SUPREME COURT COPY

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.	Supreme Court Case No. S085578 Los Angeles County Superior Court Case No. A379326

APPELLANT'S OPENING BRIEF

Automatic Appeal from Judgment of Death
Hon. William Pounders, Presiding

Tamara P. Holland
State Bar No. 179093
769 Center Blvd., #132
Fairfax, CA 94930
(415) 488-4849

Attorney for Appellant
Charles McDowell, Jr.

DEATH PENALTY

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.	)	Supreme Court Case No. S085578 Los Angeles County Superior Court Case No. A379326

APPELLANT'S OPENING BRIEF

Automatic Appeal from Judgment of Death
Hon. William Pounders, Presiding

Tamara P. Holland
State Bar No. 179093
769 Center Blvd., #132
Fairfax, CA 94930
(415) 488-4849

Attorney for Appellant
Charles McDowell, Jr.

Table of Contents

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Contents (cont'd.)

Table of Content's (cont'd.)

Table of Authorities

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Table of Authorities (cont'd.)

Cases

Constitutional Provisions

Table of Authorities (cont'd.)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court Case
Plaintiff and Respondent,	)	No. S085578
	)	
v.	)	Los Angeles County
	)	Superior Court Case
CHARLES McDOWELL, JR.	)	No. A379326
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

Introduction

In the crazed eyes of his abusive father, "Eddie" McDowell failed at everything he ever tried. For this, Charles Sr., beat Eddie from the time Eddie was a baby until he left for the army at age 17. Expert social historian Dr. Arlene Andrews described Eddie's childhood in rural South Carolina was the worst she had ever studied in 25 years as a professor of social work.

The State of California has received far more chances for success than Mr. McDowell. Having failed to obtain a valid death conviction against Mr. McDowell, it has been allowed to try, try again. Literally. After the Ninth Circuit in 1997 reversed the 1984 penalty judgment for trial court error during deliberations, the state retried the penalty phase against Mr. McDowell. That penalty phase retrial resulted in a hung jury. The state tried again, and this time obtained a death verdict. Mr. McDowell appeals from the verdict returned in that

second penalty retrial, asserting that it, too, is fatally flawed and must therefore be reversed.

As set forth in Argument 1, it was error for the trial court to allow the state to seek the death penalty in these repetitious, untimely prosecutions. By its third penalty phase against Mr. McDowell, the state – and the trial court – knew exactly the contours and strengths of the mitigation evidence that had been produced in the first two trials, and knew exactly the weaknesses in the aggravation evidence. And with these issues clearly in focus, the tenor of the second 1999 retrial changed dramatically. As set forth in Arguments 2 through 8, the trial court's changed rulings from the first to the second retrial form the bases for the majority of Mr. McDowell's issues on appeal.

The cases in aggravation and mitigation that the parties were allowed to present to the jury in the second retrial were vastly different than the cases they had presented to the jury in the first retrial, which had resulted in a hung verdict. Most stunning was the trial court's exclusion – *in its entirety* – of Dr. Andrews' expert mitigation testimony about Mr. McDowell's horrific upbringing. That error is raised below in Argument 4.

But even before eviscerating this critical piece of mitigation evidence, the prosecution – with the aid of favorable rulings by the trial court -- had already begun stacking the deck against Mr. McDowell in the second retrial. As set forth in Argument 2, the jury was tailored for the prosecution by the trial court's inappropriate excusal for cause of two prospective jurors. As set forth in

Argument 3, the prosecution was then allowed to embellish upon its victim impact testimony, which was bolstered by the trial court's improper instruction to the jury regarding this evidence.

After the trial court excluded all of Dr. Andrews' testimony, the trial court also excluded other critical mitigation evidence about Mr. McDowell's upbringing. (Argument 5.) Then the trial court allowed the prosecution to commit misconduct in closing argument that exacerbated and exploited all of these errors. (Argument 6.) Finally, in direct contravention of strategic defense requests, the trial court committed instructional error regarding aggravation evidence. (Argument 7.)

Included in nearly every argument are remarkable on-the-record statements the trial court made about its rulings. While it should be clear, even without these statements, that each of these rulings was made in error, the trial court's statements render its errors virtually undeniable. The statements reflect an increasing, inappropriate animosity toward Mr. McDowell's defense. They reflect the trial court's concern over its perceived injustice *to the prosecution* in California's death penalty scheme. And they reflect the trial court's commensurate, express desire to "balance" the scales -- toward the prosecution. Indeed, given the trial court's rulings, the death result of this second retrial was no surprise. As the trial judge himself stated at the end of the case, "*Perhaps the rest of you did not expect the verdict that came from this jury, but I did.*" (44 RT 6453; emphasis added.)

As set forth in each argument, every error that Mr. McDowell raises warrants reversal of this penalty phase verdict. As set forth in Argument 8, the cumulative effect of the errors surely does.

Statement of the Case

Appellant Charles McDowell, Jr., had been sentenced to death on October 24, 1984 in Los Angeles County, after a jury found him guilty of felony murder, burglary, attempted rape and attempted murder, and then returned a death verdict. (1 CT 7-8, 32.) Thirteen years later, the United States Court of Appeals for the Ninth Circuit reversed the penalty verdict. (1 CT 1, 32; McDowell v. Calderon (9th Cir. 1997) 130 F.3d 833.) The reversal was for a trial court instructional error during deliberations – to which Mr. McDowell had objected from the moment the trial court agreed with the prosecutor that it should not provide further instruction about language the jury indicated it did not correctly understand. (Ibid.)

On September 23, 1998, the Los Angeles County Superior Court set the case for penalty-phase retrial. (1 CT 7-8.)[1] Mr. McDowell moved to preclude the state from seeking death in its retrial. He argued that the decade-and-a-half delay between the instructional error and the retrial violated the federal Constitution, and that he would be prejudiced by the deaths of five mitigation witnesses that had

[1] The minute order for this date reflects that Mr. McDowell had previously been found guilty of Penal Code sections 187, subdivision (a) ("felony murder"); "664/187(a) (attempted felony murder)"; "664/261(2) (attempted forcible rape)"; and section 459 (burglary). (1 CT 7-8.)

occurred since the original trial. (1 CT 29-166.) However, the trial court denied Mr. McDowell's motion. (1 CT 171.)

Jury selection began on July 22, 1999. On July 28, 1999, the panel and alternates were sworn. (2 CT 298-299, 306-307.) The prosecution began its case in aggravation on August 2, 1999, and the jury began its deliberations on August 16, 1999. (2 CT 312-314, 377-378.) After deliberating for three days, the jury sent a note to the trial court: "We have a hung jury. We have had no movement. Neither side is willing to move." (2 CT 381B.) The trial court asked the jurors to keep trying. (2 CT 382-383.) On August 26, 1999 – after readback of nine witnesses' testimony – the trial court declared a mistrial when the jury was still hung. (6 CT 1552A, 1555-1556.)

Undeterred, the state again decided to try for death.

Jury selection in this penalty-phase retrial – the state's third attempt to obtain a lawful death verdict against Mr. McDowell -- began on October 20, 1999. (6 CT 1646-1647.) The jurors were sworn on November 2, and the alternates on November 3, 1999. (6 CT 1651-1652, 1653-1654.) The prosecution began its case in aggravation on November 4, 1999. (6 CT 1655-1659.) When the state rested on November 10, it moved to preclude Mr. McDowell from presenting in his mitigation case any testimony from his expert social historian witness, Dr. Arlene Andrews, who had testified on Mr. McDowell's behalf in the first retrial. (10 CT 2960-2961.) The trial court granted the state's motion. (Ibid.) On December 1, 1999, the jury returned a verdict of death. (11 CT 3030-3031.) On

January 26, 2000, the trial court denied Mr. McDowell's motion to modify the sentence, and imposed a sentence of death. (11 CT 3038-3045, 3071-3072.)

Statement of Facts

1. Denying Mr. McDowell's motion to preclude the state from seeking death again nearly 20 years after the crimes, the trial court finds it necessary to "balance" the litigation scales – toward the prosecution.

The crimes occurred on May 20, 1982. (37 RT 5246.) Mr. McDowell was convicted of all charges and sentenced to death on October 24, 1984. (1 CT 7-8, 32.) Thirteen years after Mr. McDowell was convicted and sentenced, the United States Court of Appeals for the Ninth Circuit reversed the penalty verdict for a trial court error to which Mr. McDowell had objected. (1 CT 1, 32; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833.) Accordingly, on September 15, 1998, the federal district court issued a writ of habeas corpus. (1 CT 1-2.)

The state elected to re-try Mr. McDowell for the death penalty. (1 CT 7-10.)

Mr. McDowell moved to preclude the state from seeking the death penalty against him again, instead indicating that he would accept the penalty of LWOP. (1 CT 29-44; see also 1 CT 47-165 [Exhibits in Support of Motion]; 21 RT 2567-2577.) He explained to the trial court that retrying the penalty phase after his sitting on Death Row thirteen years due to an error to which he had

objected at trial would violate the Sixth, Eighth and Fourteenth Amendments. (Ibid.)

The trial court denied the motion. (1 CT 171; 21 RT 2577.)[2] Indeed, the trial court was emphatic *that it was Mr. McDowell who had caused all the delay.* For example, "the additional years were taken all by the defendant's initiative in seeking habeas corpus." (21 RT 2569.) The trial court stated it did not understand how the defense "attribute[d] so much of the delay to everyone else, when in fact it's Mr. McDowell, which he has a right to do, seeking habeas corpus in the federal system and the delays in the federal system that occurred . . . [that] caused the delay." (21 RT 2570.)

According to the trial court, the appropriate "remedy" to Mr. McDowell after reversal was to "require the prosecution to prove all over again" that Mr. McDowell deserved the death penalty "even 15, 17 years after the event, after the crime." (Ibid.) Indeed, according to the trial court, it was the prosecution – not Mr. McDowell – that was going to experience difficulties after this delay. (21 RT 2577.)

The state retried Mr. McDowell's penalty phase. The jury hung. (6 CT 1552A, 1555-1556.)

Near the end of that first 1999 retrial, the trial court also began expressing – on the record -- its frustration with California's death sentencing scheme. For

---

[2]The trial judge who presided over the two 1999 retrials was a different judge than the one who presided over the 1984 trial.

example, during first retrial litigation of how the prosecutor would refer to Mr. McDowell's housing status, the trial court sympathized with the prosecutor's plight as it granted a defense motion to exclude evidence:

> I think it should go, but it doesn't. *You're hamstrung by three factors that I think are unfair. [Factors] (A), (B) and (C) don't go to the limits of everything that I think a jury can fairly consider in deciding what penalty is appropriate. [Para.] But if they thought that a vicious killer was going to enjoy what he viewed to be a good life in prison for the rest of his life, I think that would have an impact on their choice of penalty. But it isn't under the provisions of the statute, and that's the end of the story.*

(31 RT 4449; emphasis added.) The trial court reiterated its frustration during litigation of jury instructions in the first retrial. According to the trial court:

> 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.*

(32 RT 4518; emphasis added.) The trial court did not stop there:

> 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's 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 that the jury can consider.*

(32 RT 4518-4519; emphasis added.)

After the first re-trial jury hung and the trial court declared a mistrial, Mr. McDowell again moved to preclude the state from seeking death. (37 RT 4738.) Once again, the trial court denied that motion. (37 RT 4739.) The stage was thus set for the second retrial.

2. The trial court improperly excuses death-qualified jurors for cause.

The jury in this second retrial was sworn on the third day of jury selection, after only two days of voir dire. (See 6 CT 1646-1647 [first day of jury selection, October 20, 1999; hardship]; 6 CT 1648-1649 [second day of jury selection, November 1, 1999]; 6 CT 1651-1652 [third day of jury selection, November 2, 1999: jurors sworn and alternate selection begins]; 6 CT 1653-1654 [fourth day of jury selection; alternates sworn].) The trial court allowed only one hour total for follow-up questions by the attorneys after the court-conducted voir dire. (21 RT 2616-2620.)

The trial court granted four out of the five motions to excuse for cause made by the state to which the defense did not stipulate. (35 RT 4968-4970; 36 RT 5021; 36 RT 5022; 36 RT 5092-5095.) Two of these excusals – of prospective jurors F6136 and R9529 -- were of clearly death-qualified individuals. For example, prospective juror F6136 answered directly during voir dire that, though she was personally moderately opposed to the death penalty, "in this court if [the prosecutor] and the judge would give me instructions, I would abide by those

instructions." (35 RT 5007.) Similarly, prospective juror R9529 explicitly answered "Yes" when the prosecutor asked her whether her decision regarding punishment could include the death penalty. (36 RT 5088.)

By contrast, the trial court denied both of the defense motions for excusals for cause to which the state did not concede. (36 RT 5007; 5019-5020.) This included a prospective juror who answered in her questionnaire that she strongly agreed that anyone who intentionally kills should *always* get the death penalty (35 RT 4996-4998 [voir dire]; 36 RT 5007 [denial of defense challenge for cause].) This pro-death penalty prospective juror also responded on her questionnaire that "When someone takes another life, I don't see why he should not lose his," and that *regardless of the evidence in mitigation*, she would *always* vote for the death penalty as long as the murder was intentional. (Ibid.) During voir dire, this pro-death penalty prospective juror – whom the trial court *did not* excuse for cause upon defense motion – explained, "Well, I wouldn't want to put somebody to death without hearing everything," and that she hadn't been thinking straight when she answered the questionnaire so emphatically because she was "just so sick of innocent people being killed every day." (35 RT 4998; 36 RT 5004 [trial court denies defense challenge for cause].)

3. The trial court "rebalances" the evidentiary picture in the second retrial.

A. Lay witness mitigation evidence the defense was allowed to present

(1) Mr. McDowell's earliest years

Charles McDowell, Jr., was born on September 27, 1953, in rural South Carolina, to 16-year-old Shirley Brakefield McDowell and her husband Charles McDowell, Sr. (38 RT 5561, 41 RT 5902.) Charles, Jr. was called "Eddie." (41 RT 5902.) Neither Charles, Sr., nor Shirley ever showed Eddie one shred of affection. (41 RT 5840, 5874-5875; 42 RT 6137.) Quite to the contrary, they were violent and hostile to him from birth, onward.

The first time Eddie was beaten was when he was just a few weeks old. Because Eddie slept all day and cried all night, Charles, Sr. "would beat him to make him go to sleep." (41 RT 5902.)[3]

Charles, Sr.'s younger sister Roberta observed that Shirley virtually ignored Eddie when he cried, and it took Roberta's mother to show Shirley how a bottle worked – that Eddie was not getting any milk because it had curdled in the nipple. (41 RT 5876.) At times, Roberta saw Eddie's bottom bleed because he was left wearing a wet diaper too long; his brothers and sisters would experience this as well. (41 RT 5877.)

---

[3]This was according to Shirley's 1984 testimony, which was read into the record at both the first and second retrials. (31 RT 4343-4360; 41 RT 5901-5916.) She died in 1997. (41 RT 5901.)

Eddie was followed by five siblings: Ronnie, Teressa, Tommy, Kathy, and Carol Belinda. (42 RT 6103.) For most of Eddie's childhood, the children and their parents – a family of eight -- lived in a 1,000-1,200 square foot house a quarter mile from their nearest neighbor, between York and Sharon, South Carolina. (42 RT 6102-6103, 6107.) The boys slept in one bedroom; the girls in another; the parents in a third. (41 RT 5947, 42 RT 6102-6103.)

Charles, Sr. had fashioned a two-by-two-foot hole between the closets that linked the parents' and girls' bedroom. (41 RT 5949; 42 RT 6106.)

(a) Sexual abuse

Charles, Sr., sexually molested his daughter Teressa for as far back as she could remember. (41 RT 5946.) It was usually in his bathroom, or in the girls' room, into which he climbed through the hole between the closets. (41 RT 5946, 5949.) It happened almost every night. (41 RT 5949.) Teressa would be asleep, then feel his hand touching her. She would cry and pray while he touched her until he ejaculated. (41 RT 5948.) Then he would cry and ask forgiveness. Teressa would say, "I forgive you." (41 RT 5948.)

The boys' bedroom faced onto the girls' bedroom, and the doors were always open. (41 RT 5949; 42 RT 6104.) According to Tommy McDowell, it was common knowledge among all the siblings that their father was molesting Teressa. (42 RT 6134-6135.) He would not let the boys talk to Teressa, and constantly accused them of having sex with her. (41 RT 5910; 41 RT 5946; see also 41 RT

5846 [when the boys were teenagers, they were not allowed to go to the bathroom in the middle of the night because Charles, Sr. thought they were trying to see Teressa].)

Eddie himself was molested by his mother Shirley's male relatives. Eddie's brother Tommy – who was seven years younger than Eddie -- witnessed some of these acts. (42 RT 6098, 6161.) In turn, Eddie sucked Tommy's penis from as far back as Tommy could remember. (42 RT 6135-6136.) Eddie also touched Teressa inappropriately, and once asked her to urinate in his mouth. (41 RT 5962.)

(b) Other forms of abuse

Charles., Sr., was "very, very violent" with his family. (42 RT 6107; 41 RT 5867, 5870.) Charles beat Shirley in the face with his fists in front of their children; on several occasions, he broke her nose. (42 RT 6109.) Charles had a .410 rifle, a .22 rifle, and a .22 pistol. He would point the pistol at Shirley. Once he told her to shoot him. She didn't. (42 RT 6126.)

As for the children, Eddie got the worst of the beatings, and it "[k]ind of went down the scale the smaller you got the lesser you got." (42 RT 6108; 41 RT 5944.) The beatings took place in the presence of everyone. (42 RT 6109.) Anything could set Charles, Sr. off. (42 RT 6112.) And even if he was just mad at one person in particular, his violence would spill over to others. (42 RT 6112.)

Charles hit his children with his fists, with his belt, and with hickory switches. (42 RT 6110.) He would "just beat until the urge passed him," reported Tommy. (42 RT 6111.) Eddie got beat almost every day. (41 RT 5905.) When he was not physically beating Eddie, Charles, Sr. was telling him Eddie that he was "dumb and ignorant and didn't want to learn, didn't want to do, didn't care," reported aunt Roberta Williams (41 RT 5874; see also 41 RT 5840.)

When Eddie was only two- or three-years-old, Charles, Sr. expected that Eddie should not wet the bed. (41 RT 5907.) But Eddie wet the bed every night, so Charles, Sr. beat him every morning, and sometimes rubbed Eddie's nose in the urine. (41 RT 5906.) Charles, Sr. once pinched Ronnie McDowell's penis so hard for wetting his pants that it required surgery. (41 RT 5907.)

When Eddie was five, he and Ronnie lit the family dog house on fire. Charles, Sr. punished the boys by holding them naked over the fire. (41 RT 5909.) Around the same time, during a visit to his sister Roberta's house, Charles, Sr. punched Eddie in the face with his fists so hard that Eddie's nose bled. (41 RT 5868-5869.)

Roberta often saw bruises on Shirley and the children. (41 RT 5867, 5872.) In front of Roberta and her husband, Charles would curse at Shirley, tell her she was filthy, nasty, and that she stunk. (41 RT 5871.) He told her she was lazy and didn't know how to do anything. (41 RT 5871.)

Unfortunately, Shirley took her frustrations out on Eddie. (41 RT 5944.) Roberta saw Shirley beat Eddie in the back with her fists and with a broom, and saw her slap him in the face and on the ears. (41 RT 5875; see also 41 RT 5944.)

When Tommy McDowell was four-years-old, Charles, Sr. kicked him off a piano stool and began stomping on him. (41 RT 5908, 42 RT 6115.) This broke one of Tommy's ribs – but no one intervened, or got him any medical care. (42 RT 6116.) Six months later, Tommy's limp led him to the doctor's office – and he spent the next 18 months in body casts. (42 RT 6116-6117.) During this time, Charles, Sr. still beat him, with a belt. (42 RT 6118.)

Despite the amount of abuse suffered by the siblings, it was still agreed among all the children that Eddie got the worst of it from Charles, Sr. (42 RT 6108; 41 RT 5944.) For example, once at the dinner table, Charles, Sr. threw a fork at Eddie. Eddie blocked the trajectory right in front of his face with his hand -- where the fork stuck into the webbing between his fingers. (42 RT 6113.)

(c) Religious hypocrisy

According to Shirley McDowell, living in their house was "constantly sex and the Bible." (41 RT 5904.) Charles, Sr., "forced [us] to go to church every time the doors were open, and if we didn't go, it was hell all day." (41 RT 5904.) The family belonged to a Baptist church that held services twice on Sundays, had a Wednesday night prayer service, and hosted three-to-five-day-long revival meetings. (41 RT 5865.) Charles, Sr.'s sister Roberta attended the same church, and saw Charles, Sr. as "dogmatic. It was like he was God and everybody else was going to hell." (41 RT 5873.)

Charles, Sr. constantly quoted from the Bible, and compared his family unfavorably to its religious figures. (41 RT 5912.) Charles, Sr. would tell his wife and children that they were going to hell – but that he wasn't. (41 RT 5912; see also 41 RT 5843-5844.) He would make them listen at home while he preached and read the Bible, and would deal violently with anyone who resisted or fell asleep. (42 RT 6125-6126.)

(2) Mr. McDowell's teenaged years

When Eddie was about 15, the McDowells moved to Pompano Beach, Florida. (41 RT 5823, 5891; 42 RT 6101.) Charles Sr.'s sister Roberta and her family moved there and stayed for about a year and a half, as well. (41 RT 5863.) While Roberta lived there, both families attended the same Baptist church, and Roberta saw the McDowells frequently. (41 RT 5878.) She witnessed Charles, Sr. and Shirley get more, rather than less, violent as Eddie and the other children got older. (41 RT 5878; see also 42 RT 6122.) Family friend Bonnie Haynes, who lived down the street from the McDowells for years, witnessed the same. (41 RT 5823-5825.

Once, three-year-old Carol Belinda – the youngest of the McDowell children – overturned some paint. (41 RT 5945; 42 RT 6120.) As punishment, Charles, Sr. shoved her head into the paint. (41 RT 5945; 42 RT 6120.) Eddie went after Charles, Sr. and hit him over the head with a two-by-four. (41 RT 5945; 42 RT

6121.) Charles, Sr. grabbed Eddie by the throat and lifted him a foot off the ground. Ronnie had to plead with Charles, Sr. not to kill Eddie. (42 RT 6122.)

Soon after, Carol Belinda was hit by a car and killed. (41 RT 5826.) Charles, Sr. blamed his other children for her death. (41 RT 5826; see also 41 RT 5911 [Shirley testifies that Charles, Sr. blamed Eddie and Tommy for Carol Belinda's death].) After dinner, Charles, Sr. would make all of the children sit in the living room and would read to them what the pastor had said at Carol Belinda's funeral. (41 RT 5828.) Then he would tell the children that if they had been watching, it wouldn't have happened. (41 RT 5829.) Charles, Sr. kept an 8x10 photo of Carol Belinda on the wall, and would take it down and make everyone look at it. (41 RT 5829.) Family friend Bonnie Haynes witnessed this spectacle herself three or four times. (41 RT 5830.)

Bonnie Haynes frequently saw bruises on the McDowell boys, with Eddie and Ronnie suffering the most. (41 RT 5831.) She saw the McDowell children at least every other day, and would sometimes ask the boys why they didn't all just get together and beat the hell out of Charles, Sr. (41 RT 5835, 5838.) But Eddie told Bonnie that he himself "was no good and that he was for sure going to hell." (41 RT 5842.)

During the time the McDowells lived in Florida, Shirley repeatedly left Charles, Sr. (41 RT 5896; 42 RT 6123.)[4] She would take the girls and Tommy with her, but would leave Eddie and Ronnie with Charles, Sr. (41 RT 5896; 42 RT 6123-6124.) Once, when Eddie was 16, he asked his aunt Roberta if he could come live with her instead. (41 RT 5897.) But Roberta and her husband said no. (41 RT 5898.)

Sometime during Eddie's teens, Shirley heard that he was a "homosexual." ("I think that's what you call them," she testified). (41 RT 5915; see also 42 RT 6161 [known in the family that Eddie was homosexual].) From then on, Shirley would not let him kiss her. (41 RT 5915; see also 42 RT 6137.) This was in direct contradiction to how she treated her other children; for instance, she was very affectionate with Tommy. (42 RT 6137.)

In contrast, when the family lived in Pompano Beach, Teressa had to kiss Charles, Sr. "like a husband and wife" every day when he came home from work. (41 RT 5951.) This meant that Teressa had to be home every day at that time to perform the kiss. When she told Shirley she didn't want to, Shirley told her she'd better do it so they could all have peace. (41 RT 5953.) By this time, Charles, Sr. was molesting Teressa mostly on weekends, instead of every night, and would make her watch out the bedroom window so she could make sure the siblings doing chores outside would not come in and see. (41 RT 5953-5955.) When

[4]They eventually divorced, in 1975. (31 RT 4374 [first retrial testimony from social historian expert Arlene Andrews'; see 42 RT 6102 [Tommy McDowell testifies in second retrial that his parents divorced in 1976].)

Teressa was 17, she got a pistol from her parents bedroom and was going to kill Charles, Sr. when he walked through the door. (41 RT 5958.) Shirley talked Teressa out of it, and that's when Teressa told Shirley about the sexual abuse. (41 RT 5958.)[5]

When Eddie was 18, he was arrested in Pompano Beach for disorderly conduct and carrying a concealed weapon other than a firearm. (42 RT 6169.) A final disposition of the charges was withheld so that Mr. McDowell could enlist in the Army. (42 RT 6169.) However, he was discharged in less than two months, for wetting the bed. (42 RT 6167-6169.)

B. Expert witness mitigation evidence the defense was not allowed to present

At the first retrial, social historian Dr. Arlene Andrews testified as an expert witness in mitigation about Mr. McDowell's upbringing and its likely effect. (31 RT 4361-4389, 4410-4417, 4423-4435.) Dr. Andrews was a professor of social work at the University of South Carolina, with a Ph.D. in psychology. (31 RT 4362.) Dr. Andrews had 25 years experience working in areas related to child abuse, neglect and domestic violence. (31 RT 4362.)

During Dr. Andrews' testimony in the first retrial and continuing through jury instruction litigation at the end of the first retrial, the trial court belittled the import of this testimony. Though out of the presence of the jury, the trial court's

[5] Teressa also testified that at some point, her mother had walked in on the two having sex. (41 RT 5957-5958.) Shirley testified to the same. (41 RT 5910.)

comments evinced its hostility toward this evidence. For example, the trial court characterized the subject matter of Dr. Andrews' testimony as not "sophisticated." (31 RT 4397.) The trial court also characterized it "as a lot of information that was not necessary and tended to be cumulative and not reliable." (32 RT 4496; see also 31 RT 4497, 32 RT 4554.) However, when the prosecutor moved to strike her testimony as not the proper subject of an expert (maintaining it was not about anything a juror would not know), the trial court denied the motion because "under the case law it's relatively clear that the defense has a wide range of things they can bring" and "[m]itigating circumstances are basically anything that the defense offers to mitigate the punishment . . . ." (31 RT 4401.)

The jury that heard Dr. Andrews' testimony hung, and the court declared a mistrial. (33 RT 4713-23.)

In the second retrial, the prosecutor did not move in limine to preclude this testimony. He gave no notice at all during pretrial litigation, nor during his case in aggravation. Instead, at the close of his aggravation case, he moved to preclude Dr. Andrews from testifying at all. The trial court granted the motion. (39 RT 5641-5664.)

At the first retrial, Dr. Andrews testified to the following facts that no other witnesses – even family members – covered:

Dr. Andrews testified that Shirley was four years younger than Charles McDowell, Sr., when they married in 1952 and that their relationship was "incredibly hostile." (31 RT 4373-4375.) Andrews testified that Charles reported

he was disappointed in Shirley within a week of their marriage. He beat Shirley while Eddie was in utero. Eddie was born a month early, and weighed less than five-and-a-half pounds. (31 RT 4378.) Shirley was hospitalized for three weeks after the birth because she had hemorrhaged badly. (31 RT 4378.)

Dr. Andrews testified that Shirley was unprepared to be a mother, and didn't want to be. She had gotten married to get out of her parents' house. (31 RT 4378.) She was "very open about saying she didn't want to have a baby, didn't want Eddy [sic] and she didn't know much about how to take care of him." (31 RT 4379.) She was depressed and lonely when she had Eddie, who cried a lot. She did not know the right way to feed him and what to feed him until she took him to the doctor when he was six months old. (31 RT 4380.)

Dr. Andrews testified that Shirley's younger brothers Gene and Jerry molested Eddie. (31 RT 4373.) This started when he was a very young child, and they told Eddie that his father would beat him if he had reason to believe these things were going on. (31 RT 4388.) By the time he was nine or ten, Eddie was being molested by other boys – and eventually men -- in the York, South Carolina neighborhood. (31 RT 4388.) He would do chores for them, and then was asked to do sexual things for money. (31 RT 4388.)

Dr. Andrews testified that Eddie's school grades were very low. He had to repeat first grade. None of the children in the family finished high school. (31 RT 4389.) He also had behavioral problems in school. Eddie was a very young child in his classes, and was hyperactive. His parents were called into the school several

times about his behavior. Teachers even tried using restraints to keep him in his chair because he couldn't sit still. (31 RT 4389.)

She testified that Eddie's younger brother Ronnie told her that once when Charles, Sr. was beating Ronnie, the family's dog Blacky came through the screen door and jumped on Charles, Sr. Within a day or two, Blacky was gone and never came back. (41 RT 4386.) Another time, Ronnie had a dog on a rope leash – and Charles shot the dog. (41 RT 4386-4387.)

Dr. Andrews testified that Ronnie McDowell was homeless in 1994 and had been in and out of hospitals for alcohol and heroin addiction. He died a year later, at age 40. He'd never married or formed a lasting relationship. (31 RT 4412.) Teressa was the most functional of all the children, but had serious stress reaction problems and rarely left home. (31 RT 4412.) Tommy had spent a good deal of his adult life incarcerated for rape. (31 RT 4412.)[6] Kathy lived a reclusive life, in a rundown trailer that she and her boyfriend rented from Teressa. She almost never left the trailer, slept during the day instead of the night, and could not hold a job. (31 RT 4412.) Carol Belinda died when she was five. (31 RT 4412.)[7]

Except as noted in the footnotes, *none* of the facts above were testified to by other witnesses in the second retrial. Neither were any of the following of Dr.

---

[6]Tommy McDowell did testify in the second retrial that he had been convicted in 1987 of second degree rape, second degree sexual offense, grand theft and attempted first degree burglary. (42 RT 6099.)

[7] Evidence of Carol Belinda's death was introduced in the second retrial, as well.

Andrews' expert interpretations and opinions of the social history evidence, which she *was* allowed to present in the first retrial:

Dr. Andrews explained that witnessing parental beatings "can induce a number of social problems in a child." (31 RT 4382.) For example, there is a "deficiency in their moral and social education" of how men and women relate to each other, and the children learn that the way to deal with disagreement is to resort to violence. (31 RT 4382.) Also, "a level of terror . . . develops dealing with fear" when kids are beaten, and when they fear that a parent might be lost to the violence or hurt in some way, which "induces a number of fairly severe emotional problems in the children." (31 RT 4382.) It is also common for parents in battering relationships to overlook or ignore their children's needs: parents "don't seem to have much emotional energy left for the children, and so they simply don't pay much attention to their development and their emotional needs." (31 RT 4383.) As for animal abuse, it "creates an aura of terror about what could happen and does have a definite social impact in terms of the fear, of the power of the father, particularly when it involves the death of animals." (31 RT 4387.)

Dr. Andrews found several factors in Mr. McDowell's upbringing remarkable. One of the most was the complete lack of any form of social support. (31 RT 4413.) There was absolutely no one who was supportive of Mr. McDowell. Though many people observed what was happening and were concerned about it, they didn't express it to him or act protectively on his behalf. (31 RT 4413.) Neither was there a coalesced support group from the siblings – and Dr. Andrews

had never seen a family where the siblings were more in conflict. (31 RT 4414.) Charles, Sr., also controlled his family's access to people from the outside – like from church, or from the school. (31 RT 4414-4415.)

The chronicity of the abuse was also remarkable. Many people reported that the beatings were a daily occurrence, there was no clear sense of what it would be for, and everyone would get beaten even if only one person did something "wrong." (31 RT 4383-4384.) Beatings after Bible readings constituted "a form of spiritual abuse" that was unusual relative to other families Dr. Andrews had dealt with. Moreover, many episodes happened around food and meals, which was detrimental to social development because it was tied to the sense of being nurtured. (31 RT 4385.) "There was an expectation that there be silence and that everyone eat whatever the father determined they were going to eat." (31 RT 4385.) Charles, Sr. would knock the children out of their seats if they did not obey at the dinner table. (31 RT 4385.) Also remarkable was the extent to which Charles, Sr. would beat his children in front of other people. (31 RT 4385.)

Abuse and neglect in all its forms "at a very severe level" was present, on a "very chronic, repeated basis throughout [Eddie's] life . . . ." (31 RT 4415.) Eddie "basically was a loner" who "formed some very minimal adaptive coping habits, one which was a very chronic use of alcohol and other drugs." (31 RT 4415.) This, and increased use over time, is something very common in abused children. It provides "a way of helping to deal with the anxiety and the trauma." (31 RT 4416.) Dr. Andrews explained that becoming a sex offender is also

common among sexually-abused children, as is promiscuity. (31 RT 4416.) He was unable to sustain a marriage, or to finish school. (31 RT 4416.) Because of his social problems, Eddie never could keep a job (as a carpenter) for very long – and thus could not feel any sense of success about work, either. (31 RT 4417.) But the jury in the second retrial never heard any of this.

C. Lay witness mitigation evidence the defense was not allowed to present

After the trial court excluded the testimony of Dr. Andrews entirely, Mr. McDowell sought to introduce the declarations of two family members – who had died since the 1984 trial.

(1) Declaration of Ronald McDowell

In 1991, under penalty of perjury, Mr. McDowell's younger brother Ronald signed a declaration stating that he had never before been contacted by anyone representing Mr. McDowell, and documenting many significant incidents from their childhoods. (6 CT 1627-1630.) This included the stunning fact that when Ronald was five or six years old and Mr. McDowell was seven or eight, Ronald found Mr. McDowell trying to commit suicide by hanging himself. Ronald also saw Mr. McDowell jumped by older boys in the neighborhood, who made Mr. McDowell perform oral sex on them. When Ronald told their father, Charles Sr. about this, his response was to beat *his* sons. Ronald also walked in on Mr. McDowell in bed with a man from the neighborhood when both boys were young.

And Ronald reported that Charles Sr. shot Ronald's dog -- while making Ronald hold its leash. (Ibid.)[8]

Ronald died in 1995. (6 CT 1632 [certificate of death].)

His signed declaration was submitted, without objection by the state, in Mr. McDowell's habeas proceedings in federal court. (6 CT 1634-1643 [Declaration of Andrea Asaro; RT of 1994 federal proceedings; federal court exhibit list].)

Mr. McDowell moved, on federal constitutional grounds, to introduce Ronald's declaration as mitigation in the second retrial. (6 CT 1622-1643 [Motion to introduce declaration, and exhibits in support].)

The trial court excluded it. (39 RT 5641.)

Thus, the jury never heard that Mr. McDowell had attempted to hang himself as a child. The jury never heard that men in the neighborhood sexually molested Mr. McDowell as a young boy, nor that his own father's response was not to confront the men, but to beat Mr. McDowell and his brother for it. The jury never heard that Charles Sr. was so sick that he shot the family dog to death while he made his son hold the leash.[9]

---

[8]Mr. McDowell's younger brother Ronald did not testify in the 1984 trial. (6 CT 1630.) Several other incidents that Ronald described in his declaration – not itemized here -- were also witnessed by other family members, who testified about them in the second retrial.

[9]In the first retrial, the jury *did* hear evidence of these incidents, because Dr. Arlene Andrews used them to form her opinion. (See, e.g., RT 31 RT 4373 [uncles Gene and Jerry molesting Mr. McDowell]; 31 RT 4388 [men in the neighborhood molesting Mr. McDowell when he was a young boy]; 31 RT 4386-4387 [Charles Sr.'s cruelty to animals, including shooting the dog].)

(2) Declaration of Shirley Brakefield McDowell

In 1984, Mr. McDowell's mother, Shirley Brakefield McDowell, testified as a mitigation witness at the penalty phase that was ultimately reversed by the Court of Appeals. In 1991, under penalty of perjury, Ms. McDowell signed a declaration that included many, and more significant, family history details than she'd been asked about during direct examination in the 1984 penalty phase. (11 CT 2968-2974.) Her 1991 declaration was submitted, without objection by the state, in Mr. McDowell's habeas proceedings in federal court. (11 CT 2976-2990 [Declaration of Andrea Asaro; RT of 1994 federal proceedings; federal court exhibit list].)

Mr. McDowell's mother Shirley died in 1997. (41 RT 5901.)

After the trial court held in the second retrial that it would be excluding the expert testimony of Dr. Arlene Andrews, Mr. McDowell moved on federal constitutional grounds to introduce his mother's 1991 declaration as mitigation evidence. (11 CT 2962-2990; 40 RT 5676-5683.)

The trial court denied his motion. (40 RT 5681-5683.)

What the second retrial jurors "heard" from Shirley McDowell was a reading-into-the-record of her 1984 penalty phase testimony. (41 RT 5901-

5915.)[10] Shirley Brakefield McDowell's 1991 declaration contained the following information that her 1984 testimony did not: Mr. McDowell was unplanned and unwanted. Ms. McDowell received no prenatal care during her pregnancy with him, and was in fact beaten during pregnancy by Charles Sr. Mr. McDowell was born a month premature. Ms. McDowell was ignorant of how to care for babies and Mr. McDowell was therefore malnourished as an infant. Charles Sr. often beat her severely in front of their children. As early as the first grade, Mr. McDowell exhibited learning disorders and hyperactivity, and was tied to his chair or placed upon high shelves by his teachers to try to control him in class. When a woman from the school came to the house to speak to Mr. McDowell's parents about getting him some help, Charles Sr. peppered her with questions about her religion, called her a Communist and ordered her off the property. Mr. McDowell began using drugs as a teenager and had been sexually abused as a young boy by Ms. McDowell's own brothers. (11 CT 2968-2974.)[11]

D. Aggravation evidence

(1) Spousal abuse

---

[10]Ms. McDowell's 1984 penalty-phase testimony was also read into the record as part of the defense mitigation case in the first retrial. (See 31 RT 4343-4360.)

[11]Once again, in the first retrial, Dr. Andrews testified about many of these facts as the bases of her opinions about the McDowell family. (See, e.g., 31 RT 4378-4379 [Shirley did not want a baby, didn't know how to care for one, and was depressed and lonely when she had Mr. McDowell]. But because she was not allowed to testify in the second retrial, this jury did not hear this evidence.)

Mr. McDowell's wife Rebecca was 14 and he was 21 when they married in 1975. They were together for two-and-a-half years, and formally divorced in 1979. (38 RT 4862, 5466.) Mr. McDowell beat Rebecca, choked her, and had sex with a knife to her throat. He gave her razor blades and told her he wanted to cut her wrist. He was "into very bizarre sex acts" that included putting items into her anus. She was not aware when they married that he was bisexual, but he made her aware of that shortly thereafter. (38 RT 4862.)

(2) 1977 Curtis Milton incident

On February 24, 1977, 23-year-old Mr. McDowell molested four-year-old Curtis Milton. (38 RT 5403, 5406, 5410-5413.) Mr. McDowell and his wife Rebecca were friends of Curtis' parents, in the trailer park where they all lived. (38 RT 5408.) Mr. McDowell asked Curtis if he wanted to earn a quarter. (38 RT 5409.) When Curtis said he did, Mr. McDowell led him to the McDowells' trailer. (38 RT 5409.) Mr. McDowell had Curtis perform oral sex on him, and then performed oral and anal sex on Curtis. (38 RT 5411-5412.) Mr. McDowell gave Curtis the quarter. (38 RT 5412.) Curtis went home and told his mother, who called the police. (38 RT 5412.) They came and arrested Mr. McDowell. (38 RT 5412.)

Mr. McDowell was convicted of lewd and lascivious conduct for this offense, and was sent to Chattahoochee State Hospital's mentally disordered sex offender program. (38 RT 5403, 5463; 40 RT 5704.) One of the psychiatric diagnoses in

his record there was "sexual deviation, mixed type with elements of homosexuality and pedophilia." (40 RT 5744.) Another was "character disorder, sociopathic." (40 RT 5745.) Nurse Robbie Edwards, who saw Mr. McDowell almost daily on the ward for a year, wrote on his evaluation that he was doing very well – attending groups, participating, following the rules. (40 RT 5709-5710.) Mr. McDowell stayed in the program from 1977 to 1979, when the state cut the program. (40 RT 5708.) Ms. Edwards thought Mr. McDowell genuinely wanted help and was benefiting from the program. (40 RT 5720.) When the program was disbanded in 1979, all offenders were returned to court, and discharged unless the court imprisoned them elsewhere. (40 RT 5708.) Mr. McDowell was among those who were discharged.

Mr. McDowell's wife Rebecca had moved to Chattahoochee early in his confinement, to be near him. (38 RT 5463.) Charles, Sr., volunteered to help her pack and move. (38 RT 5475.) On the drive down, Charles, Sr. pulled the truck over to the side of the road, reached over and grabbed Rebecca's face with his hands and tried to kiss her. When she asked what he was doing, Charles, Sr. said, "You're my daughter-in-law. It's all right." (38 RT 5477.) Rebecca rebuffed this advance and Charles, Sr. left her alone. (38 RT 5477.) Rebecca eventually left Chattachoochee and divorced Mr. McDowell because she came to believe he would have killed her if he could find her. (38 RT 5464.)

(3) 1981 attack

In the summer of 1981, Mr. McDowell was back in Pompano Beach from Chattahoochee, and lived in a tent at the back of the grounds of the Pompano Baptist Temple. (38 RT 5420, 5431, 5433.)[12] Twenty-eight-year-old Patricia Huber had just moved with her six-year-old son Paul into a two-bedroom house that backed up onto the church property. (38 RT 5418, 5420, 5432-5433.)[13] Patricia knew Mr. McDowell from the Baptist Temple, and he had visited Patricia at the house. (38 RT 5433.)

Patricia and Paul shared the house with a friend of Patricia's and her young son. (38 RT 5420, 5432-5433.) The night of July 29, Patricia and Paul were home alone because their roommates were out of town. (38 RT 5433.) Mr. McDowell knocked at the front porch and said he needed help because he'd just been mugged. (38 RT 5421, 5434.) Except for tennis shoes, he was naked. (38 RT 5435.) Patricia let him in to use the phone. He asked for a towel to cover up, and appeared to call the police to report the mugging. (38 RT 5435.)

Patricia got Mr. McDowell a pair of shorts, which he put on and asked if he could wait there until the police came. (38 RT 5436.) Patricia agreed – and then noticed he was wearing jewelry. (38 RT 5436.) She asked why that hadn't been taken in the mugging. Mr. McDowell said the muggers had been in a hurry. (38

---

[12]Charles, Sr., had made this arrangement. (38 RT 5433.) The record is unclear why or how.

[13] Patricia Huber had since remarried and become Patricia Rumpler. (38 RT 5431.)

RT 5436.) She asked how long before the police came; he told her not to be nervous. (38 RT 5436.)

Mr. McDowell sat beside her on the couch, turned her face towards his and tried to kiss her. (38 RT 5437.) He smelled like he'd been drinking beer. (38 RT 5457.) He said he'd love to make love to her. Patricia said no – she was seeing someone else. Mr. McDowell was not angry. Patricia excused herself, went into her room, called her friend Carol and told her to call back in a few minutes. Carol did just that. Mr. McDowell was still there, and no police had arrived. Patricia asked Mr. McDowell if he wouldn't mind waiting outside. He complied. (38 RT 5437.)

Patricia called Carol back, told her what had happened, and asked if she and Paul could stay the night. (38 RT 5438.) She heard Mr. McDowell outside saying, "Hey, you know, lady, don't get all upset now. Nothing is going to happen." She woke Paul up and got him dressed. (38 RT 5438.)

When they were walking out to the car, Mr. McDowell jumped up from behind the car and grabbed Patricia. (38 RT 5423, 5438.) Whereas he had been calm before, now he looked crazed. (38 RT 5458.) And he was completely naked. (38 RT 5423.) Mr. McDowell said that since she wasn't going to do it his way, now he was going to have his way. (38 RT 5423.) Paul started running and screaming, and Mr. McDowell told Patricia that if she didn't get Paul, Mr. McDowell would kill him. (38 RT 5424, 5438.)

Patricia got Paul and took him in the house. (38 RT 5425, 5439.) Mr. McDowell was beside her the whole time. He told her to put Paul in the bedroom and shut the door and call Carol and tell her she'd changed her mind. Patricia did all of this. (38 RT 5439.)

Patricia kept doing everything Mr. McDowell told her to do: she took off her clothes, went into the other bedroom, let him put his penis inside her vagina, put her fingers one by one into his rectum, and performed oral sex on him. Every time Carol called back, Mr. McDowell made Patricia answer the phone and act like everything was all right. (38 RT 5440-5441.) He told her to play with his balls. (38 RT 5443.) He told her to make him feel loved. (38 RT 5459.) This lasted about two hours. (38 RT 5443; see also RT 5427 [Paul testifies the entire time in the house was three to four hours].)

Then Mr. McDowell asked whether there was a razor in the house, and told Patricia to crawl on her hands and knees to get it. (38 RT 5443, 5447.) He asked whether she had ever "had it in the ass." (38 RT 5443.) When she said no, he said, "Well, you're about to, and you better not scream or I'll kill you." (38 RT 5443.)

When Patricia retrieved the razor, Mr. McDowell told her to start shaving her pubic hair, because he didn't want "all that hair there." (38 RT 5447.) This was interrupted by Carol calling again. After Patricia again reassured her things were fine, she returned to the bedroom where Mr. McDowell was waiting. He finished the shaving himself. (38 RT 5447-5448.) He made her lie on the bed on her back,

and inserted the razor into her anus. He kept telling her not to cry, and that if she didn't stop he'd do this to Paul and then kill him. (38 RT 5448.)[14]

The phone rang again. This time, it was the police. (38 RT 5448-5449.) Through her responses, Patricia let them know things were not, in fact, all right. (38 RT 5449.)[15] At the end of the call, Mr. McDowell took her back into the bedroom and made her perform oral sex on him. He was very specific in his requests: that when he was going to come, she would hold it in her mouth and then immediately put it in his mouth. (38 RT 5450.) But when things got to this point, the phone rang again, so Mr. McDowell told Patricia just to swallow and answer the phone. (38 RT 5450.) This time it was Carol again. After that call was over, Mr. McDowell told Patricia to go outside to get his cigarettes. (38 RT 5450.)

She brought them back inside and got a glass of iced tea that Mr. McDowell asked for. (38 RT 5451.) He told her to put a paper towel around the glass. (38 RT 5451.) She asked why – so his fingerprints wouldn't be on it? He said yes -- that he'd done enough time and knew all the tricks. (38 RT 5452.) Then he took the keys from her, locked the deadbolt on the door, and handed the keys back to

---

[14]It is unclear from the record what kind of razor, and which part or end was used. However, there were no cuts or tears. (See 38 RT 5454 [Patricia goes to hospital after incident]; RT 5459 [no cuts or wounds to her rectum].)

[15]The police only had her prior address and when they called she could only tell them no, she no longer lived there, and yes, the perpetrator was still with her. (38 RT 5449.)

her and told her to wash the prints off. (38 RT 5452.) Then they went back to the bedroom. (38 RT 5452.)

All during this time, Paul kept crying and asking whether Patricia was still there. The telephone was in the room where Paul was, so when she answered the several calls that came in during the attack, she was able to reassure him. (388 RT 5425, 5452.)

Finally, lights came on in the driveway. Mr. McDowell jumped out of the bedroom and made Patricia walk in front of him. She was naked. He told her, "Go out there and make that cunt leave," because he assumed it was Carol. Patricia grabbed a robe and went out. It was her ex-brother-in-law's car, and she ran to it and told him to come with her because there was a man in the house and she'd been raped. (38 RT 5453.)

She ran back to the house to get Paul. She tried to get in the bedroom window. She told Paul to move aside so she could break the window. She did, pulled Paul out the window, and took him to the car. She told her brother-in-law to drive away, because she was terrified of Mr. McDowell. As they were driving away, they saw the police finally arriving. She waited in the church parking lot to talk to them, because she was afraid of going back onto the property. (38 RT 5428, 5454.)

Patricia told the police what had happened. She saw them go into the house to search. She didn't think they found Mr. McDowell there. (38 RT 5455.) She

went to the hospital for the lacerations on her leg from breaking the window and pulling Paul out. (38 RT 5454.) The police did not find Mr. McDowell.

(4) 1982 crimes and special circumstances

Mr. McDowell left Florida with outstanding warrants for his arrest for this crime, and for violation of his probation on the Curtis Milton conviction. (40 RT 5795.) He adopted the alias Gene Hollon. (40 RT 5785, 5792, 5794.) He ended up on Santa Monica Boulevard, where he was picked up by high-end gown designer Lee D'Crenza, who lived in the Hollywood hills. (37 RT 5368; 40 RT 5765-5768.) Lee was in his 50s. Mr. McDowell was in his 20s. They began living together. (40 RT 5768-5769.)

Mr. McDowell used drugs all the time. Lee's friend Roger Meunier used also, and saw Mr. McDowell smoke marijuana almost everyday, and do a lot of LSD. (40 RT 5767, 5771.) Mr. McDowell would come by Roger's business in the morning three or four times a week – often already high, and looking for money for more drugs. (40 RT 4771-5773.) However, Roger never saw Mr. McDowell act or even speak aggressively. (40 RT 5778.)

Jacoby and Meyers attorney Speare Primpas was in a billiards league with Mr. McDowell around this same time. (40 RT 5783-5784.) Speare and Mr. McDowell played every day at the Four Star Saloon, a gay bar in West Hollywood. (40 RT 5784-5785.) The Four Star was below Lee D'Crenza's gown-making business. (40 RT 5793.) Speare and Mr. McDowell also socialized

together at Speare's home, and at others' homes. (40 RT 5786.) They used a lot of drugs together: marijuana, cocaine, and "MDA."[16] (40 RT 5786.) Indeed, Speare never saw Mr. McDowell sleep. (40 RT 5787.) They would sometimes stay up four or five days at a time. (40 RT 5787.) There was rarely a time Speare saw Mr. McDowell when Mr. McDowell was not high. (40 RT 5788.)

At some point, Mr. McDowell revealed to Speare that he was wanted in another state, and that he'd probably commit either a robbery or burglary so that he could go back to prison where "he just knew the system better and he felt it was easier to get along." (40 RT 5797, 5797-5799.) Indeed, Daniel Vasquez (warden of San Quentin State Prison from 1983 to 1994) testified that Mr. McDowell was a model prisoner, with only one minor infraction for possession of a cigarette lighter. (42 RT 6053-6054.)[17]

On May 20, 1982, Mr. McDowell was living with Lee D'Crenza at his house on North Curson Avenue in the Hollywood hills. (40 RT 5765-5768.) Mr. McDowell was doing construction work on Lee's kitchen renovation. (37 RT 5270.) The two had a fight when Mr. McDowell felt Lee did not appreciate his work. (38 RT 5531-5532.)

---

[16]Speare tesitified that MDA was a combination of methamphetamine and something else (which he did not know). (40 RT 5787.) No other evidence on this point was presented.

[17] At the request of the defense, the jurors did not learn that Mr. McDowell had been housed on death row since his 1984 convictions. (See 42 RT 6037-6040.)

That afternoon, Mr. McDowell killed Paula Rodriguez, in the house next door to Lee D'Crenza's. (37 5244-5245, 5296; 38 RT 5509.) Paula was a 28-year-old housekeeper who worked on Thursdays at Frank and Diane Bardsleys' house. (37 RT 5244, 5245, 5296, 5369; 38 RT 5501-5503, 5587.) Paula had two daughters: Maria Elena and Valeria. (38 RT 5503-5504.) Toddler Valeria was with her that day. (37 RT 5281; 38 RT 5499.)

Mr. McDowell had visited the Bardsleys' house on several occasions before, to use the phone. (38 RT 5509.) Frank and Diane had let him. (38 RT 5510, 5513.) However, Paula was timid and very cautious. (38 RT 5509.)

Mr. McDowell apparently pushed his way in that day, because the front door knob had punched a hole in the wall behind it. (37 RT 5266.) There were also gouges in a closet door, and a broken doorstop. (38 RT 5507.)

The Bardsley's next-door-neighbors – Ted and Dolores Sum – were sitting on their sofa just after lunch that day when they heard terrible screaming coming from nearby. (37 RT 5243-5244, 5368.) When they phoned the Bardsleys' house, someone picked up the phone. There were more screams on the line, and then it went dead. (37 RT 5246-5247, 5370.) Seventy-three-year old Ted took off for the Bardsleys' house with Dolores following behind with the key. (They had a copy of the key, for house-sitting). (37 RT 5245, 5247-5248, 5370.)

Ted reached for the closed front door, which usually was locked. But it wasn't. (37 RT 5372.) Ted opened the door slightly, leaned in, and started called

for Paula. (37 RT 5372-5372.) Suddenly, Mr. McDowell appeared – naked, with blood on him. He slashed Ted across the throat. (37 RT 5248-5249, 5376-5378.)

Ted pushed Mr. McDowell off balance, got out of the house, closed the front door behind him, and told Dolores to run. (37 RT 5248-5249, 5378, 5386, 5389.) She ran back to their house, with Ted following behind. (37 RT 5249, 5378.) She tried to call 911 but was too flustered, so Ted took the phone from her and talked to the paramedics. They came quickly and took him to the hospital. (37 RT 5250, 5379-5380.) Ted stayed there for several days, recovering from the eight-to-nine inch wound on his neck. (37 RT 5380-5381.)

Los Angeles Police detective Henry Petroski arrived at the Bardsleys' house around 2:30 that afternoon. (37 RT 5261.) Paula was lying on the living room floor with her clothes on, but with her legs spread, her skirt pulled up, and her panties cut. (37 RT 5266-5267; 39 RT 5595.) There was blood all over the living room. (38 RT 5267-5268.) Other officers, who had arrived before Petroski, had found Valeria safe in the house, and took her to neighbors. (38 RT 5497-5499.)

There were two shallow wounds on Paula's throat – as if Mr. McDowell had come up from behind her, or cut her there while holding a knife to her throat to control her. (38 RT 5575-5576, 5577-5578.) The fatal wound was a deep stab below the collar bone and into the aorta. (38 RT 5571-5573, 5579.) Another deep stab wound in the lower abdomen was inflicted soon after death. (38 RT 5574, 5581-5582.) Paula also had numerous defensive wounds on her hands, as well as scratches on her knees, legs and feet. (38 RT 5584-5586.)

Detective Petroski spotted a trail of blood that led out of the Bardsleys' house to Lee D'Crenza's house. (37 RT 5271.) Inside Lee's house was a bloody 15" knife. (37 RT 5272, 5291.) There was also blood in a bedroom and bathroom, including on the tiles and shower handles. (37 RT 5293-5294.) Petroski followed drops of blood eight to ten feet apart out of Lee's house and up the street to a driveway on Curson Terrace. (37 RT 5297-5297.)

As he stood on the driveway, Petroski heard a voice coming from a bush near him, saying, "Don't shoot me, don't shoot me," and, "I'm bleeding," or "I give up." (37 RT 5298.) Petroski pulled his gun and ordered the person to get out. (37 RT 5298.) Mr. McDowell said he was stuck, and showed his hands – which were cut and bleeding. (37 RT 5298.) Petroski called for backup. Those officers pulled Mr. McDowell from the bush. (37 RT 5298-5299.)

Then Mr. McDowell talked nearly non-stop for the next seven hours -- while he was photographed by news cameras coming out of the bush, while he was driven to the hospital for attention to his wrist wounds, while he was treated at the hospital, and while he was returned to the hospital because he began to have seizures. (37 RT 5299-5300; 38 RT 5537, 5541.) He immediately told the officers he was wanted for rape in Florida. (37 RT 5299.) He reiterated this several times to Los Angeles Police officer Roger Michel, who took Mr. McDowell to the hospital both times. (38 RT 5533.)

Mr. McDowell cried on and off during the first, four-hour hospital visit, and begged Michel to shoot him in the head. (38 RT 5533, 5539-5540, 5542.) He told

Michel to just kill him, and pretend that he tried to escape. (38 RT 5542.) Mr. McDowell jumped from topic to topic and kept volunteering statements – such as the that lab tech would find it was Paula's blood on his stomach, that he was mad at Lee for not appreciating his work around the house and that was why he killed Paula, and that a force had come over him when he watched a television show that made him kill Paula. (38 RT 5531, 5532, 5541, 5552-5553.) He also said his real name was Charles McDowell, and that he had changed his name because he was wanted for rape in Florida. (38 RT 5533.) He said he had been in a mental institution, and played games -- like everyone did -- just to get out. He said he was an habitual criminal, and that's why he wanted Officer Michel to kill him. (38 RT 5533-5534.) On the way back to the police station from the hospital, Mr. McDowell began vomiting blood and having seizures. (38 RT 5544, 5557.) Despite all of this, none of the officers who observed Mr. McDowell that afternoon and evening thought he was under the influence of anything. (37 RT 5300; 38 RT 5527, 5530.)

When Mr. McDowell began having seizures, Officer Michel took Mr. McDowell back to the hospital. (38 RT 5544.) Mr. McDowell was treated at the hospital for an hour or two; then Michel took Mr. McDowell to the Hollywood station. (38 RT 5545, 5558.) There, Mr. McDowell met with his lawyer and drug-using friend Speare Primpas. (40 RT 5788.) Mr. McDowell looked to Speare like "he was very much high," and the same as he did after three or four days without sleep. (40 RT 5791.) Mr. McDowell told Speare that he had assaulted a woman.

(40 RT 5790.) Speare informed Mr. McDowell that indeed, a woman had been murdered. (40 RT 5790.) At that, all the blood rushed from Mr. McDowell's face. He turned white, put his head between his legs and started to cry. (40 RT 5790.)

(5) Victim impact testimony

Paula Rodriguez's husband Jose testified that "what the death of Paula Rodriguez" had "meant to him" was that "I have suffered every minute since then, and our family is not well. We're really not united at all." (39 RT 5608.) Nineteen-year-old Valeria Andrade, Paula's youngest daughter, was permitted to add, "I wouldn't be so estranged like I am from my sister" if Paula had not been killed. (39 RT 5612.) And Maria Rodriguez testified that after her mother died, Maria had problems with her father and other members of her family, and was still not at all close to her family. (39 RT 5633.)[18]

This victim impact testimony ran far a field of what had been introduced and litigated in the first retrial – where no mention of the family's estrangement was made, at all. (See 26 RT 3494-3512 [entire opening statement]; 26 RT 3497 [prosecutor states that family will testify to the loss they experienced after the murder]; 28 RT 3935-3956 [Valeria's testimony]; 28 RT RT 3933-3934 [Jose's

[18] In his penalty phase closing argument, the prosecutor expressly argued that the family estrangement was a reason to impose the death penalty. After reading at length from the daily transcripts of Maria's testimony, the prosecutor summed it up by urging that "[t]he killing of Paula Rodriguez splintered, and it is clear, the Rodriguez family." (43 RT 6269.)

testimony]; 28 RT 3930-3931 [Maria's testimony].) Indeed, Mr. McDowell had objected at the first retrial that if the prosecutor was going to go into this area, the parties would need to litigate it before hand to ascertain its truthfulness and admissibility. (RT 25 3381-3390.)

The parties and the trial court agreed before the second retrial began that, unless revisited, all motions and objections raised in the first retrial applied automatically to the second retrial. (36 RT 5209-5211.) The victim impact issue was not revisited during in limine motions. The prosecutor did not mention the Rodriguez family estrangement in his opening statement. (See 37 RT 5213-5232 [entire opening statement]; 37 RT 5229 [prosecutor states that he will present victim impact testimony from the people the murder affected].)

Then, in the middle of his direct examination of Jose Rodriguez, the prosecutor asked out, of the blue, "*After the death of your wife Paula, did you become estranged with one of your daughters, Maria Elena?*" (39 RT 5603-5604; emphasis added.)

Trial counsel objected immediately. (39 RT 5604.)

But the prosecutor's proffer that "the family is splintered, it's ruined his life, it's ruined all of their lives by the death of Paula Rodriguez" was, according to the trial court, "fair and specific victim impact evidence." (30 RT 5607.) The trial court thus overruled Mr. McDowell's objection. (39 RT 5607.)

Then, over defense objection, the trial court instructed the jury at the end of the family members' testimony:

> I do want to let the jurors know that as family members testify, victim's family members testify, Ms. Rodriguez' family members testify, their opinion, their desire about the penalty that should be imposed in this case is not legally admissible, so they can't be asked questions about that.

(39 RT 5610-5611.) Trial counsel had objected to this instruction on Eighth Amendment grounds. Trial counsel explained that such an instruction "suggests the family has an opinion, and that the opinion is he should be executed, and we don't even know that." (39 RT 5610.)

But the trial court overruled the objection, explaining – as it did regarding many of its other rulings – that what was at stake was essentially *unfair to the prosecution*:

> 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.

(39 RT 5610; emphasis added.)

4. The trial court refuses to honor trial counsel's strategic choice regarding aggravation instructions, and the prosecutor commits misconduct in closing argument.

In the first retrial, the prosecutor's closing argument did not draw a single defense objection. (See 33 RT 4573-4619.) In the second retrial, the prosecutor's closing argument was nearly identical (see 43 RT 6249-6310) – except that it contained three misstatements of law and fact to which trial counsel objected or about which the trial court itself raised concern. (43 RT 6252, 6282, 6309.)

Then, the trial court gave lengthy instructions regarding the elements of the unadjudicated prior bad acts – over trial counsel's express objection to them. (11 CT 3012, 3013, 3016-3017.)

During litigation of this issue in the first retrial, trial counsel stated that because the defense was not challenging commission of the prior crimes, there was no need to instruct on motive and flight, nor on the elements of the crimes. (32 RT 4505.) Trial counsel stated that it was his tactical intent not to "overload jury with what I consider unnecessary instructions." (Ibid.) Indeed, trial counsel stated he was willing to stipulate as to the prior violent crimes in order to avoid that instruction. (32 RT 4506.) The prosecutor nonetheless requested that the trial court instruct regarding all the elements of the all crimes. (32 RT 4511.)

Trial counsel again expressly objected:

> Not only do I think it's as a matter of policy not a good idea to give [the instructions], I'm going to object to giving them in light of the fact that 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.

(32 RT 4517-4518.) Trial counsel concluded that "it becomes unfair" to the defense to instruct in this manner. (32 RT 4518.)

Consistent with its attitude in so many other rulings against Mr. McDowell, the trial court responded that the circumstances *were* unfair – but, to the *state*, not to the defendant facing the death penalty. (32 RT 4518) As set forth earlier, according to the trial court:

> 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.*

(32 RT 4518; emphasis added.) The trial court did not stop there:

> 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's 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 that the jury can consider.*

(32 RT 4518-4519; emphasis added.) The trial court continued:

> And especially if they're egregious offenses where there's a 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.

(32 RT 4519.) The trial court concluded that it would give the instructions over the defense objection. (Ibid.)[19]

5. The trial court congratulates the prosecutor – and reveals its correct prediction – about the jury's death verdict.

Ultimately, after the prosecutor finally secured a death verdict against Mr. McDowell in the second retrial, the trial court could not contain its praise for the victory:

> 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.
>
> *Perhaps the rest of you did not expect the verdict that came from this jury, but I did.* And I think that's the difference between the two [retrials]. 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."

(44 RT 6453-6454; emphasis added.)

---

[19]In the second retrial, trial counsel renewed Mr. McDowell's objections. (36 RT 5208-5210; 42 RT 6198.)

Arguments

1. Mr. McDowell was denied his state and federal constitutional rights by the state's long-delayed and repeated retrial of the penalty phase against him.

Retrying Mr. McDowell for the death penalty nearly two decades after commission of the crimes, and after he had sat on Death Row for 15 years based on an error to which he'd objected at trial, violated Mr. McDowell's state and federal constitutional speedy trial rights, rights to due process, and to freedom from cruel and unusual punishment. (*Barker v. Wingo* (1972) 407 U.S. 514, 515; U.S. Const., Amends. 5, 6, 8 and 14; Cal. Const., art. I.)

As set forth in detail below, Mr. McDowell was prejudiced during the delay by deaths of his mitigation witnesses, as well as by the state's repeated chances to undercut the strength of Mr. McDowell's mitigation case and to bolster its own aggravation case. Moreover, at this point and after such delay, his sentence of death serves no valid penological purpose.[20] Certainly sufficient retribution would be wrung out from the emotional suffering caused by this two-decade rollercoaster of litigation, delay and uncertainty on death row, and converting the death sentence to an LWOP sentence would at this point satisfy the need for deterrence. The trial court thus erred when it denied Mr. McDowell's motions to preclude the state from seeking the death penalty against him in its retrials. Reversal is therefore required, and a sentence of LWOP should be imposed.

---

[20]Retribution and deterrence are the two penological justifications recognized by the United States Supreme Court for imposing the death penalty. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 183.)

A. The relevant facts below

The crimes occurred on May 20, 1982. (37 RT 5246.) Mr. McDowell was convicted of all charges and sentenced to death on October 24, 1984. (1 CT 7-8, 32.) This Court affirmed the conviction and death judgment on August 25, 1988. (1 CT 32, 50; *People v. McDowell* (1988) 46 Cal.3d 551.) In his dissent, Justice Broussard voted to reverse the penalty phase verdict for instructional error: Mr. McDowell had objected since the moment the trial court agreed with the prosecutor that it should not provide further guidance to the deliberating jury when it asked a question about how to evaluate mitigation and aggravation evidence. (*People v. McDowell* (Broussard, J., dissenting from imposition of death penalty; Mosk. J., concurring in dissent.)[21]

Thirteen years after Mr. McDowell was convicted and sentenced, the United States Court of Appeals for the Ninth Circuit agreed with Mr. McDowell, and Justices Broussard and Mosk, and reversed the penalty verdict. (1 CT 1, 32; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833.) In April, 1998, the United States Supreme Court denied the state's petition for writ of certiorari. (*Calderon v. McDowell* (1998) 523 U.S. 1103.) Accordingly, on September 15, 1998, the federal district court issued a writ of habeas corpus. (1 CT 1-2.)

---

[21]"Your Honor, it's the People's belief that they [the jury] should be instructed that they should continue to deliberate" without being given further instruction. (1 CT 41.)

The state elected to re-try Mr. McDowell for the death penalty. (1 CT 7-10.)

Mr. McDowell moved to preclude the state from seeking the death penalty against him again, instead indicating that he would accept the penalty of LWOP. (1 CT 29-44; see also 1 CT 47-165 [Exhibits in Support of Motion]; 21 RT 2567-2577.) He explained to the trial court that retrying the penalty phase after his sitting on Death Row thirteen years due to an error to which he had objected at trial would violate the Sixth, Eighth and Fourteenth Amendments. (Ibid.)

The trial court denied the motion. (1 CT 171; 21 RT 2577.)[22] Indeed, the trial court was emphatic *that it was Mr. McDowell who had caused all the delay.* For example, "the additional years were taken all by the defendant's initiative in seeking habeas corpus," (21 RT 2569), and "he's the one raising the issue and pursuing it, and it was a very [,] very close issue as I see it." (21 RT 2569)[23] The

---

[22]The trial judge who presided over the two 1999 retrials was a different judge than the one who presided over the 1984 trial.

[23]There is no mistaking the trial court's appreciation of the state courts' performances, and the trial court's hostility toward the Ninth Circuit's grant of relief:

> [O]ne of the things that impresses me about this case is that it apparently was a trial perfectly conducted from beginning to end, including jury instructions, and the only error was in the trial judge failing to clarify for the eleven jurors that thought certain items were not mitigating factors, that they in fact were.
>
> So leaving the jury to decide based on the good instructions that were given, the adequate instructions in which they should have concluded

trial court stated it did not understand how the defense "attribute[d] so much of the delay to everyone else, when in fact it's Mr. McDowell, which he has a right to do, seeking habeas corpus in the federal system and the delays in the federal system that occurred . . . [that] caused the delay." (21 RT 2570.)

Moreover, the trial court refused to acknowledge the clarity and seriousness of the error that required reversal – and again blamed Mr. McDowell for taking time in pursuing this claim: "The delay was in federal court occasioned by the defendant's pursuit of habeas corpus on an issue that was not crystal clear . . . . It was not a clear error. It wasn't clear." (21 RT 2570-71.) According to the trial court, the 1984 trial "was very well conducted" and "well done" and the instructional issue "was not a black and white issue. It was shades of gray, and the Ninth Circuit finally decided the grays favor the defendant and granted the retrial." (21 RT 2571.) The case had been "well tried. The only error was in failing to correct a misunderstanding by the jury on instructions that were found to be valid. Good instructions, good trial." (21 RT 2572.) "This was simply a misunderstanding by eleven jurors that wasn't corrected by the trial judge. So I don't see this as being – the delay here being attributable to the prosecution." (21

> that those were mitigating factors and could be considered as such at least, this is a very close case.

(21 RT 2568-2569; see also 21 RT 2572 [an "active justice . . . made the decision" to grant relief, though the trial court also observed that justice "is a very honored one in this state. I don't have a quarrel with that"].)

RT 2573; see also 21 RT 2572 ["this is not an issue . . . attributable to the fault of the state of California or the prosecution"].)[24]

According to the trial court, the appropriate "remedy" to Mr. McDowell after reversal was to "require the prosecution to prove all over again" that Mr. McDowell deserved the death penalty "even 15, 17 years after the event, after the crime." (Ibid.) Indeed, the trial court stated that it was the prosecution – not Mr. McDowell – that would experience difficulties after this delay. (21 RT 2577.)

The state retried Mr. McDowell's penalty phase. The jury hung. (6 CT 1552A, 1555-1556.)

Yet again, the state elected to retry Mr. McDowell's penalty phase. Yet again, Mr. McDowell moved to preclude the prosecution from seeking the death penalty, urging the trial court instead to impose LWOP. (34 RT 4738.) Yet again, the trial court denied the motion. (34 RT 4739.) This time, the jury returned a death verdict -- for crimes Mr. McDowell had committed nearly two decades earlier, and for which he had been found guilty a decade-and-a-half before. (11 CT 3030-3031.) This is of little wonder, given the weakened evidence available to Mr. McDowell due to the passage of time (see, e.g., Argument 5, infra,), and to the strategic advantage available to the state due to repetition. (See, e.g., Arguments 3 and 4.)

B. The state's repeated retrials of Mr. McDowell after lengthy delays for which he was not responsible violated Mr. McDowell's state and federal constitutional rights.

As set forth in detail below, retrying Mr. McDowell for the death penalty nearly two decades after commission of the crimes, and after he had sat on Death Row for 15 years based on an error to which he'd objected at trial, violated multiple state and federal constitutional provisions. The penalty verdict must therefore be set aside, and a sentence of LWOP imposed.

(1) The delay and retrials are cruel and unusual punishment.

The delay in this case violates 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.

Over a century ago, the United States Supreme Court recognized that for a condemned prisoner awaiting execution, "one of the most horrible feelings to which he can be subjected [between sentence and execution] is the uncertainty during the whole of it." (*In re Medley* (1890) 134 U.S. 160, 172.) Confinement under a sentence of death subjects a condemned inmate to extraordinary psychological duress, as well as extreme physical and social restrictions inherent in life on Death Row. This Court recognizes that part of "[t]he cruelty of capital punishment" stems from "the dehumanizing effects of the lengthy imprisonment prior to execution." (*People v. Anderson* (1972) 6 Cal.3d 628, 649; see also

Chessman v. Dickson (9th Cir. 1960) 275 F.2d 604, 607 [recognizing the "agonies" of a prolonged stay on Death Row].)[25]

The chief reason courts first recognize this inherent agony yet nonetheless deny relief is that the delays are attributable to the inmates themselves -- whose *losing* claims have required decades of litigation. Under those circumstances, "[i]t would indeed be a mockery of justice if the delay . . . could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place." (*McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1493; see also *White v. Johnson* (5th Cir. 1996) 79 F.3d 432; *Porter v. Singletary* (11th Cir. 1995) 49 F.3d 1483.)

But that is not the circumstance here. Not one day of the 15 years that elapsed between the trial court's error and the state's third penalty retrial can be attributed to Mr. McDowell's pursuit of a meritless claim. The relief he sought was granted. His instructional claim had merit. And that claim was valid the instant he objected at trial. It was still valid when he raised it in his motion for new trial, when he raised it in his motion to modify the death judgment, when he raised it on appeal to this Court (and Justices Broussard and Mosk agreed), when

---

[25]Last term, Justice Breyer once again urged in his dissent from denial of certiorari that "whether it is 'cruel' to keep an individual for decades on death row . . . raises a serious constitutional question." (*Smith v. Arizona* (2007) ___ U.S. ___, 128 S.Ct. 466, 169 L.Ed.2d 326.) (See also *Foster v. Florida* (2002) 537 U.S. 990, 991-993 (Breyer, J., dissenting from denial of certiorari); *Knight v. Florida* (1999) 528 U.S. 990, 993-999 (same); see also *Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., respecting denial of certiorari).)

he raised it in the federal district court, and finally, when he prevailed in the Ninth Circuit Court of Appeals.

It is not Mr. McDowell's fault that it took 15 years for relief and reversal of his death conviction. Instead, every day of this delay is attributable to the state. From the time in 1984 when the prosecutor agreed the trial court should not give the deliberating penalty phase jurors the clarifying instructions they needed, until the days in 1998 and 1999 that the Los Angeles County District Attorney's Office elected to try Mr. McDowell for the death penalty a second -- and then a third -- time, the state has caused delay and commensurate agony.

It is the state of California that is responsible for propounding and continuing to defend a prejudicial error – in essence, its *own* meritless claim. The state could have chosen at any point during the 15 years of post-conviction litigation to acknowledge this as error. The state could have chosen at any point in those 15 years to end the litigation by asking the trial court to impose LWOP. The state did neither. In fact, after the Ninth Circuit recognized the inherent merit in Mr. McDowell's claim and set aside the death verdict against him, the state still persisted in pursuing this issue (and further prolonging Mr. McDowell's imprisonment under sentence of death)by petitioning for writ of certiorari. When the United States Supreme Court denied the state's petition, the state chose to prosecute Mr. McDowell *again* for the death penalty. And then, again.

During all of this time, Mr. McDowell has sat on Death Row – except for the months during which he was returned to Los Angeles County Superior Court

to defend himself in two additional penalty phase trials. He sat on Death Row for 15 years waiting to hear that a court finally granted relief from his sentence of death. And though legal relief was finally granted, emotional relief was nowhere to be found. For, instead of recommending LWOP, the state chose to again -- and once *again* -- seek the death penalty against him.

Even in the context of double-jeopardy claims, the United States Supreme Court recognizes the agonies inherent in retrial:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to *embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity*, as well as enhancing the possibility that even though innocent he may be found guilty.

(*Green v. United States* (1957) 355 U.S. 184, 188.)

In its third effort to obtain a death verdict, the state was able to secure a truncated version of the mitigation evidence, and to present a bolstered aggravation case. The jury sentenced Mr. McDowell to death – 18 years after the crimes were committed, and 15 years after Mr. McDowell had been found guilty of them and was first placed on Death Row. The agony consequent to this twisted, prolonged prosecution is clear, and clearly violates the state and federal constitutional proscriptions against cruel and unusual punishment.

It is also clear that Mr. McDowell's sentence of death no longer serves any legitimate or substantial penological goals. Because the state's ability to extract retribution and to deter other murders is by this point drastically reduced, an execution at this point violates the Eighth Amendment. (U.S. Const., Amend. 8.) For when the death penalty ceases realistically to exact retribution or provide deterrence:

> its imposition would then be pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be *patently excessive and cruel and unusual punishment violative of the Eighth Amendment.*

(*Furman v. Georgia* (1972) 408 U.S. 238, 312 (White, J., concurring) (emphasis added); see also *Gregg v. Georgia*, supra, 428 U.S. at p. 183 ["The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"].)

In *Gregg v. Georgia,* supra, the United States Supreme Court held that the penological justifications that reasonably can support the death penalty are 1) retribution – the "expression of society's moral outrage at particularly offensive behavior;" and 2) deterrence. (*Gregg* at p. 183.) As Justice Stevens' memorandum regarding the denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045 suggests, a 17-year delay between the sentence of death and time of execution serves neither purpose:

> [A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted . . . [T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

(Id. at p. 1045; (Breyer, J., joining.); see also *Coleman v. Balkcom* (1981) 451 U.S. 949, 952 ["the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"] (J. Stevens, conc. in denial of cert.).)

By now, Mr. McDowell has been confined on Death Row – or in the Los Angeles County Jail, twice awaiting decision whether another jury would also recommend death – for 24 years. He has already suffered through the entire state and federal post-conviction procedure once. He has suffered through one guilt phase and three penalty phase trials. In this process and the guarantee that Mr. McDowell will spend the rest of his days in prison, he has suffered enough agony to serve as retribution. There is no further deterrence to be gained – either personally by Mr. McDowell, or generally by other citizens – by imposing the death penalty, given the tortured procedural facts of this case.

The purposes of the death penalty recognized by the High Court as legitimate – retribution and deterrence – have been satisfied. To continue to insist

upon carrying out Mr. McDowell's execution at this late date violates the Eighth Amendment's prohibition on cruel and unusual punishment.

(2) Retrial after this delay violates rights to speedy trial and due process.

The delay of 15 years between the imposition of the death penalty in 1984 and the 1999 retrial(s) violates Mr. McDowell's speedy trial rights guaranteed by the state and federal constitutions. (U.S. Const., Amend. VI, cl. 1; Cal. Const., art. I, sec. 15, cl. 1.) This delay also violates his fundamental right to due process under the Fourteenth Amendment to the United States Constitution. (*Barker v. Wingo* (1972) 407 U.S. 514, 515.)

To determine whether federal rights were violated by delay, courts apply a four-part balancing test weighing: (a) the length of the delay; (b) the reason for the delay; (c) the defendant's assertion of his right; and (d) the prejudice to the defendant. (*Barker,* 407 U.S. at p. 530; *People v. Anderson* (2001) 25 Cal.4th 543, 624.) None of the four factors are necessary or sufficient, individually, to support a finding that a defendant's speedy trial right has been violated. (*Barker* at p. 533.) The factors are related and "must be considered together with such other circumstances as may be relevant" and "with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." (Ibid.)

As set forth below, each part of this test tips against the state of California, and in Mr. McDowell's favor. Weighed in total, the tilt is absolutely in Mr. McDowell's favor.[26]

(a) Length of delay

Under *Barker*, the analysis begins with the length of the delay. A lengthy delay is "presumptively prejudicial," which means that it is a "triggering mechanism" for inquiry into the other three factors. (*Barker*, 407 U.S. at p. 530; *Doggett v. United States* (1992) 505 U.S. 647 [eight-and-a-half year delay between indictment and arrest was presumptively prejudicial and triggered analysis under *Barker;* conviction reversed]; *Coe v. Thurman* (9th Cir. 1990) 992 F.2d 528, 531 [while there is no "talismanic number of years or months" after which rights are automatically violated on appellate review, a four-year delay in a non-capital case warranted inquiry into the other Barker factors]; *Harris v. Champion* (10th Cir. 1994) 15 F. 3d 1538, 1561 [passage of two years created a presumption of inordinate delay on appeal].)

---

[26]The United States Supreme Court recognized in *Barker* that speedy trials were not only critical to criminal defendants, but to society as well. Among the many reasons the *Barker* Court cited that society required speedy trials were the prevention of backlogs in court and the high cost of lengthy detention before resolution of cases. (*Barker*, 407 U.S. at pp. 519-521.) Clearly those interests would have been served here had the state acknowledged the error and agreed to an LWOP sentence. As Mr. McDowell set forth in the trial court, 65% of the time spent in post-conviction litigation elapsed while the state was completing its briefing or the courts were conducting review. (1 CT 47-112.)

Clearly the 15 year delay between the 1984 sentence of death and the state's third penalty phase trial in 1999 triggers inquiry into the other three parts of the test. And, as set forth below, all of them – individually, and cumulatively -- demonstrate that the trial court erred when it denied Mr. McDowell's motion to preclude the state from again seeking death.

(b) Reason for the delay

As Mr. McDowell argued in the trial court below and as he has set forth above, the reason for the delay is solely attributable to the state. Mr. McDowell objected to the error when it occurred, and raised it consistently. Mr. McDowell cannot be held responsible for the error, nor for the state's choice not to acknowledge it and instead impose LWOP. And, contrary to the trial court's remarkable statements at hearing on this motion, Mr. McDowell cannot be held responsible for "delay" by pursuing a meritorious claim regarding an erroneous ruling that sent him to Death Row.

Understandably, a deliberate attempt by the government to delay a trial to hamper the defense weighs heavily against the government. (*Barker*, 407 U.S at p. 531.) But even where a state's actions do not amount to a *deliberate* delay to hamper a defendant, "neutral" reasons for delay still must be weighed against the government -- because, according to the United States Supreme Court, "the ultimate responsibility for such circumstances must rest with the government

rather than with the defense." (Ibid.) Similarly, at least one federal court has expressly recognized that even administrative delays caused by the courts themselves are to be attributed to the prosecution. (See *Burkett v. Fulcomer* (3d Cir. 1991) 951 F.2d 1431, 1439-1440.) Thus, the reason for the delay rests completely with the state. And because the trial court completely missed the boat on this issue, its ruling was completely erroneous.

(c) Defendant's assertion of his right

There can be no question that Mr. McDowell has asserted and reasserted this claim and his rights. As set forth extensively above, he raised this issue from its inception through grant of relief in the Ninth Circuit. Then when the state chose to retry him for the death penalty, he moved to preclude the state from retrying him for death – based on all of these rights. He renewed that motion when the state chose to retry him again. Clearly this part of the four-part test tips in favor of Mr. McDowell.

(d) Prejudice to the defendant

The United States Supreme Court has recognized three forms of prejudice that can result from delay: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused, and (3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." (*Doggett*, 505 U.S. at p. 654 (quoting *Barker*, 407 U.S. at p. 532) (internal quotations omitted).) "Of these forms of prejudice, 'the most serious is the last, because of the inability

of a defendant adequately to prepare his case skews the fairness of the entire system.'" (Ibid. (quoting *Barker* at p. 532.)

As set forth above, Mr. McDowell's years on Death Row and anxiety during retrials certainly qualify as the first two kinds of prejudice. As set forth below, he has just as certainly suffered the third type of prejudice as well.

This final form of prejudice is not only the most important, but is also the most difficult to prove because "time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" (*Doggett,* 505 U.S. at p. 655 (quoting *Barker* at p. 532.) Indeed, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify." (Ibid.) Thus, "no showing of [this] prejudice is required when the delay is great and attributable to the government." (Ibid.)

But in this case, Mr. McDowell did not, and is not, asserting just any claim of amorphous prejudice. He documented for the trial court the very concrete ways in which his penalty phase mitigation case would be compromised by retrial after the passage of that many years: several witnesses who had testified in the 1984 penalty phase – including his own mother – had since died; other family members who had provided valuable mitigation information since 1984 had also died. (See 1 CT 41-43 [motion]; 1 CT 114-165 [death certificates, declarations, and interview notes of deceased witnesses and potential witnesses].)

"If witnesses die or disappear during the delay, the prejudice is obvious." (*Barker,* 407 U.S. at p. 532.) The prejudice should have been obvious to the trial court, but it was not. So Mr. McDowell will repeat here what he set forth in the trial court below – on which the trial court ruled erroneously.

Two mitigation witnesses who had testified at Mr. McDowell's 1984 penalty phase trial had died: Mr. McDowell's mother, Shirley Brakefield McDowell, and his uncle Marshall Brakefield.[27] Their 1984 testimony did not include many details that the defense would have introduced in mitigation in any necessary retrial. For instance, though Shirley testified that Mr. McDowell got "whipped" ever day, that testimony did not reveal the severity of the beatings – "so bad that the skin would blister" and which "often broke [the] skin and left cuts [,] sores or welts." (1 CT 132, 133 [Decl. of Shirley McDowell]; see also 1 CT 43 [list of facts included in Shirley's declaration regarding facts to which she did not testify in 1984 trial].) Other details are completely lost, because the witnesses are now dead.

Moreover, the emotionally-flat reading into the record of prior testimony (which is what ultimately occurred in the first and second retrials regarding Shirley McDowell's testimony) is no adequate substitute for the actual physical presence of these witnesses at trial. As the jury was instructed in this case, a witness's demeanor during testimony is a critical tool for evaluating credibility.

---

[27]It was stipulated that Shirley Brakefield McDowell died on September 27, 1997. (41 RT 5901.) However, the record does not contain the precise date of Marshall Brakefield's death.

(CALJIC No. 2.20, 11 CT 3010-3011.) The jury could not evaluate the demeanor of the actual witnesses because they were not physically present.

Additionally, in a capital penalty trial where sympathy is a factor the jurors may consider, emotion plays a vital role in mitigation. For example, as this Court has recognized, "a jury may take into account testimony from the defendant's mother that she loves her son if it believes that he must possess redeeming qualities to have earned his mother's love." (*People v. Ochoa* (1998) 19 Cal.4th 353, 456.) *This is critical.* There is simply no way a stranger reading into the record Shirley McDowell's penalty phase testimony regarding her son would appear to the jury as powerful as her testimony in person would have. Neither could the jury adequately evaluate her credibility.

Sister states agree. For example, in *Coddington v. State* (Okla.Crim.App. 2006) 142 P.3d 437, an Oklahoma court reversed where the trial court granted the prosecution's motion in limine to exclude the videotaped testimony of the defendant's dying mother, and instead supply only the written transcript to the jury. The Court of Criminal Appeals found that exclusion of the tape violated the Fourteenth Amendment, and noted "a compelling difference between seeing the witness testify to this valuable mitigation evidence and hearing someone read her testimony. (Id. at p. 458.) The court reasserted "the importance of a mother's testimony as mitigating evidence in a capital trial," and recognized that without the videotape, the jury was deprived the opportunity to judge credibility and demeanor. (Id. at pp. 458, 459.)

Additionally, there were three other mitigation witnesses whose testimony the defense wanted to introduce in the retrials but who had *not* testified in the 1984 penalty phase: brother Ronald McDowell, and uncles William Brakefield and Hugh Tilley. There was therefore not even any read-in testimony to offer. In the retrials, Mr. McDowells was thus denied the opportunity to present valuable mitigation evidence about his family and background that these witnesses would have provided. (See 1 CT 138-142 [Decl. of brother Ronald McDowell]; 1 CT 144-147 [interview of uncle William Brakefield]; 1 CT 149-157 [declaration of uncle Hugh Tilley].) Among the most stunning mitigation evidence omitted here came from brother Ronald McDowell, who stated in his declaration that their father, Charles Sr., shot the family puppy while Ronald held it on a leash; that men in the neighborhood would have sex with Mr. McDowell when he was just a young boy – and that when Charles Sr. learned about it, he *beat his own sons*; and that when Ronald was five or six, he walked in on seven or eight year old Mr. McDowell trying to commit suicide by hanging himself. (1 CT 138-141.)[28]

In addition to the prejudice Mr. McDowell's mitigation case suffered from witnesses' deaths, the timing and procedural history of this case itself injected additional prejudice into the state's retrials of Mr. McDowell. Indeed, when the parties were discussing the appropriate way to refer to dates and prior proceedings before the first retrial jury, the trial court itself acknowledged, "I think there's

[28]As set forth below in Argument 5, the trial court also erred when it precluded Mr. McDowell from introducing the declarations of his deceased mother and brother.

going to be prejudice anyway from a 15-year delay." (31 RT 4340-4341.) When the prosecutor disagreed, the trial court explained:

> [I]t would prejudice Mr. McDowell if the jury concluded that he got the death penalty before, 12 jurors decided he should die, and some judge some place decided there was a screw up and let's do it again. We know about those liberal judges that don't like death penalties, so now we don't really have to worry about our decision because 12 jurors agreed with us before. Now we've got 24 that say he should die. That's prejudice to the defense, not the prosecution.

(31 RT 4341.)

And in fact, the prosecutor used this very sentiment to the state's advantage during closing argument of the second retrial. He urged the jurors, "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." (43 RT 6249; emphasis added.) He illustrated the delay by pointing out the dates again and again. For example, the prosecutor emphasized that "you know as an absolute that on August the 16th, 1984," Mr. McDowell was convicted of all crimes, and then he repeated "again this was done on the date of August the 16th, 1984." (43 RT 6250.) He continued, "We are here because there was an error made in 1984." (Ibid.)[29]

---

[29]See also 43 RT 6254 ("Murdered by the defendant May 20th, 1982. Paula Rodriguez May 20th 1982"); 43 RT 6256 ("not one of us, including Paula Rodriguez, deserved to die like this. Deserved to die on May 20, 1982, 17 years ago"); 43 RT 6260 ("The decedent has been dead for 17 years"); 43 RT 6271 ("[Paula Rodriguez] died May 20th, 1982, at the hands of Eddie McDowell"); 43 RT 6299 ("On Thursday, May 20th, 1982, Paula Rodriguez is killed by Eddie

Lastly, (and as set forth below in many of Mr. McDowell's other claims of error) retrial of Mr. McDowell's penalty phase – especially by the third time around – afforded the state too many bites at the apple of death. By the time the state waged its third penalty phase against Mr. McDowell, the state knew exactly the contours of Mr. McDowell's mitigation case, and the weaknesses in its own aggravation case as previously presented. Thus – and with the assistance of erroneous, prejudicial rulings from the trial court – the state in the second retrial was able to gut Mr. McDowell's mitigation case and bolster its aggravation case. In this way, the delay certainly worked in the prosecution's favor, and prejudicially against Mr. McDowell.

Thus, just as with every other part of this four-part test, the balance here is tipped against retrial Mr. McDowell.

(e) Conclusion

The trial court erred when it denied Mr. McDowell's motion to preclude the state from seeking the death penalty against him. The trial court erred when it

---

McDowell"); 43 RT 6300 ("This is the testimony. Paula Rodriguez, May 20th, 1982"); 43 RT 6309 ("Paula Rodriguez is dead for 17 years now")

The prosecutor also argued, "It is a fair statement that the prosecution, whom I represent, is not responsible for one day of the delay in the presentation of this penalty phase, nor should you hold it against the prosecution." (43 RT 6251.) At the request of defense counsel after the argument was completed, the trial court re-instructed the jury that the delay was due to error not attributable to either party. (See RT 6312-6313 [request]; 43 RT 6314-6315 [reinstruction].)

made this ruling prior to the first retrial. The trial court erred again when it denied Mr. McDowell's motion prior to the second retrial.

As the *Barker* balancing test applied to the facts of this case makes absolutely clear, it was wrong to retry Mr. McDowell's penalty phase the first time. The extremely lengthy delay was attributable solely to the state, not to Mr. McDowell. He raised the issue of unfairness from beginning to end. And he was prejudiced by the lengthy delay and retrial: critical mitigation witnesses died in the 15 years between the 1984 trial and 1999 retrials, and the state was afforded unfair opportunity to gage the strength of Mr. McDowell's mitigation case and undercut it. Thus, by the *second* retrial, it was absolutely clear that allowing the state to seek death a third time was wrong. This Court thus should reverse the penalty phase verdict, and Mr. McDowell should instead be sentenced to LWOP.

2. Mr. McDowell's state and federal constitutional rights were violated when the trial court granted the prosecutor's request to excuse two prospective jurors for cause, despite their expressed abilities to impose the death penalty.

After the second retrial jury returned its death verdict, the trial court stunningly stated on the record that this was the verdict it had anticipated from the beginning:

> Perhaps the rest of you did not expect the verdict that came from this jury, but I did. And I think that's the difference between the two [re-trials]. 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 with the death penalty.

(44 RT 6453.)

As set forth in detail below, the prosecution was aided in its crafting of this death-sentencing jury by the trial court's rulings. Specifically, as set forth below, the trial court erred when it excused for cause prospective jurors F6136 and R9529.

While these women candidly admitted that they were personally against the death penalty, both women consistently answered – in their six pages of death-qualification answers to the written questionnaire, in their answers to the trial court's voir dire, and in their answers to the prosecutor's voir dire -- that they could set aside those personal opinions, could follow the law, and could consider death as a penalty during deliberations. In sum, neither of these women was

"substantially impaired" when it came to deciding whether to impose the death penalty, and therefore the trial court should not have granted the state's motions to excuse them for cause. Reversal is required.

A. The relevant facts below

(1) Juror F6136

(a) Questionnaire answers

Prospective juror F6136 was a 53-year-old Hispanic female radiation physicist. (6 CT 1680.)[30] Her six-pages-worth of questionnaire answers about capital punishment clearly indicated that, while she was "moderately against" the death penalty and "hope[d] it w[ould] be abolished some day," (6 CT 1692), she could impose the death penalty. (6 CT 1691-1697.) For example, she circled "No" where asked whether she would "always vote against death, no matter what evidence might be presented at the penalty hearing in this case." (6 CT 1693.) Consistently, she also circled "Yes" where asked "could you impose the death penalty depending on the aggravating evidence to be offered in the Penalty

[30]The transcripts reflect that the parties also referred at trial to Prospective Juror F6136 as "Juror 3," which represents her seat in the jury box during voir dire and challenges -- until she was replaced by another "Juror 3." (See 35 RT 4906 [Prospective juror F6136 among the first twelve prospective jurors selected for voir dire]; 36 RT 5023-5024; 5026 [Prospective juror F6136 excused, and replaced by another "Juror 3," whose official number was D3258.].) This process applied to all numbered prospective jurors. (For example, Prospective Juror R9529, below, was referred to as "Juror 8.") Thus, to avoid confusion -- because the "Juror Number" spot was subsequently filled by other individuals -- Mr. McDowell refers to the erroneously-excused individuals here by their lengthier individual prospective juror numbers.

Phase." (6 CT 1694.) She somewhat disagreed that "Anyone who intentionally kills another person should *always* get the death penalty." (6 CT 1695; emphasis in original.) Consistently, she somewhat disagreed that "Anyone who intentionally kills another person should *never* get the death penalty." (6 CT 1696; emphasis in original.) Ultimately – and consistent with all the answers elsewhere in her questionnaire -- she circled "Yes" where asked if she could "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." (6 CT 1697; original emphasis omitted.)

(b) Voir dire by the trial court

The trial court began its voir dire of this prospective juror by accusing her of making "an understatement" when she answered that she hoped the death penalty would be abolished, but also answered that she was only moderately against the death penalty -- because, according to the trial court, "If you want to abolish it, aren't you strongly against the death penalty?" (35 RT 4922.) The prospective juror answered that she felt LWOP was really the greater penalty, and that as for the death penalty, "I don't feel strongly about it. I am not strongly in favor or opposed to it." (Ibid.)

The trial court explained the law regarding mitigation and aggravation, and read all of the factors set forth in Penal Code section 190.3. Then, the trial court returned to its accusatory questioning: "But you did say on page 13 you hoped

that the death penalty would be abolished some day. [Para.] Would you explain that?" (35 RT 4925.) The prospective juror answered directly: "I have read, sir, that it's not a deterrent for crime in the long term. That's why I wrote it down." (Ibid.)

The trial court then asked, "Do you believe that in your view the death penalty is a realistic, practical possibility for you to vote for, depending on the evidence that you hear in this case, aggravating and mitigating circumstances?" (Ibid.) The prospective juror answered, "*Yes, I think it is.*" (Ibid.; emphasis added.)

The remainder of the trial court's voir dire of this prospective juror was unrelated to capital punishment. (35 RT 4926-4929.)

(c) Voir dire by the prosecutor

After the trial court completed its voir dire of the first twelve prospective jurors, the prosecutor moved to excuse one juror for cause – but not prospective juror F6135. The trial court granted that motion. (35 RT 4968-4971.)

The next day, when the prosecutor was given his first opportunity to conduct individual voir dire, he went straight to prospective juror F6136. The prosecutor began, "[A]s far as your position on the death penalty":

> Prospective Juror No. 3: 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 [about] the value of the

death penalty as a deterrent for crime.

Mr. Barshop: You understand it's the law in the state of California?

Prospective Juror No. 3: Yes, I do.

Mr. Barshop: 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?

Prospective Juror No. 3: That's correct.

Mr. Barshop: Your statement, which I think sort of surprised the court and also surprised me, your statement was your general feelings about the death penalty penalty was that "Hope it will be abolished some day."

Is that right?

Prosepective Juror No. 3: Again if it has no value as a deterrent of crime, I think it has no point to continue.

Mr. Barshop: And is that your belief, that it has no value and therefore no point?

Prospective Juror No. 3: As a deterrent to crime, yes, sir.

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

Prospective Juror No. 3: 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.*

Mr. Barshop: 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?

Prospective Juror No. 3: Uh-huh.

Mr. Barshop: And the real question is, is with your position – do you understand this is a penalty phase trial only?

Prospective Juror No. 3: I do understand that.

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

Prospective Juror No. 3: I understand that.

Mr. Barshop: 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.

Prospective Juror No. 3: It could.

Mr. Barshop: 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.

Prospective Juror No. 3: It could be.

Mr. Barshop: Okay. Thank you.

(36 RT 5006-5008; emphasis added.)

(d) The trial court grants the prosecutor's motion to excuse for cause

Trial counsel anticipated the prosecutor's motion to excuse Juror F6136 for cause, and objected that the prosecutor had put the wrong question to her:

> The proper question is whether her views would prevent or substantially impair, and the question Mr. Barshop 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.

(36 RT 5021.)

The prosecutor protested, "That's not what she said." Instead, according to the prosecutor, the prospective juror "said she was substantially impaired, shouldn't be on this jury." (Ibid.) Trial counsel correctly pointed out that the prospective juror had in fact answered on her questionnaire that she could impose the death penalty. (Ibid.)

The trial court excused prospective juror F6136 for cause:

> 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 . . . .

(Ibid.)

(2) Juror R9529

(a) Questionnaire answers

Prospective juror R9529 was a 38-year-old African-American female typist for the city of Los Angeles who lived in South Central. (6 CT 1760.)[31] She answered on her questionnaire that she was "moderately against" the death penalty (6 CT 1773), and that she did not "believe that people should decide if someone should die," (6 CT 1774), but that she could also set aside her personal views about the death penalty to render a verdict in accordance with the law. (6 CT

---

[31]Under the same system set forth in the footnote above, Prospective Juror R9529 was also referred to by the parties during voir dire by another number – Eight, which reflected her seat in the jury box. Also as set forth above in that footnote, Mr. McDowell refers to her here by her lengthier, individuated number.

1777.) She answered that she would not always vote for life without parole, nor would she always vote for death. (6 CT 1773.) Overall, she believed that life in prison without the possibility of parole would be a worse fate than the death penalty. (6 CT 1772-1777.) Though she circled "No" when asked whether she could impose the death penalty in a case that involved murder in the commission of attempted rape, she wrote in explanation, "I don't know I would have to hear the aggravating evidence first." (6 CT 1774.)

(b) Voir dire by the trial court

Most of the trial court's voir dire concerned this prospective juror's contacts with law enforcement, through family members who had been involved in crimes, and through officers that she knew socially. (36 RT 5063-5068.) The trial court's voir dire of this prospective juror about her questionnaire answers regarding capital punishment consisted of the following:

> The Court: Page 14, you've indicated you're moderately against the death penalty, and as to the question whether you would always vote against death, you said – you circled no and then it looked like you had a question mark next to it and then you crossed it out.
>
> How do you now feel about it?
>
> Prospective Juror No. 8: How do I feel about the death penalty?
>
> The Court: Yes. Is it 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?

Prospective Juror No. 8: I think if I had to, that yes, I could. If it was up to me, no, I wouldn't want to.

The Court: 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?

Prospective Juror No. 8: I'm not sure. I really don't. [Sic].

The Court: Okay. You also indicated you really didn't have much of a choice between the two penalties as to which is worse.

Again, can you adjust the decision based on our anticipation here that the death penalty is a greater penalty, the life imprisonment which is the lesser penalty?

Prospective Juror No. 8: Yes, I could.

The Court: Thank you.

(36 RT 5067-5068.)

(c) Voir dire by the prosecutor

The prosecutor's voir dire of this prospective juror consisted of the following:

Mr. Barshop: Juror No. 8, 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?

Prospective Juror No. 8: Was that my state of mind? Yeah, when I filled out the questionnaire.

Mr. Barshop: Is it still your state of mine?

Prospective Juror No. 8: No, no, not after hearing everything here today, no.

Mr. Barshop: 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 verbally or physically."

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?

Prospective Juror No. 8: Yes.

Mr. Barshop: Do you believe that today?

Prospective Juror No. 8: *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.*

Mr. Barshop: Well, you have said you don't believe in the death penalty, right. Is that right?

Prospective Juror No. 8: Well, at that time – well, no, I didn't believe in the death penalty, no. I didn't believe in it.

Mr. Barshop: 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."

Prospective Juror No. 8: 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.

Mr. Barshop: 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?

Prospective Juror No. 8: Yes.

Mr. Barshop: And you understand that the more serious of the two penalties is the death penalty?

Prospective Juror No. 8: Yes, I understand that.

Mr. Barshop: 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.

Prospective Juror No. 8: You're kind of confusing me.

Mr. Barshop: I'm not trying to. I'm trying to have you answer.

Prospective Juror No. 8: *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 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.

Mr. Barshop: *And that could include the death penalty?*

Prospective Juror No. 8: *Yes.*

Mr. Barshop. Thank you.

(36 RT 5086-5088; emphasis added.)

(d) The trial court grants the prosecutor's motion to excuse for cause

The prosecutor challenged this prospective juror for cause:

> [S]he got very angry with me, which I thought was 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 . . . .

(36 RT 5092.)

Trial counsel objected:

> Ms. McLean: [I] believe her answers are that she could impose the death penalty if it was required. The anger I think comes from the way Mr. Barshop 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.
>
> Mr. Barshop: I don't like that, and we should just stop that.
>
> The Court: Calm down. She's entitled to her opinion.
>
> Ms. McLean: That's it, your Honor. She was – 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.

(36 RT 5093-5094.)

But the trial court granted the state's motion, and excused this prospective

juror for cause:

> [A]s far as Juror No. 8 is concerned, just judging on the answers, not that she gave to Mr. Barshop 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 the death penalty, 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.

(36 RT 5094; emphasis added.)

B. Excusal of each of these two prospective jurors requires reversal.

(1) The long-standing United States Supreme Court legal standards.

"[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) ___ U.S. ___; 127 S.Ct. 2218, 2224, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) Otherwise, the systematic removal of venire members opposed to the death penalty leads to a jury "uncommonly willing to condemn a man to die," and thus "woefully short of that impartiality to

which [a defendant is] entitled under the Sixth and Fourteenth Amendments." (*Witherspoon* at pp. 521 and 518; U.S. Const., Amends. 6 and 14; see also *People v. Lewis* (2008) 43 Cal.4th 415, 482; Cal. Const., art. I, sec. 16.) Removing such venire members "stack[s] the deck against" a criminal defendant such that "[t]o execute [such a] death sentence would deprive him of his life without due process of law." (*Witherspoon* at p. 523; U.S. Const., Amend. 14.)

Of course, counterbalancing the rights of the accused is the state's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Brown* at p. 2224, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 416.) To balance these interests, "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause . . . ." (*Brown* at p. 2224, citing *Witt* at p. 424; see also *People v. Richardson* (2008) 43 Cal.4th 959, 986 [excusal for cause proper only where juror's views "prevent or substantially impair the performance of the juror's duties;" internal quotations omitted].)

"A sentence of death cannot be carried out" where prospective jurors were excused for cause simply "because they voiced general objections to the death penalty." (*Witherspoon* at p. 522.) As the United States Supreme Court expressly holds, "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State." (*Witherspoon* at p. 519; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 699 ["Neither *Witherspoon* nor *Witt,* nor any of our cases, requires that jurors be automatically

excused if they merely express personal opposition to the death penalty"].)

Indeed:

> It is important to remember that not all who oppose the death penalty are subject to removal for case in capital cases; *those 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; emphasis added.) Similarly:

> [T]he State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But [the Constitution does not allow the State] to exclude jurors whose only fault was to take their responsibilities with special seriousness *or to acknowledge honestly that they might or might not be affected.*

(*Adams v. Texas* (1980) 448 U.S. 38, 50-51; emphasis added.)

Indeed, the *Adams* Court reversed a penalty verdict because the Texas statutory test for jury service excluded jurors who stated that they would be "affected" by the possibility of imposing the death penalty. The *Adams* Court recognized this impermissibly excluded jurors who apparently meant that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity, and would involve them emotionally, or who were unable positively to state whether or not their deliberations would be in any

way "affected." (Id. at pp. 49-50.) In short, *this did not amount to* "substantial impairment." (Id. at pp. 45, 49-50.)

A trial court's determination of whether a prospective juror is substantially impaired is "a judgment owed deference by reviewing courts" because the trial court's determination has been "based in part on the demeanor of the juror." (*Brown,* 127 S.Ct. at p. 2224, citing *Witt* at pp. 424-434; see also *People v. Lewis*, supra, 43 Cal.4th 415, 483.) Review of "the entire voir dire is instructive" in evaluating the trial court's application of the *Witherspoon* and *Witt* principles. (*Brown* at p. 2225.)

If a juror is not substantially impaired, removal for cause is impermissible. (*Brown*, 127 S.Ct. at p. 2224.) Erroneous excusal of even one prospective juror based upon her views regarding capital punishment results in the reversal of the death sentence. (*Gray v. Mississippi*, supra, 481 U.S. at p. 668; *People v. Schmeck* (2005) 37 Cal.4th 240, 257, fn. 3 [same].)

As set forth below, the trial court erred when it excused Prospective Juror F6136, and erred again when it excused Prospective Juror R9529. Reversal is certainly required.

(2) The trial court's improper excusals for cause.

As set forth in detail above, both the trial court and the prosecutor challenged these women for their personal views against the death penalty. Also as set forth at length above, that focus was inappropriate (in addition to being

belligerent, unseemly treatment of citizens by a court and one of its officers). The focus should have been on whether, as sworn jurors who had listened to the evidence and then deliberated penalty, the women *would be able to set aside* these personal views. As set forth above and below, both women answered consistently that they would be able to. But those answers were misconstrued and ignored. In addition, examination of the record of the entire voir dire and of the trial court's spontaneous post-trial comments about the jury's composition support what should be clear: the trial court's excusal for cause of these women was borne of the trial court's desire to see a death verdict returned, was in error, and requires reversal.

(a) Prospective Juror F6136's questionnaire and voir dire answers reflected her honesty and circumspection, not a substantial impairment in her ability to consider the death penalty as punishment.

Prospective Juror F6136's answers -- to the questionnaire, to the trial court, and to the prosecutor – reflected that she was precisely the type of juror qualified to sit on a capital trial, and one the United States Supreme Court would find error in excusing for cause. Though personally "moderately against" the death penalty, she answered on her questionnaire that she could put aside those personal views and follow the law, and would never vote either automatically for the death penalty, or automatically for LWOP. (6 CT 1692, 1693, 1694, 1695, 1696, 1697.) Her explanation for this position – that the death penalty does not deter crime – is practical, not based on a deep-seated moral, religious, or ethical viewpoint.

Hence, deliberating about and voting for a death sentence would not involve a crisis of conscience.

Nevertheless, after answering all of these questions consistently, the prospective juror was hammered by both the trial court and the prosecutor for her views about the death penalty. Indeed, the prosecutor confessed he was "surprised" by her views– as if personal opposition to capital punishment were some sort of shocking position. (36 RT 5006.) For its part, the trial court essentially accused her of lying on her questionnaire by answering both that she hoped the death penalty would one day be abolished, but that she was "only" moderately against it. (35 RT 4922.) The prospective juror explained several times that though she was against the death penalty because it did not seem to have any deterrent value, she really did not have strong feelings either way. However, neither the prosecutor nor the trial court could tolerate what they stubbornly viewed as inconsistent positions.

This focus -- let alone attack -- was absolutely unjustified, and off-base. As set forth above, it is error to exclude jurors for cause based upon their personal beliefs about the death penalty. A juror may only be excused for cause where those beliefs leave her *unable* to follow the trial court's instructions and the law regarding penalty – which in California require jurors to consider imposing the death penalty.

Prospective Juror F6136 was consistent in her questionnaire and voir dire answers that *she would be able to follow the law*. (See 6 CT 1697 [questionnaire

answer]; 35 RT 4925 [voir dire by trial court].) Indeed, she came up with this very example herself when trying to explain her viewpoint to the prosecutor: "*[I]n this court if you and the judge would give me instructions, I would be able to abide by those instructions.*" (36 RT 5007; emphasis added.)

That should have been the end of the inquiry. As the United States Supreme Court case law set forth above makes clear, jurors who are capable of following the law regarding penalty are death-qualified, no matter what their personal beliefs about the death penalty. This Court holds the same. In *People v. Kaurish,* supra, 52 Cal.3d 648, this Court found error in exclusion for cause of a woman personally opposed to the death penalty but who was "nonetheless [] capable of following [her] oath and the law." (Id. at p. 699.)

But after receiving this textbook example of a death-qualified answer, the prosecutor continued to hound this prospective juror. He asked this *radiation physicist* several times whether she even understood what was going on – whether she even understood that this was a penalty phase trial, and whether she realized that California had the death penalty. (36 RT 5007-5008.)

Then, when the prosecutor got down to asking her expressly whether she thought her feelings about the death penalty would substantially impair her abilities as a juror, what the prosecutor asked was a compound question: whether her views would "impair *or influence to any substantial degree* your ability to decide this case on the issue of punishment." (36 RT 5008; emphasis added.) The prospective juror answered, "It could." The prosecutor then asked whether "*it*

would affect your ability to be fair and impartial to the prosecution in this case," and the prospective juror again answered, "It could be." (Ibid.; emphasis added.)

It is apparently these two answers that tipped the balance against this prospective juror when it came to the trial court's excusal of her for cause. But, for the reasons set forth below, the trial court's ruling was absolutely improper.

First, as trial counsel correctly pointed out when objecting to excusal for cause of this prospective juror, the prosecutor's first "impairment" question was faulty. The prosecutor asked whether the prospective juror's personal views would "impair *or influence* to any substantial degree" her ability to decide penalty. Trial counsel correctly argued there was no "room in the law to excuse somebody because their views might have some influence." (36 RT 5021.) For example, as this Court has recognized, a juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*People v. Stewart* (2004) 33 Cal.4th 425, 446.) Thus, whether a juror's views *would influence* her deliberations is not the correct test.

Indeed, as set forth above, the United States Supreme Court has explicitly held that the test for excusing a juror for cause is whether her personal feelings about the death penalty will leave her "substantially impaired in . . . her ability to impose the death penalty under the state-law framework." (*Brown*, 127 S.Ct. at p.

2224, citing *Witt*, 469 U.S. at p. 424.) Whether a juror would be "influenced by" her feelings about the death penalty is not the test, as the United States Supreme Court expressly recognized in *Adams*, where the Texas jury selection statute impermissibly excluded jurors who acknowledged that deliberations in a capital case would involve greater seriousness and gravity and/or would involve them emotionally. (*Adams*, 448 U.S. at pp. 49-59.) Here, the prosecutor did not ask the prospective juror whether she would be substantially impaired. Instead, he confused the issue and cheated the strict standard by expanding the inquiry to whether she might simply "be influenced."

Second, and also as set forth above, the United States Supreme Court has explicitly held that it is impermissible to excuse a prospective juror for cause simply because that individual "acknowledge[s] honestly that they *might or might not be affected*" by their beliefs about capital punishment. (*Adams,* 448 U.S. at p. 51; emphasis added.) It is impermissible to excuse for cause jurors who are unable positively to state whether or not their deliberations would be in any way affected. (Id. at pp. 49-50.)

That is precisely what Prospective Juror F6136 told the prosecutor during voir dire – that she *might be affected.* Indeed, in his second question, the prosecutor specifically used the word "affect" – not the much stronger phrase (and ironclad test for death-qualification, under United States Supreme Court precedent) "substantially impair." (36 RT 5008.) And the prospective juror's

answer was only that "*It could be*." (Ibid.; emphasis added.) She did not answer that it necessarily would, nor even that it was likely.

In contrast, the prospective jurors recognized by the United States Supreme Court as properly struck have made strong, unequivocal statements about their inabilities to follow the law or impose the death penalty. For example, in *Witt,* a prospective juror confirmed – by repeating over and over again, "I think it would" – that her personal beliefs would interfere with her ability to judge the defendant's guilt or innocence. (*Witt*, 469 U.S. at p. 416.) Another prospective juror stated he *would not be able to* "follow the law as instructed by the Court" when the death penalty was in isssue. (Id. at p. 438, fn. 7; conc. opn. of Stevens, J.) Another stated *he could not* "keep an open mind as to whether to vote for the death penalty or life." (Ibid.) On the other hand, a juror who seemed "somewhat confused" but who stated that she "could" vote for the death penalty was "clearly qualified" to be seated as a juror. (*Gray*, supra, 481 U.S. 648, 653-654.)

In sum, it was error for the trial court to exclude Prospective Juror F6136 for cause. Her questionnaire and voir dire answers "state[d] clearly" that she was "willing to temporarily set aside [her] own beliefs in deference to the rule of law." (*Lockhart v. McCree*, supra, 476 U.S. at p. 176.) Indeed, that should have been the end of the inquiry. But, as set forth above, even the answers to questions belligerently put to this woman after she repeatedly declared that she would follow the law do not warrant excusal for cause. Reversal is therefore required.

(b) Prospective Juror R9529's questionnaire and voir dire answers unequivocally demonstrated that she would follow the law in deciding the penalty.

The trial court's excusal of Prospective Juror R9529 was just as obviously error. As detailed above, every single answer that she gave – on her questionnaire, in her voir dire by the trial court, and in her voir dire by the prosecutor – indicated that she would listen to the evidence and the law, and then decide the appropriate punishment. She was just as clear that this included the possibility of voting for death.

The only call that could even be considered close occurred when the trial court explained that she was never going to "*have to* vote for the death penalty," but the trial court wondered, "*would* you ever vote for the death penalty," and the prospective juror answered, "I'm not sure. I really don't. [sic]" (36 RT 5068; emphasis added.) In other words, she did not know whether she would, or whether she would not. This seems an eminently scrupulous, rational and honest response, and consistent with the prospective juror's answers everywhere else that she would need to hear the entire case before deciding anything at all. For example, when asked whether she could impose the death penalty in a case that involved murder in the commission of attempted rape, she circled "No" on her questionnaire – elaborating, "I don't know I would have to hear the aggravating evidence first." (6 CT 1774.)

This prospective juror was absolutely unequivocal about her ability to set aside her personal views on the death penalty and apply the law as instructed. For

example, she told the prosecutor during his repetitive and condescending voir dire, "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." (36 RT 5087.) She told him again, "You're asking me if I could sentence someone to death if I don't believe in it . . . . At this point, yeah, I think I would have to make the decision that I thought was right." When the prosecutor expressly asked, "And could that include the death penalty?" the prospective juror answered just as expressly, "*Yes.*" (36 RT 5088; emphasis added.)

This woman's responses were more strongly death-qualified than many others the United States Supreme Court has held were death-qualified. For example, in *Gray v. Mississippi,* supra, 481 U.S. 648, the Court reversed a death sentence where the trial court impermissibly struck a prospective juror for cause who appeared confused and who at times seemed to equivocate. (Id. at 655, fn. 7 [trial court characterizes her initial answers as "totally indecisive" and observes "She can't make up her mind"].)[32] However, because she eventually acknowledged that "she could consider the death penalty in an appropriate case," the Court found the woman should not have been excused for cause. (Id. at p. 653.) Here, prospective juror R9529 expressly told the prosecutor that yes, she could include the death penalty in her consideration of punishment.

---

[32]For example, when asked if she had objection to the death penalty, juror Bounds replied that she "didn't know." When asked if she would automatically vote *against* a death sentence, she replied "I don't think I would." When asked if she could impose a death verdict, she said, "I think I could." (*Gray v. Mississippi*, No. 85-5454, Joint Appendix at 16, 17-18, 22.)

Moreover, in his motion to have this prospective juror excused for cause, the prosecutor completely mischaracterized the prospective juror's answers. He said that "her . . . answers were that she was against the death penalty, that she couldn't impose the death penalty . . . ." (36 RT 5092.) As the record makes clear, and as trial counsel argued, nothing could be further from the truth. The prospective juror said precisely the opposite: that she *could* impose the death penalty, even though personally against it.

The trial court's stated reasons for excusing the woman for cause are just as remarkable. The trial court concluded that "although there's some ambiguity in what she said, it's clear to me that she is substantially impaired," because, for example, when asked whether she could impose the death penalty, "she circled no. *She said she'd have to consider the aggravating circumstances.*" (36 RT 5094; emphasis added.)

In other words, this was precisely the kind of person who *should* be seated on a capital jury: one unwilling to come to a conclusion about how she would decide penalty until she heard all the evidence. But instead, unbelievably, the trial court held this *against* the prospective juror, and even cited it as a reason for excusing her for cause.

In sum, just as did Prospective Juror F6136, this prospective juror's questionnaire and voir dire answers "state[d] clearly" that she was "willing to temporarily set aside [her] own beliefs in deference to the rule of law." (*Lockhart*

v. McCree, supra, 476 U.S. at p. 176.) It was thus error for the trial court to excuse Prospective Juror F9529 for cause.

(c) 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 these prospective jurors.

A trial court's determination of whether a prospective juror is substantially impaired is "a judgment owed deference by reviewing courts" because the trial court's determination has been "based in part on the demeanor of the juror." (*Brown,* 127 S.Ct. at p. 2224, citing *Witt* at pp. 424-434.) However, the United Supreme Court also recognizes that review of "the entire voir dire is instructive" in evaluating the trial court's application of the *Witherspoon* and *Witt* principles. (*Brown* at p. 2225.)

As set forth fully below, review of the entire record confirms what is already apparent from these two women's individual voir dire and questionnaire answers: their excusals for cause were improper, because the prospective jurors could set aside their personal views against the death penalty and consider capital sentencing. In other words, they were not substantially impaired. Reversal is therefore required.

The salient facts weighed by the *Brown* Court in its analysis of "the entire voir dire" included: the length of the entire voir dire, and how much of it was devoted to death-qualification questions; when, how often, and in what manner the defense made challenges for cause, and the results of those motions. (*Brown*, 127

S.Ct. at pp. 2225-2226.) As set forth below, analysis of these factors in this case confirms what Mr. McDowell has shown above: that excusal of these women for cause was error.

In *Brown*, the United States Supreme Court upheld the trial court's excusal for cause of a prospective juror. (*Brown* at pp. 2229-2230.) According to the *Brown* Court, the prospective juror's "assurances that he would consider imposing the death penalty and would follow the law" did not overcome the reasonable inference from the entirety of his own voir dire, and the record of the entire voir dire. (Id. at p. 2229.)[33]

Most salient of all to the *Brown* Court in this determination was the fact that *the defense did not object at trial* to the excusal for cause of this prospective juror. (Id. at pp. 2226-2227.) Indeed, in response to the prosecutor's motion to excuse this prospective juror for cause, defense counsel voluntarily and expressly stated, "We have no objection." (Id. at p. 2227.) Thus, the Supreme Court could appropriately conclude upon review that "the interested parties present in the courtroom all felt that removing [the prospective juror] was appropriate under the *Witherspoon-Witt* rule." (Id. at p. 2229.) In fact, a defendant's failure to object at trial to an excusal for cause has long been recognized as evidence of the juror's impairment. (See *Darden v. Wainright* (1986) 477 U.S. 168, 178; *Witt*, supra, 469 U.S. at pp. 434-435 [in light of counsel's failure to question the prospective juror

---

[33]The entire voir dire of the juror, set forth in an appendix to the Opinion, consists of six pages in the Official Reports.

or object to her excusal for cause, "it seems that . . . no one in the courtroom questioned the fact that her beliefs prevented her from sitting"]; *People v. Cleveland* (2004) 32 Cal.4th 704, 734-735 [although "failure to object does not forfeit the right to raise the issue on appeal, . . . it does suggest counsel concurred in the assessment that the juror was excusable"]; *People v. Schmeck*, supra, 37 Cal.4th 240, 262 [same].)

But that was not the case here. When the prosecutor moved to have these women excused for cause, trial counsel expressly objected and argued against their excusals. (35 RT 5021; 36 RT 5093-5094.) Thus – and in direct opposition to the facts of *Brown* -- the record does *not* reflect that the parties in the courtroom all felt that removal was appropriate under the *Witherspoon-Witt* principles. Indeed, what the cold record reflects is that these women *were* death-qualified under those principles and that trial counsel expressly objected and pointed this out to the trial court – which erred excusing these two prospective jurors for cause.

The *Brown* Court also found telling that the entire voir dire took more than two weeks, eleven days of which were devoted to the death-qualification issue. (*Brown* at p. 2225.) In *Brown*, 11 of the defense's 18 challenges for cause during the death-qualification phase were granted. The defense objected 7 times to the state's 12 motions for cause. Only two of those seven were excused over defense objection. (Ibid.) Moreover, "[b]efore deciding a contested challenge, the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning." (Ibid.) The appendix to the opinion in *Brown*

chronicles the six-official-reports-pages-worth of voir dire in which the parties engaged with the challenged prospective juror. In sum, the "entire voir dire" in *Brown* reflects that there was ample time, and a fair and open atmosphere, in which to ascertain prospective jurors' true feelings about imposition of penalty.

The record of the entire voir dire in this case stands in stark contrast to the facts of *Brown.*

First, trial counsel's attempts to establish a voir dire process as fair and informative as the one that took place in *Brown* were rejected when the trial court denied the defense 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. (6 CT 1610-1611 [defense-filed motion for attorney-conducted voir dire and sequestered voir dire regarding death-qualification]; 21 RT 2616-2620 [trial court's denial of those motions]; 35 RT 4853-4856 [defense objects to referring to prospective jurors by numbers instead of names; trial court overrules, but instructs prospective jurors that this anonymity procedure is not unusual or limited to this case].)

The trial court allowed only one hour *total* for follow-up questions by the attorneys after the court-conducted voir dire. (21 RT 2616-2620.)[34] The jury in

---

[34]Mr. McDowell acknowledges this Court's holdings that it is not error to limit attorney voir dire time and that it is not error to deny sequestered voir dire regarding death-qualification. (See, e.g., *People v. Lewis*, supra, 43 Cal.3d at pp. 493-495 and cases cited therein.) However – especially in light of the United States Supreme Court's examination of the entire record of voir dire in *Brown* – the practical effects of these limitations remain important facts for this Court to

this second-retrial was sworn *on the third day of jury selection, after only two days of voir dire*. (See 6 CT 1646-1647 [first day of jury selection, October 20, 1999; hardship]; 6 CT 1648-1649 [second day of jury selection, November 1, 1999]; 6 CT 1651-1652 [third day of jury selection, November 2, 1999: jurors sworn and alternate selection begins]; 6 CT 1653-1654 [fourth day of jury selection; alternates sworn].) Thus, in contrast to the two-week period recognized by the United States Supreme Court in *Brown* as a condition under which the trial court's ruling should be given deference, the voir dire in this case was anemic, and unfortunately seemed geared toward the state's purposes.

Second -- and, given these limitations, it comes as no surprise – that, as set forth above, the voir dire of each of these two prospective jurors compared to the voir dire of the properly-excused prospective juror in *Brown* was completely truncated. There are not pages and pages of voir dire in the Reporter's Transcript which reflect that all parties had adequate time and opportunity to sound out these women; nor does the record suggest that this was what the prosecution was trying to do in the first place. Instead, when the prospective jurors gave textbook answers of death-qualification, the prosecutor cut the women off and then misrepresented their answers to the court.

Third, comparing the results of challenges for cause demonstrates significant problems with the trial court's evaluation of jurors' responses. The

---

consider when evaluating the trial court's excusals for cause of these prospective jurors.

trial court granted four out of the five motions to excuse made by the state to which the defense did not stipulate. (35 RT 4968-4970; 36 RT 5021; 36 RT 5022; 36 RT 5092-5095.) But when it came to the defense, the trial court denied both of the motions for excusal to which the state did not concede. (36 RT 5007; 5019-5020.)[35]

Most stunning – and telling -- was the trial court's refusal to excuse for cause a prospective juror who answered in her questionnaire that she strongly agreed that anyone who intentionally kills should always get the death penalty (35 RT 4996-4998 [voir dire]; 36 RT 5007 [denial of defense challenge for cause]) – which was even more emphatic than Prospective Juror F6136's questionnaire answer that she was moderately opposed to the death penalty (6 CT 1692), that led to her state-requested excusal for cause. This pro-death penalty prospective juror also responded on her questionnaire that "When someone takes another life, I don't see why he should not lose his," and that *regardless of the evidence in mitigation*, she would *always* vote for the death penalty as long as the murder was

---

[35]Mr. McDowell acknowledges this Court's holdings that in order to preserve a claim of erroneous denial of defense challenge for cause, a defendant must either show (1) he used an available peremptory challenge to remove the juror; (2) he exhausted all of his peremptory challenges; (3) objected to the jury as finally constituted, *or* justify his failure to exhaust these three requirements. (See, e.g. *People v. Wilson* (2008) 43 Cal. 4th 1, 34 (conc. opn. of Werdegar, J.); *People v. Avila* (2006) 38 Cal.4th 491, 539; *People v. Bittaker* (1988) 48 Cal.3d 1046, 1087-1088.) Trial counsel did not exercise all peremptory challenges or offer justification at the time of trial. Nevertheless, for the same reasons set forth above in the footnote above, the facts regarding this denial of excusal for cause remain important for this Court to consider in evaluating the trial court's excusals for cause of Prospective Jurors F6136 and R9529.

intentional. (Ibid.) During voir dire, this pro-death penalty prospective juror – whom the trial court *did not* excuse for cause upon defense motion – explained, "Well, I wouldn't want to put somebody to death without hearing everything," and that she hadn't been thinking straight when she answered the questionnaire so emphatically because she was "just so sick of innocent people being killed every day." (35 RT 4998; 36 RT 5004 [trial court denies defense challenge for cause].)

Thus, under analysis of the very voir dire circumstances that the United States Supreme Court found instructive when it upheld the trial court's ruling in *Brown*, this Court cannot but conclude that the trial court's excusals for cause of prospective jurors F6136 and R9529 were error. The truncated voir dire precluded obtaining a complete picture of prospective jurors' views on the death penalty; and when the truth *did* manage to inject itself into this abridged process, the trial court aided the state by granting its motions to excuse for cause while denying the defense motions to excuse for cause.

Indeed, given the entire record of the voir dire, the trial court's on-the-record comments made after trial should not be so shocking -- except that trial transcripts do not typically include such stunning and candid statements of bias. When the prosecution succeeded in obtaining a death verdict in the second retrial, it received open praise from the trial court for its victory. The trial court's conclusions about the way the state won its case specifically included praise for the jury composition:

> Perhaps the rest of you did not expect the verdict that came from this jury, but I did. And I think that's the difference between the two [re-trials]. 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 with the death penalty.

(44 RT 6453.)

The record could not be more clear. This was not a victory achieved by the prosecutor alone. The state was finally able to obtain a death verdict in the second retrial because the trial court helped. As Mr. McDowell has demonstrated, the trial court improperly excluded for cause prospective jurors who – as the trial court itself expressly stated after the verdict was rendered -- "did not really believe in the death penalty" or who were even "neutral on the subject." As a result – and as reflected in the trial court's own jubilant praise for the verdict -- the jury in the second retrial was one that was "uncommonly willing to condemn a man to die." (*Witherspoon*, supra, 391 U.S. at p. 521.) Reversal is therefore required.

3. Mr. McDowell's state and federal constitutional rights were prejudicially violated by the admission of inappropriate victim impact testimony in the retrial, and by the trial court's instructions to the jurors about victim impact evidence.

In a hearing held out of the presence of the jury before the first retrial regarding "victim impact" evidence, the trial court put voice to its dramatic

feelings about what it viewed as the long-term consequences of Paula Rodriguez's murder:

> This is a pebble dropped into a pond [that] 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 a 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.

(25 RT 3389.) The trial court's sympathies did not change in the second retrial – but what the prosecution untimely decided to introduce as victim impact evidence did.

As set forth fully below, the trial court's erroneous ruling during the second retrial that improperly expanded victim impact testimony, and the trial court gave unconventional instructions to the jury about victim impact evidence during this testimony. These rulings violated Mr. McDowell's Sixth, Eighth and Fourteenth Amendment rights and their state constitution analogues. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.) These errors – singly, and in combination – require reversal.

A. Admission of "victim impact" testimony about the broken relationship between Paula Rodriguez's husband and daughter was error that violated Mr. McDowell's state and federal constitutional rights..

(1) The relevant facts below.

(a) The first retrial

In the first retrial, trial counsel objected in limine to a number of family photographs that were of people and time frames not clearly related to Paula Rodriguez at the time of the murder – which, by the time of the second retrial, had occurred nearly 20 years earlier. (25 RT 3377-3380.) According to the prosecutor, photos from dates far-removed from the murder were admissible because there were few photos remaining of Paula herself, due to a family rift:

> The death caused by Mr. McDowell has caused a complete break up of this family as a family unit. The elder daughter has no contact with the father at all. She blames him for her mother's death. She will not get married. She won't have children.

(25 RT 3379; see also 25 RT 3381.)

Trial counsel pointed out that it would be unfair to put the defense in the position of having to cross-examine the family members about the photos "and make us look frankly like insensitive ghouls, when in fact we're stretching the

rules in advance to accommodate the People because they claim it's the only photograph they have." (25 RT 3381.)[36]

The trial court disagreed that there was any stretching going on, because "[t]he fact that it is the only photograph of the victim as a semi adult or adult I think is very significant by itself, that this is the memory the children have of . . . their mother." (25 RT 3382.)

The prosecutor also sought to introduce a photo of the elder daughter, Maria, which the prosecutor argued was relevant "[b]ecause the father doesn't talk to the daughter, she doesn't talk to him . . . ." (25 RT 3382.) When the trial court asked why Maria blamed her father, Jose Rodriguez, for Paula's death, the prosecutor answered, "Because he told the mother to go to work on the day she was killed." (25 RT 3383.) The prosecutor added, "If you believe that these crimes end . . . they don't. I mean the father was in my office crying for an hour. There's no logical explanation as to why she blames him." (25 RT 3383.)

Trial counsel pointed out that there was, in fact, also evidence that "the real reason the daughter is so angry with him" was that "he fail[ed] to honor the mother's memory and remarried and set about setting up a new family for himself." (25 RT 3384.) Trial counsel objected that evidence of the family's estrangement went beyond the limits of proper victim impact testimony, under

---

[36]However, as set forth in Arguments 1 and 5, Mr. McDowell was not similarly "accommodated" by the prosecutor or the trial court regarding evidence or the passage of time.

People v. Edwards.[37] Trial counsel argued that it was necessary to "delineate limits, because it is not wide open, and I think going into alienation on the part of the children . . . is . . . certainly pushing the limits," especially where there were "conflicting explanations for this alienation." (25 RT 3384.)

Trial counsel also requested that if the prosecutor intended to go into this estrangement in his opening statement, that the trial court allow the defense to argue the matter further and receive an in limine ruling, "*so we can all understand in advance* what you are going to rule are the limits to victim impact evidence." (25 RT 3389; emphasis added.)

The trial court simply asked, "If you have something, I'll be happy to hear it." (25 RT 3389.) Trial counsel stated, "I can give you *Edwards* right off the top." (Ibid.) The trial judge then cut off trial counsel by impatiently asserting that he had written a manual on death penalty trials that was 50 pages long, had lectured to judges on the issue, and could quote to trial counsel any cites on victim impact evidence necessary. He then moved on to the next in limine issue without issuing a direct ruling. (25 RT 3389-3390.)

The prosecutor did not make any mention of the Rodriguez family rift in his first retrial opening statement. (See 26 RT 3494-3512 [entire opening statement]; 26 RT 3497 [prosecutor states that family will testify to the loss they experienced after the murder].) Neither did the prosecutor ask any of the Rodriguez family members about the estrangement during their direct

---

[37]*People v. Edwards* (1991) 54 Cal.3d 787.

examinations. (28 RT 3935-3956 [Valeria's testimony]; 28 RT RT 3933-3934 [Jose's testimony]; 28 RT 3930-3931 [Maria's testimony].) For example, Maria testified that she had been nine years old when Paula was killed. After that, Maria went to live with her grandparents in Mexico. Now an adult, Maria did not have any children of her own "because I don't want them to go through what I'm going through." (28 RT 3930-3931.)

(b) The second retrial

The parties and the trial court agreed before the second retrial began that, unless revisited, all motions and objections raised in the first retrial applied automatically to the second retrial. (36 RT 5209-5211.) The victim impact issue was not revisited during in limine motions. The prosecutor did not mention the Rodriguez family estrangement in his opening statement. (See 37 RT 5213-5232 [entire opening statement]; 37 RT 5229 [prosecutor states that he will present victim impact testimony from the people the murder affected].)

Then, in the middle of his direct examination of Jose Rodriguez, the prosecutor asked out, of the blue, "*After the death of your wife Paula, did you become estranged with one of your daughters, Maria Elena?*" (39 RT 5603-5604; emphasis added.)

Trial counsel objected immediately. (39 RT 5604.)

At the lengthy sidebar interrupting Mr. Rodriguez's testimony before the jury, trial counsel objected: 1) this was improper victim impact testimony because

it was collateral to Mr. Rodriguez's emotional feelings about the murder, and because of the uncertainty about what actually had caused the rift; and 2) the defense had been sandbagged with this evidence – which had not been introduced in the first trial, after it had been fully litigated there – and admitting it was error. (39 RT 5605-5605.)

Both the prosecutor and the trial court balked at trial counsel's assertion that this issue had been fully litigated, and that this was sandbagging. (39 RT 5605-5606.) The prosecutor stated he had not posed this question in the first retrial "because I tried to limit each of the individual witness' testimony." But, "Now I'd like to expand it because I think they have a right to be heard." (39 RT 5606.)

The trial court agreed that if the reason for the estrangement was remarriage, it was inadmissible as victim impact testimony. (39 RT 5605.) But the prosecutor's proffer that "the family is splintered, it's ruined his life, it's ruined all of their lives by the death of Paula Rodriguez" was, according to the trial court, "fair and specific victim impact evidence." (30 RT 5607.) The trial court thus overruled Mr. McDowell's objection. (39 RT 5607.)

Jose Rodriguez then testified that "what the death of Paula Rodriguez" had "meant to him" was that "I have suffered every minute since then, and our family is not well. We're really not united at all." (39 RT 5608.) Nineteen-year-old Valeria Andrade, Paula's youngest daughter, was permitted to add, "I wouldn't be so estranged like I am from my sister" if Paula had not been killed. (39 RT 5612.)

And Maria Rodriguez testified that after her mother died, Maria had problems with her father and other members of her family, and was still not at all close to her family. (39 RT 5633.)

In his penalty phase closing argument, the prosecutor expressly argued that the family estrangement was a reason to impose the death penalty. After reading at length from the daily transcripts of Maria's testimony, the prosecutor summed it up by urging that "[t]he killing of Paula Rodriguez splintered, and it is clear, the Rodriguez family." (43 RT 6269.)

(2) Admission of evidence of the Rodriguez family's estrangement was error that violated Mr. McDowell's state and federal constitutional rights.

Admission of evidence of the Rodriguez family's estrangement was error that violated Mr. McDowell's Sixth, Eighth and Fourteenth Amendment rights to effective assistance of counsel, to a sufficiently-individualized death-determination based on accurate, complete, and reliable evidence, and to Due Process. (U.S. Const., Amends. 6, 8 and 14; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27; *Strickland v. Washington* (1984) 466 U.S. 668; *Payne v. Tennessee* (1991) 501 U.S. 808; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Woodson v. North Carolina* (1976) 428 U.S. 280.) The nature of the evidence itself ran unconstitutionally far a field of appropriate "victim impact" testimony. Moreover, the timing of its admission deprived Mr. McDowell of sufficient opportunity for

counsel appropriately to challenge the legitimacy of the prosecution's spin on the family's estrangement.

(a) Evidence of the estrangement was inadmissible as "victim impact" evidence.

In *Payne v. Tennessee*, supra, the United States Supreme Court held that the Eighth Amendment does not bar the admission of victim impact testimony in the sentencing phase of a capital trial. The *Payne* Court reasoned that:

> Victim impact evidence is simply another form of informing the sentencing authority about *the specific harm* caused by the crime in question . . . . [A] state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase *evidence of the specific harm caused by the defendant.*

(*Payne*, 501 U.S. at p. 825; emphasis added.)

But as trial counsel correctly pointed out, and as the trial court's own characterization of the evidence as "ripples" emanating from the crime suggests, evidence of the family's long-term estrangement was inadmissible. As sad and unfortunate as it was, the family's estrangement was by this time nearly two decades removed from the crime. Such attenuation in time clearly removes it from the category of "specific harm" envisioned by the High Court in *Payne*. (See also *United States v. McVeigh* (10th Cir. 1998) 153 F. 3d 1166, 1203-1204 [no due process violation to allow guilt-phase testimony about "immediate effects" on

victims of bombing, "not the long-range effects"].) Moreover, and as trial counsel argued, there was a question whether the rift had indeed occurred because Maria was mad at her father for remarrying too quickly – a "ripple" that was not a "specific harm caused by the defendant." (*Payne* at p. 825; see also *United States v. Copple* (3d Cir. 1994) 24 F.3d 535, 545-546 [error, in non-capital case, to admit "victim impact" testimony regarding collateral effects of financial losses on the health and lifestyles of fraud victims].)

Thus, both in time and in circumstance, the family's estrangement was much too far removed from the crime for it to have any reasoned, logical, valid bearing on the jury's determination of Mr. McDowell's culpability for Ms. Rodriguez's death. Instead, it was purely an appeal to the jurors' emotions, and thus was likely to provoke arbitrary and capricious, and non-individualized, imposition of the death penalty in this case, in violation of the Eighth Amendment. Moreover, admission of this prejudicial victim impact testimony violated Mr. McDowell's federal constitutional right to due process. (See *Payne* at p. 825 ["the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" where admission of unduly prejudicial victim impact testimony renders the trial fundamentally unfair], 836 ["Evidence about the victim and survivors . . . can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"].)

Admission of this evidence was also error under the California state law decisions of this Court. "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* (2006) 39 Cal.4th 970, 1056-1057.) For all the reasons set forth above, admission of evidence of the estrangement could have done nothing *but* have invited a "purely irrational response from the jury." Linking the family's continued estrangement to the crime was dramatic, and sentimental – in other words, irrational.

Of course, and as John Muir wrote, "When we try to pick out anything by itself, we find it hitched to everything else in the universe."[38] This "butterfly effect" is a wonderful principle in movies, dreams, and in motivating and encouraging a spirit of community. But as the laws of logic and of the state of California recognize, at some point, the decisions and choices of other independent actors intervene. In short, it would be unfair and improper to attribute every sad and unfortunate occurrence in Maria, Valeria and Mr. Rodriguez's lives after Paula's 1984 murder *to* her murder. Moreover, it was unfair and improper for the state to take advantage of the lapse in time between the murder and the second retrial to suggest as much to the jury, especially given the question whether the rift had arisen from the murder at all.

---

[38](Muir, My First Summer in the Sierra (1911).)

(b) The timing of the state's introduction of this evidence deprived Mr. McDowell of sufficient notice of aggravation and to the effective assistance of counsel in how to address it.

The United States Supreme Court, this Court, and sister courts are virtually unanimous in their recognition that because victim impact testimony is extremely volatile, trial courts must be extremely judicious in their rulings upon it – and this includes that their rulings be judiciously-timed. (See, e.g., *Payne*, supra, 501 U.S. 808, 825, 831 (conc. opn. O'Connor, J.), 836 (conc. opn. Souter, J.); *People v. Edwards* (1991) 54 Cal.3d 787, 836 ["irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed," quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864]; *New Jersey v. Muhammad* (N.J. 1996) 678 A.2d 164, 180 [holding that trial court should normally conduct in limine hearing to determine admissibility of victim impact evidence, including written description of each witness' testimony]; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872 [state must notify trial court of its intent to produce victim impact testimony, and trial court must hold hearing outside presence of jury to determine admissibility]; *United States v. Glover* (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236 [prosecution required to submit written statement describing proposed testimony, which the court reviews for undue prejudice in advance of penalty phase]; *State v. Bernard* (La. 1992) 608 So.2d 966, 973 [defense entitled to notice of the evidence sought to be introduced by the prosecutor, and to pretrial determination of admissibility];

Wackerly v. State (Ok.Cr.App. 2000) 12 P.3d 1 [failure to hold in camera hearing to determine admissibility of victim impact evidence was error].)

Indeed, Penal Code section 190.3 and this Court's decisions requiring the state to provide adequate notice of aggravation evidence reflect the same. Penal Code section 190.3 "bars presentation of any evidence in aggravation, except when offered in rebuttal, 'unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time . . . prior to trial.'" (*People v. Howard* (2008) 42 Cal.4th 1000, 1015.) "The purpose of the notice requirement is to allow a defendant sufficient opportunity to prepare a defense to the aggravating circumstances." (Id. at p. 1016.)

Here, the state provided *no* notice to Mr. McDowell that it intended to introduce this specific aggravation evidence in the second retrial. Indeed, the only above-board, reasonable interpretation of events prior to the state's sandbagging question to Mr. Rodriguez during direct examination was that the state was *not* going to introduce evidence of the estrangement. The state did not do so in the first retrial, after Mr. McDowell objected on all the grounds set forth above: that it was collateral and questionably-based; that counsel would look ghoulish for cross-examining witnesses about the estrangement; and that if the state planned to seek admission of this evidence, the defense needed sufficient opportunity to challenge it and receive a specific ruling from the trial court before-hand.

The prosecutor did not provide notice. Instead, the prosecutor asked Mr. Rodriguez this improper question about his daughter's estrangement in front of the

jury in the middle of direct examination in the second retrial. The trial court overruled Mr. McDowell's objections. Three Rodriguez family members were then allowed to testify that one of the effects of Paula's murder was that the whole family had been estranged for decades. Of course, trial counsel was correct that to cross-examine these witnesses regarding the actual reasons for the estrangement would have looked terrible to the jury. Accordingly, he did not.

The prosecutor's sandbagging and the trial court's erroneous ruling thus deprived Mr. McDowell of notice of this aggravation evidence to allow Mr. McDowell sufficient opportunity to prepare a defense to the aggravating circumstances. As such, he was deprived of due process, was deprived of effective assistance of counsel, and was subjected to a penalty verdict that was not sufficiently individualized or based on accurate, complete, and reliable evidence. (U.S. Const., Amends. 6, 8 and 14; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27; *Strickland v. Washington* (1984) 466 U.S. 668; *Payne v. Tennessee* (1991) 501 U.S. 808; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

B. The trial court's instruction to the jurors about victim impact testimony was also error.

(1) The relevant facts below.

After Jose Rodriguez testified in the second retrial, the prosecutor requested that the trial court instruct the jury as it had in the first retrial – "that the family

can't tell the jury about what their feelings are in relation to whether the defendant should be executed or not." (39 RT 5609.)[39] Trial counsel objected on Eighth Amendment grounds. Trial counsel explained that such an instruction "suggests the family has an opinion, and that the opinion is he should be executed, and we don't even know that." (39 RT 5610.) The trial court overruled the objection, explaining – as it did regarding many of its other rulings – that what was at stake was essentially *unfair to the prosecution*:

> 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.

(39 RT 5610; emphasis added.) And the trial court did just that. The trial court informed the jury :

> I do want to let the jurors know that as family members testify, victim's family members testify, Ms. Rodriguez' family members testify, their opinion, their desire about the penalty that should be imposed in this case is not legally admissible, so they can't be asked questions about that.

(39 RT 5610-5611.)

---

[39]See 28 RT 3947 (instruction given by the trial court in the first retrial).

(2) *The trial court's instruction was error that violated Mr. McDowell's state and federal constitutional rights.*

(a) Though a correct statement of law, the trial court's instruction to the jury was nevertheless prejudicially inappropriate in these circumstances.

Mr. McDowell acknowledges that the trial court's instruction was a correct statement of the law: the Eighth Amendment forbids victim impact witnesses from testifying about punishment. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827 [in overruling the Eighth Amendment prohibition against victim impact testimony held in *Booth v. Maryland* (1987) 482 U.S. 496, 509, the *Payne* Court does not disturb that portion of *Booth* which forbids victim's family members from testifying about their opinions related to sentencing].)

What was error here was for the trial court to instruct – especially over defense objection -- at all. What the trial court should have done, as trial counsel objected, was say nothing. But instead, immediately after Jose Rodriguez finished testifying, the trial court gave the jurors this unorthodox mid-trial instruction about what else to consider – about what they had *not* heard in Jose Rodriguez's testimony.

As trial counsel correctly pointed out, this instruction could do nothing other than draw the jury's attention to this matter, and suggest all manner of potential ills. The trial court's instruction suggested (given the context) that if these witnesses *were* allowed to give their opinions, they would want Mr.

McDowell to be executed. Also, the trial court's instruction suggested that the Constitution and trial process were unfair to victim impact witnesses, who were tragically prevented from giving full voice to their anguish on their days in court. Indeed, the trial court's instruction was nothing less than a nod and a wink to the jurors about what the trial court itself viewed – as it explicitly stated at the sidebar conference -- -- as the infirmities and unfairnesses of the capital trial process *to the prosecution.*

Judges have a duty to refrain from instructing the jury as to the facts. "In a trial for any offense, questions of law are to be decided by the court, and questions of fact by the jury." (Pen. Code sec. 1125.) The court's instructions should indicate "no opinion of the court as to any fact in issue." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135, internal citation omitted.) "The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." (*United States v. Martin Linen Supply* (1977) 430 U.S. 564, 573.)

Even a judge's comments on the evidence, therefore -- which carry less potential for prejudice because, unlike instructions, they are not binding on the jury -- "must be accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766; accord *Querica v. United States* (1932) 289 U.S. 466, 470.) Comments on the evidence should not mislead the jury and especially "should not be one-sided." (*Querica* at p. 470.) The trial court with its comments may not "withdraw material evidence from the jury's

consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power." (*Rodriguez* at p. 766.)

Though a technically-correct statement of law, the trial court's instruction here violated every single one of these principles.

The trial court's instruction was one-sided. The trial court, in its overweening desire to "balance" the scales toward the prosecution's side, did not take into account all of the Eighth Amendment jurisprudence underlying the reasons for introduction and exclusion of appropriate aggravation and mitigation evidence in capital cases. Instead, the trial court drew attention to what the prosecution was (unfairly, according to the trial court) *not* allowed to do.

The trial court's instruction misled the jury. It suggested to them that the Rodriguez family would have told them to vote for death, if only the family members were allowed to testify about their opinions. But as trial counsel pointed out, there was no evidence in the record whether this was even true. Thus, the trial court's instruction was argumentative, withdrew material evidence from the jury's consideration, distorted the record, and otherwise usurped the jury's ultimate fact-finding power. Its delivery was error.

(b) <u>The trial court's instruction violated constitutional protections.</u>

Delivery of this instruction violated Mr. McDowell's state and federal right to trial by jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, sec. 16) and the state statutes which govern the respective functions of judge and jury. An

essential feature of trial by jury is that the jurors shall be "under the superintendence of a judge empowered to instruct them on the law . . . ." (*Patton v. United States* (1931) 281 U.S. 276, 289, overruled on other grounds in *Williams v. Florida* (1970) 399 U.S. 78, 92.) As set forth above in section (a), the trial court's instruction was misleading and unfair. It prohibited the jury from exercising its ultimate fact-finding power regarding aggravation evidence and mitigation evidence, and the jury's fair weighing of all of it. Thus, the instruction violated Mr. McDowell's right to trial by jury.

Moreover, the instruction effectively prevented the jury from considering relevant mitigating evidence. Under the Eighth and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution, a defendant in a capital case is guaranteed the right to have relevant mitigating evidence considered by the sentencing jury. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, secs. 7, 15 and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654, 1664-1666.) Indeed, "'*Lockett* requires the sentencer to listen.'" (*Sumner v. Shuman* (1987) 483 U.S. 66, 76, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115, fn. 10.) Any barrier which precludes a jury, or any of its members, from considering relevant mitigating evidence constitutes federal constitutional error. (*Mills v. Maryland* (1988) 486 U.S. 367, 375; *People v. Mickey* (1991) 54 Cal.3d 612, 693.)

The trial court's erroneous instruction in this case erected a barrier which prevented the jury from considering Mr. McDowell's mitigating evidence. The trial court pointed out to the jury that the victim's family members could not testify about punishment. This necessarily cast a pall over Mr. McDowell's entire mitigation case – where his evidence was all about his family life, how he had been raised, what his family thought of him, *and about his punishment.* Having been instructed by the trial court that Paula Rodriguez's family could not do the same, the jury operated inside a barrier which prevented it from fairly considering Mr. McDowell's mitigation evidence.

C. The errors – individually, and taken together -- were prejudicial and require reversal.

As the United States Supreme Court recognized in *Payne v. Tennessee,* supra, "Evidence about the victim and survivors, *and any jury argument predicated on it*, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." (*Payne*, 501 U.S. 808, 836; emphasis added.) Indeed, the *Payne* Court exhorted that in reviewing claims about erroneous admission of victim impact testimony, "With the command of due process before us, this Court and other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,' an obligation 'never more exacting than it is in a capital case.'" (Id. at p. 837, citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

In performing that duty here, this Court should take into account the following strong indicators of the prejudicial effects of these errors.

First, as the *Payne* Court recognized, evidentiary error related to victim impact testimony is compounded by any jury argument predicated on it. (*Payne* at p. 836.) Here, the prosecutor expressly argued that the estrangement between Maria and her father was the very sort of victim impact evidence that made Mr. McDowell worthy of the death penalty. After reading at length from the transcript of Maria's testimony, the prosecutor urged that "[t]he killing of Paula Rodriguez splintered, and it is clear, the Rodriguez family." (43 RT 6269.) The prosecutor then read from the transcripts of Jose Rodriguez' testimony, and from Valeria's. (43 RT 6269-6271.) This included their testimony about the family's estrangement. (43 RT 6269 [Jose]; 43 RT 6230 [Valeria].) The prosecutor argued that Mr. McDowell had thus "affected them" and "infected them" and should therefore receive the maximum sentence possible. (43 RT 6271.)

Second, in *People v. Gay* (2008) 42 Cal.4th 1195, this Court reversed a penalty-phase retrial under remarkably similar circumstances: where a combination of evidentiary error and the related trial court instruction was prejudicial. In *Gay*, the trial court improperly excluded mitigation evidence supporting the defendant's theme of lingering doubt, and over defense objection, the trial court instructed the jury that the defendant's responsibility for the crime had already been conclusively proven. (Id. at p. 1224.) Under these circumstances, this Court held that it "need not decide whether the evidentiary

rulings alone were prejudicial here . . . because the error was compounded by the trial court's instruction to the jury . . . ." (Ibid.)

The same is true here. The evidentiary error allowed the prosecution to admit testimony, and then argue, that the Rodriguez family's decades-long estrangement was one of the effects of the murder for which Mr. McDowell should be held accountable by death. The trial court's instruction – which took place in the middle of the victim impact testimony itself -- telegraphed to the jury that the Rodriguez family would like to see Mr. McDowell dead, but that pesky unfair legal technicalities were keeping these victims from having their full say on the stand. This would become all the more prejudicial when Mr. McDowell's family members *were* allowed to testify that they did not want him to receive the death penalty. Thus, the trial court's instruction alone is cause for reversal. And as in *Gay*, the combination of these two errors certainly requires it.

Finally, as is true of so many errors, this Court has before it two virtual petri dishes of prejudice demonstration: the first retrial and its result, and the second retrial and *its* result. Once again, this combination of error did not occur in the first retrial: the prosecutor did not introduce evidence of the Rodriguez family rift. That trial ended in a hung jury. In the second retrial, the prosecution *did* introduce this evidence. The second retrial ended, of course, in a death verdict. That result should be reversed.

4. Mr. McDowell's state and federal constitutional rights were prejudicially violated by exclusion of critical mitigation evidence: social historian expert testimony.

Dr. Arlene Andrews, a professor of social work at the University of South Carolina with 25 years of experience working in areas related to child abuse, neglect and domestic violence, testified at length in the first retrial about Mr. McDowell's horrific family history and the necessary ramifications to Mr. McDowell's life from that history. (31 RT 4361-4389, 4410-4417, 4423-4435.) Dr. Andrews was the only expert witness offered by the defense in the first retrial about these issues.[40] That trial ended in a hung jury.

In the second retrial, after concluding presentation of his aggravation case, the prosecutor moved to preclude Dr. Andrews from testifying -- *at all* – in mitigation. (39 RT 5641.)

Unbelievably, over express and complete defense objection, the trial court granted the state's motion. (39 RT 5660, 5664.) The trial court held that Dr. Andrews' testimony was not the proper subject of an expert, that it was cumulative of other mitigation evidence, and that it was based on hearsay. (39 RT 5660-5664.)

As set forth at length below, Dr. Andrews' expert testimony was absolutely appropriate, relevant and admissible under California state law. Moreover, Dr.

---

[40]The only other expert witness to testify in mitigation in the first retrial was Daniel Vasquez, former Warden of San Quentin, who testified about Mr. McDowell's lack of future dangerousness and prison adjustment. (31 RT 4456-4478.) Vasquez also testified in the second retrial. (42 RT 6045-6083.)

Andrews' testimony was critical mitigation evidence, the exclusion of which violated Mr. McDowell's Eighth and Fourteenth Amendment rights and their state constitutional analogues. (U.S. Const., Amends. 8 & 14; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.) This stunning exclusion was absolutely prejudicial, and reversal is therefore required.

A. ***The relevant facts below.***

(1) The first retrial

(a) The effects of Dr. Andrews' testimony and the state's concerns

Dr. Andrews was a professor of social work at the University of South Carolina, with a Ph.D. in psychology. (31 RT 4362.) Dr. Andrews had 25 years experience working in areas related to child abuse, neglect and domestic violence. (31 RT 4362.) She testified at length about the McDowell family history and dynamics, and about what her experience led her to believe were the effects of those horrific experiences. (31 RT 4361-4389, 4410-4417, 4423-4435.)

Dr. Andrews' testimony was one of nine witnesses whose entire testimony first retrial jury requested readback. (2 CT 381A.) After deliberating August 16, 17, 18, 19, 20, 25 and 26, 1999, the jury in the first retrial hung. (2 CT 377-381B, 383-385, 386-387; 5 CT 1555-1556.) The trial court declared a mistrial. (5 CT 1555-1556.)

Mid-way through Dr. Andrews' direct exam in the first retrial, the prosecutor had requested a ruling about whether he would be able to cross-examine Dr. Andrews about psychiatric reports prepared after the crimes underlying the 1984 guilt convictions. (31 RT 4396-4398.) Defense counsel offered that Dr. Andrews' "ultimate opinion" would be to "describe what the abuse was in this family . . . and she'll describe it as one of the most abusive families she's studied . . . and she'll testify that she thinks in her opinion that it had a substantial impact on the development of his character." (31 RT 4397.)

"Substantial impact? The jury could figure that one out," scoffed the trial court. "I thought we were going to get into something sophisticated . . . ." (31 RT 4397.) Defense counsel reiterated that the purpose of Dr. Andrews' testimony was not to go into Mr. McDowell's mental state at the time of the crimes, but instead to offer her expertise on the social dynamics (and their significant ramifications) of upbringing in families like the McDowells. (31 RT 4398.) The prosecutor asked then to "strike her testimony and let's get on the road. It's irrelevant." (31 RT 4399.) The prosecutor maintained that Dr. Andrews' testimony was not about anything a juror would not know himself. (31 RT 4401.)

The trial court agreed with the prosecutor in sentiment, but denied the motion because "under the case law it's relatively clear that the defense has a wide range of things they can bring" and "[m]itigating circumstances are basically anything that the defense offers to mitigate the punishment . . . ." (31 RT 4401.)

(b) Dr. Andrews' expert interpretations and opinions in the first retrial

Dr. Andrews explained in her first retrial testimony that witnessing parental beatings "can induce a number of social problems in a child." (31 RT 4382.) For example, there is a "deficiency in their moral and social education" of how men and women relate to each other, and the children learn that the way to deal with disagreement is to resort to violence. (31 RT 4382.) Also, "a level of terror . . . develops dealing with fear" when kids are beaten, and when they fear that a parent might be lost to the violence or hurt in some way, which "induces a number of fairly severe emotional problems in the children." (31 RT 4382.) It is also common for parents in battering relationships to overlook or ignore their children's needs: parents "don't seem to have much emotional energy left for the children, and so they simply don't pay much attention to their development and their emotional needs." (31 RT 4383.) As for animal abuse by parents, it "creates an aura of terror about what could happen and does have a definite social impact in terms of the fear, of the power of the father, particularly when it involves the death of animals." (31 RT 4387.)

Dr. Andrews found several factors in Mr. McDowell's upbringing remarkable. One of the most significant was the complete lack of any form of social support. (31 RT 4413.) There was absolutely no one who was supportive of Mr. McDowell. Though many people observed what was happening and were concerned about it, they didn't express it to him or act protectively on his behalf. (31 RT 4413.) Neither was there a coalesced support group from the siblings: Dr.

Andrews had never seen a family where the siblings were more in conflict. (31 RT 4414.) Charles, Sr., also controlled his family's access to people from the outside – like from church, or from the school. (31 RT 4414-4415.)

The chronicity of the abuse was also remarkable. Many people reported that the beatings were a daily occurrence, there was no clear sense of why the children were beaten, and everyone would get beaten even if only one person did something "wrong." (31 RT 4383-4384.) Beatings after Bible readings constituted "a form of spiritual abuse" that was unusual relative to other families Dr. Andrews had dealt with. Moreover, many episodes happened around food and meals, which was detrimental to social development because of its warped relationship to nourishment. (31 RT 4385.) "There was an expectation that there be silence and that everyone eat whatever the father determined they were going to eat." (31 RT 4385.) Charles, Sr. would knock the children out of their seats if they did not obey at the dinner table. (31 RT 4385.) Also remarkable was the extent to which Charles, Sr. would beat his children in front of other people. (31 RT 4385.)

Abuse and neglect in all its forms "at a very severe level" was present, on a "very chronic, repeated basis throughout [Eddie's] life . . . ." (31 RT 4415.) Eddie "basically was a loner" who, Dr. Andrews observed, "formed some very minimal adaptive coping habits, one which was a very chronic use of alcohol and other drugs." (31 RT 4415.) This, and increased use over time, is something very

common in abused children. It provides "a way of helping to deal with the anxiety and the trauma." (31 RT 4416.)

Dr. Andrews reviewed the sexual abuse in the family, and explained that becoming a sex offender is also common among sexually-abused children, as is promiscuity. (31 RT 4416.) Mr. McDowell was unable to sustain a marriage, or to finish school. (31 RT 4416.) Because of his social problems, Eddie never could keep a job (working as a carpenter) for very long – and thus could not feel any sense of success about work, either. (31 RT 4417.)

(c) The trial court's growing antipathy towards Dr. Andrews' testimony

During litigation of jury instructions at the first retrial, the trial court spontaneously and gratuitously voiced his disdain for Dr. Andrews' mitigation evidence:

* "I think it brought in a lot of information that was not necessary and tended to be cumulative and not reliable." (32 RT 4496.)

* "I think a lot of information she came up with was inappropriate and unnecessary to her conclusion" (Ibid.)

* "I found it – personally found it to be unnecessary going into a tremendous amount of information that was entirely hearsay, not supported by the evidence in this case, and just the evidence we heard would allow somebody to draw these conclusions, and I'm not so sure that an expert was necessary to do it." (32 RT 4497.)

* "I think it's logical that having given the testimony of the sister and the brother and the neighbor and everyone else, we had more than enough to draw those conclusions . . . ." (Ibid.)

* "I really don't think I fully understood what she was going to be doing with it. I thought there would be more impact of what she had to say." (Ibid.)

In keeping with this disdain, the trial court excluded from evidence the family tree that Dr. Andrews prepared because, according to the court, "She's testified to what's significant, and, in fact, far more so than is necessary or appropriate, I think." (32 RT 4554.)

The prosecutor told the trial court at this point, "If we ever see her again, the court may consider, if I'm the prosecutor, a motion to determine whether she's got any expert testimony." (Ibid.)

(2) *The second retrial*

One month after the first retrial resulted in a mistrial, the parties were back in court for a status conference about the second retrial. (6 CT 1566.) The next day, the prosecutor filed notice of the state's factors in aggravation. (6 CT 1567.) This time, the state added Mr. McDowell's sexual molestations of his siblings Tommy, Theresa, and Kathy McDowell. (6 CT 1567; compare 1 CT 20-21 [state's notice of aggravating circumstances from first retrial].) However, the prosecutor did not file any motions requesting a ruling on admissibility of Dr. Andrews' testimony.

Neither did the prosecutor seek any such ruling before jury selection, before opening statements, or before he put on his entire case in aggravation.[41]

Instead, at *end* of the prosecutor's case in aggravation, he moved to preclude Dr. Andrews from testifying -- at all -- in mitigation: "Miss Andrews. That's my motion." (39 RT 5641.)[42]

When the trial court asked for elaboration, the prosecutor stated that "she does not testify to anything that requires expert testimony." (39 RT 5642.) "Miss Andrews testifies that people that have bad childhood [sic] may have bad adulthood [sic] and create a process whereby they do criminal acts because of their childhood." The prosecutor had no "quarrel with that" and therefore believed no expert was necessary. (39 RT 5642.) The prosecutor argued that also, "even though I know the court limited her testimony, it allows unfettered hearsay. . . ." (Ibid.)

Of course, trial counsel correctly objected that under Evidence Code section 801, and this Court's case law interpretating that section, Dr. Andrews' expert testimony was indeed admissible. (39 RT 5646-5648.) Trial counsel also argued

---

[41]Indeed, during jury selection and shortly before opening statements, while the parties were discussing the logistics of objections and admissibility in the second retrial, the prosecutor offered by way of example, "If there's something [from the first retrial] that we want to revisit, *like one of the things I want to revisit is if the court allows Miss Andrews to testify*, I would like to go into to the amount of money she's been paid . . . ." (36 RT 5209; emphasis added.) However, the prosecutor did not make any motion then to exclude her testimony. The prosecutor did not raise that issue until the afternoon before the mitigation case began.

[42]Though Dr. Andrews was a Ph.D. and a grown woman, the prosecutor nevertheless referred to her throughout as "Miss Andrews."

that if the issue were whether Dr. Andrews was testifying for the defense as a mental health expert about Mr. McDowell's mental state at the time of the crime, it would mean that the door was open to the state to address these issues in rebuttal; it certainly would not mean that the defense was precluded from presenting Dr. Andrews' testimony in its mitigation case. (39 RT 5656.)

Trial counsel also pointed out that the trial court could rule and instruct upon specific potential instances of hearsay as they developed in Dr. Andrews' testimony (39 RT 5646), but to exclude her testimony entirely was nothing short of "incredible," in light of the United States and California Supreme Court cases recognizing defendants' rights to present mitigating evidence. (39 RT 5654.)[43] Dr. Andrews' testimony was necessary to help the jurors understand what the prosecutor would argue against Mr. McDowell: that though "[w]e all have bad things happen to us, we don't all don't go become murderers." (39 RT 5657.)

Trial counsel also argued that the prosecutor's "over simplification" of Dr. Andrews' testimony did not "fairly depict the various opinions that she gave in the course of her testimony." (39 RT 5643.) Trial counsel itemized, page by page, Dr. Andrews' opinion testimony in the first retrial, which had been, and continued to be, essential to aid the jury's evaluation of Mr. McDowell's childhood as mitigation evidence. Trial counsel also proffered the ways in which he had planned to enlarge the scope of Dr. Andrews' opinions in the second retrial –

[43]The next day, trial counsel clarified that all of his points related to this argument were also raised on Eighth and Fourteenth Amendment grounds. (40 RT 5683.)

including the effects of the family's low socio-economic status, the highly sexualized nature of the family abuse, and that the McDowell family's social history was one of the worst Dr. Andrews' had ever encountered. (39 RT 5645-5654.) Trial counsel also pointed out that defense attorneys had been found ineffective in other capital cases for failing to develop and introduce just such evidence of family abuse. (39 RT 5661-5663.)

Nevertheless, the trial court *excluded Dr. Andrews' testimony completely*. (39 RT 5660, 5664.)

The trial court held that Dr. Andrews' testimony was not the proper subject of an expert witness because, "[e]verybody knows that the way you're raised is going to affect you as an adult . . . ." (39 RT 5660.) Moreover, "the details" of her testimony had either been cumulative of other witnesses, or involved hearsay. (39 RT 5645, 5663 .) For instance, "It reiterates the testimony of all of these witnesses, goes back into the background, and basically emphasizes how bad the other children were treated as well, which is not relevant to the case." (39 RT 5660.) Moreover, according to the trial court, "the defendant himself can testify to that," which "would be the best measure of what happened to him as a result of the way he was raised." (39 RT 5661.)

The defense began its mitigation case the next day. (40 RT 5701.) Neither Dr. Andrews nor any other expert testified about Mr. McDowell's social history or its effects. After deliberating for a total of two full days – parts of which were

consumed by listening to readback -- the jury returned its recommendation for death. (11 CT 2999-3000, 3001-3002, 3003-3004, 3028, 3030-3031.)

B. ***The trial court's complete exclusion of expert social historian Dr. Arlene Andrew's testimony was error under California state law, and violated Mr. McDowell's state and federal constitutional rights.***

As set forth fully below, the trial court's exclusion of Dr. Andrews' testimony is a stunning error. Dr. Andrews' expert testimony was absolutely appropriate, relevant, and admissible under California state law. Moreover, Dr. Andrews' testimony was critical mitigation evidence, the exclusion of which violated Mr. McDowell's Eighth and Fourteenth Amendment rights and the state constitution analogues. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.)

(1) The trial court's exclusion of Dr. Andrews' expert testimony was error under state law.

(a) Dr. Andrews' testimony was the proper subject of an expert witness.

Evidence Code section 801 provides that an expert may testify to a subject sufficiently beyond common experience so as to assist the trier of fact, when that opinion is based on her expertise. Expert testimony is excludable under this section "only when it would add nothing at all to the jury's fund of information." (*People v. McDonald* (1984) 37 Cal.3d 351, 367.) As this Court has explained:

> The jury need not be totally ignorant of the subject matter of the opinion to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it will add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witnesses."

(*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300; citations omitted; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1222 ["pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury"]; accord *People v. Lindberg* (August 28, 2008, No. S066527) ___ Cal.4th ___, [2008 DJDAR 13741, 13758] [state's introduction of expert testimony about White Supremacist's hatred of Jews was admissible to prove racial motivation of murder].)

As to the pertinent question at issue here – namely, whether Dr. Andrews' expert testimony would have assisted Mr. McDowell's penalty phase jury in evaluating his childhood – this Court has answered in the affirmative: the effects of brutality in childhood are not, in fact, of common knowledge to jurors, and thus, are the proper subjects of expert testimony. In *People v. Smith* (2005) 35 Cal.4th 334, this Court held that, in a capital prosecution for murder and sodomy, the *state* was properly allowed to present expert testimony about children's reactions to sadistic molestation. This Court expressly rejected the capital defendant's assertion that "the experiences of child victims of violent sexual assaults are not

sufficiently beyond common experience that expert assistance is required." (Id. at p. 363.) Instead, this Court held that the experiences of child victims of violent sexual assault are sufficiently beyond common experience so that expert testimony is required:

> Only a fraction of the general population, and presumably none of the jurors, has been personally victimized. Of course a juror can 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.*

(Ibid.; emphasis added)

The United States Supreme Court is in agreement. In *Abdul-Kabir v. Quaterman* (2007) ___ U.S. ___, 127 S.Ct.1654, the Supreme Court stated about evidence of childhood abuse in a mitigation case:

> 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. 1673; emphasis added.)

Mr. McDowell's childhood was fraught with sadistic abuse and molestation. Mr. McDowell's childhood was fraught with nightmarish treatment

all around – indeed, the worst that Dr. Andrews had ever seen. As the United States Supreme Court and this Court both recognize, such childhood abuse itself is not something that lay people can contextualize without the assistance of an expert witness. Mr. McDowell's childhood was rife with abuse of every kind. It was absolutely necessary for an expert to explain the complex effects that such terrible treatment would have upon him – because, as this Court held in *Smith*, even the jury's imaginings could not substitute for expert testimony. Mr. McDowell was prepared to offer such expert testimony in mitigation, as he did in the first retrial. But in the second retrial, the court completely excluded this expert testimony.

(b) Dr. Andrews' testimony was not cumulative of other witnesses' testimony.

Another basis for the trial court's exclusion of Dr. Andrews' testimony was that it would be cumulative of other mitigation witnesses.' (39 RT 5645, 5663.) As set forth below, the trial court's reasoning was completely off base.

First, an expert's testimony is of fundamentally different character than that of lay witnesses. An expert has skills, knowledge, training and experience that allow her to explain the subject of her expertise to jurors. Lay witnesses, on the other hand, testify about what they have observed, not about a field as a whole, and certainly not as objective experts, who have studied it, understand it, and can explain it to jurors.

Second, that objectivity in the eyes of jurors also means that an expert's testimony is not "cumulative" of lay witnesses' testimony -- even if they do end up

testifying about the same events. The jury was instructed to evaluate witnesses' credibility based upon, inter alia, their biases. As members of Mr. McDowell's family, the lay witnesses all were subject to jurors' reasonable beliefs that their mitigation testimony was skewed by their relationship to him. (See, e.g., CALJIC No. 2.20; 11 CT 3010-3011; 43 RT 6384-6386.) Of course, expert witnesses do not fall into the same related – and therefore, biased – category as family members.

Third, Dr. Andrews' testimony in the first retrial properly included underlying facts supporting her opinions – many of which were not introduced in the second retrial at all, because Dr. Andrews was not allowed to testify regarding them, and no lay witnesses testified to them, either.

The following mitigating facts from Dr. Andrews' testimony in the first retrial did not come in through any witnesses' testimony in the second retrial – and thus, none of these would have been "cumulative":

Dr. Andrews testified that Shirley was four years younger than Charles McDowell, Sr., when they married in 1952 and that their relationship was "incredibly hostile." (31 RT 4373-4375.) Dr. Andrews testified that Charles reported he was disappointed in Shirley within a week of their marriage. He beat Shirley while "Eddie" (which was the family name for Mr. McDowell) was in utero. Eddie was born a month early, weighing less than five-and-a-half pounds. (31 RT 4378.) Shirley was hospitalized for three weeks after the birth because she had hemorrhaged badly. (31 RT 4378.)

Dr. Andrews testified that Shirley was unprepared to be a mother, and didn't want to be. She had gotten married to get out of her parents' house. (31 RT 4378.) She was "very open about saying she didn't want to have a baby, didn't want Eddy [sic] and she didn't know much about how to take care of him." (31 RT 4379.) She was depressed and lonely when she had Eddie, who cried a lot. She did not know the right way to feed him nor what to feed him until she took him to the doctor when he was six months old. (31 RT 4380.)

Dr. Andrews testified that Shirley's younger brothers Gene and Jerry molested Eddie. (31 RT 4373.) This started when he was a very young child. They told Eddie that his father would beat him if he had reason to believe these things were going on. (31 RT 4388.) By the time he was nine or ten, Eddie was being molested by other boys – and eventually men -- in the York, South Carolina neighborhood. (31 RT 4388.) He would do chores for them, and then was asked to do sexual things for money. (31 RT 4388.)

Dr. Andrews testified that Eddie's school grades were very low. He had to repeat first grade. None of the children in the family finished high school. (31 RT 4389.) Eddie also had behavioral problems in school. He was very young for his grade level, and was hyperactive. His parents were called into the school several times about his behavior. Teachers even tried using restraints to keep him in his chair because he couldn't sit still. (31 RT 4389.)

Dr. Andrews testified that Eddie's younger brother Ronnie told her that once when Charles, Sr. was beating Ronnie, the family's dog Blacky came through the

screen door and jumped on Charles, Sr. Within a day or two, Blacky was gone and never came back. (41 RT 4386.) Another time, Ronnie had a dog on a rope leash – and Charles shot the dog. (41 RT 4386-4387.)

Dr. Andrews testified that Ronnie McDowell was homeless in 1994 and had been in and out of hospitals for alcohol and heroin addiction. He died a year later, at age 40. He'd never married or formed a lasting relationship. (31 RT 4412.) Teressa was the most functional of all the children, but had serious stress reaction problems and rarely left home. (31 RT 4412.) Tommy had spent a good deal of his adult life incarcerated for rape. (31 RT 4412.)[44] Kathy lived a reclusive life, in a rundown trailer that she and her boyfriend rented from Teressa. She almost never left the trailer, slept during the day instead of the night, and could not hold a job. (31 RT 4412.) Carol Belinda died when she was five. (31 RT 4412.)[45]

Clearly, the trial court was absolutely wrong when it held that Dr. Andrews' testimony was "cumulative" of percipient testimony offered by others, and therefore was absolutely wrong for excluding it.[46]

---

[44]Tommy McDowell did testify in the second retrial that he had been convicted in 1987 of second degree rape, second degree sexual offense, grand theft and attempted first degree burglary. (42 RT 6099.)

[45] Evidence of Carol Belinda's death was introduced in the second retrial, as well. (See 41 RT 5826-5830, 5911.)

[46]As for the trial court's ostensible alternate ruling – that Dr. Andrews' testimony should be excluded because it involved hearsay, no more needs be said than 1) the trial court itself correctly recognized – but ultimately failed to take into account in its ruling -- that experts are indeed allowed to rely upon hearsay to form their opinions (39 RT 5645-5646); and 2) that trial counsel was absolutely correct that any potential hearsay issues could be addressed and ruled upon in a case-by-case way during Dr. Andrews' testimony – and that the appropriate solution was

(c) Though Dr. Andrews' testimony was clearly admissible under California state law, if it had been a close call, it should have been resolved in favor of Mr. McDowell.

As set forth above, it is clear that California state evidentiary law did not preclude Dr. Andrews' expert witness testimony. Dr. Andrews' certainly should have been allowed to testify as an expert in Mr. McDowell's mitigation case. But, as set forth below, if there was any doubt at all, that doubt should have been resolved in Mr. McDowell's favor.

State rules of evidence "may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303.) In *Chambers*, the United States Supreme Court held that where those rules are invoked to exclude fundamental defense evidence, the defendant is denied his federal constitutional rights to due process and to present a defense. (Ibid.)

While *Chambers* discussed hearsay evidence excluded in a guilt trial, clearly the principle is even more critical in a capital penalty phase. "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (Burger, C.J., concurring).) Because the death penalty is "qualitatively different" from any

---

not simply to exclude her testimony completely. (39 RT 5646.) (See also Evid. Code sec. 801, subd. (b) and *In re Fields* (1990) 51 Cal.3d 1063, 1070 ["An expert many generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon for that purpose.'"; *People v. Carpenter* (1997) 15 Cal. 4th 312, 403 ["On direct examination, the expert may explain the reasons for his conclusions, including the matters he considered in forming them"].)

other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opinion of Steward, Powell, and Stevens, JJ.) The United States Supreme Court thus "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring).) Thus, evidentiary rulings in capital sentencing phases require heightened scrutiny – which only serves to make it more clear that it was error to exclude Dr. Andrews' testimony.

(2) Exclusion of Dr. Andrews' expert mitigation testimony violated the Eighth and Fourteenth Amendments and their state constitutional counterparts.

(a) McDowell's jury was precluded from hearing all relevant mitigation evidence, and from making an individualized sentencing determination based on complete, accurate and reliable evidence.

The Eighth and Fourteenth Amendments require sentences of death to be based on an individualized determination of an individual's death-worthiness, and be based on accurate, complete, and reliable evidence. (U.S. Const., Amends. 8 and 14; Cal. Const., Art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27; *Caldwell v. Mississipii* (1985) 472 U.S. 320; *Woodson v. North Carolina* (1976) 428 U.S. 280.) The Eighth and Fourteenth Amendments also require jurors to consider any aspect of a

defendant's character that the defendant proffers in the penalty phase as a basis for sentence less than death. (*Mills v. Maryland* (1988) 486 U.S. 367, 373; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 121; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The "sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence . . . ." (*Weeks v. Angelone* (2000) 528 U.S. 225, 232.) "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." (*McClesky v. Kemp* (1987) 481 U.S. 279, 305-306.)

Suffering deprivation or mistreatment as a child is mitigating. (*Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654, 1673-1674; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (*Penry I*); *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116.) So are emotional problems. (*Abdul-Kabir* at pp. 1673-1674; *Penry I*, 492 U.S. at p. 319; *Eddings* at p. 115; *Bell v. Ohio* (1978) 438 U.S. 637, 641-642.) And as set forth above, both this Court and the United States Supreme Court have recognized that expert testimony on these subjects is appropriate, because the expert's observations are beyond the common knowledge of jurors.

Here, Mr. McDowell's sentencing jury was precluded from considering constitutionally-relevant mitigating evidence, and from considering circumstances that could cause the sentencing jury to decline to impose the death penalty. Indeed, in the first retrial, the jury that heard Dr. Andrews' testimony *did not*

impose the death penalty. Moreover, because the jury in the second retrial did not hear Dr. Andrews' expert testimony, the second retrial's jury was precluded from making an individualized determination of Mr. McDowell's death-worthiness, and the jury's determination clearly was *not* based on complete and reliable evidence.[47] Mr. McDowell's mitigation case was simply not complete without Dr. Andrews' testimony.

(b) Mr. McDowell's jury was precluded from being able to fully consider all of the mitigation evidence it was presented.

The Eighth and Fourteenth Amendments also require that the sentencer be able to fully consider all the mitigating evidence that is presented. (*Smith v. Texas* (2004) 543 U.S. 37, 26; *Penry v. Johnson* (2001) 532 U.S. 782, 797 (*Penry II); Johnson v. Texas* (1993) 509 U.S. 350, 369; *Penry I*, supra, 492 U.S. at pp. 320-321.)

The United States Supreme Court last term resoundingly affirmed this "[l]ong recognized" requirement when it reversed, in three separate opinions, three death judgments: *Brewer v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1706, 1709; *Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654; and *Smith v. Texas* (*Smith II)* (2007) ___ U.S. ___, 127 S.Ct. 1686. The underlying Eighth Amendment claim in each case was that, as a result of the prosecution's argument

---

[47]For example, the trial court itself excluded the signed mitigating declarations of deceased family members as unreliable, because the trial court believed they were signed "to encourage the grant of the habeas corpus." (39 RT 5641.) It requires no stretch to imagine that at least some jurors would not have viewed the family's mitigation testimony as unbiased – and therefore, not reliable.

and/or the trial court's instructions, the jury could not give "meaningful" effect to the defendant's mitigation evidence. The Supreme Court reversed in each for these *Penry I* errors – because, as the Court reaffirmed in *Brewer*:

> [A] sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death.

(*Brewer,* 127 S.Ct. at p. 1709; internal quotations omitted.) Where trial errors preclude the sentencing jury from being able to give a "reasoned moral response" to the mitigation evidence the defense has provided, the death sentence must be reversed. (Id. at p. 1710; see also *California v. Brown* (1987) 479 U.S. 538, 545 ["the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime"] (conc. opinion of O'Connor, J.; emphasis in original).]

Mr. McDowell's jury could not give a reasoned moral response to the mitigation evidence that was supplied. Without Dr. Andrews' testimony, the jurors could not effectively understand, nor accurately evaluate, the anecdotal evidence supplied by the lay witnesses. Mr. McDowell was precluded from presenting the expert testimony necessary to place his childhood experiences in external and internal context for the jurors – to show them what Mr. McDowell's upbringing was like compared to others', and how that would have affected him.

Indeed, the error here is arguably worse than in *Abdul-Kabir* – where at least the sentencing jury *heard* the mitigating evidence, including from expert witnesses – but then the mitigating evidence was undercut either by the state's argument or the court's instruction. (*Abdul-Kabir*, 127 S.Ct. at pp. 1671-1673 [court's instructions and the prosecutor's argument may have caused the jury not to give meaningful mitigating effect to testimony of two mental health expert witnesses who discussed the consequences of the defendant's childhood neglect and abandonment].) In this case, Mr. McDowell's sentencing jury was not even provided the expert testimony – testimony that would have allowed them to give full consideration to Mr. McDowell's other mitigation evidence.

In this regard, the United States Supreme Court clearly recognizes the import of expert testimony, especially in death cases. "[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 81, fn. 7.) In *Ake*, the Supreme Court held that where the state places a defendant's mental condition at issue regarding "criminal liability and . . . the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." (Id. at p. 80.) The Supreme Court recognized that experts are critical because of their abilities to "gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions" and can also "tell the jury why their observations are

relevant." Ultimately, [t]hrough this process of investigation, interpretation, and testimony," experts "ideally assist lay jurors . . . to make a sensible and educated determination" about the subject of the expert's testimony. (Id. at pp. 80-81.)

Of course, lower courts agree. (See, e.g., *Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227 [reversing death verdict for counsel's ineffectiveness in failing to develop and present expert testimony to explain the ramifications of beatings, head trauma, and pesticide exposure]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163 [reversing death verdict where, due to trial counsel's ineffectiveness, "the penalty phase was left without any expert at all "]; *Lambright v. Schriro* (9th Cir. 2007) 490 F.3d 1103, 1118-1121 [reversing death verdict for counsel's ineffectiveness in failing to discover and present expert testimony that petitioner suffered from PTSD, depressive disorder, and polysubstance dependency]; *Jermyn v. Horn* (3d Cir. 2001) 266 F.3d 257, 311 [reversing death verdict where the jury heard lay evidence of child abuse but no expert testimony discussing the effect of the abuse on the defendant's adult functioning]; compare *Stanford v. Parker* (6th Cir. 2001) 266 F.3d 442, 461 [mitigation witness' "lack of expert qualification" and other circumstances supported trial court's exclusion of his testimony].)

Indeed, in view of the uniformity and consistency of opinions on the importance of social historians in capital penalty phase trials, it is nothing short of remarkable that the trial court would exclude Dr. Andrews' testimony. As trial counsel urged the trial court to see, reviewing courts consistently reverse death

verdicts for ineffective assistance of counsel where trial attorneys have failed to investigate and develop social history evidence as mitigation. (39 RT 5661-5663; see, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 415 [effective assistance requires counsel to conduct "diligent investigation into his clients' troubling background and unique personal circumstances"]; *Wiggins v. Smith* (2003) 539 U.S. 510, 521-524 [defense attorney prejudicially ineffective for, inter alia, failing to follow prevailing 1989 professional norms by retaining a forensic social worker to conduct further investigation of relevant social history documents]; *Rompilla v. Beard* (2005) 545 U.S. 374, 390-394 [trial counsel's penalty-phase performance prejudicially deficient where she failed to unearth abuse and alcoholism in defendant's history]; see also *Jackson v. Calderon*, supra, 211 F.3d 1148 at p. 1163 [finding trial counsel prejudicially ineffective for failing to "compile a social history of Jackson, to indicate the conditions in which he had been brought up and lived," where "a major component of counsel's duty at the penalty phase is to prepare and present such a history"]; *United States v. Kreutzer* (Army Ct.Cr.App. (2004) 59 M.J. 773, 775, 777 [trial court erred in denying funds for a requested expert mitigation specialist to provide "an inter-disciplinary, scientific analysis of the psycho-social history of an individual accused in a capital case"].)

Moreover, the United States Supreme Court has consistently cited with approval the ABA Standards for Criminal Justice as indices of the obligations of defense attorneys in capital cases. (See *Williams* at p. 396; *Wiggins* at p. 524 [noting that "we long have referred to [the ABA Standards] as 'guides to

determining what is reasonable,'" quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688]; *Rompilla* at p. 387.) At the time of Mr. McDowell's retrials, those standards required counsel to investigate and develop evidence of Mr. McDowell's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. (*Wiggins* at p. 524, citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, pp. 4-55 (2d ed. 1982).)

As required under prevailing professional norms, under the ABA Standards, and under clear United States Supreme Court precedent, trial counsel retained an expert social historian who investigated and developed this mitigation evidence. For the highest Court to hold defense counsel responsible for developing this evidence but for a lower court then to preclude the defense from introducing it at trial makes absolutely no sense. There is simply no way around it: the trial court's ruling excluding Dr. Andrews' testimony was error.

Lastly, the timing of the trial court's error also kept the jury from fully considering the mitigation evidence that Mr. McDowell presented. Counsel for Mr. McDowell did not learn until the eve of the mitigation case's start that the trial court was going to preclude this expert witness from testifying at all. The prosecutor did not raise this issue before jury selection began (as he did when, for example, he filed notice of the factors in aggravation the day after the first status conference for the second retrial). The prosecutor did not move to preclude Dr.

Andrews' testimony until his own case was done, and counsel for Mr. McDowell was about to begin his case in mitigation.

C. *The prejudicial error requires reversal.*

Improper exclusion of mitigating evidence is reviewed under the *Chapman* standard: the death penalty must be reversed unless the error is harmless beyond a reasonable doubt. (*People v. Roldan* (2005) 35 Cal.4th 646, 739, citing *Chapman v. California* (1967) 386 U.S. 18, 24; *Skipper v. South Carolina* (1986) 476 U.S. 1.)[48] There is simply no way the state can credibly maintain that this error did not affect the verdict. Virtually every indicia of prejudice that reviewing courts use to measure prejudice exists here.

Most obvious is that where Dr. Andrews *was* allowed to testify – in the first retrial -- the result was a hung jury. When the trial court did *not* allow Dr. Andrews to testify, the result was a death verdict. This provides a virtual petri dish demonstration of the effect of excluding her expert testimony. Moreover, this Court and the Courts of Appeal logically recognize that a prior hung jury itself is indisputable evidence of a close case. (See, e.g., *People v. Rivera* (1985) 41

---

[48](Cf. *People v. Gay* (2008) 42 Cal. 4th 1195, 1223 ["Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict"]; and cf. *People v. Prince*, supra, 40 Cal.4th 1179, 1222 ["We apply an abuse of discretion standard in reviewing a trial court's decision to admit the testimony of an expert"; capital case].) However, as set forth at length herein, no matter what the standard, reversal here is required.

Cal.3d 388, 393, fn. 3 and 395; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634; *People v. Thomas* (1981) 119 Cal.App.3d 960, 966.)

This Court also recognizes that jurors' requests for readback and further instruction indicate a close case, and indicate prejudice from errors that have occurred in the trial. (*People v. Gay*, supra , 42 Cal.4th at pp. 1223-1227; *People v. Hernandez* (1988) 47 Cal.3d 315, 352) Here, the jury asked for readback of the testimony of two of Mr. McDowell's siblings, and asked for further instruction on the meaning of Tommy McDowell's second degree rape conviction. (11 CT 3000A, 3002A.) This jury focus on Mr. McDowell's family and its criminal history strongly suggests the jury was considering the effects of his upbringing. (See, *Gay* at p. 1227 [jurors' request of readback of eyewitness and expert testimony related to circumstances of murder was an indicia of jurors' focus on defendant's role in murder].)

And even with the granted requests for readback, Mr. McDowell's jury only deliberated for what amounted to a total of two days. (11 CT 2999-3000, 3001-3002, 3003-3004, 3028, 3030-3031.) In comparison, the jury in the first retrial (which had the benefit of hearing Dr. Andrews' expert testimony), deliberated on August 16, 17, 18, 19, 20, 25 and 26, 1999, and ultimately failed to reach a verdict. (2 CT 377-381B, 383-385, 386-387; 5 CT 1555-1556.) When a jury deliberates for a very short time, it is possible that the short deliberation is the product of the error – and thus indicates its prejudice. (See, e.g., *People v. Barnes* (1997) 57 Cal.App.4th 552, 557, fn. 3; see also *People v. Gay*, supra, 42 Cal.4th at

p. 1226 ["It is discomforting, though, that, following this inadequate reinstruction, the jury reached a verdict the very next morning"].)

The type of error itself – exclusion of expert testimony – provides another indicia of prejudice. Errors related to expert testimony are extremely prejudicial. As set forth above, "[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." (*Ake v. Oklahoma*, supra, 470 U.S. 68, 81, fn. 7; see also *People v. Lucero* (1988) 44 Cal.3d 1005, 1009 [an "expert's authority and expertise may persuade the jurors to a conclusion they would not reach on their own"]; *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1088 [erroneous admission of expert evidence "significantly bolstered" state's case, and was therefore especially prejudicial].)

Moreover, the prosecutor used the exclusion ruling to his advantage in closing argument. In *Skipper v. South Carolina* (1986) 476 U.S. 1, the United States Supreme Court reversed a death verdict for erroneous exclusion of testimony regarding lack of future dangerousness -- specifically finding prejudice in the prosecutor's focus in closing argument upon this lack. (Id. at p. 5, fn. 1.) This Court, too, has long recognized the prejudice from errors that prosecutors exploit during closing argument. (See, e.g., *People v. Hannon* (1977) 19 Cal.3d 588, 603; *People v. Roder* (1988) 33 Cal.3d 491, 505.) The Courts of Appeal are in agreement. For example, in *People v. Robbie,* supra, 92 Cal.App.4th 1075, the court reversed under the stringent *Watson* standard of review because of the highly

prejudicial nature of erroneously-admitted expert testimony, and the prosecutor's reliance upon it during closing argument. (Id. at p. 1088; see also *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1253 [prosecutor's argument "dramatically increased the risk the jury would base its verdict" on an erroneous instruction]; *People v. Acevedo* (2001) 93 Cal.App.4th 757, 770-771 [preclusion of defense cross-examination on a point that the prosecutor then emphasized in closing rendered the error prejudicial].)

Here, the prosecutor argued that Mr. McDowell's childhood *was not mitigating*. "Mitigating evidence is to make less severe, reduce moral culpability. . . . In this case if you have a bad childhood, you can have a bad adulthood." (43 RT 6308.) However, according to the prosecutor, that did not explain Mr. McDowell's criminality, for which Mr. McDowell alone was responsible. "Don't blame someone, don't blame anyone other than where it belongs. [Sic.] Put this criminality exactly where it belongs." (43 RT 6309.) Without the testimony of the very social historian expert witness that the prosecutor had successfully excluded, the jury would not understand otherwise. And the prosecutor -- whom jurors typically hold in "special regard" -- urged them to not to even try. (*People v. Hill* (1998) 17 Cal.4th 800, 828.) Indeed, the prosecutor preyed upon what (without expert testimony to the contrary) lay persons typically conclude:

> A juror may intuitively understand, based solely on facts of physical abuse, that a childhood marred by abuse would have been traumatic. That evidence may make a jury feel sorry for the defendant, but it is

> unlikely to cause her to vote for a life sentence. The critical part of the defense case for mitigation is explaining how and why the defendant's history of abuse caused long-term cognitive, behavioral, and volitional impairments that relate to the murder he committed. Without testimony making this connection, jurors probably will not comprehend the significance of the defendant's background to their sentencing decision.

(Crocker, *Childhood Abuse and Adult Murder* (1999) 77 N.C.L.Rev. 1143, 1183-1185; see also *Brewer v. Quarterman*, supra, 127 U.S. 1706 at p. 1711 [quoting prosecutor's argument that there is a link between child abuse and adult criminality, and the link is aggravating, not mitigating].)

Thus, virtually every indicia of prejudice that the courts recognize is present in this case. The state cannot therefore credibly argue that exclusion of Dr. Andrews' testimony from the second retrial did not contribute to the death verdict.

Even without all the other indices of prejudice, one very simple, compelling, common-sense fact remains: when Dr. Andrews' testified, the jury hung; when she was not allowed to testify, the jury returned a verdict of death. This Court cannot find that exclusion of Dr. Andrews' testimony was harmless. This Court must reverse the death verdict that was prejudicially tainted by this error.

5. Mr. McDowell's state and federal constitutional rights were prejudicially violated by improper exclusion of, and limitations upon, lay witnesses' mitigation evidence.

Trial counsel sought to fill part of the gap created by the loss of expert social historian Dr. Arlene Andrews by introducing declarations from two family members, Mr. McDowell's mother Shirley, and his brother Ronald, both of whom were alive for the initial 1984 trial, but who had died in the time that elapsed until Mr. McDowell's challenge to his 1984 death sentence proved successful.

Having successfully prevented the expert social historian from testifying to crucial mitigation evidence, the prosecutor was still not satisfied that he had sufficiently gutted Mr. McDowell's mitigation case. The prosecutor objected to admission of these declarations. Once again, the trial court granted a motion which favored the state.

The declarations, signed under penalty of perjury and introduced in the federal habeas proceedings *without objection by the state,* detailed significant incidents in Mr. McDowell's childhood that helped explain his adult behavior. The declarations focused on the core of what the Ninth Circuit had recognized as crucial and appropriate mitigation: the history of daily mental and physical abuse, and exposure to deviant sexual behavior. Thus, under clear and long-standing United States Supreme Court precedent, though the declarations were technically hearsay, they were reliable and critical mitigation evidence that should therefore have been admitted.

As set forth below, the trial court erred in its exclusion of these declarations on every ground it stated. The trial court also erred when it excluded Roberta Williams' direct examination testimony that Mr. McDowell's father, Charles Sr., beat his own father. Exclusion of all of this critical mitigation evidence violated Mr. McDowell's rights to due process and to have his penalty phase sentencers consider all relevant mitigation evidence. (U.S. Const., Amends 5, 8 & 14; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.) Ultimately, these exclusions require reversal.

A. The trial court improperly excluded the signed declarations of deceased family members.

(1) The relevant facts below

(a) Declaration of Ronald McDowell

In 1991, under penalty of perjury, Mr. McDowell's younger brother Ronald signed a declaration stating that he had never before been contacted by anyone representing Mr. McDowell, and documenting many significant incidents from their childhoods. (6 CT 1627-1630.) This included the stunning fact that when Ronald was five or six years old and Mr. McDowell was seven or eight, Ronald found Mr. McDowell trying to commit suicide by hanging himself. Ronald also saw Mr. McDowell jumped by older boys in the neighborhood, who made Mr. McDowell perform oral sex on them. When Ronald told their father, Charles Sr. about this, his response was to beat *his* sons. Ronald also walked in on Mr.

McDowell in bed with a man from the neighborhood when both boys were young. And Ronald reported that Charles Sr. shot Ronald's dog -- while making Ronald hold its leash. (Ibid.)[49]

Ronald died in 1995. (6 CT 1632 [certificate of death].)

His signed declaration was submitted, without objection by the state, in Mr. McDowell's habeas proceedings in federal court. (6 CT 1634-1643 [Declaration of Andrea Asaro; RT of 1994 federal proceedings; federal court exhibit list].)

Mr. McDowell moved, on federal constitutional grounds, to introduce Ronald's declaration as mitigation in the second retrial. (6 CT 1622-1643 [Motion to introduce declaration, and exhibits in support].)

The trial court excluded it. (39 RT 5641.) According to the trial court, Ronald's declaration was unreliable because "it's highly susceptible to exaggeration and outright fabrication because he's trying to get his brother off." (39 RT 5640.) Also according to the trial court, it was "highly unfair to the prosecution [for the defense] to offer testimony . . . [that] wasn't subject to cross-examination." (Ibid.) Regarding the incidents that only Ronald's declaration addressed, the trial court stated that Mr. McDowell himself could testify if he wanted to; otherwise, the material was not going to be admitted. (39 RT 5636-5637, 5641.) As far as other incidents addressed in Ronald's declaration, the trial

---

[49]Mr. McDowell's younger brother Ronald did not testify in the 1984 trial. (6 CT 1630.) Several other incidents that Ronald described in his declaration – not itemized here -- were also witnessed by other family members, who testified about them in the second retrial.

court stated they were cumulative of other family members' testimony, and were thus inadmissible. (39 RT 5641.) The trial court reaffirmed this ruling when the defense moved again, at the end of its mitigation case, to introduce any portion of Ronald's declaration. (42 RT 6182-6183.)

Thus, the jury never heard that Mr. McDowell had attempted to hang himself as a child. The jury never heard that men in the neighborhood sexually molested Mr. McDowell as a young boy, nor that his own father's response was not to confront the men, but to beat Mr. McDowell and his brother for it. The jury never heard that Charles Sr. was so sick that he shot the family dog to death while he made his son hold the leash.[50]

(b) Declaration of Shirley Brakefield McDowell

In 1984, Mr. McDowell's mother, Shirley Brakefield McDowell, testified as a mitigation witness at the penalty phase that was ultimately reversed by the Court of Appeals. In 1991, under penalty of perjury, Ms. McDowell signed a declaration that included many, and more significant, family history details than she'd been asked about during direct examination in the 1984 penalty phase. (11 CT 2968-2974.) Her 1991 declaration was submitted, without objection by the

[50]In the first retrial, the jury *did* hear evidence of these incidents, because Dr. Arlene Andrews used them to form her opinion. (See, e.g., RT 31 RT 4373 [uncles Gene and Jerry molesting Mr. McDowell]; 31 RT 4388 [men in the neighborhood molesting Mr. McDowell when he was a young boy]; 31 RT 4386-4387 [Charles Sr.'s cruelty to animals, including shooting the puppy].)

state, in Mr. McDowell's habeas proceedings in federal court. (11 CT 2976-2990 [Declaration of Andrea Asaro; RT of 1994 federal proceedings; federal court exhibit list].)

Mr. McDowell's mother Shirley died in 1997. (41 RT 5901.)

After the trial court held in the second retrial that it would be excluding the expert testimony of Dr. Arlene Andrews, Mr. McDowell moved on federal constitutional grounds to introduce his mother's 1991 declaration as mitigation evidence. (11 CT 2962-2990; 40 RT 5676-5683.)

The trial court denied his motion. (40 RT 5681-5683.) According to the trial court, the declaration contained, and was itself, unreliable hearsay because it had been "set up with a particular objective in mind, in this case to release Mr. McDowell from custody and get him a new trial." (40 RT 5678; see also 40 RT 5682-5683.) Moreover, according to the trial court, the matters covered in the declaration were cumulative of other testimony. (40 RT 5678, 5682.)

What the second retrial jurors "heard" from Shirley McDowell was a reading-into-the-record of her 1984 penalty phase testimony. (41 RT 5901-5915.)[51] Shirley Brakefield McDowell's 1991 declaration contained the following information that her 1984 testimony did not: Mr. McDowell was unplanned and unwanted. Ms. McDowell received no prenatal care during her pregnancy with him, and was in fact beaten during pregnancy by Charles Sr. Mr. McDowell was

[51]Ms. McDowell's 1984 penalty-phase testimony was also read into the record as part of the defense mitigation case in the first retrial. (See 31 RT 4343-4360.)

born a month premature. Ms. McDowell was ignorant of how to care for babies and Mr. McDowell was therefore malnourished as an infant. Charles Sr. often beat her severely in front of their children. As early as the first grade, Mr. McDowell exhibited learning disorders and hyperactivity, and was tied to his chair or placed upon high shelves by his teachers to try to control him in class. When a woman from the school came to the house to speak to Mr. McDowell's parents about getting him some help, Charles Sr. peppered her with questions about her religion, called her a Communist and ordered her off the property. Mr. McDowell began using drugs as a teenager and had been sexually abused as a young boy by Ms. McDowell's own brothers. (11 CT 2968-2974.)[52]

At the end of the defense mitigation case, the trial court denied the defense request to admit any portions of Ms. McDowell's declaration, for the same reasons set forth above. (42 RT 6179-6183.) Thus, the jury never heard this evidence from Mr. McDowell's own mother. And no one else testified about many of these facts, including prenatal beatings, early learning disabilities, mistreatment at the hands of teachers, and Charles Sr.'s fanatic response against anyone giving Mr. McDowell help.

---

[52]Once again, in the first retrial, Dr. Andrews testified about many of these facts as the bases of her opinions about the McDowell family. (See, e.g., 31 RT 4378-4379 [Shirley did not want a baby, didn't know how to care for one, and was depressed and lonely when she had Mr. McDowell]. But because she was not allowed to testify in the second retrial, this jury did not hear this evidence.)

(2) Exclusion of these mitigating declarations was error under state and federal law and violated Mr. McDowell's state and federal constitutional rights.

As set forth below, the trial court's exclusion of these declarations violated Mr. McDowell's Eighth and Fourteenth Amendment rights and their state constitution analogues. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.)

As set forth above in section 4.B.(2)(a) and reincorporated by reference herein, the Eighth and Fourteenth Amendments require sentences of death to be based on an individualized determination of a person's death-worthiness; on accurate, complete and reliable evidence, and those Amendments require that jurors consider – and that they not be precluded from considering -- any constitutionally-relevant mitigating evidence.

It is beyond dispute that the information contained in Ms. McDowell's and Ronald's declarations was constitutionally-relevant mitigating evidence. Indeed, neither the state nor the trial court said otherwise. And in its decision reversing the 1984 death penalty verdict, the Ninth Circuit expressly recognized this very type of family history evidence as mitigating, and as critical. (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833.)

Instead, the trial court excluded the declarations as unreliable hearsay, and as cumulative of other testimony. As set forth below, the trial court erred in both regards. Contrary to the trial court's ruling, the declarations were reliable hearsay statements that should have been admitted as mitigating evidence in this capital

penalty phase. And contrary to the trial court's alternative ruling, the declarations were not "cumulative." Much information in the declarations was not cumulative of any testimony at all – because no one else testified to many of these facts. And to the extent that other information in the declarations did recount what the few other family history witnesses testified, the declarations provided valuable corroboration, and thus should not have been excluded as "cumulative." In sum, the trial court's exclusion of these declarations clearly was error.

(a) Because the highly relevant declarations were reliable, their exclusion on hearsay grounds from this capital penalty phase was error.

Exclusion from a capital penalty phase, on hearsay grounds, of highly relevant and reliable evidence violates due process. (*Green v. Georgia* (1979) 442 U.S. 95, 97; *People v. Williams* (2006) 40 Cal.4th 287, 318.) Similarly, the rule against hearsay may not be applied mechanistically to defeat the ends of justice. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Here, the trial court applied the rule against hearsay mechanistically, and excluded reliable hearsay that was highly relevant to Mr. McDowell's mitigation case. The trial court therefore erred when it excluded the declarations on this basis.

In *Green*, the United States Supreme Court found a hearsay statement reliable, and therefore admissible at the punishment phase, where "substantial reasons existed to assume its reliability." (*Green* at p. 97.) This included corroboration of the statements by other evidence. (Ibid.) As set forth in the

following paragraphs, there was ample evidence of the declarations' reliability: they should have been admitted, not excluded.

First, just as in *Green*, many of the statements included in the declarations were corroborated by other evidence – here, family history witnesses who testified about the same events. Indeed, the alternate ground upon which the trial court excluded the declarations was that, according to the trial court, they were *cumulative* of other testimony. (See, e.g., 40 RT 5678 ["the information is covered from other sources"].) Therefore, they were certainly corroborated by other evidence, and bore that indicia of reliability.

Second, this hearsay evidence consisted of written declarations signed under penalty of perjury.

Third, the state of California had seen these declarations before -- in the federal court habeas proceedings -- and *had not objected to them* on any grounds, let alone allege that they were unreliable.

Fourth, the trial court's assessment that the declarations were inherently unreliable because they had been submitted by family members wanting to help Mr. McDowell is an assessment one could validly make about anyone testifying in mitigation – and therefore, a weak reason upon which to base exclusion of this important material. Moreover, as in every criminal case, the jurors were instructed to factor bias into their evaluations of evidence and its credibility. (CALJIC No. 2.20, 11 CT 3010-3011; 43 RT 6384-6386.) Thus, this instruction should have cured any possible taint from "bias."

Fifth, the trial court's lamentation about how unfair it would be to the prosecution not to be able to cross-examine the deceased was certainly undercut by the fact that, when Ms. McDowell did testify in 1984, the state did not pose one single question in cross-examination. (See 41 RT 5916 [reporter's transcript of 1984 testimony read to jury indicates no cross-examination was requested].)

In sum, such substantial indices of the declarations' reliability exist that it is clear the trial court manifestly erred when it assumed otherwise and excluded them.

The trial court also erred by mechanistically applying the rule against hearsay to defeat the ends of justice. That the ends of justice were defeated here is apparent in the nature of excluded evidence itself. What the trial court excluded would have shown the jurors, in excruciating detail, exactly how hopeless and horrifying was Mr. McDowell's childhood – that he would attempt suicide as a seven or eight year old; that his father was the kind of man who shot a puppy dead while his child held its leash; that his father beat *his own* children when he found out that men in the neighborhood were molesting them. The excluded evidence also would have shown the jurors that Mr. McDowell's mother did not want him, either; that he suffered not only at home, but at the hands of his teachers; and that his father drove away the one and only authority figure it appears ever tried to help Mr. McDowell.

Moreover, the trial court's exclusion of this evidence was extremely "mechanistic," because the trial court's ruling failed to take into account the

problems facing Mr. McDowell in presenting his mitigation case – problems which the trial court created itself in each of its rulings against Mr. McDowell.

First, the trial court failed to acknowledge the reason why Ms. McDowell's and Ronald's written declarations, instead of their live testimony, were being offered in the first place: they were dead. During the 15 years that had elapsed between the first penalty phase, its reversal, and the state's retrials, Ms. McDowell and Ronald had died. As set forth in Claim 1, that delay was not of Mr. McDowell's making. He pursued a valid claim over which the state fought with him for 15 years. Also as set forth in Claim 1, Mr. McDowell objected that the state should not be allowed to pursue the death penalty against him in its retrials, because he could not receive a fair retrial since *these very mitigation witnesses had died*. As set forth in Claim 1, the trial court denied that motion, too.

Second, the trial court failed to acknowledge the fact that, by excluding Dr. Arlene Andrews' expert social history testimony, the jurors in the second retrial were prevented from hearing significant family history testimony that only she provided – including most of the material in these declarations. Thus, given that the trial court excluded Dr. Andrews testimony, the trial court should have taken into account that these declarations provided significant family history and should have been admitted to allow the defense to present evidence that otherwise – as in the first retrial – would have been presented to the jury via Dr. Andrews.

Third, the trial court failed to acknowledge – and, indeed, seemed intent on ignoring – another evidentiary bind into which it repeatedly placed Mr.

McDowell. The trial court stated again and again that Mr. McDowell himself should testify if he wanted to introduce mitigation evidence that the trial court intended to exclude.[53] Here, the trial court stated the same: "The defendant can testify . . . and so the reason for introducing [the declaration] is absent." (42 RT 6183.)

It was wrong for the trial court to demand, let alone suggest, that mitigation evidence had to be presented through Mr. McDowell's own testimony, instead of through the other permissible avenues. The Fifth and Fourteenth Amendments provide that no person "shall be compelled in any criminal case to be a witness against himself." (*New Jersey v. Portash* (1979) 440 U.S. 450, 459; *Estelle v. Smith* (1981) 451 U.S. 454, 462-463 [Fifth Amendment right to freedom from self-incrimination applies to both guilt and penalty phases of capital trial].) By denying Mr. McDowell the right to introduce critical mitigation evidence via any means – here, the valid declarations – other than through his own testimony, the trial court effectively blackmailed him: compelling him either to be a witness against himself (because, of course, he would be subject to the state's cross-

---

[53]See, e.g., 39 RT 5636-5637 ["It may well be a defense tactic not to have Mr. McDowell testify, but that doesn't mean because you don't want him to testify that there's no other source of this information and that's why it should come in"]; 39 RT 5637 ["If [Mr. McDowell] testifies and something is missing and somebody else can explore that . . . . [b]ut not until he testifies and is cross-examined on it"]; 39 RT 5641 ["the most important information can come from Mr. McDowell personally and be subject to cross-examination"]; 39 RT 5661 ["the defendant himself can testify to that, and he has the absolute right to do that. Even over your objection he can testify to it, and that would be the best measure of what happened to him as a result of the way he was raised"].

examination), or to forego introduction of critical mitigation evidence. Moreover, the trial court's analysis – that it should be Mr. McDowell himself to testify to these facts -- did not take into account (or rather, and more nefariously, maybe did) the jaundiced eyes through which jurors would likely view Mr. McDowell's testimony in his own behalf. It requires no stretch of imagination to see how jurors would likely feel about a convicted first-degree murderer trying to save himself from the death penalty by testifying about his childhood abuse, versus how they would feel hearing the details of the McDowell family's dysfunction from other unfortunate souls who had also endured it.

In sum, not only were the declarations themselves reliable hearsay and therefore admissible, but the trial court also erred by mechanistically applying the rule against hearsay to defeat the ends of justice and deny Mr. McDowell the opportunity to present essential mitigation evidence. The trial court's exclusion of the declarations on hearsay grounds was therefore clearly in error.

(b) Because the declarations were not impermissibly cumulative, their exclusion on this ground was as error as well.

"The Eighth Amendment to the United States Constitution requires that a capital jury not be precluded from 'considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*People v. Williams* (2006) 40 Cal.4th 287, 320, citing *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) To be sure, the trial court still determines admissibility under Evidence Code section

352. (*Williams* at p. 320.) But as set forth below, the trial court's exclusion of the declarations as "cumulative" was error.

First (and as set forth above, and as argued by trial counsel), much of what Ms. McDowell and Ronald stated in their signed declarations could not be called cumulative at all -- because no other witnesses testified to it.

For example, no one else in the second retrial testified to at least the following facts from Ms. McDowell's declaration: Mr. McDowell was an unwanted child from the beginning; Ms. McDowell received no prenatal care; Mr. McDowell was born a month premature; Charles Sr. beat Ms. McDowell during her pregnancy with Mr. McDowell; as early as first grade, Mr. McDowell exhibited learning disorders and hyperactivity, and was tied to his chair or placed upon high shelves by his teachers to try to control him in class; when a woman from the school came to the house to speak to Mr. McDowell's parents about getting him some help, Charles Sr. peppered her with questions about her religion, called her a Communist and ordered her off the property.

As for Ronald's declaration, no one else testified to at least the following facts: when Ronald was five or six years old and Mr. McDowell was seven or eight, Ronald found Mr. McDowell trying to commit suicide by hanging himself; Ronald saw Mr. McDowell jumped by older boys in the neighborhood, who made Mr. McDowell have oral sex with them – and when Ronald told Charles, Sr., he beat his own sons; Charles Sr. shot Ronald's dog while making Ronald hold its

leash; Ronald walked in on Mr. McDowell in bed with a man in the neighborhood when the boys were small.

Second, the trial court's working definition of "cumulative" was completely flawed. The trial court flatly answered "Yes" when trial counsel asked whether the court considered matters "cumulative" the "second time it's mentioned" in testimony. (40 RT 5682.) In other words, 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 – because, according to the trial court, the testimony is "cumulative" if a second witness testifies about that fact. Clearly that is not correct. Indeed, historians recognize that multiple independent attestation is the most effective proof of anecdotal facts.[54]

Third, the logistics of the mitigation case itself flew in the face of this "cumulative" ruling. Few family history witnesses offered live testimony in the second retrial. Mr. McDowell called his paternal aunt Roberta Williams (41 RT 5861-5899), two siblings – Tommy and Teressa (42 RT 6098-6167; 41 RT 5942-5980), and family friend Bonnie Haynes. (40 RT 5822-5857.) His mother's 1984 testimony was read into the record. (41 RT 5901-5916.) The entire mitigation case – which also included testimony from four other witnesses about issues other than Mr. McDowell's upbringing, and which was interrupted by a state's rebuttal

---

[54]Moreover, the prosecution was not precluded from allowing multiple witnesses to testify about the same events. For example, both Theodore (through read-in testimony in the 1999 trials) and Dolores Sum testified about running to their next-door neighbors' house when Paula was killed. (See 37 RT 5243-5258 [Dolores Sum testimony]; 37 RT 5367-5389.)

witness presented out-of-order – lasted only three days. The state's aggravation case took four days. Given the brief amount of time it took Mr. McDowell to present his entire mitigation case, given the few witnesses who testified about Mr. McDowell's childhood, and given the prosecutor's credibility attacks on two of those witnesses -- Roberta Williams and Teressa McDowell Rabon during their cross-examinations -- it was certainly error to exclude these declarations as "cumulative." (see e.g., 41 RT 5881-5891, 5898, 5967-5980) To the extent the declarations contained information that was duplicative of others' testimony, Mr. McDowell should have been allowed to introduce the declarations to corroborate these mitigation witnesses' testimony.

B. The trial court improperly limited Roberta Williams' testimony about Charles, Sr.'s violence.

(1) The relevant facts below

During the testimony of his paternal aunt Roberta Williams, Mr. McDowell sought to introduce evidence of his father Charles Sr.'s violence against his own father, Floyd. (40 RT 5759-5764.) Trial counsel argued that the Eighth and Fourteenth Amendments warranted admission of this mitigation evidence about Mr. McDowell's background. (40 RT 5761-5762, 5764.)

The trial court excluded this from Roberta's testimony. (Ibid.) The trial court held that if Mr. McDowell had seen the violence and wanted to testify about it, it would be admissible. (40 RT 5763-5764.) Otherwise, according to the trial court, Roberta's testimony about Charles Sr.'s violence toward their own father

was inadmissible, because it was irrelevant to Mr. McDowell's character. (40 RT 5760.) According to the trial court, "the background of the defendant's family is of no consequence except to the extent it relates to the background of the defendant himself . . . ." and an attack by his father upon his grandfather did not qualify. (40 RT 5760.) Moreover, Roberta's testimony that this happened was no proof that Mr. McDowell was aware of it. (40 RT 5763-5764.)

(2) Exclusion of this mitigation evidence was error under state and federal law and violated Mr. McDowell's state and federal constitutional rights.

The trial court's exclusion of Roberta's testimony about Charles Sr.'s violence was error under California state evidentiary law, and also violated Mr. McDowell's Eighth and Fourteenth Amendment rights and their state constitution analogues. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.)

This Court has explicitly recognized *regarding just such evidence* that "[a]t the penalty phase a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record." (*In re Gay* (1998) 19 Cal.4th 771, 815.) Citing Penal Code section 190.3 and the long line of United States Supreme Court cases that have so held, this Court in *Gay* reversed a penalty phase verdict where counsel was ineffective in many regards -- including failing to present evidence of *his client's father's abuse of other family members.* (Id. at p. 813; pp. 826-828.)

Indeed, counsel for Mr. McDowell pointed out to the trial court that *In re Gay*, supra, required that Roberta's testimony about Charles Sr.'s acts of violence toward their father be admitted. (40 RT 5762.) But the trial court held that "the background of the defendant's family is of no consequence except to the extent it relates to the background of the defendant himself . . . ." (40 RT 5760.)

The trial court erred in its interpretation and exclusion. Charles Sr.'s criminal behavior – even when not directly aimed at Mr. McDowell – was absolutely relevant mitigation evidence. For example, this Court in *Gay* recounted dysfunctional parental behavior that was relevant mitigation evidence:

> Petitioner was physically beaten by his father, Van Gay. His father was also abusive to other family members. Van Gay was cashiered from the military for improprieties of a sexual nature, had difficulty holding a job and used drugs and alcohol regularly.

(Id. at pp. 813-814; see also *People v. Thornton* (2007) 41 Cal.4th 391, 448 [acknowledging authority for mitigation evidence that violence by one parent against another harms children even if they do not witness it].) Thus, the trial court erred when it excluded Roberta Williams' testimony about Charles Sr.'s violence.

C. Exclusion of this mitigation evidence was prejudicial.

Improper exclusion of mitigating evidence is reviewed under the *Chapman* standard: the death penalty must be reversed here unless the error is harmless beyond a reasonable doubt. (*People v. Roldan* (2005) 35 Cal.4th 646, 739, citing *Chapman v. California* (1967) 386 U.S. 18, 24; *Skipper v. North Carolina* (1986) 476 U.S. 1.)[55]

For many of the same reasons set forth above (and incorporated herein by reference) in section 4.C., it is apparent that this exclusion of mitigation evidence prejudiced the outcome against Mr. McDowell. Particularly based on the jurors' requests for readback and reinstruction regarding the family history testimony of brother Tommy McDowell, and for readback of sister Teressa McDowell Rabon's testimony, this Court can see that the jurors were focusing on these witnesses and their testimony. (See, e.g., *People v. Gay*, supra, 42 Cal.4th at p. 1227 [jurors' request of readback of eyewitness expert testimony related to circumstances of murder was an indicia of jurors' focus on defendant's role in murder].) Nearly all of their testimony was about living in the McDowell household as children.

Lastly, the ghastliness of the details excluded strongly indicates that, had the jurors heard this evidence, they would have reached a different result. Indeed, in the first retrial the jurors *did* hear these details – through Dr. Andrews, who was

---

[55]Cf. *People v. Gay* (2008) 42 Cal.4th 1195, 1223 ["Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict"]. No matter what the standard, reversal is required.

allowed to testify about these matters as part of Mr. McDowell's social history. (See 31 RT 4373 [molestation of Mr. McDowell by paternal uncles]; 4378 [Ms. McDowell beaten while Mr. McDowell was in utero, and Mr. McDowell born a month premature]; 4379 [Ms. McDowell did not want the baby and did not know how to care for him]; 4386-4387 [Charles Sr. shot the dog while making Ronald hold the leash rope]; 4388 [Mr. McDowell being molested by men in the neighborhood] ; 4389 [hyperactivity in class and teachers' maltreatment of him]; 4414 [Charles' Sr.'s treatment of woman from school who came out to the house to see about getting help for Mr. McDowell].) As set forth before, the jury in the first retrial reached a hung verdict.

Thus, this Court cannot but conclude that exclusion of this mitigation evidence from the second retrial affected its outcome. Reversal of the penalty phase is therefore required.

6. Mr. McDowell's state and federal constitutional rights were prejudicially violated by the prosecutor's repeated misconduct in closing argument, which unfairly bolstered the state's aggravation case.

In the first retrial, the prosecutor's closing argument did not draw a single defense objection. (See 33 RT 4573-4619.) In the second retrial, the prosecutor's closing argument was nearly identical (see 43 RT 6249-6310) – except that it contained three misstatements of law and fact to which trial counsel objected or about which the trial court itself raised concern. (43 RT 6252, 6282, 6309.)

As set forth below, these prejudicial instances of misconduct violated Mr. McDowell's state and federal constitutional rights to due process, and to allow the sentence fully to consider the mitigation evidence. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.) This misconduct requires reversal.

A. The relevant facts below

(1) Misstatements of law

(a) Improper summary of capital sentencing law

The prosecutor argued that once someone had been found guilty of felony murder in the first degree with special circumstances:

> 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 Mr. McDowell, 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.*

(43 RT 6252; emphasis added.) Trial counsel objected that this misstated the law, and would confuse the jury. The trial court overruled the objection. (Ibid.)

The prosecutor explained to the jury that this meant, "Therefore, you have to consider what is the punishment for the aggravating criminal conduct," (43 RT 6253) which the prosecutor enumerated as "the sodomy of Curtis Milton," "the rape and kidnapping of Patty Huber," "the attempted murder of Theodore Sum,"

"the molestation of Teressa McDowell Rabon" and "the assaults of [sic] Rebecca McDowell Kelly." (Ibid.)

Throughout the rest of his argument, the prosecutor would return again and again to this improper theme: "What is the punishment for the rape of Patty Huber? That is for you to decide" (43 RT 6289); "And what is the punishment for Mr. McDowell's conduct in relation to Patty Huber?" (43 RT 6295); regarding Theodore Sum's attempted murder: "What is the punishment for that crime?" (43 RT 6307.)

The prosecutor did not make any such argument in the first retrial. (See 33 RT 4573-4619.) Indeed, there the prosecutor argued, "Now, ultimately we all know what this case is about. *It's about the death of Paula Rodriguez as far as the appropriate punishment.*" (33 RT 4575; emphasis added.) While the prosecutor described the aggravating crimes, he did not argue or even suggest that it was the jury's responsibility to punish Mr. McDowell for them. (See 33 RT 4583-4595, 4598-4599.) Instead, he argued about all of them in total that "this escalating violence in relation to the victims in this case is way above and beyond the elements of the crime itself" and thus death was an appropriate sentence. (33 RT 4582.)

(b) Improper addition of aggravating factor

The prosecutor argued that the mitigating evidence of "a bad childhood" was insufficient for the jury to vote for life. (43 RT 6309.) The prosecutor then presented a laundry list of Mr. McDowell's transgressions:

> The testimony is defendant sexually molested his sister. The testimony is that *the defendant molested his brother*. The testimony is that the defendant molested Curtis Milton. The testimony is the defendant raped Patty Huber. The testimony is the defendant killed Paula Rodriguez. The testimony is the defendant slit the throat of Theodore Sum because he liked and enjoyed it.

(43 RT 6309; emphasis added.)

On a break outside the presence of the jury, the trial court itself addressed this improper argument, about which the trial court had noted trial counsel's physical response during closing. (43 RT 6311.) The trial court stated that "it sounded like you were making an aggravating circumstance out of Tommy McDowell's sexual encounter." (Ibid.) The trial court explained that it had already ruled, on defense motion, that there was insufficient evidence of this molestation to include it as an aggravator. (Ibid.) Thus, the argument was error. But the trial court stated that it believed the error would be cured by instructions. (Ibid.)

(2) *Arguing facts not in evidence*

The prosecutor read from 1970s psychiatric examination records that diagnosed Mr. McDowell as a "sociopath." (43 RT 6282.) The prosecutor then argued, "So what is a sociopath? It's an anti-social personality behavior that violates the rights –" (Ibid.)

Trial counsel objected that, "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." (43 RT 6282-6283.) The trial court responded, "I doubt that it's made up. Objection is overruled." (43 RT 6283.)

The prosecutor continued, "Behavior that violates the rights of others or criminal behavior, a disease against society." (43 RT 6283.) Later, the prosecutor enlarged the scope of his own diagnosis, arguing "The defendant is a predator, he is a murderer, he is a sociopath," and rhetorically asking the jury, "Do you think if this defendant was not still dangerous that the defense wouldn't call a psychiatrist to testify to that fact? They chose not to." (43 RT 6303.)

B. The prosecutor's improper arguments were misconduct that violated Mr. McDowell's state and federal constitutional rights.

Mr. McDowell was denied due process and a reliable penalty determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution and parallel California constitutional provisions when the prosecutor committed these prejudicial instances of misconduct during closing argument.

(U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [due process violation from prosecutorial misconduct]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-334, 337-341 [reliable penalty determination]; *Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654 [Eighth Amendment reliable penalty determination violation from combination of instructional error and prosecutor's improper argument].)

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Under the federal Constitution, prosecutorial argument "worthy of condemnation" violates the Constitution if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Ibid., citing *Darden*, supra, 477 U.S. at p. 181.)

A prosecutor commits misconduct when he misstates the law. (*People v. Morales* (2001) 25 Cal.4th 34, 43; *Hill*, supra, at p. 829.) This is particularly true where the argument erroneously absolves the prosecution of its obligation to overcome its burdens of proof. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) For example, in *Hill*, the prosecutor committed misconduct -- for which this Court reversed a capital guilt phase verdict – when she misstated the way in which the jury should consider circumstantial evidence, misstated an element of robbery, and

shifted the burden of proof to the defendant by arguing, "There has to be some evidence on which to base a doubt." (*Hill* at pp. 829-830.)

Here, the prosecutor made two key misstatements of law.

First, as the trial court observed, the prosecutor's list of aggravating crimes of force and violence included molestation of Tommy McDowell – which was *not* an aggravator. Indeed, the trial court had already expressly held that there was insufficient evidence to include it as an aggravator. (42 RT 6198.) By including this in his list of aggravating crimes, the prosecutor unfairly imputed to the state more aggravation evidence than was legally admitted at trial. This relieved the state of its "burdens of proof" in this penalty trial.

Second, the prosecutor completely oversimplified and mangled capital sentencing law. The prosecutor told the jury that after someone had been found guilty of first degree murder with special circumstances, if he "has no history of criminality at all, period, not one day, the minimum sentence that he receives is life without parole." (43 RT 6252.) Then, after the trial court overruled the defense objection that this misstated the law, the prosecutor drew the conclusion from this that the jurors should therefore concentrate on, and punish, Mr. McDowell for the aggravating crimes. (43 RT 6253 ["Therefore, you have to consider what is the punishment for the aggravating criminal conduct"]; 43 RT 6289 ["What is the punishment for the rape of Patty Huber? That is for you to decide"]; 43 RT 6295 ["And what is the punishment for Mr. McDowell's conduct

in relation to Patty Huber?"]; 43 RT 6307 [regarding the attempted murder of Theodore Sum, "What is the punishment for that crime?"].)

The prosecutor's argument misstated the law significantly in ways that reduced the state's burden in this penalty trial. The prosecutor was correct in concluding that, once the first-degree-murder conviction with special circumstances was returned, the minimum sentence that could be imposed was LWOPP. However, the prosecutor's formula for calculating penalty represented utter contortion of capital sentencing law.

First, that the prosecutor offered any formula at all (here: conviction + need to punishment for other bad acts = death penalty) discounted the moral evaluation of all the evidence, and instead improperly suggested that the jury's task simply involved a scorecard. Relatedly, the prosecutor's argument incorrectly implied that past criminal conduct was *the* critical factor in determining whether someone was eligible for death sentencing or not.

Second, his argument incorrectly implied that "factor (b)" evidence – in essence, prior criminal activity involving force or violence or threats of it – was *necessarily* aggravating. That is incorrect: it may actually be aggravating, or mitigating. (*People v. Gallego* (1990) 52 Cal.3d 115, 208, fn. 1 (conc. opinion of Mosk, J.).)

Third, his argument urged the jury to focus on factor (b) aggravation evidence essentially to the exclusion of everything else, and also implied to the

jury that it was their job not only to sentence Mr. McDowell for Paula Rodriguez's murder, but also to mete out punishment for the other crimes as well.

A prosecutor also commits misconduct when he argues facts or inferences not based on the evidence presented. (*People v. Valencia* (2008) 43 Cal.4th 268, 284; *People v. Hill* at pp. 823, 827; *Darden v. Wainwright*, supra, 477 U.S. at p. 181 [prosecutor commits misconduct when he manipulates or misstates the evidence].) These statements "tend to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination." (*Hill* at p. 823; citations omitted.) Moreover, although these statements are "worthless as a matter of law," they can be "dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (Ibid.; citations omitted.)

Here, the prosecutor committed misconduct when he became his own psychiatric expert witness. He defined "sociopath" for the jury in terms that were technical and diagnostic: from "anti-social personality behavior" that "violates the rights of others," to "a disease against society." (43 RT 6282, 6283.) But there was no psychiatrist who testified about this diagnosis, or who used this terminology. The prosecutor was apparently free to use whatever terms he wanted to describe the 1970 written diagnosis of one doctor, unimpeded by the impropriety of that diagnosis, made when Mr. McDowell was younger than 18 years old. The prosecutor simply made up expert testimony, and argued it himself to the jury.

Along with the due process violations set forth above, the prosecutor's three instances of misconduct interfered with the jury's ability fully to consider Mr. McDowell's mitigation evidence, in violation of the Eighth Amendment. (See *Caldwell v. Mississippi*, supra, 472 U.S. 320 [prosecutor's comments that led jury to believe that an appellate court could mitigate the jury's death sentence violated the Eighth Amendment].) Indeed, the United States Supreme Court last term resoundingly affirmed this "[l]ong recognized" requirement when it reversed, in three separate opinions, three death judgments: *Brewer v. Quraterman* (2007) ___ U.S. ___, 127 S.Ct. 1706, 1709; *Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654; and *Smith v. Texas* (*Smith II*) (2007) ___ U.S. ___, 127 S.Ct.1686. The underlying Eighth Amendment claim in each case was that, as a result of the prosecution's argument and/or the trial court's instructions, the jury could not give "meaningful" effect to the defendant's mitigation evidence. The Supreme Court reversed in each for these *Penry I* errors – because, as the Court reaffirmed in *Brewer*:

> [A] sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death.

(*Brewer,* 127 S.Ct. at p. 1709; internal quotations omitted.) Where trial errors preclude the sentencing jury from being able to give a "reasoned moral response"

to the mitigation evidence the defense has provided, the death sentence must be reversed. (Id. at p. 1710; see also *California v. Brown* (1987) 479 U.S. 538, 545 ["the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime"] (conc. opinion of O'Connor, J.; emphasis in original).]

Thus, when a prosecutor's actions are so egregious that they effectively "foreclose the jury's consideration of . . . mitigation evidence," the jury is unable to make a fair, individualized determination as warranted by the evidence and as required by the law. (*Buchanan v. Angelone* (1998) 522 U.S. 267, 277.) As a result, such actions violate the Eighth Amendment, because they "constrain the manner in which the jury [is] able to give effect" to meaningful evidence. (Ibid.)

That is what occurred here. Mr. McDowell's jury could not give a reasoned moral response to the mitigation evidence that was supplied. The prosecutor's misstatements of the law and facts effectively foreclosed the jury's consideration of Mr. McDowell's mitigation evidence. After successfully objecting to introduction of expert testimony about Mr. McDowell's childhood, the prosecutor denigrated Mr. McDowell's mitigation evidence, reducing it to a single statement: evidence of "a bad childhood" is insufficient to warrant a vote for life. (43 RT 6309.) Then the prosecutor misstated the law and the facts in the ways set forth above, which lessened the state's burden of producing aggravation evidence: (1) the prosecutor's "expert" conclusions about what "sociopath" meant; (2) the prosecutor's erroneous inclusion of a sibling molestation in the list

of aggravating prior crimes; and (3) the prosecutor's erroneous arguments about how the jurors should look at – and punish Mr. McDowell for – those prior crimes. In sum, the prosecutor's misstatements precluded the jurors from giving a reasoned moral response to the mitigation evidence, because the prosecutor's argument misled the jury as to the role of aggravation evidence in making a sentencing decision, and by impermissibly inflating the aggravation evidence.

C. The prejudicial misconduct requires reversal.

A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord *Wainwright*, supra, 477 U.S. 168, 181.) In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108; *People v. Harrison* (2005) 35 Cal.4th 208, 242.) Under California law, a prosecutor commits reversible misconduct if he uses deceptive or reprehensible methods when attempting to persuade the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable would have occurred. (*People v. Rundle* (2008) 43 Cal.4th 76, 157; quotation and citation omitted.)[56]

---

[56]There is no requirement that the bad behavior be intentional. (*People v. Hill*, supra, 17 Cal.4th 800, 822.)

The prosecutor's misconduct here was prejudicial under either standards. It was significant enough to deny Mr. McDowell a fair trial. It was also deceptive and reprehensible, and it is reasonably probable that without such misconduct, an outcome more favorable would have occurred.

That the prosecutor used deceptive and reprehensible means to persuade the jury is clear. As set forth above, the prosecutor made *none* of these improper arguments in the first retrial. That trial ended with a hung jury and mistrial. In his second time around in the retrial process, the prosecutor pushed the closing argument envelope, treading closer to – and ultimately over – the line of permissible conduct. Abusing the process in his second bite at the apple is reprehensible, indeed.

As for measuring the prejudice, this Court once again has before it the record of the first retrial to compare to the record of the second retrial. Where the prosecutor did *not* commit this misconduct – in the first retrial -- the result was a hung jury and mistrial. Where the prosecutor *did* commit this misconduct – here, in the second retrial – the result was a death verdict. This circumstance itself should sufficiently demonstrate the prejudice from the prosecutor's misconduct. However, as set forth at length above in Argument 4. section C., this case also presents virtually every hallmark of the kind of "close case" where courts recognize that errors result in prejudice.

For example, this Court and the Courts of Appeal logically recognize that a prior hung jury itself is indisputable evidence of a close case. (See, e.g., *People v.*

Rivera (1985) 41 Cal.3d 388, 393, fn. 3 and 395; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634; *People v. Thomas* (1981) 119 Cal.App.3d 960, 966.)

This Court also recognizes that jurors' requests for readback and further instruction indicate a close case, and recognizes the relative prejudice from errors that have occurred in the trial. (*People v. Gay*, supra , 42 Cal.4th at pp. 1223-1227; *People v. Hernandez* (1988) 47 Cal.3d 315, 352) Here, the jury asked for readback of the testimony of two of Mr. McDowell's siblings, and asked for further instruction on the meaning of Tommy McDowell's second degree rape conviction. (11 CT 3000A, 3002A.) Its focus on Mr. McDowell's family and its criminal history strongly suggests the jury was considering the effects of his upbringing. (See, *Gay* at p. 1227 [jurors' request of readback of eyewitness and expert testimony related to circumstances of murder was an indicia of jurors' focus on defendant's role in murder].)

And even with the granted requests for readback, Mr. McDowell's jury only deliberated for what amounted to a total of two days. (11 CT 2999-3000, 3001-3002, 3003-3004, 3028, 3030-3031.) In comparison, the jury in the first retrial, deliberated on August 16, 17, 18, 19, 20, 25 and 26, 1999, and ultimately returned a hung verdict. (2 CT 377-381B, 383-385, 386-387; 5 CT 1555-1556.) When a jury deliberates for a very short time, it is possible that the short deliberation may have been the product of the error – and thus indicates its prejudice. (See, e.g., *People v. Barnes* (1997) 57 Cal.App.4th 552, 557, fn. 3; see also *People v. Gay*, supra, 42 Cal.4th at p. 1226 ["It is discomforting, though, that,

following this inadequate reinstruction, the jury reached a verdict the very next morning"].)

With all of these indices of prejudice, the state cannot credibly argue that the prosecutor's misconduct was harmless. The prosecutor's misconduct requires reversal of the penalty conviction.

7. Mr. McDowell was denied his state and federal constitutional rights by the trial court's extensive jury instructions – over explicit defense objection – regarding prior unadjudicated acts of violence.

During jury instruction discussions in the first retrial, trial counsel expressly objected that the trial court should *not* instruct the jury with the laundry list of criminal elements associated with Mr. McDowell's prior criminal activity – aggravating factors under Penal Code section 190.3, and enumerated in CALJIC No. 8.85. (32 RT 4517-4518.) These included instructions regarding the 1977 sodomy and oral copulation of four-year-old Curtis Milton and the 1987 rape, sodomy, and oral copulation of Patricia Huber. (1 CT 20-21 [state's filed list of aggravating circumstances]; 6 CT 1542-1543 [jury instructions].)

The trial court nonetheless gave the instructions. (32 RT 4519; 6 CT 1542-1543.) The trial court explained that it was overruling Mr. McDowell's objection because "the People's [statutory] limitations of three factors in aggravation is what's unfair, [so] I think that's what they can hammer." (31 RT 4518.)

In the second retrial, trial counsel renewed Mr. McDowell's objections. (36 RT 5208-5210; 42 RT 6198.) Over objection, the trial court once again instructed on all the elements of the prior criminal activity, as well as instructing about motive and flight after crime, which the prosecutor maintained were relevant to this crimes. (11 CT 3013, 3016-3017.)

As set forth below, the trial court's instructions violated Mr. McDowell's Sixth Amendment right to effective assistance of counsel, Fifth and Fourteenth Amendment rights to due process, and Eighth Amendment right to a reliable penalty phase determination, as well as to the analogous provisions of the California Constitution. (U.S. Const., Amends. 5, 6, 8 & 14; Cal. Const., art. I, secs. 1, 7, 13, 15, 16, 17, 24, 27.) The prejudicial error requires reversal.

A. The relevant facts below.

During jury instruction discussion in the first retrial, the prosecutor indicated he would be requesting instructions regarding motive and flight – which, according to the prosecutor, were relevant to the prior unadjudicated violent incident involving Patricia Huber Rumpler. (32 RT 4500-4502.)

Trial counsel stated that because the defense was not challenging commission of the prior crimes, there was no need to instruct on motive and flight, nor on the elements of the crimes. (32 RT 4505.) Trial counsel stated that it was his tactical intent not to "overload jury with what I consider unnecessary instructions." (Ibid.) Indeed, trial counsel stated he was willing to stipulate as to

the prior violent crimes in order to avoid that instruction. (32 RT 4506.) Trial counsel reiterated that, when it came to the prior crimes, the defense was even willing to "concede force or fear" as to all of the crimes, and would only be unwilling to concede the "serious injury" component of the Curtis Milton incident – which was not even relevant to the elements of that crime, but was only relevant to the jury's determination of the seriousness of the offense. (32 RT 4510.) The prosecutor nonetheless requested that the trial court instruct regarding all the elements of the all crimes. (32 RT 4511.)

Trial counsel again expressly objected:

> Not only do I think it's as a matter of policy not a good idea to give [the instructions], I'm going to object to giving them in light of the fact that 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.

(32 RT 4517-4518.) Trial counsel concluded that "it becomes unfair" to the defense to instruct in this manner. (32 RT 4518.)

Consistent with its attitude in so many other rulings against Mr. McDowell, the trial court responded that the circumstances *were* unfair – but, to the *state*, not to the defendant facing the death penalty. (32 RT 4518) According to the trial court:

> 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.*

(32 RT 4518; emphasis added.) The trial court did not stop there:

> 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's 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 that the jury can consider.*

(32 RT 4518-4519; emphasis added.) The trial court continued:

> And especially if they're egregious offenses where there's a 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.

(32 RT 4519.) The trial court concluded that it would give the instructions over the defense objection. (Ibid.)

The trial court instructed the jury at length with the elements of sodomy and of rape, and with instructions the trial court saw as related to these incidents – motive and flight. (6 CT 1538, 1542-1543.)

In the second retrial, trial counsel renewed Mr. McDowell's objections. (36 RT 5208-5210; 42 RT 6198.) Over objection, the trial court once again instructed on all the elements of the prior criminal activity, as well as regarding motive and flight, and concurrence of act and intent (11 CT 3012, 3013, 3016-3017):

> Motive is not an element of a crime and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.
>
> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(11 CT 3012.)

> In the crimes of Sodomy and Rape, there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful.

(11 CT 3013.)

After instructing that the prosecution was required to prove the prior unadjudicated criminal acts beyond a reasonable doubt, the trial court instructed with the elements of sodomy and rape:

Every person who participates in an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the alleged victim, is guilty of the crime of unlawful Sodomy.

"Sodomy" is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, no matter how slight, is sufficient to complete the crime of sodomy. Proof of ejaculation is not required. "Against the will" means without the consent of the alleged victim.

In order to prove this crime, each of the following elements must be proved:

1. A person participated in an act of sodomy with an alleged victim; and

2. The act was accomplished against the alleged victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the alleged victim.

Every person who engages in an act of sexual intercourse with another person who is not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress, menace, or fear of immediate an unlawful bodily injury to that person or to another person, is guilty of the crime of Rape.

Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.

"Against that person's will" means without the consent of the alleged victim.

"Menace" means any threat, declaration, or act which shows an intention to inflict the injury upon another.

"Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which she would not otherwise have performed, or acquiesce in an act to which she otherwise would not have submitted. The total circumstances, including the age of the alleged victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of the duress.

The fear of immediate and unlawful injury must be actual and reasonable under the circumstances.

In order to prove this crime, each of the following elements must be proved:

1. A male and female engaged in an act of sexual intercourse;

2. The two persons were not married to each other at the time of the act of sexual intercourse;

3. The act of intercourse was against the will of the alleged victim;

4. The act was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the alleged victim or to another person.

(CT 3016-3017.)

B. The trial court's voluminous instructions to the jury regarding prior unadjudicated acts of violence violated this Court's holdings and Mr. McDowell's state and federal constitutional rights.

This Court has consistently held that trial courts have no sua sponte duty to instruct on the elements of crimes presented as aggravators under section 190.3, subdivision (b). (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1175; *People v. Osband* (1996) 13 Cal.4th 622, 704; *People v. Cain* (1995) 10 Cal.4th 1, 72; *People v. Davenport* (1985) 41 Cal.3d 247, 281-282.) This rule is grounded in this Court's just-as-consistent recognition that:

> as a tactical matter, the defendant 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 crimes rather than on the central question of whether he should live or die.

(*People v. Davenport,* supra, 41 Cal.3d at p. 281; accord *People v. Barnett*, supra, 17 Cal.4th at p. 1175; *People v. Cain*, supra, 10 Cal.4th at p. 72.)

Thus, this Court has expressly recognized precisely the concern that trial counsel raised here when he objected that the trial court should not give these

instructions. In response, the trial court ran roughshod over trial counsel's concern, over trial counsel's expressed tactical decision, and over trial counsel's emphatic objection on his client's behalf. In doing so, the trial court ran roughshod over Mr. McDowell's right to the effective assistance of counsel, in violation of the Sixth Amendment. (U.S. Const., Amend. 6.)

To be sure, this Court has "also noted that a trial court is not *prohibited* from giving such instructions on its own motion when they are 'vital to a proper consideration of the evidence.'" (*People v. Cain*, supra, at p. 72; emphasis in original; quoting *People v. Davenport*, supra, at p. 282 [trial court not prohibited from instructing on the elements of other crimes offered as aggravating factors where either the defendant or the prosecution request such instruction, or the court itself deems them necessary].) But that is not this case. For example, in *People v. Phillips* (1985) 41 Cal.3d 29 – the case in which this Court originally recognized the salience of the tactical decision about whether or not to request instruction on the elements of prior crimes -- the state had introduced evidence that ran a field of simply proving the elements of the prior crime. (Id.) One of this Court's remedies for parsing out proper consideration of aggravation evidence was a suggestion that trial courts could instruct on the elements of the crimes. (Id. at p. 71, fn. 25.)

Mr. McDowell's case stands in stark contrast. Here, the defense was not challenging what evidence about the prior crimes was relevant as aggravation, nor

even whether the prior crimes had occurred. In fact, trial counsel *expressly offered to stipulate that the prior crimes had occurred.*[57]

In short, there was absolutely no valid reason for the trial court to instruct the jury with the laundry list of elements and related instructions about these prior crimes set forth at such length above. Indeed, this is a textbook example of the very circumstance this Court recognized as a real concern for capital defendants: where their jury would be "overloaded with a series of lengthy instructions on the elements of alleged other crimes" which a defendant could reasonably fear would "lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die." (*People v. Davenport,* supra, 41 Cal.3d at p. 281; accord *People v. Barnett*, supra, 17 Cal.4th at p. 1175; *People v. Cain*, supra, 10 Cal.4th at p. 72.)

Thus, the circumstances themselves make clear that the trial court erred when it gave these instructions over defense objection. Because this case did not involve any kind of situation in which the instructions would have been "vital to a proper consideration of the evidence," the trial court should have abided by Mr. McDowell's request not to give them. (*People v. Cain*, supra, at p. 72.)

---

[57]This Court and the United States Supreme Court have recognized in a number of situations that a defendant may stipulate to prior convictions to avoid having the jury hear evidence and receive instruction upon the alleged prior conviction. (See, e.g., *People v. Bouzas* (1991) 53 Cal.3d 467; *People v. Kipp* (1998) 18 Cal.4th 349; see also *Old Chief v. United States* (1997) 519 U.S. 172.) Though that is not precisely the issue here (because, for instance, it is not apparent that the prosecution would have agreed to any stipulation) these cases nevertheless recognize what *is* at issue here: a defendant's tactical decision about how to address instruction regarding prior bad acts, given the way jurors focus upon them.

What is also clear, unfortunately, is the stark injustice expressed in the trial court's own statements in support of its ruling, and therefore another clear dimension of error in the trial court's ruling. The trial court *did* find the instructions vital – to bolster the prosecution's case sufficiently so that the jury would return a death verdict. As set forth below, there is really no other rational way to interpret the trial court's improvident remarks.[58]

First, the trial court's statements reflect an improperly activist response to California's statutory death penalty scheme, which the trial court viewed as skewed against the prosecution:

> *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.*
>
> * * * * *

---

[58]By this point, there can be no doubt: the trial court loathed Mr. McDowell. As set forth throughout Appellant's Opening Brief, the trial court's rulings and on-the-record statements reflect an animosity toward Mr. McDowell from the beginning that increased right through to the end of the proceedings. By the time the trial court rejected Mr. McDowell's motion to modify the death sentence, the trial court concluded that, of all the defendants the court had seen in death and non-death cases, "I find Mr. McDowell to be one of the most vicious and violent individuals that I've encountered." (44 RT 6460.) And, though the state had not introduced any evidence that Mr. McDowell *enjoyed* committing the crimes, the trial court bizarrely stated, "To enjoy the cruelty that he imposes on others is amazing to me," and "I'm amazed at Mr. McDowell's enjoyment of inflicting torture on other human beings" (which the trial court concluded, "I don't see justified in his history"). (Ibid.)

> And especially if they're egregious offenses where there's a 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 [to give the instructions].

(32 RT 4518-4519; emphasis added.) In short, the trial court viewed the statutory scheme as stacked against the state. And in response, the trial court dealt the state an extra card, by instructing on the elements of the prior crimes over express and repeated defense objection.

Second, the trial court's statements reflect that its decision to give these instructions was motivated by a belief that, if the jury could just hear everything that the trial court thought was fair to the state, the jury would return a verdict of death:

> 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's 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 that the jury can consider.*

(32 RT 4518-4519; emphasis added.)

This was a penalty phase retrial, where the only issue was whether Mr. McDowell would be sentenced to life in prison without the possibility of parole, or whether he would be sentenced to death. The issue was not whether the jury would set Mr. McDowell free and back out on the street. Thus, there is only one

way to interpret the trial court's statement about the need to permanently stop a repeat offender: by execution. The trial court's stated frustration with the restrictions of California's statutory aggravators reflects that the trial court was afraid that the jury would not hear enough aggravating evidence to sentence Mr. McDowell to death.

Finally, the trial court's repeated choice of the pronoun "we" is extremely problematic. The trial court stated, "That is what *we've* got" when describing prior bad act evidence, and similarly stated, "It's an indication that the only thing *we* can do is stop [recidivism] permanently." (32 RT 4518; emphasis added.) The trial court's repeated use of the word "we" when expressing its frustration over recidivism and statutorily-limited aggravation evidence unfortunately reflects the plural nature of the adversaries Mr. McDowell faced in the courtroom: the prosecutor, and the trial court.

Thus, it is clear from the circumstances of this case, and from the trial court's statements in support of its rulings, that giving these instructions was error. As set forth above, this error violated Mr. McDowell's Sixth Amendment right to the effective assistance of counsel. This error also violated Mr. McDowell's Eighth Amendment rights to individualized sentencing based on a jury's weighing of "the mix of mitigating and aggravating factors." (*Sochor v. Florida* (1992) 504 U.S. 527, 532, quoting *Clemons v. Mississippi* (1990) 494 U.S. 738, 752; U.S. Const., Amends. 8 & 14.) The trial court's improper focus in these instructions on this aggravation evidence impermissibly interfered with the jury's weighing of this

mix. Moreover, the Fifth, Eighth and Fourteenth Amendments require that the sentencing determination be reliable. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305: U.S. Const., Amends. 5, 8 & 14.) Because the trial court's instruction improperly focused the jury's attention on this laundry list of prior crimes, the sentencing phase was not reliable, and was therefore violative of these amendments.

Giving these instructions also violated, in a number of other ways, Mr. McDowell's Fifth and Fourteenth Amendment rights to due process. Trial errors violate federal due process guarantees when those errors arbitrarily violate a state's own rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.4th 795, 804.) For example, this Court held in *People v. Marshall* (1996) 13 Cal.4th 799, 850-851, that the failure to instruct on an element of a special circumstance is a violation of state law which implicates a defendant's federal due process rights under *Hicks*. Similarly, the trial court's improper instruction here violated the California statutory scheme – which emphatically does not place emphasis on any particular aggravating factor. As the trial court's own expressly-stated reasons for giving these voluminous instructions clearly indicate, however, giving these instructions allowed the state to "hammer" the prior uncharged incidents as aggravators. (32 RT 4518.)

Federal constitutional due process also requires balanced instructions that do not unduly favor the prosecution. (*Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [state rules which give unfair advantage to the prosecution violate the

"balance" that is required under the Due Process Clause]; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; U.S. Const., Amends. 5 & 14.) While *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions. As this Court has long recognized, "There should be absolute impartiality as between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) Here – once again as evinced by the trial court's own stated reasons for giving the instructions – the instructions allowed the state to "hammer" the jury with the prior uncharged acts of violence as aggravators.[59]

---

[59]Mr. McDowell acknowledges that trial counsel did not enumerate these Eighth and Fourteenth Amendment violations when he objected to the trial court giving these instructions, and Mr. McDowell anticipates that respondent thus will make its "oft-repeated" waiver argument. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Of course, this Court should reject that argument. This Court correctly recognizes that instructional error is subject to review even where not objected to below, at all. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199-2001 [failure to object to jury instruction directing guilt phase jury to consider defendant's oral admission with caution did not preclude review on appeal to the extent the instruction affected the defendant's substantial rights].)

Here, trial counsel *did* object. Counsel did not need to state each particular legal consequence of the alleged error. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) This is so because:

> no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.

In sum, the trial court's decision to give these instructions over defense objection was error that violated Mr. McDowell's state and federal constitutional rights. As set forth below, that error was prejudicial and requires reversal.

C. The instructional error was prejudicial and therefore requires reversal.

Where trial errors implicate federal constitutional guarantees, reversal is required unless the state can demonstrate beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 295-296.) However, even under this Court's standard in *People v. Watson* (1956) 46 Cal.2d 818, 836 – which requires reversal only if there is a reasonable probability that, but for the error, the outcome would have been different – reversal is required.

In evaluating most of the errors that occurred in the second retrial, this Court has the benefit of being able to compare the results of the second retrial – (where the errors occurred) to the results of first retrial (where most of the errors did *not* occur). Here, however, the trial court misinstructed in both retrials. Thus, at first blush, the analysis would seem somewhat different.

However – and very significantly – what *did* change between the first and the second retrials in this very regard was the prosecutor's closing argument. As set forth above in Claim 6, the prosecutor committed misconduct in the second

---

(*People v. Yeoman* (2003) 31 Cal.4th 93, 117; accord *People v. Partida*, supra; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

retrial by arguing improperly during his closing. Significantly, a portion of that error had to do with this very issue: the prosecutor's improper argument about the way that the jury should consider the prior unadjudicated – and, therefore, as the prosecutor argued, previously *unpunished* – acts of violence.

The prosecutor argued that if a defendant convicted of first degree felony murder had no prior criminal history:

> the absolute minimum sentence which I put down here is life without the possibility of parole. *If a defendant, if Mr. McDowell, 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.*

(43 RT 6252; emphasis added.)[60]

The prosecutor explained to the jury that this meant, "Therefore, you have to consider what is the punishment for the aggravating criminal conduct," (43 RT 6253) which the prosecutor enumerated as including "the sodomy of Curtis Milton," and "the rape and kidnapping of Patty Huber." (Ibid.) Throughout the rest of his argument, the prosecutor would return again and again to this improper theme; for example, "What is the punishment for the rape of Patty Huber? That is for you to decide" (43 RT 6289); "And what is the punishment for Mr. McDowell's conduct in relation to Patty Huber?" (43 RT 6295.)

---

[60]As set forth above in Argument 6, trial counsel objected that this misstated the law, and would confuse the jury. The trial court overruled the objection.

Significantly, the prosecutor *did not argue this in the first retrial.* (See 33 RT 4573-4619.) There the prosecutor argued, "Now, ultimately we all know what this case is about. *It's about the death of Paula Rodriguez as far as the appropriate punishment.*" (33 RT 4575; emphasis added.) While the prosecutor described the aggravating crimes in his argument in the first retrial, the prosecutor did not argue or even suggest that it was the jury's responsibility to punish Mr. McDowell for them. (See 33 RT 4583-4595, 4598-4599.) Instead, he argued about all of them in total that "this escalating violence in relation to the victims in this case is way above and beyond the elements of the crime itself" and thus death was an appropriate sentence. (33 RT 4582.)

For all the reasons set forth above in Claims 3, 4, 5, and 6, this was -- by virtually all indices recognized by reviewing courts -- a close case. There was a prior hung jury; the second retrial jury requested readback; the second retrial jury asked questions during deliberations; the second retrial jury did not deliberate at length. Most significantly for analysis of the effect of this error, however, is this Court's consistent recognition of the effect of the prosecutors' argument about the subject of the error, and "exploitation" of the error. (See, e.g., *People v. Morales* (2001) 25 Cal.4th 34, 48; *People v. Hannon* (1977) 19 Cal.3d 588, 603; *People v. Roder* (1988) 33 Cal.3d 491, 505.) The United States Supreme Court is in agreement. For example, in *Skipper v. North Carolina* (1986) 476 U.S. 1, the Court reversed a death verdict after finding prejudice in the prosecutor's focus in

closing argument upon the trial court's erroneous exclusion of evidence. (Id. at p. 5, fn. 1.)

As set forth above, that is exactly what the prosecutor did in the second retrial. This time, he played the extra card that the trial court dealt him: he focused in his closing argument on asking the jurors what punishment they should mete out to Mr. McDowell for his prior bad acts, about which the trial court had just voluminously instructed the jury. The prejudice from this instructional error is clear, and reversal is required.

8. Mr. McDowell was denied his state and federal constitutional rights by the cumulative errors at this second penalty phase retrial.

As this Court stated in *People v. Hill* (1998) 17 Cal.4th 800, "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (Id. at p. 844; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 488 ["the cumulative effect of the potentially damaging circumstances violated the due process guarantee of fundamental fairness"]; U.S. Const., Amend. 14.)

However, this is far from a case where an appellant argues that small trial errors add up to reversal. This is a case in which every single one of the trial court's errors – especially the complete exclusion of Dr. Andrews' expert mitigation testimony -- was prejudicial enough to warrant reversal. And this is certainly a case where the cumulative effect of the trial court's errors absolutely demands it. From beginning to end, the effect of the trial court's errors in this

second retrial was to stack the deck against Mr. McDowell, and in favor of the prosecution. That imbalance in and of itself violates the Due Process Clause and is prejudicial enough to trigger reversal of the death verdict. (*Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [state rules which give unfair advantage to the prosecution violate the "balance" that is required under the Due Process Clause]; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; U.S. Const., Amends. 5 & 14.)

The state was given not one, not two, but *three* bites at the apple when it came to seeking death against Mr. McDowell. By the time of this third penalty-phase trial against him, the state knew Mr. McDowell's case inside and out, and sought to gut it. But instead of perceiving that danger of unfairness and guarding against it, what the trial court repeatedly, incorrectly perceived – according to its own on-the-record statements -- was unfairness *to the prosecution.* Thus, as set forth at length above in Arguments 1 through 7, the trial court granted prosecution motions, denied critical defense requests, and made repeated instruction to the jury that favored the prosecution.

The trial court began expressing its views about its perception of unfairnesses to the prosecution when it first denied Mr. McDowell's motion to preclude the state from seeking death against him. On hearing of this motion before the first retrial, what the trial court emphatically maintained was that the responsibility for the delay and untimeliness of this re-prosecution lay at the feet of Mr. McDowell – who, according to the trial court, had cause the problem by

consuming time in pursuing his (valid) claim of instructional error. (21 RT 2569-2571.) According to the trial court, the appropriate "remedy" to Mr. McDowell after the Ninth Circuit reversal was to "require the prosecution to prove all over again" that Mr. McDowell deserved the death penalty "even 15, 17 years after the event, after the crime." (Ibid.) It was the prosecution, according to the trial court, instead of Mr. McDowell that would experience difficulties after all of these years. (21 RT 2577.)

Near the end of the first retrial, the trial court also began expressing its frustration on the record with California's death sentencing scheme. During first retrial litigation of how the prosecutor would refer to Mr. McDowell's housing status, the trial court sympathized with the prosecutor's plight as it granted a defense motion to exclude evidence:

> I think it should go, but it doesn't. *You're hamstrung by three factors that I think are unfair. [Factors] (A), (B) and (C) don't go to the limits of everything that I think a jury can fairly consider in deciding what penalty is appropriate. [Para.] But if they thought that a vicious killer was going to enjoy what he viewed to be a good life in prison for the rest of his life, I think that would have an impact on their choice of penalty. But it isn't under the provisions of the statute, and that's the end of the story.*

(31 RT 4449; emphasis added.) The trial court reiterated its frustration during litigation of jury instructions. According to the trial court:

> 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.*

(32 RT 4518; emphasis added.) The trial court did not stop there:

> 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's 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 that the jury can consider.*

(32 RT 4518-4519; emphasis added.) The trial court continued:

> And especially if they're egregious offenses where there's a 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.

(32 RT 4519.)

The trial court's frustrations over perceived unfairnesses to the prosecution continued right into the second retrial. In the second retrial, after allowing the prosecution to enlarge the scope of its victim impact testimony – without warning to the defense – the trial court agreed with the prosecution that it would instruct the jurors that Paula Rodriguez's family members were not allowed to testify

about what punishment they wanted for Mr. McDowell. When it overruled Mr. McDowell's objection to this mid-trial instruction, the trial court explained to trial counsel that what was at stake was essentially *unfair to the prosecution*:

> [Y] ou're going to in your phase of the case going to [sic] 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.*

(39 RT 5610; emphasis added.) And when it precluded the defense from introducing declarations from mitigation witnesses who had died since the 1984 trial, the trial court again cited unfairness to the prosecution. According to the trial court, it was "highly unfair to the prosecution [for the defense] to offer testimony . . . [that] wasn't subject to cross-examination." (35 RT 5640.) Of course, the trial court had earlier refused to recognize the inherent unfairness to Mr. McDowell in retrial after his mitigation witnesses had died.

Thus, the trial court's own statements about its rulings reflect that those rulings were made in an attempt to "rebalance" the scales in California's carefully-calibrated capital sentencing scheme back toward the prosecution, and inappropriately away from the defendant who was on trial for the death penalty. And, as set forth above in each argument, the effect of each of those rulings – even without the trial judge's remarkable explanations for each – added up to a trial completely prejudiced against Mr. McDowell. As the trial court itself stated at the

end of these proceedings, "*Perhaps the rest of you did not expect the verdict that came from this jury, but I did.*" (44 RT 6453; emphasis added.) That is because each of the trial court's challenged rulings unfairly stacked the deck against Mr. McDowell. There can be no question as to their cumulative effect.

First, as set forth in Argument 1, the trial court erroneously allowed the prosecution to proceed against Mr. McDowell again in two penalty-phase retrials that took place nearly two decades after the crimes. During that time, *critical mitigation witnesses died.* Moreover, the time lapse allowed the prosecutor to argue in closing that the jurors needed to reach closure in this case because "It's too old and it needs to be resolved by the 12 of you." (43 RT 6249.)

Then, as set forth in Argument 2, in the second retrial, the trial court improperly excused two prospective jurors for cause – after noticing that (according to the trial court), "That first [retrial] 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 with the death penalty." (44 RT 6453.)

As set forth in Argument 3, the prosecutor was allowed – and without giving sufficient notice to the defense -- to admit victim impact testimony that ran far a field of what was rationally connected to Paula Rodriguez's murder. And the trial court then exacerbated the victim impact trouble by instructing the jurors that Ms. Rodriguez's family members were not allowed to tell the jury their opinions about what sentence they thought Mr. McDowell should receive.

As set forth in Arguments 4 and 5, the defense mitigation case was gutted by the complete exclusion of Dr. Arlene Andrews' critical expert mitigation testimony about Mr. McDowell's childhood. Not only were the jurors denied the opportunity to hear her expert opinions and conclusions, but this exclusion also denied them the opportunity to hear other key mitigation evidence – which Dr. Andrews testified about in the first retrial, but that *no one testified about in the second retrial* because Dr. Andrews was excluded completely *and the trial court excluded the declarations of dead mitigation witnesses.*

As set forth in Argument 6, the prosecutor then committed misconduct in closing argument, by making prejudicial misstatements of fact and law that he had not made in the first retrial. And then, as set forth in Argument 7, *over express defense tactical objection*, the trial court committed instructional error that improperly highlighted the state's aggravation evidence.

The results could not be more clear. In the first retrial, where these errors did not occur, the result was a hung jury and mistrial. In the second retrial, the effects of these errors acted together to deny Mr. McDowell a fair penalty trial, and led to the unfair death verdict against him. That verdict must be reversed.

9. California's death penalty statute, as interpreted by this Court and applied at Mr. McDowell's trial, violates the United States Constitution.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. This Court,

however, has consistently rejected arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme are deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or similar claim in a prior decision, and (iii) ask us to reconsider that decision." (Id. at pp. 303-304, citing *Vasquez v. Hilllery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Mr. McDowell briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Individually and collectively, these constitutional defects require that Mr. McDowell's sentence be set aside. Should the Court decide to reconsider any of these claims, Mr. McDowell requests the right to present supplemental briefing.

A. *Penal Code section 190.2 is impermissibly broad.*

To pass constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.]; U.S. Const., Amends. 8 & 14.) To meet this criteria, a state must

genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. The special circumstances set forth in Penal Code section 190.2 – now, and at the time of Mr. McDowell's offenses – are so numerous and so broad in definition as to encompass nearly every first-degree murder. California's statutory scheme thus fails to identify the few cases in which the death penalty might be appropriate.

This Court routinely rejects challenges to the statute's lack of meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. *The broad application of section 190.3(a) violated Mr. McDowell's constitutional rights.*

Penal Code section 190.3, factor (a) directs a jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 11 CT 3013-3014; 43 RT 6392-6395.) Prosecutors throughout California have argued that juries can weigh in aggravation almost every conceivable circumstance of the crimes at issue – even those that, from case to case, reflect starkly opposite

circumstances. Eually problematic is the state's use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; for instance, facts such as the age of the victim, the age of the defendant, the method of the killing, the motive of the killing, the time of the killing, and the location of the killing. Here, the prosecutor urged that the manner in which Mr. McDowell killed Paula Rodriguez, which evidenced first degree felony murder, was a factor in aggravation warranting a death verdict. (43 RT 6260, 6299-6301.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 748-749["circumstance of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such far-ranging and ridiculous manners that almost all features of every first-degree murder can and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the set of circumstances surrounding the murder in question were enough in and of themselves – without some other, narrowing principle – to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Mr. McDowell acknowledges that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401). Mr. McDowell urges this Court to reconsider this holding.

C. *California's death penalty statute and the jury instructions failed to set forth the appropriate burden of proof.*

(1) Mr. McDowell's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 12232, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and therefore not "susceptible to a burden-of-proof quantification"]; CALJIC Nos. 8.86, 8.87.)

In conformity with this standard, Mr. McDowell's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. Neither was the jury instructed that proof of any of the aggravating circumstances besides prior criminality needed to be made by the state beyond a reasonable doubt. Instead, the jurors were instructed with the CALJIC

No. 8.88 concluding instruction to penalty-phases, which told them that "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (11 CT 3020.)

This is unconstitutional, as an unbroken string of United States Supreme Court cases make clear. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 530 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 871] require that any fact (other than that of a prior conviction) used to support an increased sentence must be submitted to the finder-of-fact and proven beyond a reasonable doubt.

As in all death penalty prosecutions in this state, in order to vote for death, Mr. McDowell's jury was required to find that aggravating factors were present, and that they were so substantial to warrant death. In other words, his jury was charged with fact-finding that increased his sentence (death over LWOP) – but the jury was not required to find these facts *beyond a reasonable doubt.* This also meant that the trial court failed to instruct the jury on the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Mr. McDowell acknowledges that this Court has held that imposition of the death penalty does not constitute an "increased sentence" within the meaning of *Apprendi* (*People v. Anderson* , supra, 25 Cal.4th at p. 589, fn. 14) and therefore

does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) This Court has also rejected appellants' arguments that *Apprendi* and following cases impose a reasonable-doubt standard on California's capital penalty phases. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Mr. McDowell urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles of *Apprendi*, *Ring*, *Blakely* and *Cunningham*.

Along with violating the right to fair jury trial guaranteed by the Sixth Amendment, the lack of any reasonable doubt standard in California's capital penalty phases violates the Fifth and Fourteenth Amendment's rights to due process, and the Eighth Amendment right to be free from cruel and unusual punishment. (U.S. Const., Amends. 5, 6, 8, and 14.) Mr. McDowell acknowledges that this Court has rejected the argument that either the Due Process Clause or the Eighth Amendment are violated in this way. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Mr. McDowell requests that this Court reconsider its rulings.

(2) Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

California state law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code sec. 520.) Evidence Code section 520 creates a legitimate expectation as to the way a criminal prosecution will be decided in the state of California; Mr. McDowell is therefore constitutionally

entitled, under the Fourteenth Amendment, to require the prosecution to prove its penalty phase case against him beyond a reasonable doubt. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant has federal constitutional due process right to procedural protections established under state law].) Accordingly, Mr. McDowell's jury should have been instructed that the state had the burden of persuasion regarding the appropriateness of the death penalty. CALJIC Nos. 8.85 and 8.88, the instructions given here (11 CT 3013-3014, 3019-3020), fail to provide the jury with the guidance that is legally required for the administration of the death penalty to meet federal constitutional minimal standards under the Sixth, Eighth and Fourteenth Amendments.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) However, Mr. McDowell is entitled to jury instructions that comport with the federal Constitution, and he thus urges this Court to reconsider its decision.

Even presuming it is permissible not to have any burden of proof in a capital penalty phase trial, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution has no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the impermissible possibility that a juror would vote for the death penalty based on a misallocation of a non-existent burden of proof.

(3) The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

The question of whether to impose the death penalty upon Mr. McDowell hinged upon whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (11 CT 3020.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in the manner necessary to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments, because it creates a vague and directionless standard. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has held that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Mr. McDowell urges this Court to reconsider that opinion.

D. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them that they can return a death verdict if the aggravating evidence "warrants"

death rather than life without parole. (11 CT 3020.) These determinations are not the same.

To satisfy the Eighth Amendment's "requirement of individualized sentencing in capital cases," (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879.) On the other hand, jurors can find death "warranted" when they find the existence of a special circumstance. (See *People v. Bacigalupo* (1992) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these two widely-diverging determinations, the jury instructions violate the Eighth and the Fourteenth Amendments. (U.S. Const., Amends. 8 & 14.)

This Court has previously rejected this claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Mr. McDowell urges this Court to reconsider that ruling.

E. 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 the possibility of parole.

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. (Pen. Code sec. 190.3.) This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377; U.S. Const., Amend. 8.) Yet CALJIC No.

8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Mr. McDowell's federal constitutional right to due process of law. (*Hicks v. Oklahoma*, supra, 477 U.S. at p. 346.)

This Court has held that, since the instruction tells the jury that death can be imposed only if it finds that the aggravation outweighs mitigation, it is unnecessary also to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Mr. McDowell submits that this holding conflicts with numerous other cases that disapprove instructions that emphasize the prosecution's theory of the case while minimizing or ignoring the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of the case].) The nonreciprocity also conflicts with due process principles; by explaining how a death verdict may be warranted but failing to explain how an LWOPP verdict is warranted, the balance of forces at trial tips in favor of the accuser and against the accused. (See *Wardius v. Oregon*, supra, 412 U.S. 470, 473-474; U.S. Const., Amend. 14.)

F. Failure to require that the jury make written findings violated Mr. McDowell's right to meaningful appellate review.

Consistent with California state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Mr. McDowell's jury was not required to make any written findings during the penalty deliberations. The failure to require written or other specific findings from the jury during its deliberations deprived Mr. McDowell of his fair trial and sentencing rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as his right to meaningful appellate review to ensure that the death penalty was not arbitrarily and capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195; U.S. Const., Amends. 5, 6, 8 and 14.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. McDowell urges this Court to reconsider that holding.

G. The instructions to the jury on mitigating and aggravating factors violated Mr. McDowell's constitutional rights.

(1) The use of restrictive adjectives in the list of potential mitigating factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" acted as barriers to the jury's consideration of mitigation evidence. (Pen. Code sec. 190.3, factors (d) and (g); CALJIC No. 8.85; 11 CT 3013-3014.) The limitations from this barrier violated Mr. McDowell's Fifth, Sixth, Eighth and Fourteenth Amendment rights. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; U.S. Const.,

Amends. 5, 6, 8 and 14.) Mr. McDowell acknowledges that this Court has rejected this very argument. (*People v. Avila* (2006) 38 Cal.4th 491, 514.) Mr. McDowell urges this Court to reconsider its holding.

(2) The failure to delete inapplicable sentencing factors

Many of the sentencing factors set forth in CALJIC 8.85 were inapplicable to Mr. McDowell's case, including factor (e) [victim a participant in or consented to homicide]; factor (g) [defendant acted under duress or domination of another person]; and factor (j) [defendant was an accomplice and minor participant]. The trial court failed to omit those factors from the jury instructions. (11 CT 3014.) Thus the jurors were likely either confused, or compared Mr. McDowell unfavorably to other theoretical defendants in other theoretical cases to whom these factors *did* apply. This prevented the jurors from making a reliable determination of the appropriate penalty, in violation of Mr. McDowell's Eighth Amendment rights. (*Woodson v. North Carolina*, supra, 428 U.S. 280; U.S. Const., Amend. 8.) Mr. McDowell asks this Court to reconsider its decision in *People v. Cook*, supra, 39 Cal.4th 566, 618, and hold instead that the trial court erred when it failed to delete the irrelevant sentencing factors from its instructions.

H. The prohibition against intercase proportionality review guarantees arbitrary and disproportionate imposition of the death penalty.

California's capital sentencing scheme does not require that either this Court or the trial court make any comparison between this and other similar cases regarding the relative proportionality of the sentence imposed – in other words, intercase proportionality review. (See *People v. Sapp* (2003) 31 Cal.4th 240, 317.) The failure to conduct intercase proportionality review 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. (U.S. Const., Amends. 5, 6, 8 and 14.) For this reason, Mr. McDowell urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

I. California's capital sentencing scheme violates the Equal Protection Clause.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than California law provides to persons charged with non-capital crimes. Therefore, the death penalty scheme violates the Equal Protection Clause. (U.S. Const., Amend. 14.) To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more – not fewer – procedure protections for capital defendants.

For example, in a non-capital case, any true finding on an enhancement allegation must be based on a unanimous verdict found beyond a reasonable doubt; aggravating and mitigating sentencing factors must be established by a preponderance of the evidence standard, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, subds. (b) and (e). In a capital case, however, there is no burden of proof at all, and there is no unanimity requirement regarding aggravating circumstances, and the jurors do not need to provide any written findings to justify the sentence. Mr. McDowell acknowledges that this Court has previously rejected these equal protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Mr. McDowell urges this Court to reconsider its ruling.

J. California's use of the death penalty as a regular form of punishment falls short of international norms.

This Court has rejected the claim that the use of the death penalty at all – or, alternatively, its regular use – violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) (*People v. Cook*, supra, 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, and the United States Supreme Court's recognition of international law as supporting its holding prohibiting the death penalty in cases where the offense was committed by a minor (see *Roper v. Simmons* (2005) 543 U.S. 551, 554), Mr. McDowell urges this Court to reconsider its previous holdings.

Conclusion

For all the reasons set forth above, Mr. McDowell respectfully requests that this Court reverse the penalty phase verdict of death against him.

Dated: 9/18/08

Respectfully submitted,

Tamara P. Holland
Attorney for Appellant
Charles McDowell, Jr.

Certificate of Word Count

People v. Charles McDowell, Jr.
California Supreme Court Case No. S085578

I am appellate counsel for Mr. McDowell. I prepared the Appellant's Opening Brief using Microsoft Word. According to that program's word count function, the Opening Brief (excluding tables) contains 57,988 words.

DATED: 9/18/08

Tamara P. Holland

Attorney for Appellant

Charles McDowell, Jr.

Declaration of Service

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 769 Center Blvd., #132, Fairfax, CA, 94930.

On Sept. 19, 2008, I served a true copy of the following document: **Appellant's Opening Brief** on the following persons by placing true copies thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at Fairfax, California, addressed as follows:

Office of the Attorney General
300 S. Spring St., 5th Floor
Los Angeles, CA 90013
(representing State of California)

CAP
ATTN: Dorothy Streutker
101 Second St., #600
San Francisco, CA 94105
(courtesy copy)

Capital Appeals Clerk
Los Angeles County Superior Court
210 W. Temple St., Room M-3
Los Angeles, CA 90012
(courtesy copy)

Guy O'Brien
Office of the Alt. Public Defender
221 E. Walnut St., #240
Pasadena, CA 91101
(trial counsel)

Office of the District Attorney
210 W. Temple St., 18th Floor
Los Angeles, CA 90012
(courtesy copy)

Service for Charles McDowell, Jr. will be completed by utilizing the 30-day post-filing period within which I will hand-deliver a copy to him at San Quentin state prison.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Fairfax, California, on Sept. 19, 2008.

T P Holland

Tamara P. Holland