial court, consistent with the rule this Court announced in *Phillips*, complied with that request. Appellant's claim fails. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1182, fn. 39, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [defendant's claim that instruction on elements of unadjudicated crimes of sodomy and forcible oral copulation violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights necessarily fails where evidence of those crimes was properly admitted]; *People v. Memro* (1995) 11 Cal.4th 786, 881 [as a matter of law, simply providing definition of offense supported by substantial evidence cannot violate Eighth Amendment].)[25]

Appellant's attempts to escape the force of the rule in *Phillips* are unpersuasive. Appellant tries to characterize this Court's statement in *Phillips* as "a suggestion that trial courts could instruct on the elements of the crimes." (AOB 195.) Respondent submits that this Court's

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[25] Moreover, instruction on the elements of unadjudicated crimes makes perfect sense. As the trial judge in this case stated: "I don't see how you can tell the jury that they have to find these offenses beyond a reasonable doubt without telling them what they actually are, without telling what the elements are." (32RT 4519.)

statement—that the prosecution is "*entitled*" to have the jury instructed on the elements of the other crimes—cannot be accurately characterized as a "suggestion."

Appellant claims that instruction on the elements was unnecessary in this case because he was not challenging the admission of evidence of the other crimes, and, in fact, had offered to stipulate that the prior crimes occurred. (AOB 195-196.) Appellant's offer to stipulate, however, does not extinguish the prosecution's right to have the jury instructed on the elements of the offenses. Indeed, given that the prosecution is entitled to present evidence of the circumstances of appellant's prior violent crimes (*People v. Zapien* (1993) 4 Cal.4th 929, 987), instruction on the elements of those offenses seems to make particular sense.

Appellant also latches onto this Court's statement in *People v. Cain* (1995) 10 Cal.4th 1, that a trial court is not prohibited from giving instructions on the elements of unadjudicated crimes "on its own motion when they are 'vital to a proper consideration of the evidence'" (*id.* at p. 72), and argues that the instructions in this case were not vital to a proper consideration of the evidence. (AOB 195-196.) Appellant's citation to *Cain*, however, is unhelpful to him. In *Cain*, this Court also stated that "there is no duty, *absent a request*, to instruct on elements of crimes proven under factor (b)." (*People v. Cain*, *supra*, 10 Cal.4th at p. 72, emphasis added.) By inserting the phrase "absent a request," this Court implicitly reaffirmed the rule it announced in *Phillips* that the prosecution is entitled to have the jury instructed on the elements of the unadjudicated crimes when it so requests. Whether or not the instructions were vital to a proper consideration of the evidence is simply irrelevant to the prosecution's right to have the jury instructed on the elements of the other crimes if it so requests. (See *People v. Davenport* (1985) 41 Cal.3d 247, 281-282 ["the cases do not prohibit a trial court from instructing on the elements of other

crimes offered as aggravating factors in an appropriate case where either the defendant or the prosecution requests such instruction *or* the court itself determines such instruction is vital to a proper consideration of the evidence"], emphasis added.)

Finally, appellant also emphasizes (AOB 194-196) the fact that this Court has previously recognized that

> a defendant, for tactical reasons, may not want the penalty phase instructions overloaded with a series of lengthy instructions on the elements of alleged other crimes because he may fear that such instructions could lead the jury to place undue emphasis on the other crimes rather than on the central question of whether he should live or die.

(*People v. Davenport*, *supra*, 41 Cal.3d at p. 281.) Again, whether or not the defendant wants the jury to be so instructed is beside the point. When the prosecutor requests the instructions, he is entitled to them. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25.)

Perhaps realizing the inadequacy of his legal argument, appellant, as he does throughout his brief, takes aim at the integrity of the trial judge, accusing him of "loathing" appellant and basing his rulings on his personal desire to see appellant executed. (AOB 197 & fn. 58.) Appellant's accusations are as unsupported as they are offensive. As evidence of the trial judge's alleged bias, appellant cites the judge's statement, made at the time he denied appellant's motion to modify his death sentence, that appellant was "one of the most vicious and violent individuals" that he had ever encountered. (AOB 197, fn. 58; 44RT 6460.) Given that appellant stabbed Paula to death as he tried to rape her, brutally raped Patricia, sodomized four-year-old Curtis, forced Teressa to urinate in his mouth, and physically and sexually abused Rebecca, the trial court's description of appellant as "vicious" and "violent" was clearly appropriate.

Appellant further faults the trial judge for finding that appellant "enjoyed" committing the crimes even though the prosecution presented no evidence of appellant's enjoyment. (AOB 197, fn. 58.) Unfortunately for appellant, in his zeal to make the trial judge appear biased, he ignores relevant supporting evidence on this point that is in the record. The prosecution *did* introduce evidence that appellant enjoyed committing the crimes. Rebecca testified that appellant forced to her to have sex with him while he held a knife and inserted items into her rectum. (38RT 5462.) Rebecca objected to these activities, but appellant was violent and controlling, and she did not know how to stop him. (38RT 5463.) Appellant told Rebecca that he "*enjoyed*" these aberrant sexual activities. (38RT 5491.) Given this testimony, and the similarities to appellant's other crimes (insertion of items in Patricia's rectum and the use of a knife in the killing of Paula), the trial court could have reasonably inferred that appellant enjoyed the torture he inflicted on other human beings.

Contrary to evincing "an animosity" to appellant (AOB 197, fn. 58), the trial judge's rulings throughout the two retrials demonstrate that he was scrupulously evenhanded. Among other things, the trial judge: indicated that it would be unfair to appellant to grant the prosecution access to appellant's former trial counsel's materials even though appellant had arguably waived his attorney-client privilege to the material by asserting ineffective assistance of counsel on habeas corpus (21RT 2566-2567, 2639-2640); sustained a defense objection to a crime-scene photograph of Paula's body (25RT 3376); overruled the prosecution's relevance objection to appellant's mitigating evidence that Charles Sr. made a sexual advance to Rebecca (28RT 3912-3913); ruled that evidence that appellant threatened to kill Rebecca did not qualify as an aggravating factor (28RT 3925-3926); precluded the prosecutor from impeaching a witness with evidence of appellant's character for violence (29RT 3990-3992); worried that appellant

may be prejudiced if the jury concluded that he had previously received the death penalty (31RT 4341); ruled for appellant even though he thought the applicable statute was unfair to the prosecution (31RT 4449); precluded the prosecutor from asking Paul about an incident where appellant exposed himself to him (38RT 5415-5417); precluded the prosecutor from presenting evidence that appellant told Rebecca he wanted to have sex with his daughter (38RT 5464-5465); overruled the prosecution's relevance objection to Thomas's testimony regarding the effect Thomas's upbringing had on him (42RT 6159-6160); and ruled that appellant's molestation of Thomas could not be used as an aggravating factor (42RT 6198). If the trial judge's goal were to ensure that appellant received a death sentence, rather than follow the law, he would not have ruled against the prosecution in all these instances.

Noting that the trial judge indicated that he believed California's capital sentencing scheme was unfair to the prosecution, appellant conclusorily asserts that the judge attempted to rectify this perceived unfairness by instructing the jury on the elements of the unadjudicated crimes. (AOB 197-198.) Putting aside the fact that the judge was simply following this Court's precedent in instructing the jury on the elements of the crimes (see *People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25), the fact that the trial judge had an unfavorable opinion of the death penalty statute does not mean that he failed to follow the law. In fact, in this case, the record reflects that the judge, despite his personal opinion, repeatedly ruled in appellant's favor and precluded the prosecution from presenting evidence that did not qualify under the statute. (See, e.g., 28RT 3925-3926; 31RT 4449; 38RT 5415-5417, 5464-5465; 42RT 6198.)

Appellant next claims that the trial judge's statements reflect that he instructed the jury on the elements of the alleged other crimes because he was afraid the jury would not hear enough aggravating evidence to sentence

appellant to death. (AOB 198-199.) It is important to place the trial judge's statements in their proper context. Defense counsel argued that instruction on the elements of the unadjudicated crimes would be "unfair." (32RT 4518.) The trial judge responded that it was not unfair, given the limitations already imposed on the prosecution by statute. *As an example* of those limitations, the trial judge stated:

> It's very impressive to me to see a defendant in court who is constantly committing crimes the moment he's out of prison, does it again, gets caught again, back in jail, back in prison, his entire life is this. It is an indication that the only thing we can do is stop it permanently.
>
> That to me is a very aggravating factor and it's not one the jury can consider. If it happens to come into evidence, the People can argue it, but they can't put in evidence that this guy's entire life, and I'm not talking about [appellant], is one of constant offenses. Whenever he gets the opportunity, he does it.

(32RT 4518-4519.) In giving the example that a defendant's entire criminal history was not a factor the jury could consider in aggravation under Penal Code section 190.3, the trial judge specifically stated that he was "not talking about" appellant. Thus, the judge's comments in no way evince some kind of personal desire to see appellant executed; the judge was simply explaining why it would be unfair to impose further restrictions on the prosecution when it was not legally required to do so. And, as discussed above, the judge was legally required to instruct on the elements of the unadjudicated crimes when the prosecution so requested. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25.)

Finally, appellant claims that the trial judge's use of the pronoun "we" on two occasions showed how he was united with the prosecutor in making sure that appellant was sentenced to death. (AOB 199.) Again, viewing the judge's statements in context, it is clear his choice of the pronoun "we" was innocuous. In referring to the three subdivisions that limit the type of

aggravating evidence the prosecution could introduce, the trial court said, "That is what *we've* got." (32RT 4518.) In using "we," the trial judge was not referring to himself and the prosecutor, but rather to all capital litigants in California—everyone was subject to the same statute.

Appellant also cites the judge's use of the word "we" in commenting that a defendant's recidivism "is an indication that the only thing we can do is stop it permanently." (32RT 4518-4519.) First, this statement was made while the judge was giving his example that he expressly stated did not apply to appellant. More importantly, the judge's use of "we" was not in reference to himself and the prosecutor, but rather to society in general who, the trial judge believed, would find evidence of a defendant's recidivism relevant to its sentencing decision. Again, appellant has failed to show any bias on the part of the trial judge.

Appellant additionally asserts that instruction on the elements of the alleged other crimes violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 199-202.) In *People v. Boyer* (2006) 38 Cal.4th 412, this Court stated that when a defendant makes arguments asserting that the trial court's error had the additional legal consequence of violating the Constitution, "rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well." (*Id.* at p. 441, fn. 17.) Here, appellant concedes that the federal constitutional violations he alleges are nothing more than additional legal consequences of the trial court's initial error in instructing the jury on the elements of the unadjudicated crimes. (AOB 201, fn. 59.) Because, for the reasons discussed above, the trial court's instruction on the elements of the alleged other crimes was proper, appellant's constitutional claims must be rejected as well. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17.)

C. Any error was harmless

Even if the trial court erred in instructing on the elements of the unadjudicated crimes, there was no reasonable possibility that the error affected the jury's penalty determination. Even without the instructions, jurors would have heard evidence of appellant's prior crimes. Appellant fails to explain how the absence of instructions on the elements of the prior crimes would have made it more likely for the jury to conclude that they did not occur. If anything, the opposite would appear to be true.

Moreover, although appellant claims that the prosecutor "exploited" this alleged error in his closing argument, none of the arguments he cites even mention the elements of appellant's other crimes. (See AOB 202-205.) Thus, if the instructions had not been given, it appears the prosecutor's argument would have been exactly the same. And there is no reason to believe the jury's penalty determination would have been different. Appellant has completely failed to show how the alleged error prejudiced him.

VIII THERE WAS NO ERROR THAT REQUIRES REVERSAL IN THIS CASE

Appellant next rehashes his prior claims, and argues that the cumulative error doctrine requires reversal. (AOB 205-211.) He is mistaken. A defendant – even one facing capital punishment – is entitled to a *fair* trial, not a *perfect* trial. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; cf. *People v. Marshall* (1990) 50 Cal.3d 907, 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can

be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial"].)

Respondent has argued throughout that appellant received a fair trial. Simply stated, he has failed to show otherwise. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors made by the prosecution or the trial court. Certainly no prejudicial errors exist. An objective review of the record without the speculation and interpretation offered by appellant shows that appellant received a fair and untainted trial. The Constitution requires no more. Even when considered together, it is not reasonably possible that, absent the alleged errors, appellant would have received a more favorable result. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1231 [two harmless errors in penalty phase did not entitle defendant to reversal of death sentence].)

IX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Finally, appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at appellant's trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 211-226.) As he himself concedes (AOB 211-212), these claims have been raised and rejected in prior capital appeals before this Court.[26] Because appellant fails to raise anything new

[26] This Court has recently rejected the bulk of the claims presented here in *People v. Watson* (2008) 43 Cal.4th 652, 703-704.

or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective, as it fails to "meaningfully narrow" the class of death-eligible defendants. (AOB 212-213.) This Court has repeatedly rejected such claims, and appellant has not distinguished his case from those previously decided. (See, e.g., *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43 [and cases cited therein].) Appellant's claim should likewise be rejected.

B. Penal Code Section 190.3(a) Does Not Allow For An Arbitrary Or Capricious Imposition Of The Death Penalty

Appellant asserts that the broad application of Penal Code section 190.3, subdivision (a), violated his constitutional rights. (AOB 213-215.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Stanley*, *supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630; 129 L.Ed.2d 750].) Appellant's claim should also be rejected.

C. California's Death Penalty Statute And Instructions Set Forth The Appropriate Burden Of Proof

Appellant also contends that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. (AOB 215-219.) Specifically, appellant raises the following

subclaims: (1) appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt (AOB 215-217); (2) the State was required to bear some burden of proof at the penalty phase and, if not, the jury should have been instructed there was no burden of proof at the penalty phase (AOB 217-218); and (3) the instructions caused the jury's penalty determination to "turn on an impermissibly vague and ambiguous standard" by the use of the phrase "so substantial" (AOB 219). As explained below, each of these claims has previously been rejected by this Court and is meritless.

With regard to appellant's first subclaim, this Court has held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not deficient by failing to assign to the State the burden of proving beyond a reasonable doubt that an aggravating factor exists (except for other unadjudicated violent criminal activity), or that the aggravating factors in this case outweighed the mitigating factors. (See *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250; *People v. Rogers* (2009) 46 Cal.4th 1136, 1180; *People v. Farley*, *supra*, 46 Cal.4th at p. 1133.) Nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi, Ring,* and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221;

People v. Morrison (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) The reasoning set forth above applies equally to appellant's claim that *Cunningham v. California* (2007) 549 U.S. 270, 293-295 [127 S.Ct. 856, 871; 166 L.Ed.2d 856] also requires the State to prove an aggravating factor beyond a reasonable doubt. (See AOB 216.)

With regard to appellant's second subclaim, it is well-settled that there was no requirement that the penalty jury be instructed concerning the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (*People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.)

With regard to appellant's third subclaim, this Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 464-465.) Thus, the instructions as they related to the comparison of aggravating and mitigating factors were not unconstitutionally vague or overbroad.

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. As such, the claim and subclaims must all be rejected.

D. CALJIC No. 8.88 properly instructs the jury that it can return a death verdict if the aggravating evidence warrants death rather than life without parole

Appellant next claims that the instructions failed to inform the jury that the central determination is whether death is the appropriate punishment. (AOB 219-220.) This Court has found that the death penalty statute was not unconstitutional by virtue of its instruction that the jury can

return a death verdict if the aggravating evidence "warrant[ed]" death, rather than requiring language that the jury find death to be the "appropriate punishment." (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 707; *People v. Perry*, *supra*, 38 Cal.4th at p. 320.) Accordingly, the penalty phase instructions were not erroneous based on the "warrant" language.

E. CALJIC No. 8.88 properly instructs the jury on the evaluation of aggravating and mitigating factors

Appellant next claims that the instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, then they were required to return a sentence of life without parole. (AOB 220-221.) This Court has held that the standard instruction is sufficient, and it is not error to fail to instruct the jury that if they determine mitigating evidence outweighs aggravating evidence, they must return a sentence of life without parole. (*People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Moon* (2005) 37 Cal.4th 1, 42.) Appellant makes no argument that would require this Court to reconsider its prior rulings.

F. Written Findings Pertaining To Aggravating Factors Were Not Required

Appellant next argues that the federal Constitution required that the jury make written findings regarding the aggravating factors. (AOB 222.) However, this Court has held on numerous occasions that the jury need not file written findings as to which aggravating factors were relied on in imposing the death penalty. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741; *People v. Medina* (1995) 11 Cal.4th 694, 782.) Hence, appellant's argument regarding the alleged requirement of written findings should be rejected.

G. Instructions On Mitigating And Aggravating Factors Did Not Violate Appellant's Constitutional Rights

Appellant also claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because the instructions used "restrictive adjectives in the list of potential mitigating factors" and the instructions failed to "delete inapplicable sentencing factors." (AOB 222-223.) As previously noted by this Court, the use of restrictive adjectives, such as "extreme" and "substantial," in the list of mitigating factors "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos* (2007) 41 Cal.4th 872, 927; see also *People v. Harris*, *supra*, 37 Cal.4th at p. 365; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Similarly, this Court has found that the trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 708; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Reil* (2000) 22 Cal.4th 1153, 1225; *People v. Earp* (1999) 20 Cal.4th 826, 899.) Appellant has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues, and his claims of instructional error must be rejected.

H. Appellant's Constitutional Rights Were Not Violated Based On An Absence Of Intercase Proportionality Review

Appellant also contends that the absence of intercase proportionality review from California's death penalty law "violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a manner that is arbitrary, unreasonable, and unreviewable, and that violate equal protection and due process principles." (AOB 224.) Respondent disagrees. Neither the federal or state Constitutions require intercase proportionality review. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Kipp*,

supra, 26 Cal.4th at p. 1139.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required in California (*Pulley v. California* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]) and this Court has consistently declined to undertake it as a constitutional requirement (*People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Welch* (1999) 20 Cal.4th 701, 772; *People v. Majors* (1998) 18 Cal.4th 385, 442.) Appellant's claim should thus be rejected.

I. California's Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution

Appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 224-225.) However, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Hinton*, *supra*, 37 Cal.4th at p. 912; *People v. Smith*, 35 Cal.4th at p. 374; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 465-467.) Thus, appellant's claim of an Equal Protection Clause violation is meritless and must be rejected.

J. California's Use Of The Death Penalty Does Not Fall Short Of International Norms

Finally, appellant claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 225-226.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Morgan*, *supra*, 42 Cal.4th at p. 628, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see also *People v. Elliot*,

supra, 37 Cal.4th at p. 488.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

CONCLUSION

For the reasons stated, respondent respectfully requests that the judgment and sentence be affirmed.

Dated: November 5, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 44,384 words.

Dated: July 14, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Charles McDowell, Jr.*** Case No.: **S085578**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On, NOV 12 2009 I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on NOV 12 2009, at Los Angeles, California.

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Declarant

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