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 REPLY BRIEF

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

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DEATH PENALTY

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APPELLANT'S REPLY BRIEF

Introduction

In its two-paragraph response to Mr. McDowell's seven-page argument about the cumulative error in this case, respondent intones a frequent appellate mantra: "A defendant . . is entitled to a *fair* trial, not a *perfect* trial." (Respondent's Brief, "RB," p. 139; emphasis in original; citations omitted.)

This was not a fair trial.

However, it was a perfect trial. For the State.

By the time of this trial -- the third penalty phase against Mr. McDowell -- the state knew exactly the contours of Mr. McDowell's mitigation case, and exactly the weaknesses in its own aggravation case. By the time of this trial, the trial court had sat through the first retrial -- which ended in a hung jury. And thus, by the time of this trial, the prosecutor proffered motions -- granted by the trial court -- that affected which jurors were death-qualified or excused for cause,

bolstered the state's case in aggravation, completely undercut the defense case in mitigation, and improperly influenced the jurors through argument and instruction.

As set forth in the prejudice sections of each claim in Mr. McDowell's Opening Brief, virtually all of the indices by which this Court evaluates the prejudice from trial errors are present in this third retrial. And in this case, the prejudice is of course even more transparent: most of these errors *did not occur in the first retrial,* where the result was a hung jury. It is thus clear that the errors raised in this appeal that occurred in the second retrial (individually, and certainly in sum) improperly affected the verdict. Reversal is therefore required.[1]

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.

As set forth in the AOB, Mr. McDowell's penalty phase retrial violated his state and federal constitutional speedy trial rights, rights to due process, and to freedom from cruel and unusual punishment. By the time the third penalty phase began -- nearly two decades after the crimes -- Mr. McDowell had been sitting on Death Row for 15 years, based on an invalid verdict that was the result of

[1] Mr. McDowell reasserts all claims set forth in his Appellant's Opening Brief, ("AOB), and addresses the State's responses at length regarding Arguments 1 through 7, while relying on the arguments already set forth in the AOB as to Arguments 8 and 9.

instructional error to which he objected at the time it occurred in 1984. Not surprisingly, Mr. McDowell's opportunities to defend himself at the penalty phase retrials were by this time prejudiced by deaths of critical mitigation witnesses, and by the chances these repeated penalty phases gave the state to undercut the strength of Mr. McDowell's case and bolster its own. (AOB pp. 48-69.)

Respondent acknowledges none of this. (RB pp. 20-39.) First, respondent fails to comprehend that this time spent under sentence of death could amount to cruel and unusual punishment. (RB pp. 22-26.) Second, respondent contends that Mr. McDowell's speedy trial claim contravenes United States Supreme Court authority, (RB p. 26) and that in any event, these facts do not amount to any speedy trial violation. (RB pp. 27-39.)

As set forth below, Respondent's contentions are incorrect.

A. The prolonged delay and retrials have subjected Mr. McDowell to cruel and unusual punishment.

Respondent makes a four-pronged argument against this claim: (1) there is no case in support; (2) because LWOP is the only alternative sentence, there is nothing cruel or unusual about waiting on Death Row for 15 years and being retried once the error was recognized; (3) Mr. McDowell brought his suffering upon himself by raising a claim that took so long to resolve; and (4) the 20-year gap between the crimes and the penalty phase retrials does not undermine the legitimate penological justifications for the death penalty: retribution and

deterrence. (RB pp. 22-26.) As set forth below, each of respondent's arguments fails.

(1) Courts recognize the inherent agony that individuals suffer on Death Row over decades of delay and uncertainty.

Though respondent correctly observes that the United States Supreme Court has not yet squarely-addressed this issue, respondent fails to acknowledge long-standing recognition by many courts of the suffering experienced by individuals in these circumstances. Indeed, as this Court itself has expressly observed:

> The *cruelty* of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the *dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.* Penologists and medical experts agree that *the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.*

(*People v. Anderson* (1972) 6 Cal.3d 628, 649 (footnote omitted)(emphasis added); see also *In re Medley* (1890) 134 U.S. 160, 172 [for a defendant between sentence and execution, "one of the most horrible feelings to which he can be subjected is the uncertainty of the whole of it"]; *Solesbee* v. *Balkcom* (1950) 339 U.S. 9, 14 (Frankfurter, J., dissenting) ["In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"];

Furman v. *Georgia* (1972) 408 U.S. 238, 288-289 (Brennan, J., concurring) ["[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"]; *Chessman v. Dickson* (9th Cir. 1960) 275 F.2d 604, 607 [recognizing the "agonies" of a prolonged stay on Death Row]; *Suffolk County District Attorney* v. *Watson* (Mass. 1980) 411 N.E.2d 1274, 1289-1295 (Braucher, J. concurring) [death penalty is unconstitutional under state constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"].)

As Mr. McDowell argued in his Opening Brief in this matter, the chief reason that courts recognize this inherent agony yet nonetheless deny relief -- in other words, find no Eighth Amendment violation -- is that the delays are typically attributable to the inmates themselves, whose *losing* claims are the source of their decades-long litigation. (See, e.g., *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1493, 1494 ["it 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"].)

As Mr. McDowell acknowledged in his Opening Brief, that reasoning has some validity. But, as Mr. McDowell also argued in his Opening Brief, the same reasoning cannot apply here, because Mr. McDowell's post-conviction efforts were successful. It took fifteen years from when Mr. McDowell first correctly objected to the trial court's error to when relief was granted. (AOB pp. 54-56.) Thus, Mr.

McDowell's circumstances are diametrically opposed to those in which the courts have declined to find Eighth Amendment violations.

(2) The LWOP alternative

According to respondent, under this Court's holding in *People v. Anderson* (2001) 25 Cal.4th 543, none of these courts' recognition of this suffering matters. (RB pp. 23-24.) Respondent is wrong.

Anderson's rationale related to LWOP has severe logical problems -- in that case itself, and as applied here. Respondent cites the following reasoning from *Anderson* to support its argument that there is nothing cruel and unusual about sitting on Death Row for decades awaiting a decision and possible retrial: "defendant has had no conceivable complaint about his extended incarceration awaiting appeal, because life without possibility of parole was the minimum statement he faced." (*Anderson* at p. 606; RB p. 24.)

If this Court and respondent truly believe there is no Eighth Amendment violation because LWOP is just as bad as the death penalty, then the state should have no argument against re-sentencing Mr. McDowell to LWOP. But of course, the state is not doing so. Indeed, at every turn in its appellate briefing, including this very argument, respondent maintains that this Court should uphold the death verdict against Mr. McDowell. Clearly, respondent does not really believe there is no difference between the two punishments; therefore its argument that there can

be no substance to the complaint is disingenuous.[2]

(3) The state -- not Mr. McDowell -- is responsible for the delay.

Just as did the trial court (see AOB pp. 50-52), respondent attributes the passage of time to Mr. McDowell. (RB pp. 24-25.) Indeed, respondent calls "absurd" Mr. McDowell's argument to the contrary - that the delay is attributable to the trial court's instructional error, *which the state propounded, and to which Mr. McDowell objected at the time, and which the state doggedly defended during15 years of litigation.* (RB p. 24.)

As set forth below, it is respondent's argument that is absurd.

First, respondent relies on a score-keeping tally of the state's "wins" on this issue and Mr. McDowell's "losses" to conclude that the party who lost in more post-conviction court decisions (here, Mr. McDowell), is the party who should be held responsible for the time the litigation took. (RB p. 24.) And, according to respondent, because the Ninth Circuit's *en banc* decision was split instead of unanimous, Mr. McDowell's "win" in that court should barely count at all. (*Ibid.*) Thus, according to respondent, the 15-year delay between the 1984 verdict and the

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[2] Moreover, this Court held in *Anderson* that there was no due process violation from the prolonged delay where the defendant failed identify any prejudice from the delay. (*Anderson* at pp. 605-606.) But, as Mr. McDowell set forth in his Opening Brief and again here in his Reply, his defense was in fact prejudiced by the prolonged delay. Witnesses died, and the prosecution was able to bolster its case against him.

1999 retrials is all Mr. McDowell's fault, and any suffering he has experienced is therefore his own fault, too. (RB pp. 24-25.)

Respondent is wrong.

Litigation within the carefully-constructed hierarchy and procedure of post-conviction review in the California state, and then the federal, judicial systems is not a sporting event where outcomes are determined by a total win/loss record. In our system of habeas corpus relief, the federal Court of Appeals has jurisdiction to overrule the federal District Courts -- which, in turn, have jurisdiction to overrule the highest state courts from which cases are filed. And, of course, the United States Supreme Court has jurisdiction to overrule all of them. Indeed, there can be little doubt that, had respondent prevailed in that Court (where respondent in fact sought relief by filing a petition for writ of certiorari from the Ninth Circuit's decision), respondent would assert that *that* Court's decision was determinative, no matter how many "wins" or "losses" each side had chalked up during the entire post-conviction review process.

Second, respondent also fails to acknowledge that, in the analogous speedy-trial-right context, even where there are "neutral" reasons for delays in prosecution, "the ultimate responsibility for such circumstances must rest with the government rather than with the defense." (*Barker v. Wingo* (1972) 470 U.S. 514, 531.) And 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.) Analogously and logically, arguing that Mr. McDowell is responsible for this delay makes no sense.

Moreover, the state's behavior has been far from neutral. It has been completely adversarial. During the 1984 penalty phase, the state objected to the trial court giving the jurors the supplemental instruction they requested during deliberations. Counsel for Mr. McDowell recognized that as error, and *asked at that time for the trial court to correctly instruct the jury.* But instead, the trial court agreed with the prosecution and did *not* give the instruction. Then, at each point in the post-conviction process, the state argued that Mr. McDowell was wrong, and that the reviewing courts should affirm the death verdict. And when the Ninth Circuit granted relief *en banc*, respondent sought certiorari review (which was denied) in the United States Supreme Court.

Thus, every single day of the 15 years that elapsed from the time the error occurred until the state retried the penalty phase against Mr. McDowell (and then did it again) *is due to state action and state error.* The state propounded the error, and the state chose over and over again to defend the error. It was certainly within the state's capacity to concede at any point along that way its request of the trial court -- to deny the jurors the instruction they requested -- was prejudicial error. The state could then have retried Mr. McDowell in a timely fashion. But the state never did so.

In sum, the responsibility for this passage of time lies with the state. It would be completely illogical, and patently unfair, to attribute to Mr. McDowell the time it took finally to right a wrong *which the state propounded, and which the state argued at every point along the way should be upheld.*

(4) After this delay, the death penalty no longer serves valid penological purposes -- and therefore, it violates the Eighth Amendment .

As Mr. McDowell set forth in his Opening Brief, the United States Supreme Court has long-recognized that imposition of the death penalty is "patently excessive and cruel and unusual punishment" when it ceases realistically to exact retribution or provide deterrence, for in that situation there are only "negligible returns to the State" which make it a "pointless and needless extinction of life." (*Furman v. Georgia* (1972) 408 U.S. 238, 312 (White, J., concurring); see also *Gregg v. Georgia* (1976) 428 U.S. 153, 183 [the penological justifications that can reasonably support the death penalty are retribution and deterrence, and "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"].)

As Justice Steven's memorandum regarding the denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045 observes, 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 hand, seems minimal.

(*Id.* at p. 1045; (Breyer, J., joining).)

Moreover, the Court's holding this term in *Graham v. Florida* (2010) ___ U.S. ___, 130 S.Ct. 2011 reflects its recognition of the monumental effect of an LWOP sentence. Holding that LWOP sentences for juvenile offenders convicted of non-homicide offenses violated the Eight Amendment, the *Graham* Court recognized that LWOP, "the second-most severe penalty permitted by law," alters "the offender's life by a forfeiture that is irrevocable." (*Id.* at p. 2027.) Sentencing Mr. McDowell at this point to such an irrevocable forfeiture would provide constitutionally-sound retribution and deterrence. Subjecting him to execution on the tortured facts of this case would not.

Respondent states that this Court's rejection of this argument in *People v. Ochoa* (2001) 26 Cal.4th 398 should control. (RB 25-26.) Mr. McDowell respectfully requests that this Court revisit the tortured logic of *Ochoa* -- as it applies to all capital cases, but especially in relation to the facts of Mr. McDowell's case.

Essentially, this Court in *Ochoa* stated that there is *more* deterrence and retribution served when condemned individuals experience lengthy delays in their post-conviction proceedings. (See *Ochoa* at pp. 463-464 ["Insofar as defendant

complains of the extreme discomfort he suffers as a result of his uncertainty regarding execution, *that discomfort would enhance the deterrent effect of the death penalty* by increasing the penalty imposed for the commission of capital crimes"] (emphasis added).)

In the first place, this is in direct contrast to Justice Stevens' and Breyers' reasoning in *Lackey*. In the second place (and with all due respect), the reasoning in *Ochoa* adds unconstitutional insult to injury by sanctioning the increased suffering and uncertainty experienced by condemned inmates pursuing legitimate claims, in a capital post-conviction landscape that members of this Court and the state's Commission on the Fair Administration of Justice have expressly termed "dysfunctional."

(5) Retrial following jury deadlock at the first penalty phase retrial further violates the Eighth Amendment.

Moreover, though respondent fails to acknowledge its effect, Mr. McDowell was subjected to further agony and uncertainty by having to endure a *third* penalty trial against him, after the initial penalty retrial ended in a hung jury. As this Court recently acknowledged in *People v. Taylor* (2010) 48 Cal.4th 574, California is one of only a handful of jurisdictions that even allows such a possibility: retrial of a penalty phase following jury deadlock in a capital case. (*Id.* at p. 633-634.) This Court declined to find any *per se* Eight Amendment violation under such circumstances. (*Ibid.*) Mr. McDowell reasserts the

defendant's claim in *Taylor*: because California's procedure is out-of-step with overwhelming national consensus on what is right and fair in capital cases, penatly retrial after hung jury and violates the Eighth Amendment. (See *Trop v. Dulles* (1958) 356 U.S. 86, 101 [federal Constitution requires states to follow "evolving standards of decency that mark the progress of a maturing society"]; *Gregg v. Georgia* (1976) 428 U.S. 153, 173, 182 [courts consider "[o]bjective indicia that reflect the public attitude toward a given sanction" when determining whether the sanction "comports with the basic concept of human dignity at the core of the Amendment"].) But even if this Court rejects such a *per se* determination, this Court should nonetheless recognize what occurred here: that the prolonged delay and uncertainty in the facts of this case -- subjection to a third penalty trial, 15 years after the state and trial court committed instructional error to which Mr. McDowell objected -- certainly amounted to a violation of the Eighth Amendment.

B. Retrial after this delay violates rights to speedy trial and due process.

Respondent maintains that this Court should reject Mr. McDowell's speedy trial claim because it "is in direct conflict" with the "reasoning" of the United States Supreme Court. (RB pp. 26-27.) Alternatively, respondent maintains that there was no speedy trial violation. (RB pp. 27-39.) As set forth below, respondent's contentions are wrong.

(1) Respondent's error regarding Ewell

Apparently, respondent believes that *United States v. Ewell* (1966) 383 U.S. 116 bars application of the Sixth Amendment's speedy trial guarantees to defendants facing retrial after reversal. (RB pp. 26-27.) Respondent maintains that, under *Ewell*, Mr. McDowell's claims "*must be summarily rejected*" because "the prosecution had the right to retry the penalty phase after the reversal of appellant's death sentence, and it did so in the normal course of events." (RB p. 27; emphasis added.)

Clearly, respondent is incorrect. No United States Supreme Court case bars application of speedy trial rights in the post-conviction process. Indeed, the United States Supreme Court stated in *United States v. Loud Hawk* (1986) 474 U.S. 302, that speedy trial safeguards "may be as important to the accused when delay *is occasioned by an unduly long appellate process"* as in other, pretrial situations. (*Id.* at p. 655; emphasis added.) Respondent completely ignores this statement in *Loud Hawk*, and instead cites that case in support of its misleading argument that the United States Supreme Court "did not want to give the Speedy Trial Clause an interpretation that would raise a Sixth Amendment obstacle to retrial following a successful attack on a conviction." (RB p. 209, citing *Loud Hawk* and *Ewell*.) Instead, the High Court applied the *Barker v. Wingo* factors to determine whether a speedy trial violation had occurred.

In short, there is no bar to applying speedy trial rights to defendants in Mr.

McDowell's situation: where there is retrial after a successful attack on a conviction. And, as set forth in his Opening Brief, and reiterated below, Mr. McDowell has consistently maintained that, under the *Barker v. Wingo* factors, the 1999 penalty phase retrials violated his speedy trial rights. (AOB pp. 59-69; *infra.*)

(2) Under the Barker v. Wingo factors, the speedy trial violation is clear.

Whether a delay in a prosecution amounts to an unconstitutional violation of the Sixth Amendment's speedy trial protections depends upon the circumstances. (*Pollard v. United States* (1957) 352 U.S. 354, 361.)[3] In *Barker*, the Supreme Court articulated four factors courts should weigh in determining speedy trial violations. (*Barker* at p. 530.) As Mr. McDowell set forth in his Opening Brief (AOB pp. 60-68) and reiterates below, all four of those factors show that a speedy trial violation occurred here.

(a) Length of the delay

It should be unnecessary for Mr. McDowell to reiterate -- yet again -- the length of time that elapsed between his objection to the instructional error in his 1984 penalty phase trial and his retrial (and then retrial again) in 1999.

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[3] The Fourteenth Amendment's Due Process guarantee is also triggered. (*Barker v. Wingo*, *supra*, 407 U.S. at p. 515.)

What is apparently at question, in respondent's view of the issue, is when the "delay" began. According to respondent, the only period this Court should review is the 10-month period between when the writ was granted and when the first retrial began. (RB pp. 28-29.) Respondent asserts this without reference to any authority on point -- in fact, instead citing statements such as this Court's observation in *People v. Anderson*, *supra*, that, "With respect to the penalty retrial, defendant does not argue that his speedy-trial rights attached any earlier than the issuance of our remittitur . . . ." (*People v. Anderson*, 25 Cal.4th at p. 603; RB 29.) But (and as respondent itself observes) not even Mr. McDowell argues that it was the 10-month delay between the writ's issuance and his first retrial that presumptively prejudicial. (RB p. 29.)

Respondent never squarely addresses Mr. McDowell's explicit contention -- which he raised when he filed his speedy trial objection in 1999, renewed before the second retrial, and now pursues on appeal: that the 15 years that elapsed between the 1984 penalty-phase trial and the 1999 retrials clearly trigger inquiry into the other three *Barker* factors.

Respondent simply dismisses this contention with a one-sentence conclusion: "Logic dictates that, until the writ issued, appellant had no right to a trial, much less a speedy trial." Respondent cites no authority for this proposition, and none exists. To the contrary, as the United States Supreme Court has long-observed, whether a delay in a prosecution amounts to an unconstitutional

violation of the Sixth Amendment's speedy trial protections depends upon the circumstances. (*Pollard v. United States, supra*, 352 U.S. 354, 361.) As set forth here and below (and at length in Mr. McDowell's original motions, and in his Opening Brief), the circumstances of this case make clear that Mr. McDowell's abilities to defend himself were impaired by the passage of time after an error to which he objected in the first place. The 15 years that elapsed between the error and the retrials definitely trigger inquiry into the other three *Barker* factors.

(b) Reason for the delay

As set forth at length in the Opening Brief and above in Argument 1.a.(3), responsibility for the delay lies at the feet of the state.

But once again, according to respondent, Mr. McDowell should bear the blame here for having the temerity to pursue this issue through the post-conviction litigation process. Indeed, according to respondent, Mr. McDowell should stop complaining because he "benefited from the careful, meticulous, expensive, and laborious process of appellate and habeas review, eventually obtaining a reversal of his initial death sentence." (RB p. 31.) In fact, respondent characterizes Mr. McDowell as the lucky recipient of "*the government's desire* to insure that appellant received a fair trial in accordance with constitutional safeguards . . . ." (RB p. 31; emphasis added.)

If "the government" were genuinely desirous of Mr. McDowell receiving a

fair trial, perhaps "the government" should have not convinced the trial court to deny the jurors the instruction they asked for -- and which Mr. McDowell told the trial court should be given -- in the 1984 penalty phase deliberations. If fairness to Mr. McDowell was "the government's" motivation during its 15 years of post-conviction litigation against him, "the government" could have conceded the error at any point along the way. "The government" never has. And today, *26 years after the error*, "the government" is still arguing against Mr. McDowell's claims, instead of following any "desire to insure that appellant received a fair trial in accordance with constitutional safeguards . . . ."

Still more shocking is respondent's assertion that the delay is Mr. McDowell's fault (and, essentially, that he should stop complaining), because, "Had the review been less thorough, appellant would likely have been executed by now." (RB p. 30.)

Yes, in fact, had Mr. McDowell *not* have pursued the issue so vigilantly, there is a good chance that by now he would have been executed -- based on an invalid death verdict obtained after instructional error propounded by the state. How it is that respondent makes this statement *to support* its claim that the 15-year delay is Mr. McDowell's fault is a mystery. Indeed, that respondent makes such a statement -- without apology -- speaks volumes about "the government's" concern for insuring Mr. McDowell's constitutional safeguards.

Nowhere does respondent ever once acknowledge that it was *the state that*

propounded the error, and it was the state that kept urging post-conviction courts for over 15 years to keep affirming it. Nowhere does respondent address the fact that *the state's 1984 death penalty verdict against Mr. McDowell was obtained in error.*

In sum, the reason for the delay is that the state propounded an instructional error in the 1984 trial, and it took 15 years for Mr. McDowell to overcome the state's consistent -- and incorrect -- assertions that the death verdict was valid. Thus, this *Barker* factor militates in favor of a finding that speedy trial violation has occurred.

(c) Defendant's assertion of his right

Respondent argues that Mr. McDowell did not assert his right to speedy trial early enough. According to respondent, he should have done so while challenging his original penalty verdict. (RB pp. 32-33.)

For this novel proposition, respondent urges this court to rely upon *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, where the Fifth Circuit Court of Appeals pointed out that the capital defendant never sought expedited review of his claims. (RB p. 33.) What respondent does not say about *White* is that it did not even concern a speedy trial claim; instead, it concerned a defendant's claim that a 17-year delay between trial and execution violated the Eighth Amendment's cruel-and-unusual punishment prohibition. (*White* at pp. 438-439.)

At bottom, respondent completely misses the point here. Mr. McDowell asserted his speedy trial right at the first legitimate opportunity: when the state proceeded against him in the first (and then second) retrial. As the state's attorneys well know, there is no forum in which a capital defendant awaiting everything along the way in post-conviction litigation (appointment of counsel, rounds of breifing, oral argument, rulings by courts) can urge the action to be expedited. Exactly how Mr. McDowell could have asserted his right to speedy (re)trial -- when he had no right to assert that anything else that needed to occur *before* should be happening in a speedy fashion -- remains a mystery. Clearly respondent has erred by concluding that Mr. McDowell should have asserted a speedy trial claim at the same time he raised the instructional error claim.

(d) Prejudice to the defendant

As for "prejudice," respondent first reiterates that Mr. McDowell suffered nothing during the delay between trials, because he would have received LWOP if not the death penalty. (RB pp. 33-34.) Respondent then spends six pages trying to explain why there was no prejudice to Mr. McDowell's ability to defend himself in another penalty phase trial 15 years later. (RB pp. 34-39.)

Mr. McDowell set forth at length in his Opening Brief the exact testimony from the exact witnesses who would have testified in an earlier trial -- and who could not do so 15 years later because they were dead. This included his own

mother, whose 1984 live testimony was simply read aloud to the jury in 1999, and his brother Ronald who would have testified, among many other things, that he found Mr. McDowell trying to commit suicide when they were children. (AOB pp. 63-66.) There is really nothing more that can be argued rationally against an adversary who claims that the absence of one's own mother's live testimony in a penalty phase is no detriment. It is simply pointless to waste this Court's time reiterating everything that Mr. McDowell set forth clearly in his Opening Brief -- including the prosecutor's repeated closing argument urgings to the jurors to reach a (death) verdict because, "*It's too old* and needs to be resolved by the 12 of you" (43 RT 6249; emphasis added) -- and which respondent callously refuses to acknowledge as troublesome at all. As Mr. McDowell set forth in his Opening Brief and reiterates here, this factor of the *Barker* test also indicates that a speedy trial violation has occurred. (AOB pp. 62-69.)

C. Conclusion

The lengthy delay between the 1982 crimes and the 1984 trial, and the penalty phase retrials in 1999, violated Mr. McDowell's constitutional rights to be free from cruel and unusual punishment, and to speedy trial. This Court should vacate the death verdict, and instead order imposition of an LWOP sentence.[4]

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[4] Given respondent's Eighth Amendment argument "logic" that a sentence of LWOP is not qualitatively than a sentence of death, respondent should have no

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.

The trial court erred when it excused for cause two prospective jurors who consistently answered on their questionnaires and in voir dire that they could set aside their personal feelings against the death penalty and follow the law. (AOB pp. 70-102.) Respondent disagrees. (RB pp. 40-62.) As set forth below, respondent is wrong.

The law is clear. A prospective death penalty juror may only be excused for cause when he or she is "substantially impaired in his or her ability to impose the death penalty under the state-law framework." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9; see also *People v. Richardson* (2008) 43 Cal.4th 959, 986.) "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted him by the State." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.)

The record is equally clear. Prospective Jurors F6136 and R9529 expressly and consistently stated *that they could indeed follow the law*. Jurors who are capable of following the law regarding penalty are death-qualified, no matter what

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objection.

their personal beliefs about the death penalty. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [error to excuse for cause a prospective juror who was personally opposed to the death penalty, but who was "nonetheless[] capable of following [her] oath and the law"].)

Nevertheless, respondent urges this Court to uphold the for-cause excusals of these women by focusing on their personal beliefs, and upon their honestly-expressed difficulties in coming to terms with imposing such a judgment, concluding that these "conflicting" statements provide sufficient ground to uphold the trial court's rulings. (RB pp. 50-58.)

Respondent misses the point.

There is indeed a conflict here -- between the women's personal beliefs about capital punishment, and their responsibilities in following the law. But these women's questionnaire and voir dire answers clearly indicate that the women, aware of the conflict, believed and stated that that they could manage it within the law. This is *not* the kind of "conflict" that the cases recognize as supporting an excusal for-cause; rather, a conflict or ambiguity warranting excusal occurs where prospective jurors give conflicting answers to similarly-put questions. The problem here is that apparently neither the prosecutor, nor the trial court, nor respondent can fathom how anyone personally opposed to the death penalty is able

to compartmentalize those personal beliefs and follow the law.[5]

Happily, this Court's and the United States Supreme Court's holdings reflect a more confident, less blinkered, sense of humanity's capacity to differentiate and to follow the law. The cases reflect what is true: that it is indeed possible for humans to set aside their personal beliefs and follow the law -- and, in fact, that it is error to excuse prospective jurors for cause where this is the "conflict" that exists.

Lastly, respondent finds fault with Mr. McDowell's analysis of the entire context of voir dire -- the trial court's statements, the limitations on voir dire time and type, the trial court's refusals to grant defense excusals for cause -- by slicing the overall argument into tiny pieces of trial court rulings and circumstances, and arguing that none "establish that the trial court erred." (RB p. 58; RB pp. 58-62.) Once again, respondent misses the point.

As Mr. McDowell set forth in his Opening Brief, the United States Supreme Court has stated that review of "the entire voir dire is instructive" in evaluating a trial court's application of the *Witherspoon* and *Witt* principles. (*Uttecht v. Brown*, 551 U.S. at p. 2225.) Thus, while no particular ruling or statement may be in error, or maybe none of them in isolation necessarily demonstrates a problem, it is

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[5] Elsewhere in its brief, however, respondent argues that it was indeed possible *for the trial judge* to set aside his own personal beliefs about California's capital sentencing scheme (that it was unfair to the prosecution), and follow the law to make fair rulings in this case. (RB p. 136.)

difficult to view all of them cumulatively without concluding that the trial court's for-cause excusals during this voir dire process were in error.

In his Opening Brief, Mr. McDowell tracked precisely the factors that the United States Supreme considered in the *Brown* voir dire, and Mr. McDowell demonstrated that the trial court's rulings on those same factors here gave overall support to what should have been obvious: that the trial court erred in excusing these two women for cause. (AOB pp. 95-102.) To reiterate here in a nutshell: the voir dire process was too truncated to warrant deference to the trial court's rulings.

Moreover, the trial court's denial of the defense motion to excuse a prospective juror for cause -- who answered on her questionnaire that she would *always* vote for the death penalty if the murder was intentional, despite other evidence (6 CT 1692) -- is another circumstance indicating the trial court's error when granting the prosecution's motions to excuse other prospective jurors for cause.[6]

The record reflects that the trial court *granted* the prosecution's motions to excuse prospective jurors for cause *in four out of five motions.* And the trial court *denied* the defense's single motion to excuse a prospective juror for cause. Respondent relies on the single instance in which the trial court denied the state's

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[6] Respondent correctly notes an error in the Opening Brief. (RB p. 100.) It appears from the record that the defense made only one motion to excuse a pro-death prospective juror for cause. That motion was denied. (36 RT 5019-5020.)

motion to support its assertion that the trial court was "evenhanded[]" and in no way "wanted to stack the jury with pro-death-penalty jurors." (RB p. 61.) These statistics themselves suggest otherwise. And if there is any doubt at all about the "evenhandness," it should be resolved by the trial court's remarks after the trial's conclusion -- which, unfortunately, bear repeating here:

> 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 unanimously agreeing with the death penalty.

(44 RT 6453.) Thus, as set forth in Mr. McDowell's Opening Brief -- and as explicitly stated by the trial court itself -- there really is no surprise about the verdict. Which is precisely why it must be reversed.

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.

The trial court erred when it allowed the prosecution to elicit "victim impact" testimony about the rift in Paula Rodriguez's family. The subject matter of this evidence made it inadmissible in the first place, for it was too attenuated in time and logic to be relevant. In addition, its reliability was questionable.

Moreover, the timing of the prosecutor's questions -- in the middle of the family members' direct examinations in the penalty phase trial (after trial counsel had clearly requested a pretrial ruling if the prosecutor decided to go into this territory) deprived Mr. McDowell of the opportunity fully to litigate and defend himself regarding this evidence: before there was any chance the jurors might hear it. These errors were then magnified and compounded by the trial court's instruction to the jury that Ms. Rodriguez's family members were prohibited from giving their opinions about the punishment they felt Mr. McDowell deserved. These errors were prejudicial and therefore require reversal. (AOB pp. 102-123.)

Respondent disagrees with every portion of this argument. (RB pp. 62- 77.) As set forth below, respondent is wrong.

A. The errors in admission of "victim impact" evidence of the Rodriguez family's estrangement.

(1) The timing of admission

Respondent's inability or unwillingness to deal realistically with the record facts, and with the realities of what trial counsel faced before the jurors, make it hard to respond succinctly and meaningfully to respondent's argument. (RB pp. 72-75.) Instead, it makes it necessary for Mr. McDowell to set forth again what he already set forth clearly in the Opening Brief:

1) In the first retrial, Mr. McDowell specifically requested that if the prosecutor intended to introduce evidence of the Rodriguez family's estrangement,

Mr. McDowell should be allowed to litigate the matter and receive a ruling in advance of the testimony. (25 RT 3389.)

2) In the first retrial, the prosecutor did not discuss the estrangement during his opening statement (26 RT 3494-3512), nor did he introduce evidence of the estrangement during the family members' testimony. (28 RT 3935-3959; 28 RT 3933-3934; 28 RT 3930-3931.)

3) Before the second retrial began, the parties and the trial court agreed that, unless revisited, all motions and objections raised in the first retrial applied automatically in the second retrial. (36 RT 5209-5211.)

4) The victim impact issue was not revisited during *in limine* motions, and the prosecutor did not refer in his opening statement to the Rodriguez family's estrangement.

Trial counsel reasonably concluded based on these facts that the prosecutor was *not* going to ask Mr. Rodriguez about the estrangement. Indeed, trial counsel could reasonably believe that his objection to the evidence of estrangement, and request for chance to be heard before any such evidence was admitted, would be honored.

Respondent refuses to acknowledge any of this. Neither does respondent acknowledge how the prosecutor's sandbagging admission of this evidence in the middle of Mr. Rodriguez's direct examination denied Mr. McDowell sufficient notice of the state's intention to admit it, and consequently denied Mr. McDowell

the opportunity effectively to defend himself against it. (RB pp. 72-79.)

Indeed, according to respondent, Mr. McDowell was on notice that the prosecution would present the evidence in question because the parties discussed this subject matter during pretrial litigation for the first retrial. (RB p. 73.) No matter that the earlier discussion was about this evidence *not being admitted unless and until there was adequate litigation and ruling about its contours.*

Instead of reasonably relying on the foundation he laid during the first retrial, which he re-established before the second retrial when the trial court and parties agreed that motions and objections raised at the first retrial would apply during the second retrial; and instead of reasonably relying on the fact that the prosecutor did not introduce this evidence in the first retrial, nor mention it in the second retrial opening statement, Mr. McDowell was apparently supposed to ask, "You know that evidence I objected to in the first retrial and you didn't introduce, and I objected that you shouldn't be allowed to introduce without hearing before hand? Well, are you going to introduce it today?" Moreover, Mr. McDowell was apparently supposed to keep asking this question over and over again -- because, according to respondent's logic, what the prosecutor and trial court said on one day had no logical bearing on what the prosecutor and trial court were going to say on another.

Obviously, this is absurd. The orderly and efficient running of trials of course requires that trial courts and litigants be able to rely upon past statements,

objections and understandings *unless and until the parties revisit an issue.* To make such an abrupt about-face without giving the other side an opportunity adequately to contend with the change is the quintessence of sandbagging. And simply because a party was aware that evidence *existed* does not change those dynamics. The sandbagging lies in the sudden introduction of the evidence -- without providing the other side sufficient notice and time to engineer the most effective way to deal with it. Here, as the record itself indicates, Mr. McDowell would have appropriately litigated the reliability of this evidence out of the presence of the jurors, where the trial court could have ascertained the true nature of the family's rift without requiring Mr. McDowell to look to the jurors like a ghoul for probing the Rodriguez family members' pain and questioning their integrity.

Respondent also maintains the claim is meritless because Mr. McDowell could and should have requested a continuance to litigate the admissibility of this aggravation evidence. (RB pp. 74-75.) Once again, respondent simply misses the point that reviewing courts do not. As set forth in the Opening Brief, reviewing courts are absolutely clear that the volatile nature of victim impact evidence requires that rulings upon its admissibility must be judiciously-timed. (See AOB pp. 113-114 and cases cited therein.) The prosecutor's sandbagging absolutely deprived Mr. McDowell of the opportunity to litigate this volatile evidence in a non-volatile situation. Respondent's refusal to address the realities of what trial

counsel faced before the jury undermines respondent's argument.[7]

(2) The unreliability and attenuation of the evidence

The record reflects that a real question existed about what caused the family's estrangement. When the parties were discussing the nature of the rift during pretrial litigation in the first retrial (in response to the trial court's question why Maria didn't talk to her father), the prosecutor stated, "Because he told the mother to go work on the day she was killed." (25 RT 3383.) The prosecutor added, "If you believe that these crimes end . . .they don't," and then, "There's no logical explanation as to why she blames him." (*Ibid.*) Trial counsel responded 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.)

Respondent attempts to dismiss the truth -- that a question existed -- by calling trial counsel's statement "*theorized,*" (RB p. 71; emphasis added), while stating that the prosecutor "*specifically affirmed* to the trial court that he had proof that Maria was holding Jose responsible for Paula's death . . . ." (RB p. 72, citing

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[7] Respondent's inability or unwillingness to fathom this error is typified by its recharacterization of it: "Appellant's real complaint appears to be that the prosecutor engaged in some kind of misconduct by eliciting the family estrangement testimony in the second retrial." (RB p. 73.) Mr. McDowell is not raising a misconduct claim here. Mr. McDowell could not have been more clear in his Opening Brief claim's headings and argument: *the trial court erred* when it overruled Mr. McDowell's objection to admission of this evidence.

39 RT 5606.) Of course, respondent does not explain why what a prosecutor says "specifically affirm[s]" a fact, while what a defense attorney proffers is simply a theory. The fact is, the record reflects there was a question about what caused the rift, and the question went unanswered before the prosecutor's sandbagging questions and witnesses' answers made it look to the jury like the rift was a direct result of the murder.

Respondent faults Mr. McDowell for failing to request a continuance to dispute the validity of the evidence, and for failing to cross-examine the Rodriguez family members about the nature of the rift. Once again, respondent misses the point. As set forth at length above, Mr. McDowell made these requests *prior to the beginning of the trial*, at the time that was most effective and appropriate. That there was no hearing at that time, *because the prosecutor either did not know, or refused to admit, that he was going to introduce the evidence,* is not Mr. McDowell's fault or responsibility. (See RB p. 74 [arguing that where the defendant fails to request a continuance, any delay in notifying the defense of evidence in aggravation is harmless].)

In addition to depriving Mr. McDowell of the opportunity to litigate the reliability of this evidence pretrial (and thus, if he prevailed, to preclude its admission), admission of this evidence was in error because it was inappropriate victim impact testimony. As Mr. McDowell argued in the Opening Brief, the murder had occurred 20 years before, and there were many events that had

transpired over the years that contributed to the family's estrangement.

Relying on this Court's cases upholding admission of victim impact evidence stretching over roughly the same time periods, and related to family estrangements, respondent claims there is no error. (RB pp. 70-71, citing *People v. Hamilton* (2009) 45 Cal.4th 863, 923-924, 926-927; *People v. Brown* (2004) 33 Cal.4th 382, 397-398; *People v. Boyette* (2002) 29 Cal.4th 381, 441.) For all the reasons set forth in his Opening Brief, Mr. McDowell respectfully requests that this Court revisit the issue of how attenuated in time and logic from a crime "victim impact" evidence can actually be, and still be admissible. (AOB pp. 110-112.) However, if this Court declines to do so, then it is even more obvious that Mr. McDowell should have been given sufficient opportunity to litigate this issue before the jury heard from Mr. Rodriguez about his estrangement from his daughter.

B. The errors in the trial court's instruction to the jury.

As all the cases that Mr. McDowell set forth in his Opening Brief reflect, instruction from a trial court is critical. (AOB pp. 117-121.) Simply put, if the jurors are doing their jobs, *what a trial court says to them is important.* That is why this Court properly acknowledges, for instance, that a trial 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.) And when a trial court

says something to jurors about specific evidence, while not commenting on any other evidence, the evidence commented on will register in their human brains as especially significant. Therefore, the trial court committed prejudicial error when it instructed the jurors at the end of the Rodriguez family's testimony that the Rodriguezes were not allowed to offer their opinions about what punishment they hoped Mr. McDowell received.

The realities of human nature are lost on respondent -- who simply concludes that because the trial court's instruction correctly reflected the law, there is no problem here. (RB pp. 75-77.) Respondent cannot or will not fathom that it is *the simple fact of the trial court explaining this point of law to the jurors* that there is the problem.

Just as jurors are instructed in all cases, the jurors here were instructed that they were not to speculate about evidence that was excluded, or about why some objections were sustained and others overruled. (43 RT 6379-6380.) That instruction was crafted, and is given in all cases, with good reason: because of the human tendency to wonder about just such things and to make up reasons why things occurred, and because of our jurisprudential recognition that it is detrimental for jurors to do so. Relatedly, trial courts do not take it upon themselves to instruct jurors *sua sponte* why certain types of evidence -- for example hearsay, irrelevant, speculative, unduly prejudicial, etc. -- are being excluded. Our jurisprudence recognizes that the rules of admissibility, and the

litigation of admissibility, are subjects for attorneys and courts to hash out, and not proper subjects for lay people to deal with.

Yet here, over defense objection, the trial court specifically instructed *that this kind of evidence was inadmissible*. (39 RT 5610-5611.) Especially in light of the fact that not *all* of the evidence admitted and excluded received such attention from the trial court, it is difficult to imagine how this could *not* have stood out to the jurors. It is akin to the Wizard of Oz telling Dorothy and her companions, "Pay no attention to the man behind the curtain." Of course they immediately looked behind the curtain.

Respondent also faults Mr. McDowell for what it calls "speculation" about how the jurors would interpret the trial court's instruction. (RB pp. 76, 77.) But of course, that is what appellate review requires -- not only from parties making their assertions, but from reviewing courts evaluating them. We are all prohibited from entering the domain of the jury's deliberation process. Thus, there is no other way to come to conclusions about the effect of errors -- other than through "speculation." Therefore, this Court should not be swayed by respondent's argument that Mr. McDowell's conclusion should be rejected as "speculation."

C. The prejudice from the errors

Respondent's entire prejudice "argument" regarding this claim (that introduction of, and instruction about, the improper victim impact evidence in this case was prejudicial error under the state and federal consitutions) is one sentence

long: "Under these circumstances, the trial court's instruction could not have been prejudicial error." (RB p. 77.) These "circumstances" were that the jury was instructed at the end of the case as to the factors it could consider in determining punishment. (*Ibid.*)

Respondent is apparently unconcerned about addressing the prejudice from these combined errors. Respondent has completely failed to address the potential prejudice from the victim impact testimony itself. And because respondent's one-sentence conclusion about the jury instruction's potential prejudice fails to contend with anything that Mr. McDowell set forth in his Opening Brief about the prejudice from these errors (see AOB pp. 121-123), Mr. McDowell will not waste this Court's time by reiterating it verbatim here.

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

In the first retrial, Mr. McDowell presented in mitigation the expert social historian testimony of Dr. Arlene Andrews -- a University of South Carolina professor with 25 years experience working in areas related to child abuse, neglect and domestic violence, who testified about Mr. McDowell's horrific family history and its necessary ramifications in Mr. McDowell's development. (31 RT 4361-4389, 4410-4417, 4423-4435.) In the second retrial, the trial court granted the prosecution's motion to exclude this absolutely critical evidence. (39 RT 5641,

5660, 5664.) This error violated Mr. McDowell's state and federal constitutional rights, and prejudiced the outcome of the case. (AOB pp. 124-154.)

Respondent argues that there was no error. (RB pp. 78-94) According to respondent, the subject matter of Dr. Andrews' testimony, which respondent characterizes as "the proposition that a person's upbringing could affect his later life," (RB p. 89), was not so far beyond common experience to require expert testimony. (RB pp. 88-93.) Respondent also argues the testimony was inadmissible because it was either cumulative of other witnesses', or amounted to a recitation of inadmissible hearsay. (RB pp. 93-94.) Alternatively, respondent contends that any error was harmless. (RB pp. 95-98.) As set forth below, respondent is wrong.

A. The exclusion of Dr. Andrews' testimony was error.

(1) This was the proper subject of expert testimony.

(a) Respondent's oversimplification of Dr. Andrews' "conclusion"

Respondent argues first that Dr. Andrews' testimony was not about a subject matter that warranted expert testimony, because, "Andrews conceded that her ultimate conclusion was that a person's bad childhood could affect him as an adult. (31 RT 4430.)" (RB p. 89.) Respondent characterizes Dr. Andrews' conclusion as standing only for "the proposition that a person's upbringing could affect his later life," which respondent argues, "is clearly not so far beyond the

common experience that expert testimony was required." (RB p. 89.) As set forth below, respondent is wrong.

In the first place, respondent's characterization of what Dr. Andrews "meant" by this statement is a vast oversimplification. In the second place, by oversimplifying Dr. Andrews' conclusion and by limiting the argument to its own oversimplification, respondent ignores all of the other expert opinions that Dr. Andrews gave in her first retrial testimony. These were set forth by trial counsel in his argument on the motion, and set forth again in Mr. McDowell's Opening Brief. (See 39 RT 5645-5654; AOB pp. 127-129.) Apparently, it is necessary to take this Court's time and summarize them here again:

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.) The child has a distorted view of how men and women relate to each other, and learns that violence is the way to deal with disagreement. (*Ibid.*) Also, "a level of terror . . . develops" when kids are beaten and exposed to violence between parents, fearing that a parent might be hurt in some way or will leave, which "induces a number of fairly severe emotional problems in children." (*Ibid.*) It is also common for parents in battering relationships to overlook or ignore their children's developmental and emotional needs. (31 RT 4183.) As for animal abuse Mr. McDowell witnessed, it "creates an aura of terror about what could happen and does have a definite social impact in terms of fear, of the power of the father,

particularly when it involves the death of animals." (31 RT 4387.)

Dr. Andrews noted several remarkable factors in Mr. McDowell's upbringing. One of the most significant was the complete lack of any form of social support for him. (31 RT 4413.) Though many people observed what was happening and were concerned about it, none of them expressed it to him or acted protectively in his behalf. (31 RT 4413.) Neither did the siblings form a protective support group. Indeed, Dr. Andrews had never seen a family where 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 school. (31 RT 4414-4415.)

The abuse in Mr. McDowell's family was constant, described by family members as daily and without consistent cause. (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 of abuse happened around food and meals, which was detrimental to social development because of its warped relationship to nourishment. (31 RT 4385.) Charles, Sr., never hesitated to hit his children in front of others. (31 RT 4415.)

Abuse and neglect in all its forms "at a very severe level" was present, on a "very chronic, repeated basis throughout [Mr. McDowell's] life . . . ." (31 RT 4415.) Dr. Andrews described him as a "loner" who had "formed some very minimal adaptive coping habits, one which was a very chronic use of alcohol and

other drugs." (31 RT 4415.)

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 form consistent relationships and, even though he learned carpentry, he could never keep a job for very long. (31 RT 4417.)

What should be clear from all of this recitation is this: what Dr. Andrews would have testified in the second retrial -- as she did in the first -- was *not* within the common knowledge of the lay people on the jury. Tellingly, respondent ignores all of it.

(b) Respondent's failure to distinguish *Smith*

In his Opening Brief, Mr. McDowell compared Dr. Andrews' testimony to the expert testimony in *People v. Smith* (2005) 35 Cal.4th 334. In *Smith*, this Court held that *the state* in its aggravation case was allowed to present expert testimony about children's reactions to sadistic molestation (over defense objection that this was not sufficiently beyond common experience that expert assistance is required), because:

> 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.

(*Smith* at p. 363; emphasis added.)

Just so, *there was no way anyone on the jury could have imagined what Mr. McDowell's childhood was like, and how it would affect his development.* As Dr. Andrews would have testified, his childhood was *the worst she had ever seen.* Without Dr. Andrews' testimony, the jurors had no context in which to evaluate Mr. McDowell's childhood. Dr. Andrews would have given the jurors the benefit of her expertise and experience, explaining why the violence and abuse Mr. McDowell suffered was so damaging. The effects of such mistreatment are *not* among the common understandings of lay people. One simple, obvious example is Mr. McDowell's substance abuse. Dr. Andrews explained was a very typical minimally-adaptive coping habit among people who were abused as children, who use substances as a way of contending with massive anxiety and trauma. (31 RT 4416.) Instead, the more typical "common knowledge" belief about substance abuse is that it is a matter of weakness of character or selfish and lazy decision-making by individuals exercising free will.

The only way respondent can contend with what should be obvious from *Smith* -- i.e., that this *exactly* the sort of subject for which expert testimony was necessary -- is by trying to distinguish the facts. Respondent does so, but the effort fails.

Respondent argues that because it was a *psychologist* who testified in *Smith* about what children feel during sadistic molestations, that was different -- because, according to respondent, Dr. Andrews was only a "social worker." (RB p. 90.) Thus, according to respondent, none of the principles of *Smith* should apply to the similar facts of this case: where the jurors really had no idea what a childhood like Mr. McDowell's entailed, how it compared to the childhoods of others,' nor what its likely ramifications would be.[8]

(2) Respondent mistakenly relies upon Watson.

Respondent moves directly from its rejection of *Smith's* obvious principles to an assertion that, instead, this case is just like *People v. Watson* (2008) 43 Cal.4th 652, where this Court upheld a trial court's exclusion of penalty phase investigator's testimony "synthesizing" the defendant's background. Respondent

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[8] Later in its argument, respondent briefly attempts to distinguish *Smith* by arguing it is different because *"The jurors in that case, having never been sadistically molested as children, would simply not have known much about a child's thought processes during such an experience."* (RB p. 91; emphasis added.) That is *exactly* the case here: the jurors would not have known what Mr. McDowell experienced growing up as a child in this utterly sadistic household. Mr. McDowell should have been allowed to present this mitigation evidence to his jurors -- especially in light of the fact that it was *the state* that was allowed to present *the experience of victims* in *Smith*. There is no Constitutional requirement guaranteeing that a jury hear such evidence in aggravation.

Moreover, respondent mischaracterizes Dr. Andrews credentials. She has a Ph.D. in psychology (31 RT 4362), but did not offer an expert opinion regarding Mr. McDowell's mental health. Rather, she used her expertise to interpret Mr. McDowell's social history for the jury.

contends *Watson* supports the trial court's exclusion of Dr. Andrews. Respondent is wrong.

What was at issue in *Watson* was *not* the relevancy of the expert's testimony, nor whether it was the proper subject matter for expert testimony. What was at issue in this Court's affirmance of the trial court's exclusion in *Watson* was *the competency of the expert.*

In *Watson*, the defense proffered expert testimony by a criminologist penalty phase investigator who had no psychological training, let alone a degree. This Court upheld the exclusion in *Watson* because the criminologist did not have sufficient training and background to offer opinions about future prison adjustment or about the effects of the defendant's background on his future life. (*Id.* at pp. 692-693.)[9] Significant to this Court's affirmance of that ruling was the fact that the criminologist was not a psychologist, and therefore was not competent to testify as an expert in such matters. (*Id.* at p. 693.)

The obvious problem with respondent's argument is that Dr. Andrews *was eminently qualified to testify as an expert on exactly this subject matter.* Dr. Andrews *has a Ph.D. in psychology.* She had 25 years experience working in areas related to child abuse, neglect and domestic violence. She was a professor of social work at the University of South Carolina -- the very spot in the country

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[9] This Court alternatively held that any error in excluding the criminologist's testimony was harmless because his testimony would largely have been cumulative of other witnesses'. (*Id.* at p. 693.)

where Mr. McDowell was raised, and in whose culture she was thus immersed in her work. (31 RT 4362.) She was offered as a social historian.

In short, Dr. Andrews' competency was never at issue. Indeed, not even the prosecutor or the trial court (both of whose animosity toward this professional woman verged on complete disrespect) asserted that Dr. Andrews lacked competency to testify as an expert on these matters.

Respondent attempts to get around this by arguing that Dr. Andrews essentially de-competenced herself: "Because Andrews expressly admitted she was not testifying *as a psychologist*, she, like the criminologist in *Watson*, was not qualified to offer an expert opinion on the psychological impact of appellant's upbringing on his adult character." (RB p. 91; emphasis added.)

Respondent is either being disingenuous, or just doesn't get it.

In the first place, social history mitigation evidence is admissible, relevant character evidence about the defendant -- not about the defendant's mental state at the time of the crime. As counsel for Mr. McDowell made clear throughout, Mr. McDowell was *not* introducing expert testimony from mental health professionals about Mr. McDowell's mental state. This did not, however, preclude the defense from offering relevant social history mitigation evidence about the straits Mr. McDowell faced as he was growing up, nor did it preclude him from offering expert testimony about the aspects of this childhood that were beyond the common knowledge of lay people. Simply because Dr. Andrews expressly testified she was

not going to be testifying as a psychologist in regards to Mr. McDowell's mental state, did not "disqualify" her by eliminating her credentials (and therefore competency) to testify as an expert regarding social history mitigation evidence.

Indeed, *Watson* logically supports Mr. McDowell's claim that the trial court erred by excluding Dr. Andrews' testimony. This Court held that the criminologist in *Watson* was not qualified to testify as an expert about the defendant's background -- to the very same extent the Dr. Andrews did in the first retrial, by reviewing records and interviewing significant family members and friends -- *because he was not a psychologist.* (*Watson* at p. 692.) This Court did *not* hold that such was improper subject matter for expert testimony. And it is not. As set forth at length in the Opening Brief, it is clearly the proper subject matter of expert testimony , and Dr. Andrews was eminently qualified to testify about it as an expert witness.

Just so, the Mississippi Supreme Court in *Fulgham v. State* (Miss. 2010) 46 So.3d 315, reversed a death penalty verdict for erroneous exclusion of expert social historian testimony -- where the expert was a licensed certified social worker, not even a Ph.D. (*Id.* at pp. 334-337.) The *Fulgham* court recognized that the social worker's testimony was critical to the defendant's mitigation case, because it:

> would have provided the jury with additional observations and a cohesive overview of the mitigation evidence presented

> by three other witnesses. Her expert testimony would have focused on Fulgham's social history and the social context of the crime.

(*Id.* at p. 336.) The court found the expert's testimony "especially relevant" because of the background materials and witnesses she had interviewed. (*Ibid.*) That is just the sort of social historian expert testimony Dr. Andrews (who had the additional qualifications of a Ph.D.) would have provided. The *Fulgham* court properly recognized that because "[i]n the sentencing phase of a capital murder trial, the stakes are life and death," defendants are permitted "to introduce virtually any relevant and reliable evidence touching upon the defendant's character and background," and that it was thus reversible error to exclude social historian expert testimony. (*Ibid.*)

Of course (and as set forth at length in the Opening Brief), the *Fulgham* court's recognition of the importance of social historian expert testimony to capital penalty phase mitigation cases stems from United States Supreme Court precedent. The Eighth and Fourteenth Amendments 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.) Suffering deprivation or mistreatment as a child is mitigating. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (*Penry I*). Expert testimony is critical because

of experts' 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." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 80-81.) The High Court reverses death penalty verdicts where trial attorneys have failed to present relevant social history testimony. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 521-524 [defense attorney prejudicially ineffective for, *inter alia*, failing to follow prevailing 1989 norms by retaining a forensic social worker to conduct further investigation of relevant social history documents].) The lower courts are in agreement. (See, e.g., *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163 [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"].)

(3) Dr. Andrews' testimony should not have been excluded as hearsay or as cumulative.

Respondent contends that the trial court's decision to exclude Dr. Andrews

testimony completely was sound, because, as the trial court stated, it was mostly cumulative and hearsay. (RB pp. 93-94.) Respondent is wrong in both regards.

Indeed, the very case cited by respondent regarding hearsay makes this clear. In *People v. Dean* (2009) 174 Cal.App.4th 186, the Court of Appeal reiterated this Court's principles regarding expert testimony and hearsay:

> [A]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably ... be relied upon" for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, " 'under the guise of reasons,' " the expert's detailed explanation " '[brings] before the jury *incompetent hearsay evidence.*' " ' " (*People v. Catlin* (2001) 26 Cal.4th 81, 137; italics added.)

(*Dean* at p. 202.) And then the *Dean* court concluded:

> Here, other than some testimony as to the ASH and other institutional records, the facts testified to by the experts did not bring before the jury incompetent hearsay evidence. The facts testified to were admitted into evidence from other sources. Because of this, the plaintiff's experts were not precluded from reiterating the same facts during their direct examination.

(*Ibid.*)

Respondent's problem here is clear. Respondent (and the trial court) maintained that Dr. Andrews' testimony was inadmissible because it was

alternately hearsay, or was cumulative of other testimony. But as *Dean*, and this Court in *Catlin,* make clear, an expert *is* allowed to testify regarding hearsay when it forms the basis for her opinion, as long as there is no wholesale attempt to put matters before the jury that are simply hearsay with no corroboration.

In this case, Dr. Andrews testimony *was corroborated* by the testimony of other family members -- which respondent and the trial court deem unacceptable as "cumulative." To the extent that Dr. Andrews would have testified to any other other hearsay statements not corroborated by other witnesses (e.g., the items contained in Shirley and Ronald's declarations) that fault cannot lie at the feet of Mr. McDowell. He sought to introduce those declarations, but the trial court denied the motions. (See Argument 5, *infra.*) The point is, the evidence existed, and as Mr. McDowell asserts, was admissible, and therefore there can be no claims that Dr. Andrews' testimony would have included "incompetent hearsay."[10],[11]

As for the "cumulative" portion of respondent's argument, it is not

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[10] Moreover, as trial counsel argued, and as set forth in the Opening Brief, that the trial court excluded Dr. Andrews' testimony *in its entirety* on the ground that it contained inadmissible hearsay, is stunning. As set forth above and in the Opening Brief, Mr. McDowell does not concede that Dr. Andrews' testimony would have contained any "incompetent hearsay." But were that not the case, the appropriate remedy would have been to exclude specific portions of Dr. Andrews' testimony, and/or to give jury instruction -- *not* to exclude Dr. Andrews completely as a mitigation expert witness.

[11] Additionally, the court in *Fulgham v. State*, *supra*, recognized that just such hearsay objections were baseless in a nearly identical case. (*Fulgham*, 46 So.315, 335.)

surprising that respondent has completely ignored Mr. McDowell's central point regarding the nature and character of expert testimony. (AOB pp. 137-138.) 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, can explain it to jurors, and can put it into context that includes comparisons.

Additionally, even when lay witnesses and experts end up testifying about the same facts, the objectivity of an expert -- versus the inherent bias of family and friends -- renders the "cumulative" label completely inapt. As members of Mr. McDowell's family, the lay witnesses all were subject to jurors' reasonable beliefs that their mitigation testimony could be viewed as biased. (See, e.g., CALJIC No. 2.20: 11 CT 3010-3011; 43 RT 6384-6386.)[12] Of course, expert witnesses do not fall into the same related (and therefore, biased) category as family members.

B. The error was prejudicial.

Respondent asserts that even if the trial court erred by excluding Dr.

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[12] Indeed, given the trial court's repeated assertions that the declarations of Shirley and Ronald McDowell were unreliable because they were from family members hoping to get Mr. McDowell's death sentence set aside, (see Argument 5, *infra)* it requires no stretch to imagine what lay people on a jury might conclude about family member testimony.

Andrews' testimony, any error was harmless. (RB pp. 95-98.) That is because, according to respondent, "There is no reasonable possibility that Andrews's testimony would have affected the jury's verdict." (RB p. 95.)

In fact, there is much more than a reasonable possibility that Dr. Andrews' testimony would have affected the jury's verdict. And this is not based on speculation. It is based on what actually occurred: the jury that did hear Dr. Andrews' testimony hung.

That is of no moment to respondent, who states that this fact in and of itself does not establish prejudice, and chides Mr. McDowell for emphasizing it. Instead, respondent urges this Court to rely on the record-stated conclusions of the trial court itself, which respondent describes as "an impartial observer of both retrials." (RB p. 97.) The trial court told the parties after the trial was over that the prosecutor made a "more impassioned" presentation of the evidence in the second retrial, while Dr. Andrews' testimony in the first retrial did not have "a lot of impact." (RB p. 97, citing 44 RT 6453 and 31 RT 4399).

As Mr. McDowell set forth throughout his Opening Brief, nearly every claim unfortunately includes statements on the record that indicate the trial court's animosity toward the defense, and the trial court's perception that California's death penalty scheme is unfair to the prosecution. This Court therefore should not rely upon the trial court's statements about the prosecutor's personal performance when it determines prejudice from trial court error. Nor should it rely on the trial

court's statement that Dr. Andrews' testimony did not make an impact in the first retrial. [13]

Respondent also argues that the verdict was not affected by exclusion of Dr. Andrews' testimony because the jurors in this second retrial heard enough of this kind of evidence from lay witnesses (RB p. 95), and that defense counsel made a really good closing argument about how his childhood affected his later life (RB p. 96)

Of course, respondent ignores that argument of counsel is not evidence. And argument of counsel certainly cannot substitute for evidence *from an expert witness*. Respondent also ignores the portion of Mr. McDowell's claim that sets forth the uniform and consistent case law recognizing the importance of expert testimony (AOB pp. 146-149), and the prejudice that occurs from its improper exclusion. (AOB p. 152.) Thus, for the sake of argument, even if there were testimony from "enough" lay witnesses who testified to these facts, there was still prejudice from exclusion of the expert witness who would have explained the import and context of these facts to the jury. Indeed, *Fulgham v. State*, *supra*,

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[13] Moreover, the trial court's assessment that Dr. Andrews' testimony did not "have a lot of impact" in the first retrial seems quite opposed to the reason the trial court gave for excluding this very testimony from the second retrial: that the subject was not proper for an expert, that it was cumulative of other lay witnesses' testimony, and that it consisted of too much hearsay. In other words, all of the trial court's reasons for excluding Dr. Andrews' testimony center on its risk of having *too much* effect -- the gravitas of an expert; repetitious; and based on statements not subject to cross-examination.

reversed a penalty verdict because exclusion of the expert social historian was prejudicial, precisely because of what that expert would have added to the mitigation case: "the proposed testimony would have provided the jury with additional observations and a *cohesive overview of the mitigation evidence* presented by" the other mitigation witnesses. (*Fulgham* at 46 So.3d 315, 336.) In other words, the reviewing court properly recognizes *the prejudice inherent in excluding this very kind of expert testimony* -- for exactly the same reason that respondent urges this Court not even to find error from its exclusion: because it was necessary to explain, corroborate, and contextualize lay witness testimony.

Lastly, respondent concludes that trial counsel's closing argument combined with the heinous nature of these crimes and prior bad acts left "no reasonable possibility that Andrews's testimony would have affected the jury's sentencing determination in this case." (RB p. 98.) Once again, Mr. McDowell points out that there is indeed more than a reasonable possibility: *an actual jury that actually heard Dr. Andrews' actual testimony actually did not sentence Mr. McDowell to death.* And because this Court cannot reasonably conclude other than exclusion of Dr. Andrews testimony affected the verdict, reversal is required.

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

Mr. McDowell's mitigation case was further gutted by the trial court's

denial of his motion to introduce the declarations of his mother Shirley and his brother Ronald, both of whom had died since the 1984 trial. The trial court also refused to allow Mr. McDowell's aunt Roberta to testify that Mr. McDowell's father, Charles, Sr. beat their own father. This mitigation evidence was relevant to portraying for the jury the daily mental and physical abuse suffered in the McDowell household. Especially in light of the exclusion *in toto* of Dr. Arlene Andrews' social history testimony, exclusion of this mitigation evidence prejudiced the penalty phase outcome. (AOB pp. 155-174.)

Respondent argues that there was no error. (RB pp. 99-117.) As for the declarations, respondent maintains they were properly excluded because they were unreliable, "not highly relevant" (RB p. 104), and cumulative of other testimony. (RB pp. 104-112.) As for Roberta's testimony about Charles, Sr.'s violence toward their father, respondent maintains it was properly excluded because it was irrelevant unless Mr. McDowell witnessed it. (RB pp. 112-116.) As for the possibility of prejudice existing if there was error, respondent dismisses it in two paragraphs. (RB pp. 116-117.)[14] As set forth below, respondent is wrong.

A. Exclusion of the declarations was error.

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[14] Respondent's first assertion in its prejudice section is that "even if the trial court abused its discretion in excluding *Andrews'* testimony, the error was harmless." (RB p. 116; emphasis added.) Mr. McDowell assumes that respondent means to argue that any error in excluding the evidence in this argument -- the declarations, and Roberta's testimony -- was harmless.

Respondent argues that the hearsay declarations were properly excluded from this penalty phase because they did not meet the test set forth in *Green v. Georgia* (1979) 442 U.S. 95, 97 and cited by this Court in *People v. Kaurish* (1990) 52 Cal.3d 648, 704: the hearsay evidence must be highly relevant to a critical issue in the punishment phase, must not be cumulative of other evidence, and must bear substantial indices of reliability. (RB p. 103.) Respondent argues that these declarations were not highly relevant, and were not reliable, and were cumulative of other testimony. (RB pp. 104-112.) Respondent is wrong.

(1) The declarations were highly relevant, and not cumulative of other evidence.

Respondent contends that the declarations were "not highly relevant to a critical issue in the penalty phase of appellant's trial because they were cumulative to other evidence of appellant's violent and dysfunctional upbringing." (RB p. 104.) In other words, respondent cannot really be maintaining that the declarations were not highly relevant -- otherwise, they could not be called simply "cumulative" to other admitted evidence that must have been relevant. Instead, respondent's contention must simply be that the declarations were cumulative of other mitigation evidence admitted.

Respondent relies upon this Court's decisions in *People v. Smithey* (1999) 20 Cal.4th 936 and *People v. Loker* (2008) 44 Cal.4th 691 to support its argument:

because Mr. McDowell presented much mitigation evidence about his horrific upbringing, anything else he sought to introduce would have simply been cumulative. These cases do not help respondent's argument.

In *Smithey*, there was ample evidence admitted to showed precisely the same circumstance the defendant tried to address again with more evidence: that his lack of mental health treatment was his parole officer's fault. (*Smithey*, 20 Cal.4th at pp. 996-997.) Similarly, in *Loker*, evidence that one of the defendant's cousins had drawn a gun on police officer was cumulative of other evidence that the children from the trailer park in which the defendant grew up had committed crimes. (*Loker*, 44 Cal.4th at pp. 729-730.)

Clearly, these are much different circumstances than Mr. McDowell faced in the exclusion of his mother's and his uncle's declarations. As set forth at length in the Opening Brief, their declarations contained many critical mitigation facts that *no one else* testified to. This included the stunning fact that when Ronald was five or six years old, he found seven- or eight-year-old 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, the man's response was to beat his own sons. And Ronald reported that Charles., Sr. shot the family dog while making Ronald hold the leash. (6 CT 1627-1630.) Shirley's declaration included, among other things, evidence of: prenatal beatings, Mr. McDowell's

premature birth and Shirley's inability to care for him, Mr. McDowell's sexual abuse by Shirley's own brothers, and history of Mr. McDowell's behavior in elementary school -- where he was hyperactive, mistreated by teachers, and where Charles, Sr. berated the one teacher who tried to help Mr. McDowell. (11 CT 2968-2974.)

Thus, unlike the evidence at issue in *Smithey*, these were not facts that had been admitted via the testimony of any other witnesses. Moreover, unlike the evidence at issue in *Loker*, these were not facts only tangentially supporting one of the mitigation case's sub-themes.

This was not evidence of a cousin pulling a gun to illustrate the general lawlessness of children in the trailer park where the defendant grew up.

This was evidence that the one and only authority figure who ever tried to help Mr. McDowell as a child was absolutely thwarted by Mr. McDowell's own father. This was evidence that Mr. McDowell's mother knew that her own brothers were molesting her son. This was evidence that Mr. McDowell's father murdered the family dog and made his son an accomplice. This was evidence that Mr. McDowell tried to hang himself when he was no more than a third-grade boy.

Respondent's point is that, because "enough" mitigation evidence about Mr. McDowell's childhood was admitted, the declarations were merely "cumulative" of family background topics overall, and therefore were inadmissible. (See RB pp. 105-107.) Respondent stubbornly refuses to accept what is true: that the facts in

these declarations were critical -- no matter whether, and how much, other evidence of Mr. McDowell's childhood traumas were admitted. These facts that were excluded painted an even more painful, horrifying picture of what exactly Mr. McDowell experienced as a child. It comes as no surprise that the jury that heard this evidence -- in the first retrial, through the testimony of Dr. Arlene Andrews -- hung. These are appalling facts. Just the evidence that a seven- or eight-year- old child would try to hang himself is something Mr. McDowell's penalty phase jury should have been allowed to hear. It cannot be true, as respondent callously and illogically asserts, that "evidence of appellant's suicide attempt *was merely tangential* to the defense evidence relating to the physical and mental abuse appellant suffered as a child." (RB p. 108; emphasis added.)

Respondent also maintains that the trial court was correct in excluding evidence as "cumulative" when only one other witness had testified to the same fact. (RB pp. 108-109.) For all the reasons already set forth in his Opening Brief, Mr. McDowell reiterates that this ruling was error. (AOB pp. 167-170.) Most tellingly, respondent has failed to address the fact that *the State was repeatedly allowed to present "cumulative" testimony.* Facts about the attack of Theodore Sum were admitted through the "cumulative" testimony of Delores Sum and Theodore Sum's 1984 trial testimony. Facts about the attack of Paula Rodriguez were admitted through the "cumulative" testimony of Detective Petroski, Officer Glenn Plahy, and Officer Mike Perez. Facts about the prior unadjudicated acts

against Patricia Rumpler were admitted through the "cumulative" testimony of Ms. Rumpler and her son Paul. The state had no higher burden of proof in this penalty trial than Mr. McDowell. Yet it was allowed to present repeated "cumulative" testimony about the incidents it portrayed as aggravating evidence, while the trial court used this "cumulative" reason to reject admission of these two declarations in Mr. McDowell's mitigation case. Clearly the trial court's exclusion of these declarations on "cumulative" grounds was error.

(2) The declarations were reliable.

Respondent takes up the trial court's troubling refrain and conclusion: the declarations were unreliable (and thus inadmissible) because "they were prepared with the distinct purpose of convincing a court to grant appellant's petition for writ of habeas corpus, overturn his death sentence, and award him a new trial." (RB p. 109, citing 39 RT 5638-5641, 40 RT 5677-5679, 40 RT 5682-5683, 42 RT 6181-6183.)

In other words, according to the trial court and respondent, what Mr. McDowell's mother and brother declared under penalty of perjury were apparently lies.

And this is a conclusion that respondent urges this Court to accept *despite the fact that it was not alleged by any of the state's attorneys during federal habeas litigation, and despite the fact that there is not one shred of evidence*

anywhere in the record to support it.[15]

Indeed, what the record unfortunately does reflect is the trial court's irrational hostility toward these declarations. Over and over again, the trial court exhibited complete disdain for these documents and the circumstances under which they were prepared. (See, e.g., 39 RT 5638-5641, 40 RT 5677-5679, 40 RT 5682-5683, 42 RT 6181-6183.) For instance, the trial court stated that Ronald's declaration was "highly susceptible to exaggeration and outright fabrication," because it was given under the motivation to obtain a reversal of Mr. McDowell's death sentence. (39 RT 5640.) The trial court later stated that Ronald's declaration was unreliable because it had been prepared by an attorney under circumstances that lacked trustworthiness -- i.e., in furtherance of federal habeas corpus litigation. (42 RT 6182-6183.) On yet another occasion, the trial court stated the same thing about Shirley's declaration -- that it, too, was suspect, because it was prepared with the intent to secure a new trial. (40 RT 5677-5679.) The trial court got even more specific: Shirley's declaration was unreliable because it "was set up by an attorney with a specific goal in mind." (40 RT 5683.)

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[15] Indeed -- and as respondent itself argues immediately before making this assertion -- the kinds of facts about Mr. McDowell's childhood that the declarations set forth are corroborated by what other family members testified about living in the McDowell household. In other words, what respondent argues *elsewhere* is that the declarations so resemble that testimony that they are "cumulative" of it and therefore were properly excluded . . . while what respondent conveniently argues here is that this Court should uphold the trial court's ruling that the declarations were unreliable, i.e., outlandish or untruthful.

In the first place: attorneys -- for the defense, and for the prosecution -- prepare declarations all the time. There is nothing unseemly or dishonest or nefarious about this practice. It is simply a reflection of the very human fact that most witnesses will not sit down at their desks and write a document chronicling whatever it is that the litigation concerns. For instance, most individuals do not feel they have the time, or the inclination, or the writing skills to prepare what they see as a "legal document." In civil and in criminal matters, and on both sides of the table, preparing declarations is part of an attorney's job.

In the second place: the trial court's statements unfortunately admit to virtually no other interpretation than that the trial court believed federal habeas counsel and Mr. McDowell's witnesses lied in order to get him off, and that involvement in federal habeas litigation was itself a suspect activity -- because the motivation was to obtain reversal of Mr. McDowell's death sentence, which apparently was a *really* suspect activity.

Nowhere does the record evince any awareness by the trial court, or respondent, about the inherent prejudice reflected in these statements: that there is something automatically, necessarily suspect in what *the defense* prepares and submits in support of litigation. In other words, the underlying assumption here is that, in an effort to win, the defense will probably lie. There is no other way to interpret the trial court's statements, reasserted now by respondent, as grounds for upholding exclusion of these declarations. The trial court expressly stated that the

declarations were untrustworthy simply because they were prepared and submitted in support of the defendant, in his post-conviction litigation to have his conviction reversed.

There is no other way to interpret these statements because there is absolutely no evidence in the record that the declarations were, in fact, suspect. To the contrary, not even the state's attorneys during federal litigation asserted anything like this.[16] And the kinds of facts included in the declarations are so consistent with those testified to by others under oath and subject to cross-examination that respondent (and the trial court) claimed the declarations were "cumulative" of that testimony.

In short: the trial court erred when it excluded these declarations on the basis of their "unreliability."

B. Exclusion of Roberta's testimony about Charles, Sr.'s violence was error.

Respondent maintains the trial court properly excluded this testimony because it was irrelevant to Mr. McDowell's background, and there was no evidence that Mr. McDowell himself knew of or witnessed it. (RB pp. 112-116.)

Respondent's interpretation of this Court's holdings regarding "background" mitigation evidence is as incorrectly narrow as the trial court's interpretation. As

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[16] Respondent misses this point, claiming that Mr. McDowell's mention of the state's attorneys during habeas litigation "hardly merits a response" when weighing the trial court's holding. (RB pp. 110-111, fn. 20.)

this Court's discussions and holdings (in, for example, *In re Gay* (1998) 19 Cal.4th 771 and *People v. Thornton* (2007) 41 Cal.4th 391), make clear, among the relevant mitigation evidence for a jury to hear is evidence about the family in which a defendant grew up. The reason for this is clear:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable to a disadvantaged background*, or to emotional and mental problems, may be less culpable than defendants who have no such excuse ....

(*California v. Brown* (1987) 479 U.S. 528, 545 (O'Connor, J., concurring) (emphasis in original).)

Evidence of how one's parents behave in the world is evidence relevant to a defendant's disadvantaged background. What matters is that the jury is given an accurate picture of the disadvantages faced -- which, unfortunately, typically includes the very people who raised the defendant. There is no separate requirement that the defendant have witnessed particular acts, nor even been aware that they occurred. (See, e.g., *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 239 [describing mitigation evidence presented, which included the fact that shortly after the petitioner was born, his father was arrested for robbing a liquor store]; *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, it was error for the trial court to exclude Roberta's testimony that Charles, Sr. had beaten their own father. Mr. McDowell's penalty phase jurors were entitled to hear that the man who raised Mr. McDowell was a man who would -- did -- beat his own father. Charles, Sr.'s abuse knew no bounds. He neither respected nor honored anyone. Evidence that he beat not only his wife and his children, but even members of his family's older generation, would have shown the jurors even more of the terror that Mr. McDowell must have faced as a child.[17]

C. Exclusion of this mitigation evidence was prejudicial.

Respondent's lack-of-prejudice argument comprises a total of two paragraphs. (RB pp. 116-117.) The first paragraph sets forth the applicable legal standards. (RB p. 116.) The second paragraph contains a seven-sentence recitation of the aggravating evidence, and respondent's conclusion that this mitigation evidence would not have made any difference: "Under these circumstances, there is no reasonable possibility that the introduction of the excluded evidence would have affected the jury's penalty determination." (RB p.

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[17] Respondent's attempt to distinguish the facts here from those in *People v. Thornton* (2007) 41 Cal.4th 391, is unavailing. (RB pp. 115-116.) Respondent maintains that trial counsel never made an offer of proof of what this testimony would be, nor its grounds for admissibility. (*Ibid.*) On the contrary, during Roberta's testimony, trial counsel sought to introduce evidence of episodes of Charles, Sr.'s violence against his father, Floyd. (40 RT 5759-5964.) Trial counsel objected that the evidence was relevant mitigation about Mr. McDowell's background admissible under the Eighth and Fourteenth Amendments. (40 RT 5761-5762, 5764.)

117.)

But there is.

Indeed, there is *more than* a reasonable possibility that the introduction of this evidence would have affected the verdict. The jury that did hear this evidence in the first retrial hung.[18]

In the first retrial, Dr. Arlene Andrews testified about the facts she had gathered in forming her expert opinions about the environment in which Mr. McDowell grew up. These facts included these details from Shirley and Ronald's declarations (and which were not covered by any other witnesses' testimony in the second retrial): Mr. McDowell's molestation by his paternal uncles (31 RT 4373); Shirley McDowell's beating with Mr. McDowell *in utero*, and Mr. McDowell's premature birth (31 RT 4378); Shirley's not wanting the baby, and not knowing how to properly care for him (31 RT 4379); Charles, Sr.'s shooting of the family dog while making his son Ronald hold its leash (31 RT 4386-4387); Mr. McDowell's molestation as a boy by men in the neighborhood (31 RT 4388); Mr. McDowell's hyperactivity in school and his teachers' maltreatment of him (31 RT 4389); Charles, Sr.'s treatment of the one and only person from school who came to the family home to see about getting help for Mr. McDowell (31 RT 4414).

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[18] Respondent completely ignores the facts here. Respondent's conclusion is thus clearly more "speculative" than respondent accuses Mr. McDowell of being when Mr. McDowell argues that the trial errors affected the verdict. (See, e.g., RB pp. 76, 77.)

This fact alone -- that the jury that heard this mitigation evidence hung, and the jury that did not hear this mitigation evidence sentenced Mr. McDowell to death -- should be enough to show the prejudice from exclusion of this evidence. Not surprisingly, many other indices of prejudice (which respondent also fails to address) are also present:

1) the fact that a prior jury hung (regardless even of which evidence was or was not presented in each case) 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.);

2) that jurors request readback of testimony and further instruction indicates a close case, and prejudice from errors that have occurred during the trial. (*People v. Gay* (2008) 42 Cal.4th 1195, 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 his brother Tommy's second degree rape conviction. (11 CT 3000A, 3002A.) This focus on evidence about Mr. McDowell's family and its criminal history strongly suggests that 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]);

3) the relative shortness of these deliberations compared to the length of deliberations where the jury heard this evidence. 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"].)

All these indices of prejudice make it more than reasonably possible that exclusion of this mitigation evidence affected the jury's verdict. Reversal 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.

The prosecutor made three key misstatements of law and fact in his closing argument in the second retrial to which trial counsel objected or about which the trial court expressed concern. The prosecutor did not make these misstatements in the first retrial. The prejudice from this misconduct, individually and cumulatively, requires reversal. (AOB pp. 174-188.)

Respondent argues that Mr. McDowell has forfeited portions of this claim, and that the prosecutor committed no misconduct. Respondent alternatively contends that any misconduct was simply harmless. (RB pp. 117-129.) As set

forth below, respondent is incorrect.

A. The prosecutor committed misconduct.

(1) The prosecutor's misstatement of capital sentencing law

As set forth in the Opening Brief, the prosecutor oversimplified and mangled capital sentencing law in his closing argument by telling the jurors what a minimum sentence would be in such a case, and arguing an add-on formula for prior bad acts that that he told the jury they needed to punish Mr. McDowell for. (AOB pp. 175-176, 178-182.)

Respondent's first contention is that Mr. McDowell has forfeited this portion of this claim, because after the trial court overruled Mr. McDowell's initial objection and the prosecutor kept misstating the law, trial counsel did not keep objecting. (RB pp. 118-120.) This Court consistently rejects respondent's contention. "A defendant will be excused from the necessity of either a timely objection and/or request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820; citations omitted.) Here, as in *Hill*, trial counsel was not required to keep posing the same objection when it would be futile. The trial court was on notice about the misconduct, and refused to correct the error and avoid its continuing. (43 RT 6252.) Given the trial court's rejection of trial counsel's objection, there was no reason to believe the trial court would change its mind as the prosecutor continued with this line of argument. Thus, as this Court

recognized in *Hill*, trial counsel had no duty to keep objecting each time the prosecutor misstated this aspect of the law. (*Hill* at p. 820.)

Respondent next contends that the prosecutor's argument was not misconduct, for it was not a misstatement of the law. (RB pp. 120-121.) Respondent characterizes Mr. McDowell's argument as simply a matter of "semantics" -- and one which respondent does not believe suggested to the jury that there was any formula or scorecard for penalty determination. However, reviewing courts are sensitive to just such prosecutorial argument, i.e., any that suggests to jurors that burdens of proof are proved by some sort of mechanical calculation, instead of a moral evaluation of all the evidence. For example, in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, the Court of Appeal found misconduct where the prosecutor's use of a puzzle graphic (with two pieces out of eight missing) to convey the "reasonable doubt" standard improperly suggested a quantitative measure of reasonable doubt. (*Id.* a pp. 1265-1276.)

Here, what the prosecutor argued to the jury was similarly flawed. The prosecutor gave the jury a baseline: murder with special circumstance, with no prior criminal conduct equals at least LWOP. The prosecutor then argued that consideration of and punishment for other bad acts should be added to the baseline. The prosecutor then referred to these past acts again and again, and asked the jury to vote for retribution.

Setting up this sort of equation for the jury -- of "baseline, plus" -- is the

same sort of quantitative, formula argument about burdens of proof that the *Katzenberger* court rejected. That such formulas are even more problematic in penalty phase deliberations, where jurors must deliberate by making a moral evaluation of all of the evidence presented -- is evident.

(2) Reference to facts not in evidence: definition of "sociopath"

As set forth in the Opening Brief, the prosecutor argued facts not in evidence when he read during his closing argument from 1970s psychiatric examination records that Mr. McDowell was a "sociopath," and then argued his own definition of pseudo-pyschiatric definition of the word. (AOB pp. 178-185.)

This Court is consistently clear that it is misconduct for a prosecutor to argue facts that are not in evidence. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 82 [prosecutor committed misconduct in closing when he described his purported factual basis for arguing that the defendant had written certain letters, where the basis was not in evidence]; *People v. Collins* (2010) 49 Cal.4th 175, 210 [misconduct where the prosecutor referred to facts outside the record in his guilt phase closing argument].)

Respondent contends that the prosecutor was not arguing facts outside the record when he defined for the jury, in his own terms, the word "sociopath." (RB pp. 123.) Respondent argues that this Court's holding in *Friend*, *supra*, controls. Respondent is wrong.

In *Friend*, this Court held that it was not misconduct for the prosecutor in his closing argument to call the defendant a "sociopath." (*Friend* at p. 84.) This Court reasoned that, given the wide latitude allowed for prosecutors in closing argument, it was not error for the prosecutor to use the word "sociopath" in his description of the defendant -- because, according to this Court, the prosecutor was simply "using language in the common currency." (*Ibid.*)

Whether or not the previously-utilized definition is in any way accurate, the prosecutor here did not rely upon a popular definition of the term "sociopath." Rather, the prosecutor read a psychological diagnosis of "sociopath" from one of Mr. McDowell's 1970's medical records and then offered definitions of it. This is vastly different from a prosecutor referring to someone as "psycho" or "crazy" or even "a sociopath" during the heat of argument. This was a calculated reading of a medically diagnostic term and then an explanation, based on no supporting expert evidence, of what that term meant in behavioral terms. The prosecutor also suggested the definition had a moral dimension. There was no evidence in the record that supported those definitions.

Moreover, this manner in which the prosecutor in the case at bar used the term "sociopath" completely undercuts respondent's analogy to the "language in common currency" holding in *Friend.* The prosecutor in Mr. McDowell's case was expressly *not* using the word "sociopath" in his argument as a part of commonly-understood language. Instead, the prosecutor used it as a technical,

medical, diagnostic term *requiring definition*. Indeed, he asked the rhetorical question, "So what is a sociopath?" as a transition to answering his own question with his own definition.

(3) Improper addition of aggravating factor

As set forth in the Opening Brief, the prosecutor added Mr. McDowell's molestation of his younger brother to the list of aggravating factors the prosecutor argued, when the trial court had ruled there was insufficient evidence of this molestation to include it as an aggravator. (AOB pp. 177-185.)

Respondent's first contention is that Mr. McDowell has forfeited this portion of his claim by failing to object. Respondent states that after the trial court itself brought up the prosecutor's offending statement (when the parties were out of the presence of the jury), "even at the invitation of the trial court, defense counsel expressly refused to object to the comment and request an admonition or any other corrective action." (RB p. 126, citing 43 RT 6311-6312.) What actually happened was different. When the jury was on break during this argument, the trial court told the prosecutor that "it sounded like you were making an aggravating circumstance out of Tommy McDowell's sexual encounter." (43 RT 6311.) The trial court told the prosecutor that it had already ruled, on defense motion, that there was insufficient evidence of this molestation to include it as aggravator. (*Ibid.*) Thus, the argument was error. The trial court went right on to state that it

believed the error would be cured by the jury instructions themselves. (*Ibid.*)

Thus, no where did trial counsel expressly refuse to object to the comment or refuse to request admonition, as respondent states. Instead, what happened was that trial counsel was faced with the same air of "futility" as he was with the misconduct described in the previous section. Here, the trial court immediately and expressly stated that it believed the prosecutor's error would be cured by the jury instructions themselves. There is no question from the record that the prosecutor erred. And there is no question from the record that the trial court refused to do anything about it. Thus, it clearly would have been futile for trial counsel rotely to recite, "I object," to an error already acknowledged by the court, and about which the trial court believed jury instructions would cure.

Moreover, respondent's assertion evinces lack of understanding about this Court's rules of forfeiture and futility. As this Court has explained:

> The reason for the forfeiture rule is that it is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.

(People v. Collins (2010) 49 Cal.4th 175, 226-227 ; internal quotations and citations omitted.)

Obviously, the trial court was on notice about the prosecutor's improper addition of another act of molestation to the list of aggravating prior bad acts --

because the trial court itself brought up this issue when the jurors were out on break. (43 RT 6311.) Therefore, there should be no forfeiture bar to raising this on appeal.

Respondent next contends that there was no misconduct, because the prosecutor "never referred to the molestation of Thomas as an aggravating factor." (RB p. 126.) But in this instance, not even the trial court agreed with respondent's interpretation of the prosecutor's argument. The trial court's express statements on the record reflect that the trial court itself understood the prosecutor's listing of Mr. McDowell's prior bad acts -- including Tommy's molestation -- *as a list of aggravating prior bad acts*. That is exactly what the trial court said when it brought this matter up to the parties. (43 RT 6311-6312.)

B. The misconduct was prejudicial.

Not surprisingly, respondent analyzes individually (and of course rejects individually) Mr. McDowell's claim of prejudice from these three statements. (See RB pp. 122-123 [misstatement of capital sentencing law]; RB p. 124 [sociopath definition argument]; RB pp. 126-127 [listing of additional aggravator].) Respondent concludes that none were prejudicial. (*Ibid.*)

However, the effect of prosecutorial misconduct is measured cumulatively. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-846.) And, as set forth in the Opening Brief, these errors were prejudicial. (AOB pp. 186-188.) Mr. McDowell

briefly reiterates here the indices of prejudice that he set forth at length there. In the first retrial, the prosecutor made *none* of these statements -- and in that case, the jury hung (and, indeed, a prior hung jury itself indicates closeness in a case). (See AOB pp. 186-187 and cases cited therein.) During deliberations in the second retrial, the jury asked for readback and further instruction, which this Court also recognizes as an indices of a close case, and as indices of prejudice from errors that have occurred in the trial. (See AOB p. 187 and cases cited therein.) Finally, deliberations in the second retrial were substantially shorter than in the first, which this Court also recognizes as reflection of a close case and effect of errors. (See AOB pp. 187-188.)[19] Reversal for the prosecutor's prejudicial misconduct is therefore required.

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.

Over defense objection expressly based upon the defense's strategic choice *not* to challenge the commission of prior unadjudicated violent acts, the trial court

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[19] Respondent apparently misses Mr. McDowell's point about the length of deliberations and what they suggest. This Court observed in *People v. Gay* (2008) 42 Cal.4th 1195, 1226, that "[i]t is discomforting . . . that, following [] inadequate instruction, the jury reached a verdict the very next morning." Mr. McDowell's point in comparing the length of deliberations in the first retrial -- seven days -- to the length of deliberations in the error-filled second retrial -- two days -- is the likelihood that the errors affected the deliberations.

instructed the jury -- at excruciating length -- on all the elements of the prior acts of violence. This prejudicial error requires reversal. (AOB pp. 188-205.) According to respondent, the trial court's instructions were correct -- and were even required; alternatively, any error was harmless. (RB pp. 129-138.)

The trial court should not have given these instructions. (See AOB pp. 194-202.) Nothing that respondent asserts in its discussion of *People v. Phillips* (1985) 41 Cal.3d 29 and *People v. Cain* (1995) 10 Cal.4th 1 refutes this. Respondent stubbornly refuses to address the subtleties and portions of these cases that recognize that trial courts *are not required* to give these instructions whenever and simply because the state requests that they do so. (RB pp. 132-134.)

Instead, respondent accuses Mr. McDowell -- who, according to respondent, "realiz[es] the inadequacy of his legal argument" -- of unfairly impugning the trial court by setting forth the trial court's statements consistently impugning Mr. McDowell throughout the litigation. (RB p. 134; pp. 134-138.)

Mr. McDowell stands by his legal argument, and stands by his chronicling of the trial court's statements. Mr. McDowell will not reiterate all of them here. Instead, Mr. Mr. McDowell simply refers this Court back to the sections of his Opening Brief that chronicle the trial court's statements against the defense, and trusts this Court to judge for itself. (See, e.g., AOB pp. 7-8, 44-47, 50-52, 70, 102-103, 116, 126, 129-130, 133,157, 159, 191, 197-199, 206-210.) Mr. McDowell concedes, upon re-review of the record, that the prosecution did elicit

testimony that Mr. McDowell "enjoyed" hurting others. (See RB p. 135.) And, of course, Mr. McDowell acknowledges that not every single ruling in the trial was in favor of the State. (See RB pp. 135-136.) Even so, and very unfortunately, the ramifications of the trial court's repeated statements of animosity toward the defense, and its constant refrain that the state's capital sentencing scheme unfairly limited the prosecution, cannot be more clear.

In the same way it refuses to see error here, respondent fails to see how any error could be prejudicial. In its two-paragraph conclusion that there could be no prejudice, respondent fails to comprehend how a trial court's loading of the instructions with these criminal elements could have any effect on a jury. Indeed, this deleterious effect is precisely why so much of the case law discusses whether and under what circumstances these instructions should and should not be given. For all the reasons already set forth in the Opening Brief, Mr. McDowell reiterates that this error was prejudicial. (AOB pp. 202-205.)

8. Mr. McDowell was denied his state and federal constitutional rights by the cumulative errors at this second penalty phase retrial.

In its anemic, rote, two-paragraph response to this claim, respondent asserts only that Mr. McDowell's Opening Brief argument here simply "rehashes his prior claims." (RB p. 139.) While respondent is wrong, respondent really offers nothing substantive to which Mr. McDowell can reply. Mr. McDowell therefore

relies on the arguments set forth already in his Opening Brief. (AOB pp. 205-211.)

9. California's death penalty statute, as interpreted by this Court and applied at Mr. McDowell's trial, violates the United States Constitution.

Mr. McDowell relies on the arguments set forth already in his Opening Brief. (AOB pp. 211-226.)

Conclusion

From beginning to end of this second retrial of the penalty phase against Mr. McDowell, the effect of the trial court's errors was to stack the deck against Mr. McDowell, and in favor of the prosecution. 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 the third penalty-phase 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 statements on the record) was unfairness to the prosecution. Thus, as set forth in Mr. McDowell's Opening Brief and readdressed here, the trial court granted prosecution motions, denied defense requests, and made repeated instruction to the jury that favored the prosecution.

Any one of the errors in this trial are enough to warrant reversal of this

death penalty verdict -- most especially, the complete exclusion of the social history expert testimony of Dr. Andrews. And viewed in sum, this Court should not conclude other than all the errors together resulted in a verdict that must be reversed.

Dated: January 5, 20011

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 Reply Brief using Microsoft Works Program. According to that program's word count function, the Reply Brief (excluding tables and footnotes) contains 17, 876 words.

Dated: January 5, 2011

Respectfully submitted,

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 January 7, 2011, I served a true copy of the following document: APPELLANT'S REPLY 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
ATTN: DAG Jonathan Kline
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Los Angeles, CA 90012
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Service for Charles McDowell, Jr., will be completed by utilizing the 30-day post-filign 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 January 7, 2011.

Tamara P. Holland