No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN BENSON, Petitioner

vs.

KEVIN CHAPPELL, WARDEN, Respondent

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

CAPITAL CASE

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958 F.3d 801
United States Court of
Appeals, Ninth Circuit.

Richard Allen BENSON,
Petitioner-Appellant,
v.
Kevin CHAPPELL, Warden,
San Quentin State Prison,
Respondent-Appellee.

No. 13-99004
|
Argued and Submitted
December 5, 2017
|
Submission Vacated February 7, 2019
|
Resubmitted April 24,
2020 Pasadena, California
|
Filed May 1, 2020

Synopsis

Background: After affirmance, 52 Cal.3d 754, 802 P.2d 330, 276 Cal.Rptr. 827, of state prisoner's murder convictions and death sentence, based on sexually molesting two little girls and murdering the girls, their mother, and their baby brother, prisoner petition for federal habeas relief. The United States District Court for the Central District of California, A. Howard Matz, J., denied the petition. Prisoner appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:

presentation of probable cause which supported the warrantless arrest, at an arraignment within 48 hours of the arrest, was not required because prisoner had a parole hold;

state court reasonably determined that prisoner's confession was voluntary;

state court reasonably determined that trial counsel did not perform deficiently for penalty phase in failing to further investigate and present mitigation evidence of physical, mental, and sexual abuse that state prisoner endured as a youth;

prisoner was not prejudiced, at guilt phase, by counsel's failure to present expert testimony raising factual questions about timing of murders; and

state court reasonably refused to entertain prisoner's claim that counsel was ineffective in failing to discover prior litigation misconduct of doctor to whom prisoner confessed.

Affirmed.

Murguia, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Attorneys and Law Firms

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William Bilderback II, Supervising Deputy Attorney General; Lance E. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Attorney General's Office, Los Angeles, California; for Respondent-Appellee.

Appeal from the United States District Court for the Central District of California, Alvin Howard Matz, District Judge, Presiding, D.C. No. 2:94-cv-05363-AHM

Before: Consuelo M. Callahan, Carlos T. Bea, and Mary H. Murguia, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge Murguia

OPINION

CALLAHAN, Circuit Judge:

In 1986, **Richard Allen Benson** confessed to sexually molesting two little girls and murdering the girls, their mother, and their baby brother. He was tried and convicted for murder and other crimes and sentenced to death. After his conviction and sentence were affirmed and the California Supreme Court had denied several habeas petitions, **Benson** filed a federal habeas petition with the United States District Court for the Central District of California. The district court denied the petition and **Benson** has appealed.

On appeal **Benson** raises two certified claims: (1) his confessions should have been suppressed, and (2) his trial counsel was ineffective at sentencing because he failed to investigate and present evidence of **Benson's** severe physical, sexual, and emotional abuse in early childhood. In addition, **Benson** raises two uncertified claims: (3) trial counsel was ineffective at the guilt phase in failing to impeach the state's case, and (4) the prosecutor withheld material and exculpatory evidence (a claim pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)).

Because **Benson's** claims are subject to review under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, to be granted relief, he must show that the California Supreme Court's denials of his claims were unreasonable determinations of the facts or contrary to clearly established federal law. **Benson** has not done so. He confessed after he was given his *Miranda* warnings, acknowledged the warnings, and waived them. The California Supreme Court reasonably determined that an officer's misstatement during **Benson's** interrogation that there was no death penalty in California did not prompt **Benson's** confessions. Furthermore, **Benson** has not shown that his statements were not knowing, voluntary, and intelligent. In addition, even if **Benson** were able to show that trial counsel was ineffective in not fully investigating his abuse as a child or his alleged organic brain injury, the California Supreme Court could reasonably have determined that any shortcoming in trial counsel's investigation was not prejudicial. Finally, we grant the Certificate of Appealability on **Benson's** two uncertified issues and determine that the state court reasonably rejected **Benson's** *808 claims that (a) his trial counsel should have impeached the government's case, and (b)

the prosecutor withheld material, exculpatory evidence. Accordingly, we affirm the district court's denial of the writ.

I. The Underlying Facts

A. Benson's Criminal Activities

There is overwhelming evidence that **Benson** deliberately murdered Laura Camargo and her two-year old son, and sexually molested her four-year-old and three-year-old daughters, before brutally murdering both girls. He then set the family's home on fire and fled the scene.

The California Supreme Court's opinion provides this recitation of the underlying facts:

> On the evening of Saturday, January 4, 1986, Laura Camargo set out to visit Barbara Lopez and Katrina Flores. The three women were close friends. Laura lived in Nipomo with her children, Stephanie Camargo, age four, Shawna Camargo, age three, and Sterling Gonzales, age twenty-three months, in a small, two-room shack that shared an unattached bathroom with another unit. Barbara and Katrina lived with their children in an apartment in Oceano, which was about 10 miles away. Just before Thanksgiving of 1985, defendant had moved into the apartment; he was a jeweler by trade. Over the following weeks, he became acquainted with Laura and her children.
>
> On the evening in question, Laura secured a baby-sitter to care for Stephanie, Shawna, and Sterling, and then obtained a ride to Oceano. She socialized with Barbara, Katrina, and defendant. Before long, she decided to return home. Defendant arranged for a ride. Taking measures to conceal his destination from Barbara and Katrina, he accompanied Laura to Nipomo, carrying with him a heavy briefcase. As he later admitted, he "went out there with the intention of doing something to the kids."
>
> Around midnight, defendant and Laura arrived at the shack, and the baby-sitter departed. Shortly thereafter, defendant took up a claw hammer he found in the shack, apparently positioned himself behind Laura, and repeatedly and violently struck her in the head, as he subsequently acknowledged, "to take her out." Laura fell; defendant thought she was dead; she gurgled loudly; he stuffed socks into and over her mouth; she soon expired. From that point on, he took pains to make it appear to Laura's neighbors that no one was in the shack. He proceeded to sexually assault Stephanie and Shawna.
>
> Throughout Sunday, January 5, defendant continued to molest the two girls. A number of times that day, neighbors came by the shack and the common unattached bathroom. More than once, Sterling coughed and cried; more than once, defendant quieted the child. After nightfall defendant—in words he later used—"realized ... that it was inevitable": in order to avoid discovery, he decided to kill Sterling. Although he met with resistance from the child as he attempted to smother and strangle him to death, he finally succeeded. With Laura and Sterling dead, he found himself in what he later described as "a molester's type of heaven": in the paraphrase of the police psychiatrist to whom he confessed, "it was like being

> in heaven, and being completely able to get what he wanted with no interference."
>
> As Monday, January 6, approached, defendant continued to molest Stephanie and Shawna. At the same time, he began to consider whether he should kill the girls. As he later described his thoughts: ***809** "I knew it couldn't be put off and uh, in the state of mind that I was in at that time, the best thing, no I can't say it like that, the only option I had was to go ahead and finish the job and uh, try to keep from being implicated in it, okay. Uh, I had trouble bringing myself to do it. ... [A]nd uh, you know, three, four times I set them up for it and I, I just couldn't do it. ..." As the sky began to lighten, however, defendant found himself able to carry through. He took up a heavy steel jeweler's mandrel which he carried in his briefcase; he repeatedly struck Stephanie and Shawna in the head; seeing that death did not come immediately, he seized the claw hammer and used the instrument to dispatch the children. As he subsequently admitted, he killed Stephanie and Shawna, and Laura and Sterling before them, "to protect my freedom." To cover his crimes, he proceeded to start a fire in the shack. About 8 a.m., just before the flames began to rage, he fled.

People v. ***Benson***, 52 Cal.3d 754, 276 Cal.Rptr. 827, 802 P.2d 330, 336–37 (1990).

On Monday morning, January 6, 1986, Mike Owen stopped by a liquor store in Nipomo. **Benson** approached him and asked for a ride to Oceano. Owen agreed. **Benson** retrieved his briefcase and was dropped off in Oceano just after 8:00 a.m. At around this time, smoke was seen coming from Laura's home and the fire department was called. The home was heavily damaged and charred. According to the district court:

> Laura's three children, Stephanie, Shawna, and Sterling, were all dead, on the floor in the middle of this room, which the fire had heavily damaged. A lot of burnt and partially burnt debris was under and around the girls' bodies and on the floor of the second room. A pink and black, wire-ribbed female corset was next to Stephanie's body.
>
> A partially-burnt claw hammer was lying on top of Stephanie's shoulder. Petitioner's ring mandrel was lying next to Shawna. Another hammer was hanging on the wall next to the kitchen sink.
>
> Investigators found pornographic magazines, newspapers, and a photo album under the two girls' bodies. ...
>
> The arson investigator ... examined the fire, and determined someone had deliberately set on fire the surface of a four foot wide pile of magazines, paper goods, clothing, and toys, in the middle of the children's room next to and underneath the bodies of Stephanie and Shawna, allowing it to burn down into the pile.

On Tuesday, January 7, **Benson** asked a friend of a friend, K.S., for a ride to Los Osos, a town north of San Luis Obispo. K.S. agreed to give him a ride as far as San Luis Obispo, **Benson** picked up his belongings, and they left for San Luis Obispo around 6:30 p.m. They drove to an apartment complex where **Benson** got out and asked K.S. to wait while he went inside. When **Benson** returned, he started gathering his belongings, then he grabbed K.S. from behind,

put a knife to her throat, and ordered her to drive to Los Osos. K.S. panicked and offered **Benson** her car. He rejected the offer and "took out a cylinder with something like a needle sticking out of it and told her it would kill her if he pricked her with it."

Benson made K.S. drive to a liquor store in San Luis Obispo where he forced her to buy a bottle of whiskey and pornographic magazines. They returned to the car and **Benson** forced her to continue driving to Los Osos. When they got there, **Benson** said he was on a mission to rescue a family ***810** in Los Osos.[1] They talked in the parked car for more than an hour until **Benson** made a phone call. K.S. was terrified of **Benson**, who remained within reach of her. **Benson** made K.S. drive to an abandoned house, where he eventually got his things out of the car and went inside. K.S. drove straight home to San Luis Obispo and called the police.

1 The district court noted:

> Petitioner claimed he knew a police officer in Los Osos who had been suspended for molesting an 11 year-old girl, and was producing and filming a home-made pornographic movie in which he was forcing his wife and two daughters to participate. Petitioner claimed he had borrowed some pornographic magazines from the policeman, and, under the guise of returning them, he would go to the policeman's house to rescue the two girls.

Later that night, K.S. accompanied the police to the abandoned house in Los Osos. The police went to the house and arrested **Benson**. **Benson** was booked at around 11:30 p.m. on Tuesday, January 7, in connection with the kidnaping of K.S.

On Wednesday, January 8, **Benson's** parole agent, Felix Martel, was notified of **Benson's** arrest. **Benson** had four prior felony convictions for abducting minors. Martel went to the San Luis Obispo County Sheriff's Office to discuss the matter with detectives. He authorized the breaking of the lock on **Benson's** briefcase to conduct a parole search, and he placed a parole hold on **Benson**. Law enforcement officers spent Wednesday consolidating and reviewing the evidence they had concerning the murders.[2] On Thursday morning, based on evidence pointing toward **Benson** as responsible for the murders, the Sheriffs Office called someone with the FBI's Behavioral Science Unit to discuss how best to approach a pedophile like **Benson**.

2 **Benson** had been interviewed briefly at his home on the afternoon of January 6, 1986.

B. Benson's Confessions

Detective Bolts and Investigator Hobson began interviewing **Benson** in an office at the San Luis Obispo County Detective Bureau around 11:00 a.m. on Thursday, January 9, 1986. **Benson** was initially detained on a parole hold based on his kidnaping of K.S. At the beginning of the interview, Bolts read **Benson** his *Miranda* rights, and **Benson** indicated that he understood his rights and waived them. A portable transmitter in the room monitored the conversation and relayed it to another room where other investigators could listen to, and record, the interview. All but the initial one and one-half hour to two hours of the almost twelve-hour interview was tape-recorded.

The officers initially focused on a charge of kidnapping K.S. but then shifted their focus to the events that occurred at Laura Camargo's home in Nipomo. Bolts commented: "I think

we could perhaps start anew and talk about some things that occurred Saturday night and talk some straight turkey." Bolts continued, "I think you only realize too well that we didn't call you in here without having done our homework." **Benson** responded that he had "known that for quite awhile" and that, "as it looks right now, I'm a very suspected man." The following colloquy ensued:

> Hobson: What's going through your head right now **Richard**?
>
> **Benson**: I don't think you'd believe it.
>
> Hobson: I'd like to believe it, try me. We sat here with you all this time and that's why we're still here with you, because we care also.
>
> Bolts: We're caring, feeling, human beings and we have compassion for a lot of things and we've seen a lot worse, believe ***811** me, this is not the end of the line by any means.
>
> Hobson: **Richard**, if we didn't care, we wouldn't be sitting here.
>
> **Benson**: I don't see, I don't see how you can say it's not the end of the line.
>
> Bolts: It's not.
>
> **Benson**: It is for me.
>
> Bolts: Why? There's no death penalty here.
>
> **Benson**: That doesn't matter.
>
> Hobson: Wait a minute, before we talk about that, we don't know what happened in that house ... [.]
>
> Bolts: Exactly. We know what kind of a person Laura could be.
>
> Hobson: Laura had a temper. We know that. Maybe you were put into a position where you had to make a choice.
>
> **Benson**: It doesn't matter what choices I had.
>
> Hobson: Sure it does.
>
> **Benson**: No, because nothing justifies the outcome.
>
> Hobson: Well, why don't you tell us and let us decide that.
>
> **Benson**: The thing ot [sic] it is, I can't.
>
> Hobson: Why?
>
> **Benson**: I don't know.
>
> Hobson: You don't know what?
>
> **Benson**: I don't know what happened.

Benson, 276 Cal.Rptr. 827, 802 P.2d at 841 n.3.

Benson claimed he could not tell the officers what happened because he could not remember. However, after telling the officers a number of lies, **Benson** admitted he committed all the murders and sexually molested Stephanie and Shawna for 30 hours before he killed them. **Benson's** admissions were laced with inconsistencies about how and why he committed the acts. The officers finally terminated the interview around 11:00 p.m., returned **Benson** to jail, and booked him on murder and other related charges.

Later that night, **Benson** was placed on "suicide watch" and placed naked into a small empty cell with foam rubber padded walls and a bare concrete floor—a so-called "rubber room." *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 346. He was told by a jailer that he would not be released until he was cleared by "Mental Health." *Id.*

On the morning of January 10, 1986, Dr. Gordon of the Sexual Assault and Response Team visited **Benson**. Dr. Gordon testified that he told **Benson** that he was a doctor and he advised him of his constitutional rights including the right to remain silent and the right to an attorney. Dr. Gordon stated that **Benson** agreed to talk to him and that **Benson** proceeded to describe his sexual molestation of the two girls in some detail.

On January 13, 1986, Bolts and Hobson interviewed **Benson** for another three hours. **Benson** was again advised of his *Miranda* rights and waived them. During the interview he provided further details of the crimes. Near the end of the interview, the following dialogue transpired:

> Bolts: ... [J]ust so that I'm clear, is there something that we've said uh, as far as, you know, threats that we've made to you, promises or any promises of leniency, anything that has caused you to tell us what you've told us?
>
> **Benson**: No. I'm surprised that that came up.
>
> Bolts: Well, I, it's something that uh, you know, I've thought of, that maybe something that we said you interpreted as some kind of threat or promise or some ...
>
> **Benson**: You know what, if you guys started whipping me with billy clubs right now, you'd see me smile, so you know that's not uh, a ... now, no, you ***812** guys are good at your job, I complimented you to your lieutenant about it as a matter of fact, uh, I'm glad you are, because it served in getting me off the street, you know, I feel that in some sick twisted way I helped a little, but you guys still ... you did your job.

II. Judicial Proceedings

A. The Indictment and Appointment of Counsel

On January 14, 1986, **Benson** was arraigned. He was charged in a 14-count complaint with murder, child molestation, arson, and kidnapping. That afternoon he appeared in court and was advised of his right to counsel. Although **Benson** initially said he did not want an attorney, the court appointed counsel, and advised **Benson** that the charges carried the possibility of the death penalty. After conferring with counsel, when **Benson** was again asked whether he wanted counsel, he responded:

> I do desire counsel, your honor. It turns out, in my interrogation with the deputies, I was led to believe that, according to them, California no longer had a death penalty. Because of that, we were just talking years, not life. Because of that, I didn't feel that the expenditure of the court was warranted in something that was inevitable to happen.

B. The Motion to Suppress

On February 26, 1987, the first day of trial, the court ruled on **Benson's** motion to suppress his confessions to the officers. The court first rejected his arguments that: (1) **Benson's** arraignment had been delayed in order to elicit incriminating statements; and (2) **Benson** was entitled to a second *Miranda* warning when the subject of the questioning changed from kidnapping to homicide.

Benson testified at his suppression hearing. **Benson** explained that when Detective Bolts commented that there's "no death penalty here," **Benson** thought Bolts meant that "the death penalty was dormant in California, and that they weren't seeking the death penalty as far as what the interview, what the case was going to." When asked to explain his response "that doesn't matter" to Bolts's statement about the death penalty, **Benson** testified that "[a]t the time, the incidents were very fresh and vivid in my mind, and I was having a lot of trouble dealing with the whole situation." **Benson** further stated that his "primary thought was nothing was going to change the effect of the people that died. Nothing was going to bring them back." When asked why he gave information to the police, **Benson** testified that "there's no one answer to that."

The judge carefully considered the possible impact on **Benson** of Bolts's indication that there was no death penalty. The judge noted that **Benson** "is very articulate, very well-spoken, seems to the Court having read this transcript, that he's an intelligent young man," and that, by his own account, he is experienced in the criminal justice system. The court, having reviewed the transcript of the interrogation, opined that **Benson** had been focusing on the horror of the situation and did not rely on the officer's statement. The judge also noted the passage of time between the officer's statement and **Benson's** eventual admission of what he had done. The judge concluded that he was "persuaded beyond a reasonable doubt that Mr. **Benson's** statements were not coerced by promise of leniency, but rather were made freely and voluntarily."

C. The Motion to Exclude Dr. Gordon's Testimony

When Dr. Gordon was called as a witness, **Benson's** counsel moved to exclude **Benson's** statements to Dr. Gordon as involuntary. ***813** The district court described counsel's argument as follows:

> the reason that Mr. **Benson** was so willing to speak to Dr. Gordon was his desire to vacate the - - what we have referred to as the rubber room. And in an effort to get out of that confinement, he was willing to open up and speak to Dr. Gordon. That that was, in effect, a ruse or a scam on behalf of the police in that there was a suggestion that he would be speaking to someone from Mental Health, and that they substituted in that person's stead Dr. Gordon who came in and then proceeded to ask and obtain - - ask questions and obtain incriminating statements.

The trial court denied the motion to exclude and noted that it seemed clear "that Mr. **Benson** was going through some terribly draining emotional feelings," and "that in his own heart and mind he felt it was necessary to get this off of his chest and to speak to somebody about it."

D. The Guilt Phase

The guilt phase of the trial began on February 26, 1987, and took less than four days. Defense counsel examined two prosecution witnesses out of order in an attempt to show that **Benson** was a regular drug user, but offered no affirmative defense once the prosecution rested. Defense counsel told the trial judge, out of the jury's presence, that once **Benson's** pretrial statements were admitted, their tactical decision was to concentrate on the penalty phase because they thought the result of the guilt phase was a foregone conclusion. On March 4, a jury found **Benson** guilty of the charges.

E. The Penalty Phase

At the penalty stage, the prosecution presented the kidnapping of K.S. as aggravating subsequent criminal activity. They also presented **Benson's** four prior felony convictions. In 1971, when **Benson** was 24 years old, he was convicted of committing a lewd and lascivious act on a nine-year-old girl he had kidnapped as she was walking down the street. In 1975, **Benson** was convicted of kidnapping an eight-year-old girl from her bedroom where she was sleeping. In 1975, he was also convicted of lewd and lascivious acts on a three-year-old girl that he had taken from her mother's house. In addition, in 1980, **Benson** was convicted of kidnapping a four-year-old girl he had taken from her bedroom while she was sleeping. As part of its case, the prosecution played the tapes of **Benson's** January 9 and 13 confessions in full for the jury.

The tapes revealed that **Benson** had made a number of statements to the officers about how Laura had encouraged him to sexually abuse her daughters[3] and how his inhibitions had been overcome by his use of methamphetamine.[4]

3 **Benson** stated that Laura encouraged him to molest the children, possibly in return for payment of money. When asked what Laura would allow him to do, **Benson** stated:

> Anything that didn't hurt them. You know, they were too small for penetration or anything like that. Basically fondle, you know, and uh, I, you know, what's important ... this is believe it or not kind of funny, uh, I was the one that told her, you know what, I don't want any of this to come out to where it leaves any lasting bad memories on the kids. And uh, she goes, what do you mean and I says ... if for some reason, you know, they're uncooperative, we drop it and she goes, well, my kids will do what I tell them to. And I said, that is what I'm saying, you know, I don't want to talk, coerce or anything into something that later they will, you know, and, uh, she goes, man, you're weird and uh, you know, I tell her that that was right ....

4 In responding to questions about the pornography in his briefcase and Laura encouraging him to molest her daughters, **Benson** commented:

> Yeah, you know, and uh, the pictures have been what has been keeping me out of trouble, okay, the only time I have problems with this is when I do crank, okay, needless to say, if I had any sense at all, I'd quit doing crank. Alright, uh, I like doing crank. I don't like the end result, you know, and sometimes I get wired and start thinking about little girls and stuff like this and that's when the briefcase comes in, you know, it keeps me off the streets, okay. Uh, the only thing I can say is it's worked, you know, and I have cut back my use of crank. Okay.

***814** In response to the prosecution's presentation, **Benson's** counsel called a number of witnesses to show that **Benson** had a very difficult childhood and was addicted to drugs. Counsel called **Benson's** brothers Dale Snow and Brad **Benson**.[5] Dale testified that, when he was one year old, he was sent to live on a ranch near Petaluma run by Marjorie Buchanan, and that all his brothers were also sent to the ranch. Dale identified a photo of the brothers taken at

Easter at Aunt Grace's home in San Francisco when **Benson** was seven or eight. He described Aunt Grace as being "very supportive of the family and instrumental in having holidays for all of us." Dale then testified that when he was ten, and **Benson** nine, the brothers were returned to the custody of their alcoholic father. Brad also testified that all the brothers had lived on Marjorie Buchanan's ranch until their father instituted proceedings to have them returned to his custody. Neither Dale nor Brad offered any criticism of life on the ranch in their testimony.

5 To avoid confusion the brothers, Dale and Brad, are referred to by their first names, and the petitioner, **Richard Benson**, is referred to by his last name.

Both Dale and Brad described the difficulties of the approximately three years they lived with their father before the state removed them from his custody. They first went to an apartment where their father, their "stepmother," and their sister lived. The district court noted that within weeks the family was evicted, and for the next three years they lived "in seedy, skid row hotels, houses, apartments and shanties, including a converted chicken coop, never staying in any one place more than a few months or the time it took for the manager or landlord to realize that no rent was forthcoming." The father, a chronic alcoholic, was always unemployed and looking for money. The boys continually attended different schools, and worked at whatever odd jobs they could find. Dale and Brad testified that they were alcoholics and that their brothers, Bill, David, and Teddy Joe were also alcoholics.

The defense also called **Benson's** sister, Sandra Bradley, who testified that both their father and mother were alcoholics and confirmed that when her brothers came to live with them they "moved a great deal." In three years she attended three or four different schools.

Defense counsel had Grace Ehlig O'Brien, a retired high school principal and teacher, testify that she remembered **Benson** when he was in seventh grade for three-to-four months before being sent to juvenile hall. She identified a summary paragraph from **Benson's** school records that read:

> Boy told vice-principal and later grade counselor that no one cared for him or wanted to listen to his problems. He said that no one believed him when he told the truth. He wants to be with his brothers and sister. He says he blames his parents for many of his present problems and he feels quite strongly about this.

The note concluded that **Benson** "[w]ants to be an electrician. Likes to take radios apart, likes reading, dislikes math."

***815** Counsel called Holmes R. **Benson**, **Benson's** uncle, as a witness. He testified that **Benson's** father was an alcoholic—who was secretive, unreliable, and would at times ask for financial assistance.[6] On cross-examination, Holmes testified that he had arranged for **Benson** to get a job and outfitted him "with the necessary welding equipment, helmet, a jacket, gloves," but he was employed only for three-to-six months.

6 In addition, the defense called Mr. Gunville, a social worker with the State of Washington, who testified that **Benson's** father was an alcoholic and had refused to address his alcoholism. He further testified that the father had been in a documentary film about the homeless in Seattle.

In addition, Mary Pat Degroodt, a chemical dependency nurse who had worked with Dale Snow, testified that alcoholism can run in families, that **Benson** was a member of a dysfunctional family, and that she thought that he had a chemical dependency.

Defense counsel recalled Officer Bolts to the stand to testify that a person who knew **Benson** and had previously testified, had told the officer: "[**Benson**] often goes up to Katrina's room long periods of time, stares [sic] out window. Often gets up, leaves early in a.m. [sic], does crank often dash every day."[7]

7 Officer Bolts also testified that the person used "crank" to refer to methamphetamine.

Dr. Gregory Hayner, a pharmacist at the Haight-Ashbury Free Medical Clinic, testified that he had interviewed **Benson** for two hours. Dr. Hayner expressed the opinion that at the time of the murders, **Benson** was "very, very paranoid." He continued:

> And by the effects of the drug and lack of sleep, being very disoriented and unable to think very clearly, or really formulate many cogent plans about what he was going to do at any given time, and tended to react to the situation at hand rather than acting out on a set-out plan.

Dr. Hayner concluded that **Benson's** ability to conform his conduct to the requirements of the law was "definitely impaired," that he heard and saw things that were not there, and that he was "suffering a toxic psychosis at the time due to chronic intoxication with amphetamines."

Dr. Gene Abel, a neurologist and psychiatrist and an expert in sexual violence and the evaluation and treatment of sex offenders, also testified for the defense. At counsel's request, Dr. Abel had first examined **Benson** in August 1986. Dr. Abel had reviewed approximately 280 pages of information on various evaluations of **Benson**, had given **Benson** a variety of tests, and had interviewed him for about 12-to-13 hours. Dr. Abel opined that **Benson** had a number of psychiatric disorders, including paraphilia, which in his case is a sexual deviation of pedophilia. He explained in some detail that **Benson's** ability to conform his behavior had been impaired by his paraphilia.[8] In reviewing **Benson's** records, Dr. Abel was very critical of the prior psychiatric treatment of **Benson**, opining that when "talk therapy" failed to help **Benson** to overcome his psychiatric problems, **Benson** "should have been ***816** placed on a medication to eliminate his arousal."

8 Dr. Abel explained that a person suffering from paraphilia surrounds himself with cognitive distortions. "Molesting the child won't hurt child." That is a faulty belief. "I can predict if I molest a child, which child will be hurt in the future." That is a faulty belief. That isn't true. "If I'm not using force, it's no harm to the child." That's a false belief. There are a variety of these cognitive distortions that the offender surrounds himself with and begins to think and really believes in.

Dr. Abel also opined that **Benson** had a drug dependency with a variety of drugs, particularly amphetamines. He explained that for **Benson** the effect of amphetamines "starts from starting to feel good to misperceiving the realities of the situation, feeling that you have skills that you do not have, feeling that you have abilities that you do not have. You start getting frightened and scared to what would be called delirium."

Dr. Abel admitted that, based on his prior convictions, **Benson** was clearly dangerous

and was likely to molest children. However, because **Benson** was manipulative and could "access children easily," he didn't "need to kill somebody." He opined that the murders were "out of character" and the result of the combination of **Benson's** pedophilia and drug dependency.

Benson's counsel also played a video of a program on San Quentin from the television series, "Two on the Town," "which depicted the gas chamber, described how it operates, explained how one sentenced to die is executed, and provided background."

The jury returned a verdict that the aggravating factors outweighed the mitigating factors and fixed the penalty at death. The jury provided no written statement in support. ***Benson***, 276 Cal.Rptr. 827, 802 P.2d at 365. On April 30, 1987, **Benson** was given the death sentence.

F. Direct Review

On appeal, the California Supreme Court struck two witness-killing special circumstances, but otherwise confirmed **Benson's** conviction and death sentence. ***Benson***, 276 Cal.Rptr. 827, 802 P.2d at 366. The court reviewed the voluntariness of **Benson's** confession "independently in light of the record in its entirety." *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 343. It concluded that the trial court did not err in denying the motion to suppress and that "the court properly concluded that the confessions were voluntary beyond a reasonable doubt." *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 344. The California Supreme Court concluded that even "[e]xamined de novo, each of the [trial] court's crucial determinations is sound." *Id.* The court explained, first, "the police activity here was clearly not coercive." *Id.* "Second, Detective Bolts's comment about the death penalty did not constitute a promise of benefit."[9] *Id.* "Third, Detective Bolts's comment about the death penalty did not operate as an inducement."[10] *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 345.

9 The court reasoned: "Hobson's words effectively 'withdrew' the remark. And as defendant himself conceded at the hearing, the remark was not 'renewed': the officers '[n]ever again discuss[ed] the matter of the death penalty with' him." ***Benson***, 276 Cal.Rptr. 827, 802 P.2d at 345.

10 The California Supreme Court explained:

> On this record, it is difficult to conclude that the remark was even a cause-in-fact of the confessions. To Bolts's observation, "There's no death penalty here," defendant immediately responded, "That doesn't matter." The evidence practically compels the inference that insofar as the confessions were concerned, the comment in fact "didn't matter." We recognize that the remark preceded defendant's confessions. The intervening period of time, however, was not insubstantial. Moreover, temporal priority does not establish causal force: it is a logical fallacy to reason *post hoc ergo propter hoc*. In any event, the evidence simply does not support an inference that the causal connection between Bolts['s] comment and defendant's confessions was more than "but for." As explained above, however, causation-in-fact is insufficient.
>
> Again, it is true that defendant testified that he was indeed induced to confess by the comment. But again, the court clearly, albeit impliedly, found his testimony lacking in credibility. Again, on this record we must agree.

Benson, 276 Cal.Rptr. 827, 802 P.2d at 345.

***817** The California Supreme Court also rejected **Benson's** argument that his statements to Dr. Gordon should have been suppressed. Reviewing the record de novo, the court agreed with the trial court's implicit determination that **Benson's** confession was voluntary. *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 346. It reasoned: (1) "defendant was properly advised of, and effectively waived, his *Miranda* rights - -

nor does he claim otherwise"; (2) "of crucial importance, the necessary element of coercion on the part of the authorities is lacking"; (3) "there was no promise or deception by the authorities"; and (4) "defendant made his confession freely out of compunction." *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 346–47.

G. Post-Conviction Proceedings

Benson filed his first state habeas petition in January 1993 with the California Supreme Court. He argued that his confessions to the police and Dr. Gordon were involuntary based on "severe psychological, neurological and developmental impairments." He relied on psychologists and psychiatrists who opined that **Benson** had brain damage caused by "in utero toxin exposure, anoxia, head trauma, and solvent inhalation," as well as voluntary drug use, and also head injuries from physical abuse and a near drowning incident. Experts also asserted that **Benson** suffered from dis-associative disorder and Post-Traumatic Stress Disorder. Dr. Abel, who testified on **Benson's** behalf at trial, supplemented his prior diagnoses and now opined that **Benson's** neurological and psychiatric impairments rendered him an unreliable witness and that all of **Benson's** statements should be viewed skeptically.

In addition, the habeas petition alleged ineffective assistance of counsel at the penalty phase based on counsel's failure to investigate and present evidence that **Benson's** two-to-three years on the Buchanan farm were horrible, and that **Benson** suffered from an organic brain injury. In support of this claim, **Benson** alleged that on the Buchanan farm he and his brothers were subject to sexual, emotional, and physical abuse. He was beaten until bloody with various objects, including a belt buckle, his hand was intentionally burned on a stove, and soap and cayenne pepper were forced into his mouth. Allegedly, **Benson** "developed psychotic behavior (in response to the beatings), which, for example included his withdrawing and becoming quiet, banging his head against the wall, and eating dirt and live bugs." The petition alleged that **Benson** was "fondled, sodomized, beaten in the genitals, given frequent and repeated enemas, and forced to perform sexual acts with the farm animals." The petition further alleged that David, Marjorie Buchanan's son, caused **Benson** to be "fondled, sodomized, digitally raped, orally copulated, forced to orally copulate David, raped with foreign objects including a cattle prod and tied to a tree or a chair, molested, and then left naked and tied for hours."[11] However, the habeas petition also alleged that **Benson** had "no memory of the torture, and sexual, psychological and emotional abuse he suffered on the Petaluma farm."

11 In addition, the petition asserted that David was a Boy Scout leader, and in 1956, the year **Benson** left the farm, David was convicted of sexually molesting members of a Boy Scout troop.

On May 12, 1994, the California Supreme Court denied the habeas petition "on the merits," with no further explanation.

***818** In February 2001, **Benson** filed a third habeas petition with the California Supreme Court.[12] In this petition, **Benson** argued his Fourth Amendment rights were violated because he was not arraigned within 48 hours of his arrest as required by *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661,

114 L.Ed.2d 49 (1991). The court denied the petition on its merits without explanation.

12 A second habeas petition was denied in August 1997, but none of the claims asserted therein are at issue in this federal petition.

III. District Court Proceedings

Benson filed his federal habeas petition with the United States District Court for the Central District of California in April 1997, and amended it in August 1997. After California moved for summary judgment, **Benson** was allowed to file a second amended petition. On February 28, 2013, the district court issued a 373-page memorandum and order granting summary judgment in favor of California and denying **Benson's** request for an evidentiary hearing.

Because **Benson** filed his habeas petition after April 24, 1996, the district court reviewed the petition under AEDPA's deferential standards. *See Woodford v. Garceau*, 538 U.S. 202, 207, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). Accordingly, relief is available only if the last-reasoned state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). The district court described the standard of review: where "a state court adjudicates the merits of an issue without providing its underlying reasoning, as it did here in the case of petitioner's four state habeas petitions, the federal court conducts an independent review of the record to determine whether the state court's resolution of the issue constitut[es] an objectively unreasonable application of clearly established federal law." It further noted that where a state court "has not decided an issue, the federal court reviews that question de novo." However, it recognized that in *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that a federal court may not grant relief just because it would have reached a different conclusion; rather, a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *See also Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

A. The Admissibility of Benson's Confessions

The district court first addressed **Benson's** challenges to the admissibility of his statements to Detective Bolts, Investigator Hobson, and Dr. Gordon. **Benson** argued that the tape recordings of his statements to Bolts and Hobson were unreliable and inaccurate. The district court rejected this contention, noting that **Benson** had identified no clearly established federal law that required complete accuracy in tape-recordings and transcriptions of uncoerced admissions. The district court found that "the California Supreme Court could reasonably have concluded, on the record before it, that petitioner's claim here fails because, although petitioner has pointed out numerous errors and omissions in the tapes and transcripts, he has not identified ***819** any errors or omissions which are materially prejudicial to him."

Second, **Benson** claimed that his statements to Bolts, Hobson, and Dr. Gordon were involuntary. The district court noted that the California Supreme Court had found that (1) Bolts's statement (no death penalty) did not constitute a promise of leniency, (2) Hobson's following statement effectively countered the death penalty statement, (3) **Benson's** testimony that Bolts's comment induced him to confess lacked credibility, and (4) **Benson's** true motivation for confessing was "a compunction arising from of his own conscience." Based on its review of the record, the district court held that these findings were "reasonable in light of the evidence presented in state court," and were entitled to a presumption of correctness under § 2254(e)(1). The court further found that **Benson** "[had] failed to rebut these factual findings with any evidence at all, let alone evidence that is 'clear and convincing.' " The court concluded:

> All of this evidence supports the California Supreme Court's finding that police coercion played no role in causing petitioner to make his statements to Detective Bolts and Investigator Hobson on January 9 and 13, 1986, or his statements to Dr. Gordon on January 10 and 12, 1986. This court "cannot conclude that there is no possibility that fairminded jurists could agree with the state court's interpretation" of the record on this issue.

Third, **Benson** asserted that his waiver of his *Miranda* rights was not voluntary, knowing, and intelligent. In rejecting this argument, the district court noted it was undisputed that **Benson** had been read his *Miranda* rights before the interviews and had agreed to speak. The court further reasoned that the California Supreme Court could reasonably have concluded that **Benson's** waivers of his *Miranda* rights were motivated by the same "compunction arising from his own conscience." The district court concluded that the California Supreme Court could reasonably have concluded that **Benson's** waivers were voluntary, knowing, and intelligent, particularly as **Benson** "acknowledged that he understood his rights and expressly stated that he waived them," and "demonstrated during the interviews that he had extensive, prior experience with law enforcement."

Although **Benson** claimed his waivers were not knowing due to his mental condition and incompetence, the district court noted that none of his "experts' declarations include an opinion that petitioner's waiver of *Miranda* rights was not knowing or intelligent due to his mental condition or that he was incompetent to waive those rights." Accordingly, the California Supreme Court could reasonably have concluded that **Benson's** proffer of "conclusory evidence was insufficient to establish a prima facie case that his waiver of *Miranda* rights was not knowing or intelligent."

Fourth, **Benson** argued that the seven-day delay between his arrest and his arraignment violated his Fourth Amendment rights as set forth in *McLaughlin*, 500 U.S. at 57, 111 S.Ct. 1661, as well as his rights to due process and counsel. He argued that the delay tainted his confessions. The district court rejected this claim and ruled that because **Benson** had been subject to a parole hold, no clearly established federal law required compliance with the 48-hour time frame set forth in *McLaughlin*. Recognizing that there was no copy of the

parole hold in **Benson's** file, the district court, nonetheless, credited the 2002 deposition of **Benson's** parole officer that he ***820** had placed a parole hold on **Benson.**[13]

13 The district court commented:

> [T]here is no affirmative evidence demonstrating that Martel failed to place a parole hold on petitioner; in fact, all of the affirmative evidence supports the conclusion that Martel did place the parole hold when he testified he did. The only "evidence" to which petitioner points in support of the contrary contention is the absence of a document from a file where it should appear and Martel's lack of an explanation for the document's absence. This is insufficient to justify the further delay of this action that granting a stay under *Gonzalez* [*v. Wong*, 667 F.3d 965 (9th Cir. 2011)] would entail. Also weighing against the grant of a stay is the fact that petitioner has apparently made no effort until now to present the alleged new evidence to the California Supreme Court even though he has had the deposition transcript where the "evidence" appears since 2002.

B. Incompetence

The district court also rejected **Benson's** claim of incompetence. The district court concluded that **Benson's** "claim he was actually incompetent to stand trial does not survive review under [28] U.S.C. § 2254(d), and must be DENIED. The full record establishes that he was unusually focused and responsive, and was acutely aware of the proceedings."

C. Ineffective Assistance of Counsel (IAC) at the Penalty Phase

1. *Benson's Childhood*

In its memorandum order the district court reviewed the relevant filings and then described **Benson's** childhood. He was the fourth child in a family of six boys and a girl. His mother was a drug addict, and both she and his father were alcoholics. **Benson** and his brothers were sent to live on a farm near Petaluma with a foster mother, Marjorie Buchanan. Life on the farm was represented at trial as relatively normal, aside from the fact that the boys seldom saw their natural parents. When **Benson** was nine years old, his father obtained physical custody over him, and **Benson** and his brothers went to live with his father and a stepmother in a motel in Long Beach. Within weeks the family was evicted, and for the next three years they lived "in seedy, skid row hotels, houses, apartments and shanties, including a converted chicken coop, never staying in any one place more than a few months or the time it took for the manager or landlord to realize that no rent was forthcoming." The father, a chronic alcoholic, was always unemployed and looking for money. The boys continually attended different schools, and worked at whatever odd jobs they could find.

The district court noted:

> The county protective services agency sometimes intervened to remove the **Benson** children from their father's custody and place them in various foster and group homes. Off and on, the boys were reunited with their father, only to be repeatedly split up and placed in foster and group homes again. Finally when petitioner was 11 or 12, after three years of sporadically living with their father, the children were permanently taken from their father, and they were never together again as a family. All of the boys turned to alcohol to escape from reality, but Sandy [the daughter] did not.

Benson lived in group homes and institutions from age 11 onward and had difficulty

adjusting to society. He began drinking alcohol and using marijuana at age 15. He was arrested a number of times for drunk driving and began using amphetamines and barbiturates around age 18. He went to junior high school in Los Angeles, and although he missed the last three weeks of school because he was placed in juvenile ***821** hall, all of his grades were passing and some were excellent. He told a school counselor that no one cared, no one believed him, he wanted to be with his brothers and sisters, and it was all his parents' fault.

Benson was first arrested at age 10, and was first committed to the California Youth Authority (CYA) at age 13. He was removed from one foster home after he engaged in sexual activity with a younger female there. The district court further noted that **Benson** also had molested a four-year-old girl, but it was not reported to the authorities, he had a number of window-peeping charges, and he was a pedophile from age 14.

Between June 1967, when he was released from the CYA, and his arrest in 1971, **Benson** had 13 run-ins with the law and spent a year in custody. After his 1972 conviction, **Benson** was confined at Atascadero State Hospital until 1974. Due to his criminal activity and convictions, **Benson** was out of custody for less than a year between 1975 and 1985.

2. *Denial of Relief on IAC*

The district court noted that trial counsel's strategy at the penalty stage had been to argue that **Benson** "was a 'normal' little boy on the Buchanans' Petaluma farm, who was not born evil, but was a poor child taken from a normal life at the ranch and exposed to severe deprivation when his father took him and his brothers away from the ranch." The court then reviewed the mitigating evidence that **Benson** contends should have been presented including his predisposition to mental illness, exposure to alcohol in his mother's womb, the physical, sexual, and psychological abuse inflicted on **Benson** by the Buchanans, and his numerous serious and longstanding mental deficiencies.

The district court nonetheless denied relief on **Benson's** IAC claim, reasoning:

> Having before it, as it did, petitioner's complete social history and the psychiatric diagnoses of Drs. Able [sic] and Foster, the California Supreme Court could reasonably have concluded that the additional information provided in connection with petitioner's first state habeas petition would have been insufficient to establish a reasonable probability that at least one juror would be persuaded to sentence petitioner to life without parole instead of the death penalty. Although petitioner's current account of his history is sordid and awful, his crimes were heinous, and the aggravating evidence presented by the prosecution was also sordid. The state court could reasonably have concluded that presenting petitioner as a normal little boy who was removed from a nurturing environment on the Buchanan farm and exposed to severe deprivation while living with his father might have benefitted petitioner, and that such a person would be more worthy of sympathy and a life sentence than someone who was environmentally and genetically damaged beyond rehabilitation from the beginning.

The district court distinguished the then-most-recent Ninth Circuit case, *Stankewitz v. Wong*, 698 F.3d 1163 (9th Cir. 2012). The court noted that unlike counsel in *Stankewitz*, **Benson's** counsel did present mitigating evidence,[14] and that **Benson** ***822** had "committed four murders which, however callous, were far from impulsive." The district court concluded that **Benson's** claim of IAC at the penalty stage "[did] not survive review under AEDPA."

14 The court noted that the evidence included:
(1) that his mother was a prostitute and drug addict and his father an alcoholic; (2) that he was placed into foster care almost immediately after birth; (3) that his natural mother visited him only once during the first eight years of his life; (4) that upon reaching the age nine, his father obtained physical custody and within a few weeks of that Petitioner was forced to endure a years-long travail of bouncing around skid row hotels, shanties (including a chicken coop) and different schools; (5) that he experienced chronic hunger (he was forced to steal food); (6) that he was subjected to periodic placements into foster and group homes; (7) that petitioner and his several brothers all turned to alcohol; and (8) that he was first arrested at age 10, spent 4 of the 7 years between age 13 and 20 in the custody of the California Youth Authority, started using drugs at age 15, and between 1975 and 1985 was out of prison for a total of less than one year.

IV. Discussion

On appeal, **Benson** challenges four aspects of the district court's 373-page decision. The two certified issues are: (1) whether **Benson's** statements to the officers and Dr. Gordon should have been suppressed, and (2) whether **Benson's** counsel was ineffective at the penalty phase because he failed to investigate and present evidence of **Benson's** "severe physical, sexual and emotional abuse in early childhood at the hands of a foster family." **Benson** also raises two uncertified issues: (3) whether trial counsel was ineffective at the guilt stage in failing to impeach the state's case, and (4) whether the prosecutor withheld material and exculpatory evidence.[15]

15 We requested and received a responding brief from California. *See* 9th Cir. R. 22-1(f). We then accepted **Benson's** oversized reply brief. We now issue a Certificate of Appealability for these two issues and consider the merits of **Benson's** contentions. *See Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 773–74, 197 L.Ed.2d 1 (2017).

A. Standard of Review

As the district court noted, and **Benson** concedes, his federal habeas petition is reviewed under AEDPA, 28 U.S.C. § 2254. *Woodford,* 538 U.S. at 210, 123 S.Ct. 1398 ("Because respondent's federal habeas corpus application was not filed until after AEDPA's effective date, that application is subject to AEDPA's amendments."). Accordingly, we can grant relief only upon a showing that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The Supreme Court has directed that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101, 131 S.Ct. 770. Moreover, even "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met

by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98, 131 S.Ct. 770.

B. Benson's Statements were Properly Admitted

The record shows, and **Benson** admits, that he was advised of his *Miranda* rights prior to each of his police interviews and he indicated that he understood those rights and waived them. Nonetheless, **Benson** argues his statements should not have been admitted because: (1) his confession was tainted because he was not presented with the probable cause which supported his arrest within 48 hours as required by ***823** *McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49; (2) his statements were not voluntary because he relied on the officer's statement that there was no death penalty and the interrogations were coercive; and (3) he has mental impairments which were exacerbated by his use of drugs, necessitating the suppression of his confessions. None of **Benson's** arguments merit relief.[16]

16 **Benson** also appears to advance as a separate argument that it was clear error and an abuse of discretion for the district court not to hold an evidentiary hearing. This argument fails in light of the Supreme Court direction in *Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, that review under 28 U.S.C. § 2254(d)(1) is limited to the record in existence before the state court. *Id.* at 181, 131 S.Ct. 1388. Our review of the record shows that the district court considered **Benson's** evidence of mental impairment, was aware of the allegations concerning the interrogation procedures, and rejected **Benson's** *McLaughlin* claim. Thus, it appears that all of **Benson's** factual and legal allegations that were before the state courts were also before the district court, and we perceive no factual issue that required the district court to hold an evidentiary hearing. **Benson** has not carried his burden of showing that he was denied due process by the district court declining to hold an evidentiary hearing.

1. ***Benson*** *is not entitled to any relief under McLaughlin*

a. *Because a parole hold was put in place,* McLaughlin *does not apply.*

Benson gave multiple detailed confessions regarding the murders. However, each of the confessions was made during the period of time between **Benson's** arrest for kidnapping on January 7, 1986 and January 14, 1986, when he was arraigned and presented with the probable cause for his arrest for the first time. The Supreme Court ruled in *County of Riverside v. McLaughlin*, 500 U.S. 44, 57, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) that an arrestee is entitled under the Fourth Amendment to a hearing at which he is presented with the probable cause of his arrest within forty-eight hours of the arrest. **Benson** argues that his confessions were tainted due to the delay in his arraignment.

Benson raised his *McLaughlin* claim in his third state habeas petition, which was denied by the California Supreme Court on February 28, 2001. Accordingly, he is entitled to relief on this claim only if "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770.

A Fourth Amendment claim resulting from a *McLaughlin* violation would be cognizable on habeas corpus review. *Anderson v. Calderon*, 232 F.3d 1053, 1071–72 (9th Cir. 2000), *overruled in part on other grounds by Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2003). However, the State argues that the 48-hour rule described in *McLaughlin* does not

apply to the Fourth Amendment rights of a parolee who is held pursuant to a "parole hold." Generally, a parole hold authorizes a person suspected of violating his parole to be detained while authorities investigate the alleged parole violation. As we have already noted, **Benson's** parole officer, Felix Martel, placed a parole hold on **Benson** immediately after **Benson's** arrest for the kidnaping.

Benson argues that evidence gathered since his trial calls into question whether a parole hold was, in fact, put in place. In particular, he asserts that as early as 2002, in connection with his third state habeas petition, the actual paper parole hold could not be located. However, **Benson's** parole officer Martel testified at the initial suppression hearing in June 1986, and at his deposition on May, 2002, that he had ***824** placed a parole hold on **Benson** on Wednesday, January 8, 1986.

Although the district court accepted the 2002 deposition of **Benson's** parole officer, the information in the deposition is not properly before us. *See* 28 U.S.C. § 2254(d)(2) (making clear that a writ of habeas corpus will not be granted unless the State court's adjudication on the merits "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court* proceeding") (emphasis added). We have held that *Pinholster* prohibits consideration of new evidence "for the purpose of determining whether the last reasoned state court decision was contrary to or an unreasonable application of clearly established law or an unreasonable determination of the facts." *Crittenden v.* ***Chappell***, 804 F.3d 998, 1010 (9th Cir. 2015). In other words, new evidence may not be used to determine whether the California Supreme Court's decision was an unreasonable determination of the facts before it. Accordingly, we are precluded from considering the evidence.[17]

17 In any event the newly proffered evidence does not raise a material issue of fact. All the affirmative evidence in **Benson's** state court proceedings shows that a parole hold was placed on **Benson** on Wednesday, January 8, 1986. Indeed, multiple documents that were produced at the 2002 deposition confirm the parole hold. For example, both an incident report written by **Benson's** parole officer and a teletype message sent to the sheriff's office attest to the placing of a parole hold on **Benson**. **Benson's** presentation does not come near showing that the California Supreme Court's denial of relief was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

The existence of a parole hold obviated the Fourth Amendment requirement that **Benson** be arraigned within 48 hours. In *Morrissey v. Brewer*, 408 U.S. 471, 483, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Supreme Court noted that "the State has an overwhelming interest in being able to return the individual [on parole] to imprisonment without the burden of a new adversary criminal trial," commended a two stage process,[18] and recognized that there is "typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked." *Id.* at 485, 92 S.Ct. 2593. In *Pierre v. Washington State Board of Prison Terms and Paroles*, 699 F.2d 471, 473 (9th Cir. 1983), we upheld a preliminary probable cause determination held 21 days after parole was suspended. Moreover, the California Supreme Court has declined to require a probable cause hearing for a parolee within ten days of arrest. *People v. DeLeon*, 220 Cal.Rptr.3d 784, 399 P.3d 13, 26 (2017). *McLaughlin* therefore does

not apply to **Benson's** situation, and there is no clearly established law that a parolee subject to a parole hold must be presented with the probable cause within 48 hours of his arrest.

18 The Supreme Court explained: "The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked." 408 U.S. at 485, 92 S.Ct. 2593.

b. *Even if* McLaughlin *applied,* ***Benson's*** *confessions would not be suppressed.*

In *Anderson*, 232 F.3d at 1071, we held that the appropriate remedy for a *McLaughlin* violation "is the exclusion of the evidence in question —*if* it was 'fruit of the poisonous tree.' " We noted that this test "ensures that courts will not suppress evidence causally unrelated to the Fourth Amendment violation," and "protects the arraignment right in question by barring ***825** any exploitation of the delay that causally produces a statement." *Id.*

Here, **Benson** was detained late at night on Tuesday, January 7, 1986, and he voluntarily confessed to the murders and sexual assaults in disturbing and graphic detail to the officers on January 9, 1986, within 48 hours of his detention. Thus, the "delay" of his arraignment until Monday, January 13, in no way created or influenced his first confession.

In addition, **Benson's** assertion that the delay in his arraignment was specifically to deny him counsel and thus violated his Sixth Amendment right to counsel is not meritorious. **Benson** suggests that because his name was on the lists of individuals to be taken to court for arraignment on January 8, 9, and 10, and he was taken to the court on Friday, January 10, but not arraigned, he was held for an improper purpose. However, Officer Bolts explained that the "daily prisoner transportation list" was created every morning by the booking clerk and included the names of all those in custody who have not yet appeared in court. Officer Bolts indicated that **Benson** was transported to the court on Friday, January 10 and not arraigned, but did not know why. There is no evidence in the record that the delay in arraignment was designed to frustrate or prevent the provision of counsel. We need not inquire further into the reasons for **Benson** not being arraigned on Friday in terms of abridging his Fourth Amendment rights because it is not causally related to his prior confessions. Furthermore, as **Benson** points to no case law indicating that a failure to arraign an individual within 48 hours represents a per se violation of that individual's Sixth Amendment right to counsel, there is no clearly established law which compels a contrary result.

2. *The California Supreme Court reasonably concluded that* ***Benson's*** *confessions were voluntary*

Benson asserts that the confessions he made to Bolts and Hobson were not "voluntary," and that the state court's determinations that they were voluntary represented an unreasonable determination of the facts. In his opening brief, **Benson** claims that the "officers' plan was to make Mr. **Benson** believe they were dealing with him, but to not do so – the exact type of 'trickery' that is impermissible when leading one to believe in an inducement."

The trial court held a suppression hearing regarding **Benson's** confessions, and the

California Supreme Court upheld the trial court's decision not to suppress the confessions. Before us **Benson** makes two arguments regarding the voluntariness of the confessions. First, he argues that the confession was coerced because of Detective Bolts's incorrect statement that "there is no death penalty here." Second, **Benson** argues that his mental defects prevented him from being able to confess voluntarily. The Supreme Court of California, after a review of the record, determined that **Benson's** confession was "voluntary beyond a reasonable doubt." *People v.* ***Benson***, 276 Cal.Rptr. 827, 802 P.2d at 345.

In denying the motion to suppress the statements, the trial court found that the police officers had not been coercive and that their statement regarding the death penalty did not function as an inducement. The trial court described the interview as "totally aboveboard," and noted that there was "no mention of the degree of any charge pending ... [or] an implied promise of a reduced charge." The trial court further found that there had been no false promises. It found that there was no deception, as "there's no suggestion of different treatment if Mr. **Benson** chose to make any confessions or admissions" and no "implied ***826** promise of leniency." The trial court concluded that "Mr. **Benson's** statements were not coerced ... but rather were made freely and voluntarily."

The California Supreme Court, upon a full review of the record, agreed and found that there was "[n]o coercion, no harassment. To the contrary, [the police interview] was strangely cordial and somewhat light, and not at all heavy-handed in the approach that was taken." ***Benson***, 276 Cal.Rptr. 827, 802 P.2d at 344. The California Supreme Court also noted that there was a "not insubstantial" period of time between Detective Bolts's statement about the death penalty and **Benson's** ultimate confession, and that **Benson's** statement "it doesn't matter" in response to Bolts's comment "practically compels the inference that insofar as the confessions were concerned, the comment in fact 'didn't matter.' " *Id.*, 276 Cal.Rptr. 827, 802 P.2d at 345.

In the case of a coerced confession, we have observed that the "pivotal question ... is whether the defendant's will was overborne when the defendant confessed." *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993). The California Supreme Court was presented with evidence that **Benson** understood the questions being asked of him and volunteered a confession. **Benson** stated that the existence of a death penalty "didn't matter" and the interrogation was not coercive. **Benson** testified that his "primary thought was nothing was going to change the effect of the people that died. Nothing was going to bring them back." He noted that there was "no one answer" to explain why he decided to confess, and he indicated on several occasions that he felt relieved by admitting his actions. The California Supreme Court's conclusion that **Benson's** will was not overborne by the misstatement about the law regarding the death penalty in California was neither "an unreasonable application, of clearly established Federal law, as determined by the Supreme Court of the United States," nor "based on an unreasonable determination of the facts in light

of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).[19]

19 **Benson's** argument that his confession to Dr. Gordon should have been suppressed because he was misled by Dr. Gordon, or confused, also fails because it is not compelled by the evidence. **Benson** admits that Dr. Gordon properly introduced himself and advised him of his *Miranda* rights. Thus, even if **Benson** was confused as to the purpose of Dr. Gordon's visit, this was not Dr. Gordon's or the state's fault.

3. *Benson has not shown that his mental condition rendered his confession involuntary*

Benson claims that he "suffers from diffuse organic brain damage and frontal lobe damage which severely affects his mental functioning." He contends that these impairments "create irrational belief systems and behavior," and deny him "the capacity to recall accurately the events that he recounted." He argues that the California Supreme Court, in denying this claim, "unreasonably determined the facts, and unreasonably applied Supreme Court precedent."

Benson raised this argument in his first habeas petition, which the California Supreme Court, on May 12, 1994, denied on the merits without further explanation. We review the record to determine whether "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98, 131 S.Ct. 770.

Benson has not met this standard. The district court carefully reviewed the evidence of **Benson's** behavior during pretrial proceedings and at trial, concluded that ***827 Benson** "was unusually focused and responsive, and was acutely aware of the proceedings." This determination is a fair reading of the record of the state court proceedings. **Benson** was verbose and elaborate in his confession providing excruciating descriptions of how he molested the children and eventually killed them. He did not simply agree to suggestions from the police officers. Although **Benson** began his interview by dissembling, after becoming caught in lies, he made detailed confessions. Indeed, during the hearing on the motion to suppress, **Benson's** trial attorney did not argue that **Benson's** psychological state made him incapable of rendering a voluntary confession.[20] Further, none of the experts presented to the California Supreme Court in **Benson's** habeas filings specifically opined that **Benson's** neurological defects made it likely that his confessions were false or otherwise made **Benson** incapable of truthfully inculpating himself in a confession.

20 The district court noted in reviewing **Benson's** participation in the initial phases of his trial:

> These passages make it clear petitioner was well-aware of the nature of the proceedings against him. Significantly, in argument on the motion to suppress, petitioner's attorney made no argument that petitioner was incompetent to render a voluntary confession, nor did counsel suggest a doubt existed as to petitioner's competence to proceed with the hearing or with trial.

We agree with the district court that it was reasonable for the California Supreme Court to conclude that **Benson** was aware of the nature of the proceedings against him, and that he understood the consequences of his statements to the officers.

C. Trial Counsel Was Not Ineffective at the Penalty Phase

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth the now well-

established two-prong test for ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S.Ct. 2052.

In addition to setting forth the *Strickland* two-prong test, the Supreme Court has further directed that where a federal habeas petitioner challenges his state trial counsel's performance, the question in federal court " 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.' " *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)). Thus, our review of the state court decision on ineffective assistance of counsel is "doubly deferential." *Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388 (quoting *Knowles*, 556 U.S. at 123, 129 S.Ct. 1411).

The Supreme Court emphasized that federal courts should defer to the state court's decision. "Pinholster must demonstrate that it was necessarily unreasonable ***828** for the California Supreme Court to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death." 563 U.S. at 190, 131 S.Ct. 1388. The Court further commented on the deference due counsel who "confronted a challenging penalty phase with an unsympathetic client," and held that we, the Ninth Circuit, had "misapplied *Strickland* and overlooked 'the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions.' " *Pinholster*, 563 U.S. at 193, 195, 131 S.Ct. 1388 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

Accordingly, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105, 131 S.Ct. 770.

1. *The record does not compel a finding that counsel was ineffective*

Benson argues that trial counsel was ineffective in failing to investigate and then present evidence of the physical, mental, and sexual abuse **Benson** endured at the Buchanan ranch. He also claims that counsel should have investigated whether he had an organic brain injury.

a. *Counsel's "failure" to investigate further* ***Benson's*** *childhood.*

The strategy at trial was to humanize **Benson**, and to point to at least one moment in time when **Benson** appeared happy, normal, and relatable. **Benson's** counsel presented a photograph of **Benson** on the Buchanan farm: **Benson** was nine years old, smiling, and bottle-feeding a calf. Defense counsel then asked the question, "How did a little boy who got from – that darling little boy in that photograph with the bottle of milk feeding the calf – one wonders how did he get from there to where we are today?" Counsel then described the relative deprivation **Benson** experienced. Mitigating evidence was presented that (1) **Benson's** mother was a prostitute and father an alcoholic; (2) he was placed into a foster home immediately after birth; (3) there was hope for a nice life due to his time on the Buchanan farm; (4) **Benson** was ripped from the farm at age nine, and within weeks was forced to endure a years-long travail of bouncing around seedy hotels, shanties (including a chicken coop) and different schools; (5) **Benson** experienced chronic hunger; (6) **Benson** was placed periodically in other foster homes; (7) **Benson** and his brothers turned to alcohol and drugs; (8) **Benson** was first arrested at age 10 and between 13 and 20 was in and out of custody; (9) **Benson** was diagnosed with "early-onset pedophilia," which made it difficult for him to conform his behavior to social norms; and (10) **Benson** had mental impairment due to drug use.

Benson now contends that the strategy used by **Benson's** trial counsel was deficient. He proffers evidence that life on the Buchanan farm was far from idyllic. Evidence has come to light indicating that Marjorie Buchanan beat **Benson** with a rubber hose, willow tree branches, a belt, and a large shovel. She held **Benson's** hand to the stove, and punished him by filling his mouth with cayenne pepper. She gave the boys enemas of hot, soapy water. Her adult son would routinely sexually abuse **Benson** and his brothers, and forced **Benson** to do unnatural acts with animals. According to **Benson's** brother Bill, "[i]t happened so much that we all thought it was normal." The abuse allegedly led to strange behavior: **Benson** would bang his head against the wall and eat dirt, live ***829** bugs, and beetles. **Benson** was also hit on the head repeatedly as a child and at one point nearly drowned. To deal with the abuse, the **Benson** brothers abused various substances, including drinking cough syrup and sniffing glue to the point of hallucinations. Dr. Jonathan Pincus who examined **Benson** well after the trial, determined that **Benson** evinces signs indicative of brain damage.

Benson argues that counsel should have been on notice to investigate his time on the Buchanan farm. He points to a February 1994 declaration by Dorothy Ballew, a private investigator and the defense investigator for **Benson** in 1986–87. She stated that: (a) she was the only person on the defense team to meet regularly with **Benson**; (b) she "realized early on that many of his memories, especially of his childhood, were inaccurate and incomplete"; (c) she suspected trauma in **Benson's** past; and (d) she had "requested trial counsel's assistance in pursuing specific avenues of investigation and was met with no response or was rebuffed." Ballew asserted that she told trial counsel that there "were several extremely important investigative tasks that needed to be completed before commencing [the] penalty phase," but counsel did not request a continuance. Ballew

further asserted that when she interviewed Brad **Benson**, "immediately after the penalty phase had begun," he told her that Marjorie Buchanan disciplined him and his brothers "by putting red pepper in their mouths and beating them with a rubber hose," and that from the age of nine to twelve, he (Brad) "was routinely sodomized by his older foster brother, David Buchanan." Ballew reported what Brad had told her to trial counsel but he declined to request a continuance of the penalty phase.

Benson also points to a December 1992 declaration by Terry Kellogg, "a family systems therapist and Certified Chemical Dependency Practitioner." Kellogg stated that he was contacted by Ballew in early 1987 and was retained by trial counsel as an expert to testify at trial. Kellogg traveled to Santa Barbara in March 1987 to consult with trial counsel. He informed counsel that he "was quite certain that Mr. **Benson** had suffered significant physical and/or sexual abuse in his formative years and advised him that further investigation of Mr. **Benson's** childhood was necessary if the jury was to be provided an accurate picture of Mr. **Benson's** mental state at the time of the crimes." Kellogg asked counsel for an opportunity to meet with **Benson**, but counsel denied the request, and seemed to ignore Kellogg's suggestions.

Reasonable minds could conclude that **Benson's** trial counsel's decision not to investigate **Benson's** life on the farm further was reasonable. **Benson** himself did not recall the abuses he endured at the Buchanan ranch. Indeed, **Benson's** first habeas petition to the California Supreme Court noted that **Benson** "[had] no memory of the torture, and sexual, psychological and emotional abuse he suffered on the Petaluma farm." Dr. Gordon testified that **Benson** told him that "until [**Benson**] was nine and a half years of age in that first foster home (the Buchanan ranch), he had the nicest life he has ever known." Testimony from **Benson's** siblings corroborated Dr. Gordon's report about **Benson's** life on the farm. Brad testified that he and his siblings were "displaced from the farm" after their father won custody. Brad then described his father's alcoholism, the difficulties the family experienced after their time on the farm, and his own alcoholism. He further testified that when at age 15 he left a home for boys where he was temporarily placed, "the only thing .... I could think of was to return to the farm, to the ***830** only woman that cared about me ... Marjorie Buchanan."[21]

21 According to Ballew's declaration, when she spoke to Brad after the penalty phase had begun, Brad mentioned that he had been sodomized by David Buchanan, but apparently did not state that **Benson** also had been sodomized.

Benson has provided no evidence that trial counsel was informed that **Benson** was seriously abused at the Buchanan ranch. The only mistreatment at the Buchanan ranch that trial counsel appears to have been aware of was that Marjorie Buchanan had disciplined the **Benson** boys with red pepper and a rubber hose. The California Supreme Court could reasonably have decided that such disciplinary measures did not put trial counsel on notice that **Benson** had been tortured during his stay on the Buchanan ranch, especially given the countervailing evidence which indicated that his time at the ranch was positive.

Furthermore, counsel had a reasonable explanation for **Benson's** aberrant behavior – **Benson's** traumatic experiences living with his alcoholic father after the age of nine. Thus, with no suggestion from either **Benson** or his siblings that **Benson** suffered trauma on the Buchanan ranch, counsel cannot be faulted for not investigating a suspicion of suppressed past trauma. Reasonable minds could conclude that competent trial counsel would not have investigated **Benson's** treatment during his two-to-three-year stay at the Buchanan ranch.[22]

22 Although the defense investigator and the family systems therapist stated in 1992 and 1994 that, in 1986, they thought "that Mr. **Benson** had suffered significant physical and/or sexual abuse in his formative years," it does not appear that they focused on **Benson's** two-and-a-half year stay at the Buchanan ranch. In light of **Benson's** and Brad's favorable testimony in 1986 concerning the Buchanan Ranch, there was little reason for trial counsel to investigate that period of **Benson's** troubling childhood.

This is not an instance in which trial counsel did not proffer a defense at the penalty stage. Counsel called two of **Benson's** brothers and his sister to establish that they all had endured horrible childhoods. Counsel called a retired high school principal to testify that in junior high school **Benson** was capable but misunderstood. Counsel called **Benson's** uncle and a social worker to testify that **Benson's** father was a secretive, unreliable alcoholic who refused to address his alcoholism. Counsel called a pharmacist who testified that **Benson** was "very very paranoid" and that his judgment was compromised by his addiction to methamphetamine. Several months before trial, counsel retained Dr. Abel who testified that **Benson** had a number of psychiatric disorders, including paraphilia, that he had a drug dependency, and that he generally did not need to kill. Counsel even recalled one of the officers to support the argument that **Benson** was addicted to methamphetamine at the time of the murder. In sum, trial counsel presented a cogent theory supported by the testimony of several witnesses against the imposition of the death penalty

This defense, although unsuccessful, was a reasonable strategy. Portraying **Benson** as a normal boy until he was nine or ten seems just as likely, perhaps more likely, to tug on the heart-strings of the jury as explaining that mental health problems ran in **Benson's** family and that he was mistreated all his life rather than after he was nine and a half years old. Indeed, the suggestion that **Benson's** perversion was a result of a traumatic period in his childhood allowed for the possibility that he could change, that he could reform. Arguing that **Benson's** depravity emanated ***831** from sexual and physical abuse throughout the entirety of his childhood, while perhaps reducing a perception of his responsibility for his actions, might also make it appear less likely that **Benson** could change. This was a material concern in light of the admitted evidence of **Benson's** multiple prior abductions of children. In addition, this approach would be slightly inconsistent with counsel's argument, through Dr. Abel, that **Benson** did not need to kill and could conform his behavior to acceptable standards if incarcerated for life.

Benson's counsel's efforts are clearly distinguishable from those cases in which defense counsel have been found ineffective at the penalty stage. *See Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ("It flouts prudence to

deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking."); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (holding that "[c]ounsel's decision not to expand their investigation beyond [the pre-sentence report] fell short of the professional standard that prevailed in 1989"); *Porter v. McCollum*, 558 U.S. 30, 39–40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (holding that counsel's failure to investigate any evidence of Porter's mental impairment, family background, or military service was not a reasonable professional judgment). Similarly, in *Stankewitz v. Wong*, 698 F.3d 1163, 1166 (9th Cir. 2012), relief was based, in part, on counsel's failure to hire "an investigator or interview[ ] Stankewitz's teachers, foster parents, psychiatrists, psychologists or anyone else who may have examined or spent significant time with him during his childhood and youth." *Id.* at 1171 (internal quotation marks and citations omitted).

Benson's trial counsel in 1986 investigated **Benson's** background and put on a comprehensive defense to the death penalty. Perhaps different trial counsel might have employed different tactics, but on this record we agree with the district court that the "California Supreme Court could reasonably have concluded that 'the egregious nature of [**Benson's**] offenses' and the sordid nature of the other evidence the prosecution proffered in aggravation were sufficient to 'overcome any alleged prejudice resulting from counsel's 'failure' to introduce mitigating evidence.' "

b. *Counsel's failure to investigate organic brain injury.*

Benson also argues that his counsel was ineffective because he did not investigate whether **Benson** suffered from an organic brain injury. He points to a declaration by Terry Kellogg, the "family systems therapist" retained by **Benson's** attorneys, who stated that he advised **Benson's** counsel to look for symptoms of serious head injuries. **Benson** contends that the neurological impairments were apparent because he had difficulty in school, and his problems with concentration and attention were "apparent to teachers, social workers and probation officers." **Benson** asserts that his neurological impairment has been confirmed by subsequent testing: Dr. Jonathan Pincus, a neurologist, stated in a declaration dated January 7, 1993, that testing has confirmed that **Benson** has organic brain injury.

Benson objects that "the jury never knew ... that [he] suffers from frontal and temporal lobe impairment [or] corresponding neurological impairment." **Benson** further argues that the mitigating evidence which his trial counsel failed to present is "explanatory mitigation .... [it] does precisely what trial counsel in this case admitted he cannot do – it explains crimes." According to Dr. Pincus, **Benson's** "neurological damage in combination with ***832** the extreme abuse and sexual abuse to which [he] was subjected as a child were the cause of [his] bizarre sexual impulses. With the brain damage he sustained after birth, [his] ability to control these impulses is severely compromised and non-existent at times."

However, the California Supreme Court could have concluded that trial counsel was not on notice of organic brain injury, and therefore not required to investigate it. The only possible evidence of organic brain injury which was known to **Benson's** trial counsel was that (1) **Benson** had trouble in school, and (2) a statement by Kellogg to the effect that counsel should look for a history of head injuries.[23] But **Benson's** trial counsel had employed the aid of a mental health expert, Dr. Gene Abel, a board certified psychiatrist. According to his trial testimony, Dr. Abel examined approximately 280 "pages of information regarding various evaluations that [**Benson**] has had," and met with **Benson** for approximately twelve to thirteen hours. Dr. Abel also administered "a variety of paper and pencil tests that he completed when [Dr. Abel] wasn't there talking with him." Dr. Abel testified that he received **Benson's** "medical records from Atascadero and various other institutions in California as part of [his] preparation for examining [**Benson**]." Dr. Abel diagnosed **Benson** with pedophilia and serious drug dependency. He explained that **Benson's** pedophilia should have been treated with hormonal injections but was not. Dr. Abel explained that these disorders made it difficult for **Benson** to conform his conduct to the requirements of the law. Dr. Abel did not diagnose **Benson** with having experienced severe head trauma.[24]

23 Kellogg's declaration does not indicate his education. He describes himself as a "family systems therapist and Certified Chemical Dependency Practitioner." He asserts that over the past 23 years he had "treated literally thousands of patients, including hundreds of people convicted of sex offenses," has "created and consulted for sexual offender treatment programs throughout the country," and "lectured extensively at continuing education seminars for mental health professionals." The record does not indicate that he is a neurologist, psychologist, or any other kind of board certified professional.

24 In his 1992 declaration, Dr. Abel explained that after interviewing **Benson** in 1986, he diagnosed **Benson** with depression. However, he did not state in that affidavit that, after interviewing **Benson** in 1986, he suspected that **Benson** had experienced organic brain injury.

Accordingly, trial counsel was not on notice that further examination of **Benson** with the specific goal to uncover organic brain injury was necessary. This was not a case where counsel failed to have the defendant examined by a psychological professional. Quite the opposite. The psychological professional who examined **Benson**, Dr. Abel, testified for the defense, diagnosed **Benson** with a medical disorder, and did not opine that **Benson** suffered a brain injury. Indeed, trial counsel reported to **Benson's** state habeas counsel that "the mental health professionals ... retained for Mr. **Benson's** trial did not report that Mr. **Benson** suffered from organic brain damage," and noted that had such brain damage been reported, he " 'would have seized upon it' and would have used the information at trial."

The California Supreme Court could reasonably have concluded that counsel did what investigation was necessary in terms of organic brain injury. We are aware of no clearly established law that shows otherwise.

2. *The record does not compel a determination that counsel's performance, if ineffective, was prejudicial*

The ultimate step in determining whether counsel's deficient performance ***833** prejudiced the defendant at the penalty phase is reweighing the evidence in aggravation

against the totality of the mitigating evidence in order to determine "whether there is a reasonable probability that absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Sears v. Upton*, 561 U.S. 945, 956, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010); *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Reasonable probability is a level that "undermine[s] confidence in the outcome," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; however, counsel's deficient performance is not prejudicial just because the court cannot "rule out" the possibility that the sentencer would have imposed a life sentence instead of the death penalty. *Wong v. Belmontes,* 558 U.S. 15, 20, 27, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009). Rather, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112, 131 S.Ct. 770 (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052).

Here, the record fully supports the California Supreme Court's implicit determination that counsel's performance, even if it were deficient, did not prejudice **Benson**. *See Richter*, 562 U.S. at 98, 131 S.Ct. 770 (commenting "[a]s every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning," and holding that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief").

Benson's trial counsel presented the jury with evidence that **Benson's** aberrant behavior had been brought about by his horrendous childhood, that he was unable to control his pedophilia when he was high on amphetamines, and that he had taken methamphetamine during the weekend in issue. Thus, much of the proffered evidence offered in the post-conviction petition was cumulative. **Benson's** childhood was not just horrible after he was nine years old, but also horrible between the ages of seven and nine. His pedophilia was not just the consequence of an appalling childhood, but might be partially genetic or due to in utero trauma.

The proffered evidence in **Benson's** post-conviction petition included evidence of his sexual abuse while living at the Buchanan farm. We have recognized that "[c]hildhood sexual abuse can be powerful evidence in mitigation, particularly when it is not an isolated event." *Wharton v.* ***Chappell***, 765 F.3d 953, 977 (9th Cir. 2014). Absent the considerable aggravating evidence, the proffered information, including evidence of sexual abuse, might have made **Benson** more sympathetic to the jury, but it also might have made him seem less likely to be rehabilitated. Furthermore, the information does not explain or justify **Benson's** murder of Laura and her three children, particularly as, according to **Benson**, she was willing to indulge his pedophilia.

Moreover, the evidence in aggravation was damning. The heinous nature of **Benson's** crimes was overwhelming: killing Laura, sexually abusing two little girls for a day before

murdering them, and killing a two-year old boy because he cried (he could hardly have been a witness). In addition, **Benson** had four prior felony convictions over a ten-year period of time for abusing little girls, including two instances in which he had taken the girls from their ***834** bedrooms when they were sleeping. In this context, additional evidence of **Benson's** past abuse and possible genetic make up might not have assisted his attorneys' argument for a life sentence as the evidence tends to suggest that **Benson** was not able to, and never would be able to, control his pedophilia.

We do not fault the California Supreme Court for denying **Benson's** relief. To grant relief, we would have to conclude that the California Supreme Court's denial of relief was unreasonable. *Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388; *Knowles*, 556 U.S. at 123, 129 S.Ct. 1411. But, on this record, in light of **Benson's** horrific crimes, past felony convictions, and the mitigating evidence offered by trial counsel, we cannot conclude that there is no reasonable argument that the additional information would not have changed **Benson's** conviction or sentence. *See Richter*, 562 U.S. at 105, 131 S.Ct. 770.

Benson's argument with respect to his organic brain injury is similarly unavailing. According to Dr. Pincus, the brain damage from which **Benson** suffers could lead to difficulty in impulse control and rational thinking. But the crime, as **Benson** himself described it in his confession, was for the most part not "impulsive." **Benson** did not kill the Camargo family in a fit of rage. He killed Laura, and then, over the course of the next day, proceeded to molest the two daughters. He described killing the baby Sterling because he wanted to quiet him to avoid detection. **Benson** described hesitating before finally striking the killing blows on the two little girls. After it was all over he attempted to cover up his crime. He set the house on fire and fled. The crime was not "impulsive": it was deliberate, and took place over approximately thirty hours. **Benson** has not shown that evidence of neurological damage which gave rise to problems with "impulse control" would have significantly aided his showing for mitigation.

In sum, given the heinous nature of the crime and the mitigating evidence presented by trial counsel, we cannot conclude that it would have been unreasonable for the California Supreme Court to determine that the alleged deficient performance of **Benson's** trial counsel at the penalty stage of his trial, did not prejudice **Benson**.[25]

25 The dissent, focusing on the abuses **Benson** suffered during his stay at the Buchanan Ranch, concludes that "no fair-minded judge objectively reviewing the unintroduced mitigating evidence ... could conclude, *with confidence*, that the outcome would have been the same." Dissent at 843. We, of course, disagree. As noted, the jury was presented with evidence of **Benson's** horrendous childhood, much of it occurring after he left the Buchanan ranch, that **Benson** had multiple criminal convictions, including several for kidnapping young children, that he was unable to control his pedophilia when high on amphetamines, that he had taken amphetamines during the weekend at issue, and that his abhorrent actions over that weekend could not fairly be considered impulsive. Considering all the evidence, the California Supreme Court could reasonably determine, with confidence, that evidence that a portion of **Benson's** childhood was considerably more horrendous than initially presented would not have changed the outcome.

D. Benson Has Not Shown that Trial Counsel Was Ineffective at the Guilt Phase of the Trial

The first of **Benson's** newly certified claims is that trial counsel was ineffective at the guilt phase of the trial. **Benson** supports his claim with a smorgasbord of assertions. He argues that trial counsel should have: (1) further investigated the officers' conduct in soliciting his confession; (2) presented expert opinions raising factual questions as to the timing of Laura's death, whether Stephanie was alive ***835** when the fire began, and how Sterling died; (3) presented evidence that a test performed several days after the weekend revealed methamphetamine in **Benson's** urine; (4) obtained and presented evidence of the absence of semen on the girls, and that Laura may have been breathing at the time of the fire; (5) investigated whether Dr. Gordon had, in bad faith, intentionally destroyed exculpatory evidence in a prior case and had previously concealed evidence in violation of a court order; and (6) investigated evidence that a witness had told police she was at the Camargo residence on Sunday and that Laura was alive. In addition, **Benson** argues that counsel should have further investigated his impairments that rendered his statements involuntary as that would have undermined the credibility of his confession and made it less likely that the jury would have convicted him or given him the death penalty.

1. ***Benson*** *has not shown that further investigation and presentation of evidence could have affected the conviction or sentence*

Benson's claim of ineffective assistance of counsel at the guilt phase cannot overcome the uncontroverted evidence that he arrived at the Camargo home on Saturday night when Laura and her children were alive, that nobody else was seen entering or leaving the home on Sunday, and that on Monday morning, when the home was found to be on fire and Laura and her children dead, **Benson** was not there. Moreover, **Benson's** heavy ring mandrel, which had been used to strike Laura and her daughters, was found at the scene, along with pornography on which **Benson's** fingerprints were found. Add to this **Benson's** confession to sexually abusing the girls and murdering Laura and her children, and trial counsel's decision to concentrate on the penalty phase of the trial was certainly reasonable.

The assertion that trial counsel should have further investigated the officers' conduct leading to **Benson's** confession is not well taken. The matters **Benson** now suggests deserve further investigation—the lack of the tape recording for the first two hours of interrogation, **Benson's** nine hours of equivocation, and the officers' leading statements and questions —were all thoroughly considered in the litigation over the admission of **Benson's** confessions. Even if the officers had engaged in some improprieties—and there is nothing in the record to suggest they did—the improprieties would be insignificant in light of **Benson's** detailed, disturbing confessions.

Furthermore, in light of the physical evidence and **Benson's** confession, the actual sequence of events during the thirty hours that **Benson** was in the home is of little consequence. Even accepting that **Benson's** experts could

raise questions as to the timing of Laura's death, whether Stephanie was alive when the fire began, and how Sterling died, those questions would not make **Benson** any less responsible for the murders and the sexual abuse of the girls. Indeed, such presentations may have led a jury to conclude that Laura and her children had suffered even more than as described in the state's case. Also, the contention that there was an absence of semen on one of the daughters is not particularly probative under these circumstances. Nor would these factors necessarily undermine **Benson's** narrative, which was full of contradictions and inconsistencies based on what he claimed he did, and did not, recall. Trial counsel may reasonably have determined that contesting the grisly details of the sexual abuse and murders, which would not have exonerated **Benson**, might have weighed against the ***836** jury sentencing him to life without the possibility of parole.

Even accepting that trial counsel did not obtain the lab report indicating methamphetamine in **Benson's** urine, and should have done so, **Benson** has failed to show that this deprived him of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Trial counsel presented evidence and argued that **Benson** was high on methamphetamine over the weekend, that methamphetamine compromised his ability to think and control his actions, and that the use of methamphetamine had a lingering effect. Indeed, the state did not really contest that **Benson** used methamphetamine. The lab report would have been cumulative evidence.

2. Trial counsel's alleged failure to investigate Dr. Gordon was not prejudicial

In a different case involving child molestation in the Superior Court of San Luis Obispo, Dr. Gordon was found to have participated in the destruction of evidence and to have acted in bad faith.[26] Accepting that the revelation of Dr. Gordon's prior misconduct was important information which should have been turned over to the defense by the state, it does not follow that trial counsel was ineffective. Although the evidence would have impeached Dr. Gordon's credentials, it would not have been evidence that Dr. Gordon's testimony as to what **Benson** said, or even his impressions of **Benson**, were not sound. Critically, **Benson** had already confessed his sexual abuse and the murders to the officers before he met with Dr. Gordon and did so again after his meeting with Dr. Gordon. Attempting to impeach Dr. Gordon on the basis of his misconduct in an unrelated proceeding might have been difficult and of minimal value, suggesting that even if trial counsel should have discovered Dr. Gordon's judicial reprimand, the failure to do so was not prejudicial. Moreover, we are not aware of any case where counsel was deemed ineffective for failing to conduct a thorough analysis of each of the cases in which a proffered expert had previously testified. **Benson** has not shown that the state courts' refusal to entertain his ineffective assistance of counsel claim based on Dr. Gordon's alleged bias and incompetence was unreasonable.

26 The case was *People v. Nurss*, No. 13655 in the Superior Court of California for the County of San Luis Obispo. The superior court's order stating that Dr. Gordon acted in bad faith was entered on July 29, 1986.

*3. **Benson's** allegation that trial counsel failed to investigate the statement of a lay witness is not persuasive*

Benson's assertion that a witness had told the police that she was at the Camargo residence on Sunday and that Laura was alive is of little weight when placed in context. It appears that the alleged statement by a teenage neighbor was known to trial counsel or should have been known to trial counsel. The police had discounted the report because the girl was "an airhead or something like that." Moreover, any trial testimony by the girl would have been undercut by testimony from others who saw no signs of activity in Laura's residence on Sunday, the testimony of the forensic pathologist that by Monday Laura had been dead for several days, and **Benson's** own statement that he had murdered Laura on Saturday night. Accordingly, we agree with the district court that "it would have served no purpose other than to diminish the defense's credibility to attempt to inject [the girl's] faulty memory into the proceedings to challenge ***837** the prosecution's case that petitioner committed the crimes, a tactic defense counsel reasonably decided not to pursue in any event."

Given the murder of four persons, **Benson's** confession, and the lack of any suggestion that anyone other than **Benson** was responsible for the murders, trial counsel reasonably could have concluded that further investigation into the details of the underlying crimes and Dr. Gordon's credentials would not be in **Benson's** best interest. **Benson** has not shown that the state courts' refusal to entertain his claim of ineffective assistance of counsel at the guilt stage of his trial was an unreasonable determination of fact or contrary to established federal law.

E. Benson has not shown that there was a prejudicial violation of *Brady*

Benson's second previously uncertified claim is that the prosecution failed to disclose (1) information tending to impeach Dr. Gordon, (2) a lab report showing that **Benson** had methamphetamine in his urine three days after his arrest, (3) that three witnesses had their pending criminal charges reduced, and (4) officer notes showing that a teenage neighbor visited Laura on Sunday. **Benson** raised these claims in his first state habeas petition and the California Supreme Court denied the habeas petition on the merits without any explanation.

There are three components to a true *Brady* violation: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). A *Brady* violation is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

1. *The failure to disclose Dr. Gordon's judicial reprimand was not prejudicial*

In a prior case involving child molestation,[27] Dr. Gordon, as part of the Sexual Assault

Response Team, interviewed a child who had allegedly been sexually assaulted. The interview was taped, but the tape was destroyed. The court determined that the tape recording had contained exculpatory statements, and declared that it was "utterly unconvinced that Dr. Gordon failed to recognize that the statement was exculpatory at the time it was made." In an order entered approximately six months before **Benson's** trial, the court ruled that "law enforcement including Dr. Gordon, acted in bad faith regarding the tape."

27 *See* footnote 26, *supra.*

The minute order meets the first prong for a *Brady* violation. It tends to show that Dr. Gordon is an unreliable witness who may obfuscate or lie in order to convict an alleged sex criminal. On this record, we accept that the prosecution did not bring the minute order to the attention of **Benson's** counsel, and that it was suppressed.[28]

28 The state argues that there is "no evidence [the impeaching evidence] was not available as part of the prosecution's open file discovery policy." The state's argument is not persuasive. Although the state had an open file policy, **Benson's** trial counsel reported that he "made a strategic decision that [he] would not relieve the prosecution of its obligation to provide discovery by inspecting the District Attorney's files themselves to determine whether they had been provided everything to which they were entitled." Moreover, while the information was contained in a public record, we have held that under some circumstances, this does not diminish the state's obligation to produce documents under *Brady*. *Milke v. Ryan*, 711 F.3d 998, 1017–18 (9th Cir. 2013). Here, the record indicates that the information regarding Dr. Gordon was not produced and that counsel would have used it if he had had it.

***838** Nonetheless, we affirm the denial of relief on the alleged *Brady* violation. To set aside **Benson's** conviction and sentence, there must be a "reasonable probability" that impeaching Dr. Gordon with evidence of his prior judicial reprimand would have altered the jury's "conclusion that the aggravating circumstances outweighed the mitigating circumstances." *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052. **Benson** has not made such a showing.

The evidence both of guilt and of aggravation was so overwhelming that there is no reasonable probability of a different result had Dr. Gordon's testimony been impeached. The evidence of guilt included not only **Benson's** confessions to Bolts and Hobson but also the presence of his fingerprints at the scene and evidence that he owned the steel jeweler's mandrel found at the home. The aggravating evidence is similarly overwhelming. Dr. Gordon was tasked with presenting forensic evidence of molestation, and he recounted **Benson's** description of his acts. But **Benson** also admitted, in graphic detail, to the police officers his molestation of both young girls as well as his killing of all four members of the family. Thus, Dr. Gordon's testimony was cumulative. Given the overwhelming nature of the aggravating evidence, and that **Benson's** confession to Dr. Gordon was not the only evidence of molestation, it was reasonable for the California Supreme Court to conclude that the conviction and sentence would have been the same had Dr. Gordon been impeached or his testimony excluded.

2. ***Benson** has failed to show that the suppression of the lab report was prejudicial*

Benson claims that the government withheld "a lab report [which] indicated Mr. **Benson** had

methamphetamine in his urine three days after his arrest and during the time he was being interrogated." This is the whole of **Benson's** argument. He does not explain why the report matters or how this information could have been used at trial. That **Benson** had been a drug addict and had used methamphetamine was not in dispute. **Benson's** counsel had presented evidence and had argued at trial—without dispute by the state—that **Benson** was under the influence of drugs over the weekend in question. The inclusion of a lab report showing the presence of methamphetamine in **Benson's** urine three days after his arrest would not have significantly added to the information that was before the jury.

3. ***Benson*** *has failed to show that the reduction of pending charges against three witnesses had any effect on his conviction or sentence*

Benson argues that prosecutors failed to disclose criminal charges against several lay witnesses and suggests that their charges were subsequently reduced. The criminal records of the witnesses were of marginal relevance because none of the witnesses testified as to where **Benson** was or what he did over the weekend in question. **Benson** does not indicate what the defense would have accomplished with this information, how it would have aided the ***839** defense at trial, or even that the information was unknown to trial counsel. **Benson** has not made the requisite showing of prejudice for relief on this issue.

4. ***Benson*** *has not shown that the failure to disclose a statement by a lay witness was prejudicial*

Finally, **Benson** argues that the prosecution withheld notes from a police officer indicating that a teenage lay witness had stated that she visited Laura Camargo and her three children on Sunday evening. **Benson's** assertion that the witness had told the police that Laura and the children were alive on Sunday is of little weight when placed in context. It appears that **Benson** knew of the statement because during his discussion with the officers, he described having heard that a teenage girl claimed that she had "talked to Laura about 8:15 the night before the fire." **Benson** intimated to police that the girl should not be believed, because she was a "champion airhead."

Moreover, as noted, any testimony by the witness would have been undercut by testimony from others who saw no signs of activity in Laura's residence on Sunday, the testimony of the forensic pathologist that by Monday Laura had been dead for several days, and **Benson's** own statement that he murdered Laura on Saturday night. Accordingly, we agree with the district court that "it would have served no purpose other than to diminish the defense's credibility to attempt to inject [the girl's] faulty memory into the proceedings to challenge the prosecution's case that petitioner committed the crimes, a tactic defense counsel reasonably decided not to pursue in any event."

In sum, on this record, even if some *Brady* materials were withheld, **Benson's** claim must be rejected because he cannot show prejudice from the alleged non-disclosures. The Supreme Court recently explained:

> Petitioners and the Government, however, do contest the materiality of the undisclosed *Brady* information. "[E]vidence is 'material'

> within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." "A 'reasonable probability' of a different result" is one in which the suppressed evidence " 'undermines confidence in the outcome of the trial.' " In other words, petitioners here are entitled to a new trial only if they "establis[h] the prejudice necessary to satisfy the 'materiality' inquiry."

Turner v. United States, —— U.S. ——, 137 S. Ct. 1885, 1893, 198 L.Ed.2d 443 (2017) (internal citations omitted). **Benson** has failed to show a "reasonable probability" that presentation of any or all of the alleged suppressed materials—the prior judicial reprimand of Dr. Gordon, the lab report, the witnesses' criminal records, and the teenage girl's statement—would have changed his conviction or sentence. Accordingly, even though the state court denied **Benson's** *Brady* claims without explanation, a review of the record reveals sound reasons for the denial.

V. Conclusion

It has been over thirty years since **Benson** murdered Laura and her toddler son and sexually abused and murdered her two young daughters. He has been ably represented by his counsel. After reviewing his conviction and sentence pursuant to AEDPA, as we must, we affirm the district court's denial of **Benson's** petition for a writ of habeas corpus. The California Supreme Court reasonably could have determined that **Benson's** confessions to the police should not have been suppressed. Because **Benson** was a parolee subject to a ***840** parole hold, his Fourth Amendment rights were not violated by the delay in his arraignment. **Benson's** additional evidence concerning his background, mental problems, and horrendous childhood do not compel a determination that he did not knowingly and intelligently waive his *Miranda* rights.

Similarly, the additional evidence of a predisposition to mental illness, exposure to alcohol in his mother's womb, and physical, sexual, and psychological abuse inflicted on him during the two-to-three years he lived at the Buchanan ranch, does not compel a determination that he is entitled to relief under AEDPA. In light of the fact that at the time of his trial neither **Benson** nor his siblings informed counsel of any abuses at the Buchanan ranch, there is no compelling evidence that trial counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Moreover, even if counsel's performance were deficient, reasonable jurists could conclude that, in light of the defense offered by trial counsel, the gravity of **Benson's** offenses, and **Benson's** prior offenses, counsel's errors were not "so serious as to deprive [**Benson**] of a fair trial." *Id.*

Finally, **Benson's** claims that trial counsel was ineffective at the guilt stage of the trial and that the prosecution withheld materials do not merit relief. **Benson's** confessions, combined with all the circumstantial evidence that confirm his responsibility for the murders and sexual abuse, render trial counsel's decision not to further contest guilt reasonable, if not wise. Viewed in the light of the whole record, there is no probability that production of the so-

called *Brady* materials would have produced a different result. *See Turner*, 137 S. Ct. at 1893.

The district court's denial of **Benson's** petition for a writ of habeas corpus is **AFFIRMED**.

MURGUIA, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's decision on the first certified issue and on the uncertified claims. I cannot, however, join the majority's opinion with respect to **Benson's** penalty-phase *Strickland* claim. The California Supreme Court unreasonably determined that **Benson's** counsel provided constitutionally adequate representation at the penalty phase. Even under AEDPA's deferential standard, 28 U.S.C. § 2254(d), **Benson** is entitled to penalty-phase relief.

Make no mistake, **Benson's** crimes are brutal and reprehensible. He senselessly murdered Laura Camargo and her three young children—Stephanie, Shawna, and Sterling. He repeatedly sexually assaulted Stephanie and Shawna before killing them. And he ruthlessly burned the bodies of his victims to hide the crimes.

But whether or not **Benson's** crimes are abhorrent does not determine whether he is entitled to constitutionally adequate representation. At the penalty phase of his trial, **Benson's** attorney had a professional duty to explain those crimes, and the person who committed them, to the jury. Indeed, his counsel's job—and that of any lawyer defending a client facing the death penalty—was to explain what, in **Benson's** life, might have driven him to commit such heinous acts so as to shed some amount of human light on his behavior. This means, concretely, that **Benson's** attorney was duty-bound to investigate and present mitigating evidence that could give the jury a reason to exercise some measure of mercy for crimes that otherwise warrant none.

Significant evidence of that nature existed here. From infancy until the age of nine, **Benson** was subjected to grotesque sexual and physical abuse at the hands of his foster family, the Buchanans. And although ***841** readily available, this evidence was never discovered by **Benson's** lawyer and was, therefore, never introduced at the penalty phase of **Benson's** trial. Mitigating evidence of this magnitude clearly has a substantial probability of convincing at least one of twelve jurors to exercise mercy and vote for life rather than death. The California Supreme Court's conclusion to the contrary is fundamentally unreasonable.

I must, therefore, respectfully dissent.

I

Benson's biological parents abandoned him at birth and sent him to live with the Buchanan family on a ranch in rural Petaluma, California. Each of **Benson's** six brothers was eventually sent to the ranch, which the boys referred to as their foster home. Their foster parents, Marjorie Buchanan and her husband Jack, ran the ranch. Marjorie's son, David, also lived on the ranch.

According to the declarations submitted by two of **Benson's** brothers, life on the Buchanan

ranch was a veritable hell.[1] All of the boys were physically, sexually, and psychologically abused while living there. The physical abuse was extreme. Marjorie beat at least one of the boys every day. She beat them with a rubber hose, branches, and a belt. She even hit **Benson**, at around the age of six, over the head with a shovel. She would punish the boys by placing their hands on a hot stove; filling their mouths with cayenne pepper; and holding their heads underwater to stop their crying. At least once, Marjorie held **Benson's** head underwater until he lost consciousness. Another time, as punishment for leaving a gate open, Marjorie tied **Benson's** limbs spread-eagle across the gate and beat his genitals with a rubber hose and ping pong paddle. **Benson** was seven or eight years old at the time.

1 The evidence of **Benson's** life on the ranch comes from declarations from **Benson's** brothers, Brad and William. These declarations were presented to the California Supreme Court, but **Benson** was never afforded an evidentiary hearing to further develop his penalty-phase *Strickland* claim.

Jack, Marjorie's husband, also beat the boys. He would use the buckle-end of a belt to hit the children and would "kick [**Benson**] in the head and ribs when [he] fell down during a beating." On one occasion, he beat **Benson** for so long and so severely that **Benson's** brother, William, feared for **Benson's** life.

According to his brothers, **Benson** was subjected to the worst of the beatings. At times, **Benson** was beaten so badly that he could not walk, nor could he go to school. After beatings, **Benson's** face and body would be so severely bruised and swollen that his brothers were embarrassed to go to school with him. **Benson** would withdraw and would refuse to speak after severe beatings. He would bang his head against a wall and eat dirt and live bugs.

Benson and his brothers were also routinely sexually abused on the ranch by David, their older "foster brother." According to William **Benson**, the sexual abuse "happened so much that we all thought it was normal." David would fondle the boys and orally copulate them. He would take the boys into a treehouse, away in a car, or tie them to a chair or tree and sexually abuse them. He forced the boys to have anal intercourse with him and inserted foreign objects into their anuses, including an electric cattle prod.

In addition to sexual abuse, David forced the boys to engage in bestiality and wanton torture of animals. He made the boys put their penises in calves' mouths and pigs' vaginas. He would put the electric cattle prod in the cows' throats and pigs' rectums and turn the electricity on. He made the boys watch as he sledgehammered ***842** animals to death, and he would make the boys clean up the animals' feces after they were killed. He made the boys bite the testicles off sheep and drink the animals' blood. When the boys did not comply, David would beat them.[2]

2 **Benson's** brothers' declarations describe additional deviant acts that occurred on the ranch—including forced enemas, forced sexual contact with adults, and witnessing other acts of bestiality.

Though it should have been, the jury was not informed of all of these monstrous details regarding **Benson's** life on the ranch.

II

In short, **Benson's** childhood on the ranch was remarkably horrific. **Benson's** counsel, nevertheless, failed to discover the abuse despite being put on notice by a mental health expert and his own investigator that physical and sexual abuse—specifically, on the ranch—likely occurred during **Benson's** childhood.[3] Counsel therefore failed in his duty to perform a reasonable investigation, rendering his performance at the penalty phase patently deficient. *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Andrews v. Davis*, 944 F.3d 1092, 1108–10 (9th Cir. 2019) (en banc). It was unreasonable for the California Supreme Court to conclude otherwise. *Wiggins v. Smith*, 539 U.S. 510, 520–34, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Andrews*, 944 F.3d at 1115–16.[4]

3 The majority errs when it suggests that the only abuse of which **Benson's** counsel was aware was that Marjorie "disciplined" the boys with pepper and hit them with a rubber hose. Maj. Op. at 829–30. I assume, although skeptically, that those punishments—specifically, filling a child's mouth with cayenne pepper and striking a child with a rubber hose—would not trigger counsel's duty to investigate that abuse more thoroughly. But **Benson's** counsel knew more than that. He also knew that his mental health expert suspected **Benson** had been sexually abused in the past and that **Benson's** brother had been sexually abused by David, who was later convicted of molesting children. *Any* reasonably competent attorney aware of those two facts would have undertaken further investigation of **Benson's** relationship with David and, more generally, of **Benson's** life on the ranch.

4 Because **Benson's** counsel failed in his duty to investigate, it is irrelevant whether the strategy counsel adopted at the penalty phase was reasonable. That is, counsel's performance can still be deficient under *Strickland* based on the failure to adequately investigate, even if the strategy counsel ultimately settled on was superficially reasonable. *Wiggins*, 539 U.S. at 521–22, 123 S.Ct. 2527. The majority thus errs by crediting counsel's strategy. *See* Maj. Op. at 829–31. The relevant question is whether counsel's *investigation* was reasonable under the circumstances. *Wiggins*, 539 U.S. at 523, 123 S.Ct. 2527; *Andrews*, 944 F.3d at 1111–16.
Additionally, although **Benson** himself had no memory of the abuse he suffered on the ranch, the Supreme Court has recognized that a client's representations, or lack thereof, do not excuse counsel's investigatory responsibilities. For example, a client facing the death penalty may be "fatalistic or uncooperative," but that does not relieve counsel of his independent duty to investigate the client's background. *Porter v. McCollum*, 558 U.S. 30, 40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam).
Simply put, counsel had a duty to investigate **Benson's** life on the ranch—not to make assumptions about what his life was like. Had counsel fulfilled that duty, he would have discovered evidence of the abuse **Benson** suffered. And any reasonably competent attorney would have presented that mitigation evidence at the penalty phase.
Accordingly, **Benson's** counsel had an independent duty to investigate *and*—contrary to the majority's inaccurate characterization of the record, *see* Maj. Op. at 830 n.22—was sufficiently aware of facts pointing to a probability that **Benson** had been severely abused on the ranch, *see supra* note 3.

III

The admittedly more difficult question relates to prejudice. *See* ***843** *Strickland v. Washington*, 466 U.S. 668, 694–96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Indeed, the question the California Supreme Court had to answer—and the decision we review under AEDPA for substantive unreasonableness—was whether there was a "reasonable probability" that the omitted evidence would have altered the outcome of the penalty phase. *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527. That is, whether there was a *reasonable probability* that the omitted mitigating evidence would persuade a single juror that—despite the violence and suffering **Benson** inflicted on others—he should be sentenced to life in prison rather than death. *Id.* The California Supreme Court concluded such a reasonable probability

did not exist. That determination is objectively unreasonable.

The question is *not* whether jurors, presented with the evidence, would nonetheless have voted for death. Rather, the question is whether the omitted evidence was of such a magnitude that there was a reasonable probability the outcome would have been different. *See Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 776, 197 L.Ed.2d 1 (2017) (applying *Strickland*'s prejudice prong). No fair-minded jurist objectively reviewing the unintroduced mitigating evidence in this case could conclude, *with confidence*, that the outcome would have been the same. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. There is simply "too much mitigating evidence that was not presented to now be ignored." *Porter*, 558 U.S. at 44, 130 S.Ct. 447 (internal quotation marks omitted).

The majority's most severe error is its conclusion that the evidence of **Benson's** life on the ranch was "cumulative" of other mitigating evidence. Maj. Op. at 833, 834 n.25. Contrary to the majority's conclusion, the mitigating evidence actually presented at the penalty phase *pales* in comparison to the evidence of the suffering imposed on **Benson** at the ranch. It is not a difference in magnitude, but a difference in kind. The unintroduced mitigating evidence of unprovoked, grotesque abuse inflicted on **Benson** as a child is precisely the type of mitigating evidence that could have moved the jury to sentence **Benson** to life in prison rather than death. *See Wiggins*, 539 U.S. at 535, 123 S.Ct. 2527; *Boyde v. California*, 494 U.S. 370, 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Andrews*, 944 F.3d at 1116–18. It is the type of evidence that "alter[s] the entire evidentiary picture," and its omission undermines confidence in the penalty phase verdict. *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052; *see Andrews*, 944 F.3d at 1121.

Given **Benson's** attorney's inadequate representation, the jury that sentenced him to death was unable to fully evaluate **Benson's** moral culpability for his actions. Unless certain crimes are beyond the reach of prejudicial error—or we view jurors as immovable and incapable of exercising mercy—then the omission of the mitigating evidence here must be considered prejudicial.

The aggravating factors in this case are substantial, to be sure. But so, too, is the mitigating evidence that was not introduced. Although I cannot say with certainty that the penalty-phase result would have been altered had counsel investigated and introduced evidence of **Benson's** childhood on the ranch, the evidence is sufficiently significant that my confidence in the penalty is undermined. Any fair-minded jurist would agree.

I respectfully dissent.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD ALLEN BENSON, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden, San Quentin State Prison, Respondent-Appellee.	No. 13-99004 D.C. No. 2:94-cv-05363-AHM Central District of California, Los Angeles ORDER

Before: CALLAHAN, BEA, and MURGUIA, Circuit Judges.

Judges Callahan and Bea vote to deny the petition for rehearing. Judge Callahan votes to deny the petition for rehearing en banc and Judge Bea recommends denial of the petition for rehearing en banc. Judge Murguia votes to grant the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED.

cumulate, petitioner's cumulative error claim must fail. Claim 16 is without merit and must be DENIED.

IX. Penalty Phase Ineffective Assistance of Counsel (Claim 17)

In Claim 17, petitioner alleges ineffective assistance of counsel in his trial's penalty phase. (2d Am. Pet., at 224-44).

A. Relevant Clearly Established Federal Law

Under clearly established federal law, to establish ineffective assistance of counsel, a habeas petitioner must, as noted, meet the deficiency and prejudice test of Strickland v. Washington, supra; see also Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (counsel's error must make result unreliable or trial fundamentally unfair), which applies to the penalty phase of a capital trial. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir.) (The Strickland standard applies to performance at the penalty phase of a capital trial), cert. denied, 537 U.S. 942 (2002). Because failure to meet either prong is fatal to petitioner's claim, this Court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

As with petitioner's guilt phase "IAC" claims, in this habeas proceeding governed by AEDPA, to prevail on his penalty phase IAC claims, petitioner must surmount two highly deferential standards. Harrington v. Richter, __ U.S. __, 131 S. Ct. 770, 778 (2011) ("Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)."). In such a case, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland 's deferential standard." Id.

B. Disposition of Petitioner's Claims

Applying these standards, the Court GRANTS summary adjudication in favor of respondent and against petitioner, and denies petitioner's request for an evidentiary hearing, on all sub-claims of claim 17.

1. Claim 17(1): IAC For Failure to Investigate and Present Mitigating Evidence at the Penalty Phase

In claim 17(1), petitioner claims his trial counsel ineffectively failed to investigate and present mitigating evidence at the penalty phase of petitioner's trial. (See 2d Am. Pet., at 225-34). Petitioner raised the state court analogue to this claim as claim 23 of petitioner's first state habeas petition, which the California Supreme Court denied on the merits in an unreasoned decision. (1st St. Hab. Pet., at 87-100 [Lodged Doc. No. C1]; Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

Counsel's performance at the penalty phase of a capital trial is evaluated using the same two-pronged analysis used in assessing performance at the guilt phase, except that, in assessing prejudice, "the question is whether there is a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence–would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. In evaluating prejudice, the reviewing court, in this case the California Supreme Court, must "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently," Bonin v. Calderon, 59 F.3d

815, 834 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996); see also Cullen v. Pinholster, __ U.S. at __, 131 S. Ct. at 1408 (In evaluating prejudice, "[w]e therefore 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'") (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)), and evaluate whether the difference between what was presented and what could have been presented is sufficient to "undermine confidence in the outcome" of the proceeding. Strickland, 466 U.S. at 694. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. Wiggins, 539 U.S. at 537. In this habeas case under AEDPA, petitioner must "show that the California Supreme Court must have unreasonably concluded that [petitioner] was not prejudiced" by his trial attorney's failure to discover and present additional mitigating evidence at the penalty phase. Pinholster, __ U.S. at __, 131 S. Ct. at 1408.

Here, petitioner's claim does not survive review under AEDPA, 28 U.S.C. § 2254(d), under either prong of Strickland.

(a) Trial Counsel's Penalty Phase Strategy

At the penalty phase, trial counsel's strategy was to argue that petitioner was a "normal" little boy on the Buchanans' Petaluma farm, who was not born evil, but was a poor child taken from a normal life at the ranch and exposed to severe deprivation when his father took him and his brothers away from the ranch. (See 4 R.T. 1190-91 (defense counsel arguing that petitioner "was a normal, nice little boy," and asking, "How did a little boy who got from - that darling little boy in that photograph with the bottle of milk feeding the calf - one wonders how did he get from there to where we

are today?")). Although petitioner now contends that trial counsel "profoundly mis-characterized" petitioner's childhood (2d Am. Pet., at 227), the California Supreme Court could reasonably have concluded that this was a reasonable tactical choice for counsel to have made given the information trial counsel had at the time based on the testimony of petitioner's family members and others, and based on petitioner's statements to Dr. Gordon. (See. e.g., 5 C.T. 1236-37 ("[Petitioner] states that, until he was nine and a half years of age in that first foster home [the Buchanan ranch], he had the nicest life he has ever known.")). Even with the benefit of hindsight, full awareness of the character and background evidence petitioner now contends his trial counsel should have investigated and discovered, this Court concludes it would have been reasonable for the California Supreme Court to have found that trial counsel's strategy was reasonable. See Cullen v. Pinholster, supra, __ U.S. at __, 131 S. Ct. at 1407 (" . . . '[t]here are countless ways to provide effective assistance in any given case.' There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus 'mak[ing] particular investigations unnecessary.'") (internal citations omitted); see also id., at __, 131 S. Ct. at 1408 ("The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it.") (quoting Pinholster v. Ayers, 590 F.3d 651, 692 (9th Cir. 2009) (en banc) (Kozinski, C.J., dissenting).

As discussed, at the penalty phase, trial counsel called a number of witnesses to testify on petitioner's behalf, who testified

in accord with trial counsel's attempt to present petitioner as a normal little boy who went bad. (See 3 R.T. 781 (commencement of presentation of penalty phase defense)).

(b) The Mitigating Evidence Petitioner Contends Should Have Been Presented

Briefly summarized, petitioner's social history discloses the following facts petitioner contends his trial counsel should have discovered and presented in support of petitioner's case in mitigation.[40]

According to petitioner, he suffered damage even before he was born. He was predisposed to mental illness and was exposed to alcohol in his mother's womb. Many of petitioner's blood relatives, including both parents, suffered from mental illnesses, and his mother was an alcoholic who drank while pregnant with petitioner.

By the time petitioner was born on April 17, 1947, his three older brothers, Brad, Bill Jr., and Dale, were already living on the Buchanan farm in rural Petaluma, California. Shortly after petitioner's birth, his alcoholic parents sent him there as well, as they did later with petitioner's younger brothers, David and Teddy. All six Benson brothers lived on the farm until 1956 when their father took them to Los Angeles.

Petitioner lived his early years daily fearing for his life and safety. The Petaluma farm was on a parcel called "Rancho Roblar de la Miseria" in property records, and was run by Marjorie Buchanan, her husband, Jack Buchanan, and their two adult children, David and

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[40] Petitioner's complete social history is more fully detailed in the Declaration by Shirley A. Reece, M.S.W. (See Declaration of Shirley A. Reece, M.S.W., ¶¶ 9 et seq., 1 Exhs. to 1st St. Hab. Ptn., Exh. B, at 4-61 [Lodged Doc. # C2]).

Elaine. The Buchanans tortured and abused the Benson brothers. Each of the brothers still bears emotional and physical scars from the abuse they suffered at the hands of their caretakers. Petitioner was not only abused himself, but was also forced to witness his brothers' abuse and the torture of farm animals. He was taught to use narcotics, hallucinogens, and other substances early on and did so to numb his pain and fear.

Petitioner was beaten regularly and with such severity that he was often bloody and bruised. Jack and Marjorie Buchanan routinely beat him until he could not walk. He was beaten nearly every day and learned to confess to things when it was his turn. Marjorie beat petitioner with a switch from a willow tree, a rubber hose, a ping pong paddle, a broom handle and a shovel. She once hit him on the head with the shovel. Another time when she thought petitioner was responsible for leaving a gate open so the cows escaped, she tied petitioner spread-eagled to the gate and beat him in the genitals with a ping-pong paddle. Jack also beat the boys with the rubber hose and ping pong paddle, but he favored whipping them across the back and the back of their thighs with the buckle-end of his belt. At least once, Jack beat petitioner so hard and for so long that his back and legs were bloody and his brother thought Jack was trying to kill petitioner. The brothers did not see petitioner for a few days after that beating. Petitioner and his brothers still bear scars which correspond to the belt buckle. If petitioner fell down during one of Jack's beatings, Jack would kick him in the head and ribs. Petitioner has an abnormality to his left rib cage, and Brad has multiple fractures of his ribs, ankles, arms and knees, all consistent with Jack's and Marjorie's abuse. Petitioner's

brothers remember that petitioner was beaten the worst.

Marjorie burned the boys' hands on a stove. When they were sick or she said they might be sick, Marjorie forced a pencil into their penises, or gave each of them repeated enemas. One time Marjorie and her son, David Buchanan, tied petitioner down to a bed, and petitioner's brothers remember hearing his screams afterward. Petitioner was nearly drowned several times and suffered numerous other serious insults to his brain. Once, he was nearly drowned when he was caught in a creek. He was pulled from the water, non-responsive and blue, and his brain was likely without oxygen for several minutes. He nearly drowned other times when Marjorie deliberately held his head underwater, and at least once he lost consciousness. He also suffered numerous head injuries including being struck with an ax, an injury that rendered him unconscious and left a still palpable ridge on his skull. He fell from a tree house and landed on his head. He was hit in the head with a shovel, and kicked in the head. According to petitioner's brothers, Jack Buchanan hit petitioner in the face and head often.

David Buchanan, a convicted Mentally Disordered Sex Offender, sexually abused the Benson boys, including petitioner. David was the Bensons' Boy Scout leader and taught the boys to tie knots by tying them to a tree or chair and molesting them. He would then leave the boys naked and tied up for hours. Sometimes, David forced a pencil, flashlight or cattle prod into Brad's rectum.

Petitioner also had to participate in and witness bizarre, sadistic and unnatural acts with farm animals. The boys put nipples on the ends of old oil or 7-up bottles to feed the calves as in the photograph trial counsel exhibited at penalty phase. David Buchanan

made the boys pull out the bottles and put their penises in the animal's mouths. He instructed them to put their penises in the older pigs' vaginas and told the boys the pigs looked like women. David also tortured the animals with a live cattle prod and made the Benson boys watch. He touched the live prod to a cow's udder. He forced the cattle prod into the pigs' rectums. He touched the live prod to a bull's testicles. He also threatened the Benson boys, saying if they tried to run away from him he would likewise use it on them. At least twice, David made the Benson boys help him castrate sheep by biting off the cheeps' testicles. Petitioner did not want to do it but David forced him to by hitting him across the back with a two-by-four board.

The Benson brothers learned to stick together. They took turns getting beaten, accepting the blame when it was their turn, confessing to things they had not done. They learned to attempt to deaden the pain and hopelessness they felt with substances: Marjorie gave them cough syrup with codeine, and they learned to sneak it from her. They also sniffed model airplane glue to the point of hallucinations. They suffered neurological damage from the physical and emotional abuse, as well as the toxic inhalants. Petitioner began to exhibit signs of dissociation and psychosis. His brothers remember that, after a beating, petitioner often would withdraw inside himself and not talk, that he would eat dirt and live bugs.

Petitioner's developing neurologic and psychiatric defects were manifested both physically - he was smaller than his brothers - and mentally. He had difficulty in school, could not pay attention, and could not concentrate. It was recommended that he repeat the third

grade. A psychologist met with him and his brothers. No meaningful intervention took place, and petitioner lived on the farm until age nine, when his father took him back to Los Angeles, where his life was one of chaotic moving from place to place, and constant, gnawing hunger. Petitioner's early records show his mental deficits were apparent to social workers, probation officers, and teachers.

According to petitioner, his entire life has been one of serious deprivation. He learned that the world was a dangerous and frightening place. He was never taught how to cope, and his neurological deficits made it impossible for him to deal with the onslaught of stimuli life offered. He was damaged neurologically, and he dissociates such that he does not remember, and cannot deal with, traumatic events.

Petitioner claims his mental deficiencies are numerous, serious, and longstanding. Petitioner claims to have attention and memory deficits which render him incapable of remembering events, concentrating, or making rational decisions, organic brain damage and post-traumatic stress disorder. Psychiatrist David Vernon Foster, M.D., opines that petitioner suffers from brain impairments which affect attention and concentration, memory, impulse control, planning, executive functioning and organizational ability.[41] Moreover, according to Dr. Foster, petitioner's impairments resulted in his being in a dissociative state during the offenses. Dr. Foster says petitioner was unaware of and/or unable to control his actions or conform his conduct to the requirements of the law, and

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[41] Dr. Foster's complete opinion is set forth in full in his declaration, which accompanies petitioner's first state habeas petition. (See Declaration of David Vernon Foster, M.D., ¶¶ 7-70, 1 Exhs. to 1st St. Hab. Ptn., Exh. V, at 3-38 [Lodged Doc. # C2]).

that, at the time of the crimes, petitioner was insane and/or unconscious and/or did not premeditate or deliberate.

(c) Resolution of Claim

Having before it, as it did, petitioner's complete social history and the psychiatric diagnoses of Drs. Able and Foster, the California Supreme Court could reasonably have concluded that the additional information provided in connection with petitioner's first state habeas petition would have been insufficient to establish a reasonable probability that at least one juror would be persuaded to sentence petitioner to life without parole instead of the death penalty. Although petitioner's current account of his history is sordid and awful, his crimes were heinous, and the aggravating evidence presented by the prosecution was also sordid. The state court could reasonably have concluded that presenting petitioner as a normal little boy who was removed from a nurturing environment on the Buchanan farm and exposed to severe deprivation while living with his father might have benefitted petitioner, and that such a person would be more worthy of sympathy and a life sentence than someone who was environmentally and genetically damaged beyond rehabilitation from the beginning.

The most recent Ninth Circuit decision in this area is Stankewitz v. Wong, 698 F.3d 1163 (9th Cir. 2012). There, the Court of Appeals upheld the district court's grant of a writ on the basis that as a child petitioner had been severely abused by his parents, including by physical beatings; that this caused him severe emotional damage; and that his trial counsel failed to provide effective representation by ignoring the State's penalty phase aggravating evidence and presenting no mitigating evidence of the

abuse and its impact.

Stankewitz is distinguishable. First, at petitioner's trial his counsel did present mitigating evidence. That evidence included the following: (1) that his mother was a prostitute and drug addict and his father an alcoholic; (2) that he was placed into foster care almost immediately after birth; (3) that his natural mother visited him only once during the first eight years of his life; (4) that upon reaching age nine, his father obtained physical custody and within a few weeks of that Petitioner was forced to endure a years-long travail of bouncing around skid row hotels, shanties (including a chicken coop) and different schools; (5) that he experienced chronic hunger (he was forced to steal food); (6) that he was subjected to periodic placements into foster and group homes; (7) that petitioner and his several brothers all turned to alcohol; and (8) that he was first arrested at age 10, spent 4 of the 7 years between age 13 and 20 in the custody of the California Youth Authority, started using drugs at age 15, and between 1975 and 1985 was out of prison for a total of less than one year. All of this was substantial mitigating evidence. Trial counsel also presented mental and psychiatric evidence from Dr. Able about petitioner's early-onset pedophilia. They further introduced expert evidence of the pharmacological and mental impact of Petitioner's methamphetamine use.

Moreover, unlike in Stankewitz, petitioner committed four murders which, however callous, were far from impulsive. Petitioner bludgeoned to death Laura Camargo and her three young children, and set their home on fire, as part of a carefully thought out plan to commit, and then cover up, his molestation of Stephanie and Shawna.

The California Supreme Court could reasonably have concluded that "the egregious nature of [petitioner's] offenses" and the sordid nature of the other evidence the prosecution proffered in aggravation were sufficient to "overcome any alleged prejudice resulting from counsel's failure to introduce mitigating evidence." Sully v. Ayers, 2008 WL 2128171, at *11 (N.D. Cal. May 20, 2008) (citing Strickland, 466 U.S. at 700 ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances"); Allen v. Woodford, 395 F.3d 979, 1009 (9th Cir.) (finding no prejudice, despite deficient performance, because of overwhelming evidence in aggravation, consisting, in part of Allen's history of orchestrating and committing violent robberies and plotting the murder of several individuals who testified against him), cert. denied sub nom. Allen v. Brown, 546 U.S. 858 (2005); Bonin v. Calderon, 59 F.3d 815, 837 (9th Cir. 1995) (aggravating circumstances were so numerous and so compelling that it is improbable that juries would have returned a sentence of life imprisonment rather than death, even if all of the mitigating evidence offered at the evidentiary hearing had been presented at trials), cert. denied, 516 U.S. 1051 (1996); Gerlaugh v. Stewart, 129 F.3d 1027, 1033, 1042 (9th Cir. 1997) (no prejudice resulted from counsel's failure to present three character witnesses, as the circumstances of the crime were overwhelming), cert. denied, 525 U.S. 903 (1998)).

Claim 17(1) does not survive review under AEDPA, 28 U.S.C. § 2254(d), and must be DENIED.

2. Claim 17(2): IAC For Failure to Request Continuance of the Penalty Phase

In claim 17(2), petitioner contends trial counsel was ineffective for failing to request a continuance of the penalty phase of petitioner's trial. (2d Am. Pet., at 235). Petitioner brought the state court analogue to claim 17(2) as part of claim 33 of his first state habeas petition. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 216-17). The California Supreme Court denied this claim on the merits. (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

Other than a conclusory allegation that trial counsel had not completed their investigation of mitigating evidence (2d Am. Pet., at 234-35), claim 17(2) contains no allegations of how trial counsel's failure to request a continuance of the penalty phase prejudiced petitioner. See James v. Borg, 24 F.3d 20, 26 (9th Cir.) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."), cert. denied sub nom. James v. White, 513 U.S. 935 (1994).

The Court GRANTS summary adjudication in favor of respondent, and against petitioner, on claim 17(2).

3. Claim 17(3): IAC For Failure to Object to K.S. Testimony; Prosecution's Failure to Inform Defense Counsel of Intent to Dismiss Kidnapping Charges

In claim 17(3), petitioner raises two separate sub-claims. First, although trial counsel moved to exclude evidence of the kidnapping of K.S. from petitioner's penalty phase trial, petitioner alleges his trial counsel was ineffective because counsel "failed to raise other meritorious objections to this evidence such as its

sufficiency," failed to investigate or cross-examine K.S. effectively, "especially regarding her drug use and acquaintance with other witnesses who were drug dealers," failed to call Judith Miller, at whose house K.S. met petitioner and whom trial counsel knew was a dealer in amphetamines, and "fail[ed] to attack [K.S.]'s credibility . . .." (2d Am. Pet., at 235).

Second, petitioner contends "[t]he prosecutor's failure to inform trial counsel of iits [sic] expectation that it would dismiss the [K.S.] kidnap charge if there was a death verdict against [petitioner] constitutes a violation of the prosecution's constitutionally mandated duty to inform defense counsel of material exculpatory evidence." (2d Am. Pet., at 235-36).

Petitioner brought the state court analogue to claim 17(3) as part of claim 33 of his first state habeas petition. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 217-18). The California Supreme Court denied the claim on the merits. (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

With respect to the first sub-claim in claim 17(3), petitioner's allegations that trial counsel was ineffective for: (1) "fail[ing] to raise other meritorious objections to" the K.S. kidnapping evidence "such as its sufficiency," without identifying what other objections counsel should have raised or specifically how the evidence of K.S.'s kidnapping was insufficient; (2) failing to investigate or cross-examine K.S. effectively on matters other than "her drug use and acquaintance with other witnesses who were drug dealers," without identifying what matters, other than K.S.'s drug use or acquaintance with drug dealers, adequate investigation or cross-examination would have disclosed;

(3) failing to call Judith Miller as a witness, without identifying what matters Judith Miller could have testified to; and (4) "fail[ing] to attack [K.S.]'s credibility . . ." without specifying on what grounds counsel could successfully have attacked K.S.'s credibility (see 2d Am. Pet., at 235), are too conclusory to survive summary dismissal. See James v. Borg, 24 F.3d 20, 26 (9th Cir.) (Conclusory allegations not supported by a statement of specific facts do not warrant habeas relief.), cert. denied sub nom. James v. White, 513 U.S. 935 (1994).

The remaining allegation, that trial counsel should have cross-examined K.S. on "her drug use and acquaintance with other witnesses who were drug dealers" (2d Am. Pet., at 235), fails because petitioner has not shown that such cross-examination would have elicited relevant, admissible evidence, and therefore would have been permitted.

With respect to the second sub-claim of claim 17(3), the fact the prosecution intended to dismiss the K.S. kidnapping charges in the event of a death verdict against petitioner is not exculpatory evidence favorable to petitioner. Petitioner does not allege any additional facts, such as a claim that weaknesses in the K.S. kidnapping case motivated the prosecution to seek a dismissal. Nor, in view of the heinousness of petitioner's crimes and the wealth of other aggravating evidence, is there a reasonable probability that the prosecution's intent to dismiss the K.S. kidnapping charges in the event of a death verdict would have led to a penalty phase verdict of less than death. Therefore, such evidence would not satisfy the materiality prong of the Brady standard.

The Court GRANTS summary adjudication in favor of respondent,

and against petitioner, on claim 17(3).

4. Claim 17(4): IAC For Failure to Rebut Evidence of Petitioner's Prior Criminal Activity

In claim 17(4), petitioner contends trial counsel was ineffective for failing to investigate and present at the penalty phase evidence to rebut prior criminal activity which the prosecution presented as factors under Cal. Pen. Code § 190.3(b) in support of a verdict of death. (2d Am. Pet., at 236-37). Petitioner brought the state court analogue to claim 17(4) as part of claim 33 of his first state habeas petition and in petitioner's second state habeas petition. (1st St. Hab. Pet.. [Lodged Doc. No. C1], at 218-19; 2d St. Hab. Pet. [Lodged Doc. No. D1], at 101-04). The California Supreme Court denied these claims on the merits. (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]; Order, filed Aug. 20, 1997, In re Benson, Cal. S. Ct. Case No. S063126 [Lodged Doc. No. D2]).

Evidence was admitted during the penalty phase of petitioner's trial that petitioner was convicted of the following crimes which occurred prior to the Camargo-Gonzales murders: the 1971 molestation and kidnapping of J.M. (3 R.T. 705-12), the 1975 kidnapping of L.W. (3 R.T. 635-37), the 1975 molestation of L.H. (3 R.T. 639-53, 691-93), and the 1980 kidnapping of S.M. (3 R.T. 611-34). Petitioner pleaded guilty to kidnapping L.W. (3 R.T. 638), to kidnapping, burglary, and drunk driving in connection with the offenses against S.M. (3 R.T. 617-19, 634-35), and to molesting L.H. (3 R.T. 694-95). At petitioner's penalty trial, the prosecution and defense stipulated that petitioner was found guilty of molesting J.M., apparently at least in part on the basis of the transcript of

the preliminary hearing in that case. (3 R.T. 712-13).

In the present federal habeas petition, petitioner alleges his trial counsel rendered ineffective assistance in litigating these instances of prior criminal conduct.

(a) Failure to Rebut Evidence Regarding Rape of S.M.

S.M., who was ten years old when she testified at petitioner's penalty trial, testified about petitioner's kidnapping of her. (3 R.T. 624-29). The trial judge called a recess in direct examination because S.M. wanted her "mommy." (3 R.T. 626). Later, petitioner's trial counsel gently cross-examined her. (3 R.T. 629-30).

Petitioner alleges that none of the police reports regarding, and prepared immediately after, this incident refer to petitioner making such a threat. (2d Am. Pet., at 236). Petitioner faults his trial counsel for (a) failing to raise S.M.'s belated report of intent to rape and (b) failing to challenge petitioner's three criminal convictions based on the S.M. incident, for kidnapping, burglary, and drunk driving, on the ground they were obtained in violation of petitioner's right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963), and his rights under Miranda v. Arizona, 384 U.S. 436 (1966). (2d Am. Pet., at 236).

However, given the uncontested fact that petitioner kidnapped S.M. when she was so young and helpless, and the overwhelming strength of the other heinous evidence against petitioner, trial counsel's failure to raise these challenges to the evidence of the S.M. incident likely would not have affected the outcome of petitioner's penalty phase trial. Petitioner has not established prejudice under Strickland.

(b) Cross-examination and Impeachment of L.W.

Petitioner alleges that trial counsel "failed to adequately cross-examine L.W. and to present available impeaching evidence that [petitioner] did not forcibly assault [L.W.]" (2d Am. Pet., at 236). However, nowhere in the petition or his opposition to respondent's summary judgment motion does petitioner identify how cross-examination would have undermined L.W.'s credibility or what "available impeaching evidence that [petitioner] did not forcibly assault [L.W.]" should have introduced to impeach her. See James v. Borg, 24 F.3d 20, 26 (9th Cir.) ("[P]etitioner does not identify what evidence counsel should have presented which would have shown that petitioner did not shoot Lev and Rima Pikas. Conclusory allegations" of ineffective counsel "not supported by a statement of specific facts do not warrant habeas relief.") (citation omitted), cert. denied sub nom: James v. White, 513 U.S. 935 (1994). This portion of claim 17(4) is without merit and is DENIED.

(c) Failure to Raise Hearsay Objection to Testimony About L.H. Incident

L.H.'s mother testified at the penalty phase of petitioner's trial about petitioner's kidnapping and abuse of L.H. (3 R.T. 639-44). Over trial counsel's objection, the mother was allowed to testify that her daughter told her petitioner made her put "his thing" in her mouth. (3 R.T. 642-44).

Petitioner alleges trial counsel "failed to argue adequately to exclude inadmissible hearsay testimony of [the mother] as to the [L.H.] incident." (2d Am. Pet., at 236, citing 3 R.T. 642-43). He argues that the mother's testimony about statements the "alleged victim" made was inadmissible hearsay, and trial counsel's failure

to raise "this obvious and rudimentary objection" was unjustified. (2d Am. Pet., at 236). However, trial counsel did raise a hearsay objection to this testimony (3 R.T. 642-43), but the trial judge overruled it.[42] (3 R.T. 643-44). Petitioner does not allege what, if any, additional argument trial counsel should have made to sway the trial judge to uphold the hearsay objection. (See 2d Am. Pet., at 236; 2 Ptr's Opp., at 294-96). This portion of claim 17(4) is without merit and is DENIED.

(d) Failure to Attack Petitioner's Prior Convictions

Petitioner raises a number of claims of allegedly deficient performance by his trial counsel which relate to all of the instances of prior criminal activity the prosecution proffered at petitioner's penalty phase trial. Specifically, petitioner alleges his trial counsel failed to:

(a) present evidence that petitioner "was under the influence of amphetamines, alcohol and other substances during the commission of the acts upon which his prior convictions were based, despite evidence in his possession indicating he was intoxicated" or to present evidence that petitioner "reported to have no memory immediately following each incident which resulted in the prior convictions." (2d Am. Pet., at 236).

(b) request that the trial judge hold a hearing and require the state to make a preliminary showing as to the sufficiency of the

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[42] Respondent states in the motion for summary judgment that "[t]rial counsel did object to the statement, but not on hearsay grounds." (Rsp's S.J. Mot., at 702 (emphasis in original)). This is incorrect: counsel's objection included hearsay grounds. (3 R.T. 642 ("MR. BIELY: Just a moment, please. I would object. This would be hearsay, your honor."), 643 ("MR BIELY: . . . [¶] . . . If he wants to show what happened, [he can] put his witnesses on and not use hearsay.")).

evidence offered as criminal activity involving the use or attempted use, or threat to use, force or violence. (2d Am. Pet., at 236-37 & n.254, citing People v. Phillips, 41 Cal.3d 29, 72n.25 (1985)).

(c) challenge each of the prior criminal acts the prosecution relied upon on the ground that the use of these convictions as evidence in aggravation was unconstitutional because petitioner was incompetent to waive any constitutional or statutory rights, waive counsel or plead guilty.[43] (2d Am. Pet., at 337).

(e) Failure to Present Evidence of Petitioner's Intoxication During, and Lack of Memory of, Prior Offenses

Petitioner alleges his trial counsel were ineffective for failing to investigate and present at the penalty phase evidence that he was under the influence of alcohol and other substances at the time of the commission of the prior offenses, and that he reported to have had no memory immediately following the incidents which led to his prior convictions. (2d Am. Pet., at 236).

At petitioner's penalty phase trial, trial counsel did present evidence that petitioner was intoxicated at the time of the incidents involving K.S. and S.M. During defense counsel's cross-examination, K.S. testified petitioner appeared under the

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[43] In addition, petitioner contends his trial counsel was ineffective for failing to object adequately to the admission of evidence of the conduct underlying his prior felony convictions "on federal constitutional grounds" in his in limine motion, at the hearing on that motion, or at the time the evidence was presented to the trial jury. (2d Am. Pet., at 337). This claim duplicates portions of claim 17(5). (See 2d Am. Pet., at 237-40). To the extent petitioner seeks to allege a sub-claim here which is not included in claim 17(5), it is DENIED for lack of specificity. See James v. Borg, 24 F.3d 20, 26 (9th Cir.) ("Conclusory allegations [of ineffective assistance of counsel] which are not supported by a statement of specific facts do not warrant habeas relief."), cert. denied sub nom. James v. White, 513 U.S. 935 (1994).

influence of something when they were in his car at the pier, but she did not see him ingest anything. (3 R.T. 606). The officer who arrested petitioner in the S.M. incident testified at the penalty phase that, upon stopping petitioner and S.M. in petitioner's car, he smelled alcohol and asked petitioner to take a field sobriety test. (3 R.T. 613). After completing that test, the officer formed the opinion that petitioner was driving under the influence of alcohol and arrested him. (3 R.T. 613). When Salinas police Detective Larry Lukenbill interviewed petitioner after his drunk driving arrest, petitioner said he "could have" broken into S.M.'s residence, gone up to S.M.'s bedroom, and taken S.M. downstairs, "possibly to molest the child," but he did not remember having done so. (3 R.T. 632-33). Lukenbill arrested petitioner on additional charges of kidnapping and burglary. (3 R.T. 633).

On the other hand, petitioner did remember the L.H. incident. San Luis Obispo County Deputy Sheriff Coroner Darwin Jensen, who interviewed petitioner one day after his arrest for the L.H. incident, testified at the penalty phase that petitioner told him he recalled that he had L.H. orally copulate him and had sexual intercourse with her twice, for which he used Jergen's lotion as a lubricant. (3 R.T. 652, 687-88). Petitioner was unsure if he had anal intercourse with the child. (3 R.T. 688).

Petitioner cites in support of this claim the declarations of Shirley A. Reece, M.S.W., and psychiatrist David Vernon Foster, M.D. (Ptr's. Opp., at 50-53 (citing Reece and Foster Declarations, 1 Exhs. to 1st St. ab. Pet., Exhs. B & V)).

Clinical Social Worker Reece summarizes petitioner's social history and suggests petitioner was under the influence of drugs or

alcohol, or suffered memory lapses, during the prior offenses. For example, Dr. Reece states, regarding petitioner's 1971 offense:

> Court records show that, prior to November 1, 1971, [petitioner] had been up for five days and nights taking amphetamines and not eating. Alberta reported that he was taking amphetamines heavily and seemed to have a 'mental aberration.' One day [petitioner] and Alberta had a serious argument from which he felt betrayed so he went to a friend's house and injected amphetamine intravenously for several days. He was subsequently arrested and convicted for kidnapping and sexual molestation when he masturbated on a nine year old girl. He reported that he had no memory of events. A psychiatric evaluation noted [petitioner's] flat affect and the 'vacant expression of his eyes.' He was convicted as a mentally disordered sex offender and at the age of 25 was sentenced to Atascadero State Hospital where he was incarcerated March 6, 1972, until his probation was granted on May 28, 1974.

(Declaration of Shirley A. Reece, M.S.W., ¶ 130, 1 Exhs. to 1st St. ab. Pet., Exh. B, at 50-51). After his release from Atascadero, petitioner had another serious relationship with an adult woman, but she left him, and:

> Stung by this rejection and abandonment, [petitioner] drank a fifth of scotch, ingested [a] handful of amphetamines, and smoked marijuana. Court records describe him as 'really out of it.' The last thing he remembered was finding himself sitting in a pickup truck looking at the ocean. He did not remember the kidnapping

incident to which he subsequently plead guilty. (Id., ¶ 131, at 51). Another offense occurred in 1975, when, according to court records:

> [Petitioner] attended a party where he got 'loaded,' had hallucinations, and heard voices. He was arrested for child molestation, though he did not remember his actions that night. On January 8, 1976, he pled guilty to both incidents: a kidnap charge and a child molestation charge.

(Id., ¶ 131, at 51-52). Dr. Reece notes that CDC records from 1976 describe petitioner's behavior at the time of the crimes "as having a psychotic quality in that he had no awareness of the consequences of his actions." (Id., ¶ 132, at 52). Another time in 1980:

> [Petitioner] drank wine all day with a wino at the junk yard. Afterward, [petitioner's] memory of events was nonexistent and he reported that his mind was 'blank.' After purchasing more wine, his next memory was driving in his vehicle somewhere out in the county area when he looked over and saw a young child in the passenger seat. He feared he had molested the child but he had not. She reported that he only held her hand. When arrested he was intoxicated. He pled guilty to the charge of kidnap and was readmitted to the Department of Corrections in January, 1981.

(Id., ¶ 133, at 53). Dr. Reece states that, in June of 1984, petitioner was paroled to Salinas, and then moved to San Luis Obispo, where "he took large quantities of methamphetamine ('speed' or 'crank') and befriended other heavy users called 'speed freaks,' some of whom were also dealers." (Id., ¶ 134, at 53).

Dr. Reece states that, the day before the Camargo killings, petitioner, Michael Smeal, Barbara Lopez, and Katrina Flores "used drugs all day," petitioner and Tony Padgett "ingested a great deal of crank and drank beer at Linda's house that evening," and petitioner "apparently began to lose what small amount of control he had . . . ." (Reece Decl., ¶ 145, 1 Exhs. to 1st St. Hab. Pet., Exh. B, at 58). Michael Bonano "reports that" when petitioner and Laura went to Laura's house, petitioner "was talking in riddles, was tense, fidgety, red-eyed, paranoid, and appeared to be under the influence of amphetamines." (Id.).

"On the night of his arrest, January 7, 1986, [petitioner] was apparently psychotic and delusional." (Reece Decl., ¶ 146, 1 Exhs. to 1st St. Hab. Pet., Exh. B, at 58). K.S., who gave him a ride the evening of January 6, stated:

> [Petitioner] claimed to be on a mission to rescue a woman and her children who were being forced by their father, a suspended police officer, to make pornographic movies. [K.S.] recalled that [petitioner] claimed to have a "car that was very supercharged" and could chase her. His behavior was so bizarre and psychotic she believed he was under the influence of something.

(Id., ¶ 146, at 59).

Psychiatrist David Foster, M.D., discusses the history of drug abuse and lapsed memory Dr. Reece reported:

> In November of 1971, [petitioner] was first arrested for kidnapping and child molestation of a nine year old girl (on whom he allegedly masturbated) whom he did not know. According to a psychiatric report at the time,

[petitioner] reported drinking "at least six quarts of beer a day and taking about thirty mini-whites [amphetamines] a day." He reported no memory of the crime, had a flat affect and a vacant expression when interviewed regarding it. He was convicted as a mentally disordered sex offender and sentenced to Atascadero State Hospital where he was incarcerated March 6, 1972 to May 28, 1974. Atascadero records from that period note his feelings of guilt, his impulsivity, and confusion, fear, and anxiousness toward women.

. . . He was convicted January 18, 1976 for two offenses committed in 1975 during which time he was reportedly ingesting large quantities of amphetamines, and hearing voices and having hallucinations. Again, he was unable to recall the event and records describe his actions as having a psychotic quality in that he had no awareness of them. He was admitted to the California Men's Colony (CMC) Prison on May 7, 1976 and released in 1980. His diagnosis at CMC included schizoid personality. His depression and deficits continued.

. . . In 1981, he was readmitted to the Department of Corrections on a kidnap charge of which he had no memory. When arrested he was intoxicated. In 1986, he told the medical officer at CMC, Dr. Hollingsworth, that he was not ready for release and 'needed more help.'

. . . He again began taking amphetamines and on the evening of Saturday, January 4, 1986, was reportedly psychotic, spoke in riddles, was fidgety and red-eyed.

> The night of his arrest, January 7, 1986, [petitioner] was again exhibiting signs of psychosis. He claimed to be on a mission to rescue a woman and her children who, he stated, were being forced by their father, a suspended police officer, to make pornographic movies, and he claimed to have a supercharged car.

(Declaration of David Vernon Foster, M.D., ¶¶ 34-37, 1 Exhs. to 1st St. Hab. Pet., Exh. V, at 16-17).

During an interview with Dr. Foster, petitioner "admitted difficulties with his memory and was unable to remember five digits backward (impaired immediate memory), could not remember three items for five minutes (impaired recent memory), and could not remember events from his past that are well documented by others (impaired remote memory)." (Foster Decl., ¶ 52, 1 Exhs. to 1st St. Hab. Pet., Exh. V, at 27). His "thought processes were at times tangential and circumstantial, and at times showed loosening of associations when left unstructured in his responses. The former is an indicator of organic impairment and the latter of psychotic thinking." (Id., ¶ 53, at 27). Petitioner "appears to experience episodes of dissociation," which "results in the loss of contact with reality from brief periods of a few minutes to sustained states of psychosis." (Id., ¶ 54, at 27). "He reports that he 'sees red,' loses consciousness of what happens and comes to consciousness at some latter time to find that he has done something of which he was not aware." (Id.). On one occasion:

> [Petitioner] found a woman he loved 'more than anyone I have loved' with another woman and feared losing her. He remembered nothing after finding them together until he

> came to in another room with his hands in shreds and bleeding from beating on a heater grate. 'The pain would bring me back to reality.' After this he went on a three day amphetamine binge and ended up committing the sexual offense for which he was first convicted. The subsequent offenses were likewise committed in drugged and altered states and for which he had no memory. He consistently reported no memory of the events. Additionally, record[s] note that before the events in 1975 he had been hearing voices and hallucinating. All of the foregoing factors are indicative of [petitioner's] being in a dissociative state at the time of the offenses.

(Id., ¶ 54, at 28). In addition:

> [Petitioner] has no reliable memory of his actions while physically present at the Camargo residence but describes coming to his senses later, panicked and in a fog. He demonstrated symptoms of dissociation during my interview of him when he experienced two episodes where he 'spaced out' when we were talking about emotionally laden material and could not recall what we were talking about. During the dissociative state, [petitioner] was incapable of knowing or understanding the nature and quality of his actions and therefore could not conform his conduct to the requirements of the law. His memory is fragmented and any reconstruction of the dissociated events is wholly unreliable.

(Id., ¶ 55, at 28). Dr. Foster opined that petitioner suffered from post-traumatic stress disorder, which "caused [him] to be in a

dissociative state for all or part of the time he was physically present at the Camargo residence," as a result of which he "was unable to control his actions at the Camargo residence" and "was acting in an altered state of consciousness, unaware of the nature and consequences of his behavior." (Id., ¶ 62, at 32).

Applying the Strickland test to this portion of claim 17, on the first prong of Strickland, deficient performance, petitioner has not presented evidence showing his trial counsel's failure to investigate and present the material in the Reece and Foster declarations was unreasonable. Furthermore, the California Supreme Court could reasonably have concluded that petitioner failed to establish prejudice, given the "double-edged" nature of evidence of drug and alcohol abuse. Mitchell v. United States, 2010 WL 3895691, at *33 (D. Ariz. Sept. 30, 2010) ("Courts have repeatedly observed that evidence of drug and alcohol abuse is often a 'double-edged sword' because it is equally possible a sentencer will fault a defendant for his failure to effectively address an addiction problem or construe him as a continuing threat to society.") (citations omitted)). Petitioner's ineffective counsel claim must therefore fail.

The Court GRANTS summary adjudication in favor of respondent and against petitioner on petitioner's ineffective counsel claim for failure to present evidence of petitioner's intoxication during, and lack of memory of, prior offenses.

(f) Failure to Request Preliminary Showing of Sufficiency of the Evidence of Criminal Activity

Petitioner contends trial counsel was ineffective for not requiring the state to make a preliminary showing of sufficiency of

the evidence offered as criminal activity involving force or violence. (2d Am. Pet., at 236-37 & n.254, citing People v. Phillips, 41 Cal. 3d 29, 72n.25 (1985)).

(1) Background

On March 11, 1987, trial counsel filed a motion to exclude evidence of other criminal activity under Cal. Penal Code § 190.3(b), or, alternatively, to empanel a separate penalty phase jury, on the ground that allowing the guilt phase jury to hear such evidence would be unduly prejudicial. (3 C.T. 813-18). In that motion trial counsel specifically cited People v. Phillips, supra, for the proposition that a criminal defendant is entitled to an in limine inquiry into the sufficiency of the evidence supporting unadjudicated violent crimes. (3 C.T. 815-16).

In Phillips, the California Supreme Court held, under the 1977 death penalty law, that "evidence of other criminal activity introduced in the penalty phase pursuant to former section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." 41 Cal. 3d at 72. In a footnote, the state high court added, in relevant part:

> The problems revealed by the record in this case suggest that in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity. This determination, which can be routinely made based on the pretrial notice by the prosecution of the evidence it intends to introduce in aggravation, should be made out of

> the presence and hearing of the jury. Once the trial court has determined what evidence is properly admissible as other criminal activity, 'the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. . . . [T]he jury should be instructed not to consider any additional other crimes in fixing the penalty.' Whether such other criminal activity has been proven beyond a reasonable doubt is then a question of fact for the jury. If the jury finds that the evidence does not establish such criminal activity beyond a reasonable doubt, it could still consider such evidence, if appropriate, under any of the other listed factors enumerated in former section 190.3. . . .

41 Cal. 3d at 72 n.25 (internal citations omitted). Phillips involved evidence of unadjudicated activity offered as "factor (b)" evidence in aggravation.

At the hearing on the motion in petitioner's case, which the prosecutor characterized as a "Phillips motion" (3 R.T. 583), the prosecutor said he initially included "everything that I knew about concerning this defendant" in his motion to seek the death penalty, to put the defense on proper notice. (3 R.T. 583). However, "in light of Phillips," the prosecutor decided "to limit the prior conduct of the defendant and also the one subsequent act to adjudicated violent crimes rather than unadjudicated." (3 R.T. 583). He stated:

> So if counsel wants an in limine motion at this time, it's

proper. However, the only crimes for which I intend to present evidence are those crimes that the Court has already sought and obtained admissions from the defendant, that he was, in fact, convicted of those crimes, the four prior convictions that have been admitted to.

In addition, the other violent act, criminal activity is one that occurred subsequent to this crime. That would be the kidnapping from San Luis Obispo to Los Osos of [K.S.] There has been a preliminary hearing on that, and I believe an in limine motion would really serve no purpose. A court in San Luis Obispo found probable cause to believe that offense to have been committed and ordered [petitioner] top stand trial to that.

And prior to these proceedings, I severed that particular case for other legal reasons not having to do with sufficiency of evidence. They are the only two other acts that I intend to bring up during the penalty phase.

(3 R.T. 583-84). The judge allowed evidence of "the four prior felony convictions relating to violent crimes" and the K.S. kidnapping to be admitted at the penalty phase, and denied the defense motion. (3 R.T. 584).

(2) Discussion

As the California Supreme Court has pointed out, the Phillips Court "did not . . . require . . . a hearing nor predicate admission of" evidence of prior criminal activity "on the holding of a hearing." People v. Jennings, 53 Cal. 3d 334, 389, cert. denied sub nom. Jennings v. California, 502 U.S. 969 (1991). Thus, petitioner is incorrect when he claims he "had the right to such a hearing

under state law . . . ." (2d Am. Pet., at 237).

Furthermore, the prosecutor limited the evidence he was offering of petitioner's prior criminal activity under factor (b) to adjudicated crimes. Petitioner pled guilty to all of the offenses involving victims S.M., L.H., and L.W. As for the offense involving J.M., petitioner was found guilty, apparently, at a court trial. As the trial judge's ruling suggests, petitioner was not entitled to a hearing on whether there was "substantial evidence" to "prove" each element of crimes petitioner had already admitted through guilty pleas or of which he was found guilty in a trial.[44]

As for the one instance of other criminal activity petitioner committed after the Camargo killings that the prosecutor introduced under factor (b), the kidnapping of K.S., petitioner had a preliminary hearing and was held to answer on that charge, K.S. testified at the preliminary hearing and was cross-examined by defense counsel, and after the penalty phase, petitioner's jury was instructed on the elements of kidnapping and that, before it could consider the K.S. kidnapping as an aggravating circumstance, it had to conclude beyond a reasonable doubt that petitioner committed the crime. (3 C.T. 877, 884). Given these facts, "there was no question that there existed 'substantial evidence to prove each element of the [assault]', and that a preliminary hearing on the question was unnecessary." Jennings, 53 Cal. 3d at 389.

Given this state of the law and how the trial judge ruled on

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[44] Petitioner concedes this point in his discussion in opposition to respondent's motion for summary adjudication on claim 22. (See Order on Respondent's Motion for Summary Adjudication as to Claims 10, etc., filed May 8, 2000 [Docket Entry # 287], at 23 & 23 n.6 (citing Ptr's. Opp., at 331)).

the motion defense counsel did bring, which motion explicitly mentioned Phillips, it is extremely unlikely the trial judge would have granted petitioner a preliminary hearing under Phillips had his trial counsel squarely asked for one. Even if the trial judge had granted such a hearing, given the fact petitioner pled guilty to, or was found guilty of the offenses involving victims S.M., L.H., L.W., and J.M., and was held to answer for the K.S. kidnapping after a preliminary hearing, it is extremely unlikely the judge would have ruled in petitioner's favor on whether, as to these crimes, there was "substantial evidence to prove each element of the other criminal activity." Jennings, 53 Cal. 3d at 389 (citing Phillips, 41 Cal. 3d at 72 n.25).

Petitioner's ineffective counsel claim for failure to seek a hearing under People v. Phillips, supra, is DENIED. See Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance."), cert. denied, 474 U.S. 1085 (1986).

(g) Failure to Challenge Admissibility of Prior Convictions

Petitioner contends trial counsel was inadequate for not challenging the "prior criminal acts" on the ground petitioner was incompetent to waive any constitutional or statutory rights, to waive counsel, or to plead guilty. (2d Am. Pet., at 237).

Under California law, a capital defendant can move to strike a prior conviction, charged as a special circumstance under Cal. Pen. Code § 190.2(a)(2), on the grounds his constitutional rights were infringed or that any prior guilty plea was involuntary because it was not knowing or voluntary. People v. Horton, 11 Cal.4th 1068, 1127-41 (1995), cert. denied sub nom. Horton v. California, 519 U.S.

815 (1996); Curl v. Superior Court, 51 Cal.3d 1292, 1296 (1990).

Assuming this rule applies to prior convictions used as aggravating factors under Cal. Pen. Code § 190.3 at the penalty phase, the facts and circumstances of the crimes of which petitioner was convicted would have been admissible under California Penal Code section 190.3(b) ("factor b"), as "underlying criminal activity involving the use or threat of force or violence," and the convictions themselves would have been admissible under section 190.3(c) (factor C) as prior felony convictions. People v. Fierro, 1 Cal.4th 173, 230 (1991) (citing People v. Benson, 52 Cal.3d 754, 788 (1990), cert. denied sub nom. Benson v. California, 502 U.S. 924 (1991)), cert. denied sub nom. Fierro v. California, 506 U.S. 907 (1992). Thus, even if the prior convictions were not admissible due to petitioner's incompetence to stand trial or to plead guilty, the underlying facts and circumstances of the crimes on which those convictions were based would still have been admissible. Even if trial counsel was ineffective for failing to seek exclusion of the prior convictions, that deficient performance was not prejudicial, and the California Supreme Court's denial of petitioner's Strickland claim arising from counsel's conduct was neither contrary to, nor an unreasonable application of, federal law as determined by the United States Supreme Court. Harrington v. Richter, __ U.S. __, __, 13 S. Ct. 770, 792 (2011); Hebner v. McGrath, 543 F.3d 1133, 1137 (9th Cir. 2008) (counsel's failure to object to evidence under one provision of the evidence code is not prejudicial if the evidence was admissible under a different provision), cert. denied sub nom. Hebner v. Evans, __ U.S. __, 129 S. Ct. 2791 (2009).

In sum, the Court GRANTS summary adjudication in favor of

respondent and against petitioner on claim 17(4).

5. Claim 17(5): IAC For Failure to Object to Evidence of Prior Convictions

In claim 17(5), petitioner contends his trial counsel was ineffective for failing to object adequately to the admission of evidence of petitioner's prior convictions in the S.M., L.W., L.H., and J.M. incidents, and to evidence of the conduct underlying those prior felony convictions. (2d Am. Pet., at 237-39; see also 2d Am. Pet., at 237 & 237 n.255 (alleging similar allegations in claim 17(4)). Petitioner brought the state court analogue to claim 17(5) in his second state habeas petition. (2d St. Hab. Pet. [Lodged Doc. No. D1], at 101-04). The California Supreme Court denied the claim on the merits. (Order, filed Aug. 20, 1997, In re Benson, Cal. S. Ct. Case No. S063126 [Lodged Doc. No. D2]).

Claim 17(5) is without merit.[45] In addition to rejecting

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[45] In his opposition to respondent's motion for summary judgment, petitioner states that claim 17(5) "is a companion to claim[s] 21 and 27(4)" (Ptr's. Opp., at 297) of the amended petition, in which petitioner alleged (1) "the trial court refused to conduct a hearing to determine the sufficiency of the evidence to support alleged criminal activity offered as evidence in aggravation" (Am. Pet., at 270 (citing People v. Phillips, supra, 41 Cal. 3d at 72 n.25), and (2) that the trial court violated petitioner's constitutional rights when it failed to require that juror findings of the presence of evidence of aggravating factors be unanimous (Am. Pet., at 312-14), respectively.

In its May 8, 2000, order, this Court denied both of these "companion claims" on the merits (Order on Respondent's Motion for Summary Adjudication as to Claims 10, etc., filed May 8, 2000 [Docket Entry # 287], at 21-23 (claim 21), 48-49 (claim 27(4)), a result which is unquestionably correct, as both claims are plainly without merit.

In the operative second amended petition, former claim 21 has been superceded by a new claim 21, in which petitioner alleges that he made, and the trial court erroneously denied, a motion "to exclude prior criminal activity at the penalty phase on the grounds that the introduction of such evidence before the same jury that

petitioner's underlying constitutional claim on procedural default grounds, the California Supreme Court rejected it on the merits. People v. Benson, 52 Cal.3d at 788-89. Neither in the operative second amended petition nor in his opposition to respondent's motion for summary judgment does petitioner identify what additional arguments trial counsel should have made or what additional actions counsel should have taken which would have resulted in an outcome more favorable to petitioner.[46] See James v. Borg, supra, 24 F.3d at

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convicted him of capital charges would be unnecessarily prejudicial and deny him due process." (2d Am. Pet., at 261 (citing 3 C.T. 813-20)). This claim is also without merit. See Lockhart v. McCree, 476 U.S. 162, 180-81 (1986) (Approving of capital proceedings in which "'the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven.'") (quoting Rector v. State, 280 Ark. 385, 395 (1983), cert. denied, 466 U.S. 988 (1984)); United States v. Taveras, 584 F. Supp. 2d 535, 543 (E.D. N.Y. 2008) ("Courts, while cognizant of due process requirements, have almost invariably conducted capital trials with a unitary jury through both phases. . . . Where a curative instruction adequately remedies the problem of guilt phase evidence that is inadmissible for the penalty phase, a unitary jury remains the appropriate choice.").

[46] In an apparent attempt to remedy this defect, petitioner contends introduction of petitioner's prior convictions under Cal. Pen. Code § 190.3(c) "destroys" "the state's burden to prove the underlying actions beyond a reasonable doubt . . .." (Ptr's. Opp., at 297). However, the California Supreme Court expressly rejected petitioner's argument that "that the People should have been allowed to prove only the fact of the criminal activity, and that they should have been permitted to use only the record of the prior felony convictions in making their proof," stating that "as a general matter, the People may prove any pertinent circumstance of the criminal activity, and may do so in any permissible way." People v. Benson, 52 Cal. 3d at 788. Petitioner fails to allege what trial counsel should have said that would have resulted in a different holding.

Petitioner also asserts that the prosecution "affirmatively misled trial counsel by originally listing these incidents solely as factor (c) evidence, not under factor (b)," in violation of a state-created liberty interest. Assuming petitioner's claim is that trial counsel should have raised an objection along these lines, petitioner cites no case law, and the Court is aware of none, showing that the notice requirements governing the introduction of

26 ("Conclusory allegations [of ineffective assistance of counsel] which are not supported by a statement of specific facts do not warrant habeas relief.").

The Court GRANTS summary adjudication in favor of respondent and against petitioner on claim 17(5).

6. Claim 17(6): IAC For Failure to Rebut Prosecution Testimony Regarding a Sentence of Life Without Possibility of Parole

In the penalty phase of petitioner's trial, Mike Madding, an associate warden at the California Men's Colony at San Luis Obispo, testified for the prosecution that inmates sentenced to life in prison without parole receive a number of privileges, including family visits, furlough from the facility, contact with the outside world by televison, telephone and letter, and the possibility of housing in a medium or minimum security facility. (4 R.T. 1024-30).

In claim 17(6), petitioner alleges in a single conclusory paragraph that petitioner's trial counsel was ineffective for failing to "rebut" or object to Madding's testimony, leaving the jury with a "serious misunderstanding of the prison life of a convicted child molester. (2d Am. Pet., at 241). Petitioner brought the state court analogue to claim 17(5) as part of claim 33 of his first state habeas petition. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 220). The California Supreme Court denied the claim on the merits in its unreasoned decision denying petitioner's first

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evidence of aggravating factors under California law are a federally protected liberty interest (see Rsp's. Rpy., at 146-47 (making this point and suggesting creation of such a rule is barred by Teague v. Lane, 489 U.S. 288, 305-310 (1989) (plurality opinion)), and, given that state of the law, any objection by counsel along these lines would have been futile. James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) (finding no ineffective assistance where the motion that allegedly should have been made would have been futile).

state habeas petition. (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

Claim 17(6) must be denied on the merits because it is too vague to support the grant of habeas relief. For example, petitioner alleges that his trial counsel failed to cross-examine Madding adequately or to present evidence, and failed to "object adequately" to Madding's testimony. (2d Am. Pet., at 241). However, petitioner fails to identify with specificity what new evidence, cross-examination, or rebuttal of Madding's testimony would have produced which would have swayed at least one juror to vote for life imprisonment rather than death. See James v. Borg, supra, 24 F.3d at 26 ("Conclusory allegations [of ineffective assistance of counsel] which are not supported by a statement of specific facts do not warrant habeas relief.").

Claim 17(6) is without merit and must be DENIED.

7. Claim 17(7): IAC For Failure to Present Evidence That Petitioner is a Model Prisoner

In claim 17(7), petitioner alleges that his trial counsel was ineffective for not "present[ing] available evidence that [petitioner] is a model prisoner whose neurological deficits are controlled in a prison environment . . .." (2d Am. Pet., at 241). He presented the state court analogue to this claim as part of claim 33 of his first state habeas petition, which the California Supreme Court denied on the merits in an unreasoned decision. (1st St. Hab. Pet., at 220-21 [Lodged Doc. No. C1]; Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

This Court must deny claim 17(7). Although petitioner cites his "institutional record" and "the expert opinions present[ed] in

support of claim 17(1)" (Ptr's. Opp., at 299; see also id. (citing "Reece Declaration, at pp. 36-62" [sic]; see Reece Decl., supra, ¶¶ 89-148, Exhs. to 1st St. Hab. Ptn., Exh. B, at 36-59 (summarizing petitioner's history of institutionalizations)), the California Supreme Court could reasonably have concluded that, in light of the heinousness of petitioner's crimes and the evidence presented at trial regarding his potential for future dangerousness, such evidence would have made no difference to the outcome of petitioner's penalty trial.

During direct examination at the penalty phase, petitioner's own expert, psychiatrist Gene G. Able, M.D., first raised petitioner's "future dangerousness." (See 4 R.T. 4 951-53, 963-65). According to Dr. Able, petitioner's history demonstrated that, when not incarcerated, petitioner was a danger to society as a pedophile for whom traditional treatments such as talk therapy were ineffective. (4 R.T. 951-52). When he was not in prison, petitioner had access to drugs and children, which made him dangerous as a pedophile. (4 R.T. 963). Dr. Able also stated that petitioner had "convinced a number of people" at Atascadero that his pedophilia "was just transient in nature," which plainly was not the case. (4 R.T. 944-945). He testified on cross-examination that petitioner escaped penal custody on one occasion and thereafter committed "a number of crimes" while a fugitive. (4 R.T. 977). However, Dr. Able testified that the murders were out of character for petitioner. (4 R.T. 965).

On cross-examination, the prosecutor elicited testimony suggesting petitioner would in fact pose a future danger even while incarcerated. To this end, the prosecutor elicited evidence

suggesting petitioner was not using, or at least not using to a significant extent, drugs when he was arrested for child molestation in 1971. (4 R.T. 983-85). The prosecutor further elicited Dr. Able's admission that petitioner exhibited manipulative behavior throughout his career, one of the hallmarks of an antisocial personality, and raised the suggestion that it was his antisocial behavior, not his pedophilia, which accounted for his violent tendencies and the murders. (4 R.T. 1000-02). Dr. Able's testimony on cross-examination raised a reasonable inference that drug use was not a prerequisite to petitioner's violent behavior, so that petitioner could continue to be violent even when cut off from drugs and children in prison.

In light of this record, the California Supreme Court could reasonably have concluded that the fact petitioner might be a model prisoner while incarcerated would be extremely unlikely to have swayed a reasonable jury from imposing the death penalty. At least as likely, a jury might reasonably have construed model behavior by petitioner while in prison to be merely another in a series of ongoing attempts at manipulation, manipulation a jury would be more likely to find to be aggravating than mitigating.

Claim 17(7) does not survive review under AEDPA, 28 U.S.C. § 2254(d), is without merit, and must be DENIED.

8. Claim 17(8): IAC For Failure to Raise Constitutional Objection to Admission of Photographs

In claim 17(8), petitioner alleges his trial counsel were incompetent for not objecting, on federal constitutional grounds, to admission into evidence of certain photographs the prosecution

introduced in the penalty phase.[47] (2d Am. Pet., at 241-42). Petitioner proffered the state court analogue to this claim in claim 33 of his first state habeas petition, and the California Supreme Court denied it on the merits in an unreasoned decision. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 221; (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

(a) Background

In the guilt phase, petitioner objected to certain photographs taken at the crime scene and during the autopsy of the victims, and the trial judge ruled them inadmissible in the guilt phase. (See May 8, 2000, Order, supra, at 19 (describing the relevant facts and citing 1 R.T. 81-90). People v. Benson, supra, 52 Cal. 3d at 785 ("At the guilt phase, the court had barred admission of some of the photographs as unduly prejudicial, having determined in substance that the items were substantially more prejudicial than probative on the question of guilt."). Before the penalty phase, petitioner moved in limine to exclude all photographs of the victims in death under Cal. Evid. Code § 210, on relevancy grounds, and under Cal. Evid. Code § 352, on the ground they were unduly prejudicial and cumulative. (May 8, 2000, Order, at 19 (citing 3 R.T. 579-81)). People v. Benson, 52 Cal. 3d, at 785. The judge denied the motion, finding the photographs relevant to the circumstances of the crimes

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[47] The photographs are described in the record (see 3 R.T. 721-27), and authenticated copies accompanied the parties' moving papers. (See People's Tr. Exhs. 33, 36, 37, 47, 49, 53 and 55; Decl. of Sonja Berndt, ¶ 6, at 2, Declarations of Sonja Berndt, et al., filed Oct. 9, 1998, at 2 [Docket Entry # 185]; Decl. of Gary L. Hoving, ¶¶ 8-8 [sic], at 4-5, Declarations of Sonja Berndt, et al., at 93-94; Decl. of William K. Stoller, ¶¶ 3-4, at 2-3, Declarations of Sonja Berndt, et al., at 159-60). These photographs are also the subject of claim 20. (See Rsp's. S.J. Mot., at 751 n.231; May 8, 2000, Order, supra, at 18-21 (describing, and denying, claim 20)).

and the appropriateness of death, that, although they were gruesome, seven were not unduly prejudicial and were admissible, while 12 were unduly prejudicial and therefore excludable. (May 8, 2000, Order, at 19 (citing 3 C.T. 825 (minute order); 3 R.T. 573-82)). People v. Benson, 52 Cal. 3d, at 786. Subsequently, on the prosecution's motion and over petitioner's objection, it received into evidence the photographs it had held admissible. (May 8, 2000, Order, at 19) People v. Benson, 52 Cal. 3d, at 786.

On direct appeal, the California Supreme Court affirmed the trial judge's rulings admitting the photographs. Id. In this Court, petitioner raised as claim 20 of his amended petition the contention that the California Supreme Court violated petitioner's federal constitutional rights in so ruling (Am. Pet., at 267; see 2d Am. Pet., at 258-61 (same claim 20 re-alleged in the operative petition), and the Court denied the claim on the merits in its May 8, 2000, Order. (May 8, 2000, Order, at 18-21).

Petitioner's trial counsel objected on state law grounds as discussed above, but raised no federal constitutional objections to admission of the photographs. See People v. Benson, 52 Cal. 3d, at 786-87 n.7. The California Supreme Court held that petitioner procedurally defaulted on his claim that the ruling violated the Fifth, Eighth, and Fourteenth Amendments because he failed to comply with the contemporaneous objection rule. Id. Petitioner challenges trial counsel's failure to object as ineffective.

(b) Resolution of Claim

The Court has already ruled that the photographs, to whose admission into evidence trial counsel failed to object, were not constitutionally inadmissible. (May 8, 2000, Order, at 20-21). See

Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) ("Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'") (citation omitted). As the Court stated in its May 8, 2000, Order, the photographs that were admitted were relevant to show the circumstances of the crime. (May 8, 2000, Order, at 20).

Resolution of petitioner's ineffective assistance of trial counsel claim is straightforward because petitioner has failed to satisfy either prong of the Strickland test. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (as amended) (stating that trial counsel cannot have been ineffective in failing to raise a meritless objection); Featherstone v. Estelle, 948 F.2d 1497, 1507(9th Cir. 1991) ("[P]etitioner was not prejudiced by appellate counsel's decision not to raise issues that had no merit."). Petitioner is entitled to no relief on claim 17(8).

9. Claim 17(9): IAC For Inadequate Preparation of Dr. Hayner

In claim 17(9), petitioner alleges his trial counsel were ineffective for failing adequately to prepare Gregory Hayner, D. Pharm., a pharmacist at the Haight Ashbury Free Clinic in San Francisco, who testified in the penalty phase about petitioner's substance abuse at the time of the offenses. (2d Am. Pet., at 242-43; see 3 R.T. 885-906 (Dr. Hayner's testimony)). Specifically, petitioner alleges trial counsel:

(1) never provided Dr. Hayner with a copy of the transcript of petitioner's statements to law enforcement or the tape recordings themselves, so that Dr. Hayner based his opinions solely on petitioner's recollections and descriptions of his perceptions at

the time of the offenses, leaving the doctor susceptible to impeachment and impairing his credibility. (2d Am. Pet., at 242). (2) failed to provide Dr. Hayner with information to explain any inconsistencies in petitioner's statements as evidence of his memory deficits, tendency to confabulate and other deficits relevant to his ability to recall and accurately relate prior events, rather than as evidence of "lies." (2d Am. Pet., at 242-43). (3) failed to have needed toxicological testing conducted and/or provided to Dr. Hayner, leaving Dr. Hayner's testimony that petitioner was under the influence of amphetamines uncorroborated by physical evidence.[48] (2d Am. Pet., at 243). Petitioner raised the state court analogue to this claim in claim 33 of his first state habeas petition, and the California Supreme Court it on the merits in an unreasoned decision. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 221-22; (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

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[48] In his opposition to respondent's summary judgment motion, petitioner lists four of what he claims are defects in Dr. Hayner's testimony: (1) Dr. Hayner, as a pharmacist, was not qualified to discuss methamphetamine use and its effects, or to render an opinion concerning a diagnosis related to methamphetamine use; (2) trial counsel failed to provide "statements of witnesses from around the time of the incident," "petitioner's statement itself," or other, unspecified "basic materials" Dr. Hayner needed to render a reliable opinion; (3) trial counsel failed to provide Dr. Hayner with "any material" concerning petitioner's impairments or history, or any "statements and declarations of family members and other who could substantiate his history of drug use;" and (4) trial counsel failed to have toxicological testing conducted and provided to Dr. Hayner to corroborate Dr. Hayner's testimony. (Ptr's. Opp., at 301-02). These allegations, which are substantially broader than claim 17(9) as alleged in the second amended petition, are not part of petitioner's claim and, except to the extent petitioner has alleged them in the petition, the Court will not consider them. Park v. California, 202 F.3d 1146, 1155 (9th Cir.) ("We do not consider either ineffective assistance of counsel arguments because Park did not properly raise them as claims in the instant petition."), cert. denied, 531 U.S. 918 (2000).

(a) Background

Dr. Hayner testified in the penalty phase that he interviewed petitioner for about two hours in jail the night before his testimony and spent about 2-1/2 hours with defense counsel going over the case. (3 R.T. 889). He also reviewed medical records from Atascadero State Hospital and prison records. (3 R.T. 890). Dr. Hayner opined that, at the time petitioner committed the Camargo crimes, he was " very, very paranoid," that "by the effects of [methamphetamine] and lack of sleep, being very disoriented and unable to think very clearly, or really formulate many cogent plans about what he was going to do at any given time," petitioner "tended to react to the situation at hand rather than acting out on a set-out plan," that petitioner's ability to conform his conduct to the requirements of the law "was definitely impaired, that, as a result of "a toxic psychosis at the time due to chronic intoxication with amphetamines," "[o]ne of the things he describes is hearing and seeing things which in retrospect he knows were not there but which at the time were very much affecting his actions." (3 R.T. 892-93).

On cross-examination, Dr. Hayner admitted he did not listen to the tapes of petitioner made shortly after the crimes; listening to them "might have been" helpful, "but given the constraints of my time here, I didn't have time to listen to those tapes." (3 R.T. 893). Nor did Dr. Hayner read the transcripts of petitioner's interviews with the police: "I was not given that as part of the things to review." (3 R.T. 893-94). Dr. Hayner said he relied on petitioner's statements and statements from petitioner's attorneys and investigator about the facts of the crime, and he relied on petitioner's attorneys to tell him that petitioner had told him the

truth: "I understood from the attorneys, after talking with [petitioner], that what he had told me in the interview in substance corresponded to what was in the confession." (3 R.T. 894, see also 3 R.T. 902 (Dr. Hayner's opinion was based on petitioner's being truthful to him)). Had petitioner lied to Dr. Hayner, that would have affected Dr. Hayner's opinion. (3 R.T. 895). Dr. Hayner also admitted he had not seen prior to his testimony an April 19, 1976, case summary created while petitioner was in prison which listed Reds and LSD, but not methamphetamine as "dangerous drugs" petitioner was using at the time. (3 R.T. 895-96). Dr. Hayner admitted that, "[a]ccording to that" document, petitioner was not using methamphetamine in 1976. (3 R.T. 896).

The prosecutor also challenged Dr. Hayner's testimony that petitioner had been hallucinating:

> Q. Specifically, what noises did [petitioner] claim he heard on the nights of the murders?
>
> A. Umm, different sounds that sounded to him very much like footsteps approaching the building, knocking on doors, creaking in the wall of the building, as if people were pushing hard against the outside and bowing -- the bowing, the wall itself.
>
> Q. You took this as a hallucination?
>
> A. Umm, well, this was also combined with reports from him that he was also looking out the windows and seeing bushes that looked like policemen. Seeing buses go by and feeling sure that the people in the buses were scrutinizing him very carefully.

(3 R.T. 897). Dr. Hayner admitted he had not read the crime reports

for the incident, did not know there was a bus parked next to the house where petitioner committed the murders, and that these facts "possibly" would have made a difference in establishing whether petitioner had been hallucinating. (3 R.T. 898). Dr. Hayner said it would also make a difference if several witnesses stated they had knocked on the door of the house while petitioner was inside with the children and the dead mother and that the walls of the bathroom attached to the house were so flimsy that, if someone leaned on the wall, it would bow or creak. (3 R.T. 898). Dr. Hayner stated that if the events he took as hallucinations actually occurred, then the events would not be hallucinations. (3 R.T. 898). Dr. Hayner did not change his opinion, however, that petitioner was in a state of "toxic psychosis" at the time of the crimes. 3 R.T. 892-93 (initial opinion), 902-904 (stating that he still stood by his opinion)).

On redirect examination, Dr. Hayner said petitioner's behavior was consistent with that of someone under the influence of amphetamines:

> Q. Well, counsel keeps asking you, just assuming that the defendant's telling you the truth. Let me ask this question: Was the behavior that he described to you, his motives, his actions, was that consistent with an individual who is under the influence of methamphetamine?
> A. Yes, sir, if he describes doing a lot of this out of paranoia either for being -- as to being discovered or what was going to happen afterwards if he left people there alive, I suppose these could be construed otherwise as well, but they are consistent with thinking that would be going on with someone who was having problems with

their thought processes due to the drug.

Q. Whether he was telling you the truth or not, the thought process that he's describing appears consistent with the abuse?

A. Yes, sir.

(3 R.T. 906).

(b) Resolution of Claim

Although trial counsel's preparation of Dr. Hayner to testify was not stellar, petitioner's Strickland claim based on that lack of preparation fails because petitioner has not demonstrated prejudice. See Strickland v. Washington, 466 U.S. 668, 697 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). Even if Dr. Hayner's testimony went completely unchallenged and were given full credence by the jury, its import is that petitioner is a methamphetamine addict, whose paranoia as a result of taking the drug led him to murder four people. (3 R.T. 906 ("if he describes doing a lot of this out of paranoia either for being -- as to being discovered or what was going to happen afterwards if he left people there alive, I suppose these could be construed otherwise as well, but they are consistent with thinking that would be going on with someone who was having problems with their thought processes due to the drug.")). Such evidence is not necessarily mitigating. Upon hearing such evidence, a reasonable juror would likely be at least as inclined, if not even more inclined, to vote for the death penalty, given jurors' likely antipathy to a methamphetamine user.

The Court GRANTS summary adjudication in favor of respondent and against petitioner on Claim 17(9).

10. Claim 17(10): IAC For Failure to Present a Lingering Doubt Defense

In claim 17(10), petitioner alleges that, in view of "substantial evidence that Michael Bonano was wholly or partially responsible for the crimes of which [petitioner] had been convicted and "the improper, suggestive and overbearing tactics used by the prosecution in interrogating" petitioner, his trial counsel were ineffective for failing to present a lingering doubt defense at the penalty phase. (2d Am. Pet., at 243-44). Petitioner raised the state court analogue to this claim in claim 33 of his first state habeas petition, and the California Supreme Court rejected it on the merits in an unreasoned decision. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 222-23; (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

Because the California Supreme Court might reasonably have found that petitioner can show neither deficient performance nor prejudice, claim 17(10) does not survive review under 28 U.S.C. § 2254(d). First, on the issue of performance, petitioner confessed to the crimes with which he was charged, and told the investigators that, in Bonano, they "had the wrong man." (2 R.T. 385 (Investigator Hobson's testimony about what petitioner said); see 01.09.1986 Interview Tr., Tape # 131-15 & 131-17, at 128-31, 138-40, 1 C.T. Aug. 151-54, 161-63 (petitioner denying Bonano was in the house; questioning how Bonano could have known Laura had a sock in her mouth, since "[h]e never came into the house" and "[t]hat house was locked tighter than a drum."); 01.09.1986 Interview Tr., Tape # 131-17, at 141, 1 C.T. Aug. 164 (petitioner denying Bonano was an accessory)). In addition, petitioner stated repeatedly during the

interrogation that he knew he had committed wrong and wanted to plead guilty. (See, e.g., 01.09.1986 Interview Tr., Tape # 131-16, at 132-33, Tape # 131-17, at 143, Tape # 131-23, at 173, 1 C.T. Aug. 155-56, 166, 196). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. "For example," the high court explained,

> when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. Petitioner having confessed to the crimes and having affirmatively represented that Bonano was not involved, and the jury having convicted petitioner of the crimes, the California Supreme Court could reasonably have concluded that trial counsel was entitled to rely on those facts in deciding not to raise a lingering doubt defense at the penalty phase.

Furthermore, in assessing prejudice, the California Supreme Court could reasonably have determined that a lingering doubt defense would have made no difference in the outcome because petitioner's own statements to law enforcement would have rendered such a defense completely lacking in credibility.

Although petitioner contends petitioner's confession was unreliable, the California Supreme Court specifically found that

there was no police coercion, that petitioner was not promised any benefit, and that nothing the interviewing detectives said or did constituted an inducement, Benson, 52 Cal. 3d at 780-82, findings which, as discussed above, survive review under AEDPA. Additionally, reliable or not, defense counsel knew that, despite their best efforts, petitioner's statements to law enforcement would come before the jury, as indeed they had by the time of the penalty phase. Defense counsel were entitled to take those statements into account and to decide not to attempt to mount a lingering doubt defense which the statements rendered not credible.

Claim 17(10) must be DENIED.

11. Claim 17(11): IAC For Failure to Request Mitigating Circumstances Jury Instructions

In claim 17(11), petitioner alleges his trial counsel failed to request complete jury instructions on mitigating circumstances, but instead acceded to a modified instruction which "omitted reference to the consideration of another participant in the crimes under California Penal Code Section 190.3(g) and (j)." (2d Am. Pet., at 244 (citing 3 C.T. 882-83)). He also faults trial counsel for failing to object to the California death penalty statute and the jury instructions derived from this law on the grounds "they are unconstitutionally vague and result in the arbitrary, irrational and capricious imposition of the death penalty." (Id.). The state court analogue to claim 17(11) was part of claim 33 of petitioner's first state habeas petition. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 223; see also 2d St. Hab. Pet. [Lodged Doc. No. D1], at 107, 111-13, 119-24). The California Supreme Court denied it on the merits in an unreasoned decision. (Order, filed May 12, 1994, In re

Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]; see also Order, filed Aug. 20, 1997, In re Benson, Cal. S. Ct. Case No. S063126 [Lodged Doc. No. D2]).

At the end of petitioner's penalty phase trial, defense counsel and the prosecutor stipulated to a modified version of CALJIC 8.84.1, which excluded Factors G and J from the list of mitigating factors to be read to the jury. (3 C.T. 882-83; see 4 R.T. 1038 (both sides agreeing to deletion of Factors G and J from jury instruction), 1041 (trial judge agreeing to give the modified instruction)). As given, modified CALJIC 8.84.1 omitted Factors G and J.[49] (3 C.T. 88-83; 4 R.T. 1198-99).

Claim 17(11) is easily disposed of given the absence of evidence supporting these factors. Whether or not trial counsel could be deemed to have rendered deficient performance - he could not - omitting Factors G and J undoubtedly did not prejudice petitioner. CALJIC 8.84.1 as given included Factor K, which instructed the jury to consider:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence of less than death, whether or not related

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[49] Mitigating Factor G is: "whether or not defendant acted under extreme duress or under the substantial domination of another person." Factor J is: "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Cal. Pen. Code §§ 190.3(g), (j).

to the offense for which he is on trial.[50] (3 C.T. 882; 4 R.T. 1199). See Cal. Pen. Code, § 190.3(k). This "catchall" language is sufficient to cover the issues raised by factors G and J: whether petitioner acted under duress or the domination of another, or played a minor role or acted as an accomplice, when he committed the Camargo murders.

Petitioner's claim that "trial counsel were ineffective in failing to object to the unconstitutionality of the California death penalty statute and the jury instructions derived from it" fails because the basis for the objections petitioner says counsel should have raised is without merit. See Mayfield v. Woodford, 270 F.3d 915, 924 (9th Cir. 2001) (en banc). For this reason, petitioner cannot show prejudice, and this claim of ineffective trial counsel fails. See United States v. Aguon, 851 F.2d 1158, 1172 (9th Cir. 1988) (en banc) ("Our disposition of the various objections above suggests that the failure to raise them was not prejudicial.").

The Court GRANTS respondent's motion for summary adjudication in favor of respondent and against petitioner on claim 17(11).

12. Claim 17(12): Penalty Phase IAC Cumulative Error

Petitioner asserts that, even if the instances of ineffective assistance of trial counsel at the penalty phase were insufficient individually to warrant granting relief, when viewed cumulatively, they entitle him to penalty phase relief. (2d Am. Pet., at 244). In assessing prejudice under Strickland, the Court should assess the cumulative prejudicial impact of all of counsel's errors together.

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[50] Because of the omission of other factors listed in Cal. Pen. Code § 190.3, Factor K is listed as paragraph (f) of the modified instruction given to the jury. (3 C.T. 882; 4 R.T. 1199).

Cf. Benn v. Lambert, 283 F.3d 1049, 1053 (9th Cir.) (In assessing materiality for purposes of Brady, "we analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases.") (citing United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)), cert denied, 537 U.S. 942 (2002). Here, particularly in light of the heinousness of petitioner's crimes, as confessed to by petitioner himself, petitioner has not shown that the cumulative prejudicial effect of the alleged ineffective counsel errors at his trial puts the case in such a different light as to undermine confidence in its outcome.

Claim 17(12) is without merit and must be DENIED.

13. Claim 17(13): IAC For Failure to object to evidence presented in opposition to motion to modify the death verdict

In claim 17(13), petitioner alleges his trial counsel was ineffective for failing to investigate, object to, and rebut the victim impact evidence and other evidence the prosecution presented at the hearing on the defense motion to modify the jury verdict of death pursuant to Cal. Pen. Code § 190.4. (2d Am. Pet., at 244-49). Petitioner alleged the state court analogue to this claim as claim 37 of his first state habeas petition, and the California Supreme Court denied it on the merits in an unreasoned decision. (1st St. Hab. Pet. [Lodged Doc. No. C1], at 254-63; (Order, filed May 12, 1994, In re Benson, Cal. S. Ct. Case No. S030686 [Lodged Doc. No. C11]).

(a) Background

On April 15, 1987, petitioner's trial counsel filed a motion for new trial or, in the alternative, for modification of the jury's

death verdict. (4 C.T. 923-51; see 4 C.T. 952-55 (prosecution's opposition)). At the sentencing hearing on April 30, 1987 (4 R.T. 1214), the trial judge ruled on both the motion for new trial and the motion for modification of verdict. (4 R.T. 1215, 1218 (trial judge stating he would rule on motion for new trial first and then take up motion for modification)). After hearing from counsel for the prosecution and the defense (4 R.T. 1219-24), the trial judge denied the motion for new trial. (4 C.T. 956; 4 R.T. 1224-26).

The judge then took up the motion for modification of verdict. (4 R.T. 1226). Petitioner's counsel argued the motion and said the modification request was based largely on the same grounds as the already denied motion for new trial: "[W]hat I'm really saying, Your Honor, is that it's difficult for me to argue modification when you deny my motion for a new trial." (4 R.T. 1226-27).

The prosecution then moved, under Proposition 8, Cal. Pen. Code § 1191.3, to present testimony by members of the victims' family:

> Pursuant to Proposition 8, during the long course of this trial, the families of the victims have been in contact with me and have at all times wished to make statements to the Court. I informed them that the appropriate time to make such a statement would be this day. And pursuant to that, to Proposition 8, I would like the permission of the Court to call the victim's family.

(4 R.T. 1227-28). Defense counsel did not object, and the prosecutor called, in succession, Martin Einert, father of Laura Camargo and grandfather of the three children (4 R.T. 1228-29); Robert Camargo, father of Stephanie and Shawna Camargo (4 R.T. 1230-32); Ed Cummins, stepfather of Robert Camargo and grandfather to the

girls (4 R.T. 1232-33); Mary Einert, mother of Laura (4 R.T. 1233-34); and Judy Cummins, paternal grandmother of Stephanie and Shawna (4 R.T. 1234-37), each of whom gave a statement to the Court about how petitioner's crimes affected them and why they felt death was the appropriate punishment. The prosecutor also referred to a letter from Laura's grandmother, Mrs. Vincent, in which Mrs. Vincent asked that the prosecutor "make her wishes known that she would ask this Court to sentence [petitioner] to death." (4 R.T. 1234). Based on this testimony, the prosecutor argued that the death verdict should not be modified. (4 RT 1237-38). Petitioner's trial counsel pointed out two erroneous items to the judge, but did not raise others and did not proffer any additional evidence or argument of their own. (4 R.T. 1238-40).

The trial judge also had reviewed the pre-sentencing investigation report, which included petitioner's criminal record and additional victim impact evidence. (4 C.T. 959-991; see 4 C.T. 989 (judge's signature indicating he had "read and considered" the report); 4 R.T. 1238 (trial judge acknowledging he had "read and considered the very fine report that was prepared and submitted.").

The trial judge denied the motion to modify the verdict. (4 RT 1240-46).

(b) Evidence Petitioner Contends Counsel Should Have Presented

Petitioner contends his trial counsel should have presented at petitioner's trial "the substantial and significant mitigation evidence" described in claims 8, 11, 12(1), and 17(1), and that, confronted with this evidence, the trial judge would have found death to be inappropriate. (2d Am. Pet., at 245).

Petitioner claims his trial counsel should have called

witnesses or cross-examined the prosecution's witnesses to establish that Laura was sexually active with many men, at times in front of her children; that Laura bragged of group sex and her preference for younger men; that she was an unfit mother who asked her ex-husband to take custody of Stephanie; that she had already given up caring for her oldest child, Sasha, who lived with Laura's mother; that Laura sold drugs and used drugs in her house; and that she sometimes prostituted herself. (2d Am. Pet., at 247).

The pre-sentence investigative report quoted Peggy Tillema, who described Laura as "a real neat girl, pleasant personality, caring, loving, a good mother." (4 C.T. 966). However, petitioner alleges that, according to investigative reports, Michael Powell went to the Camargo residence on January 14, 1986, to purchase marijuana from Laura, which he did weekly or semi-weekly. (1st St. Hab. Pet., at 258 [Lodged Doc. # C1]). A San Luis Obispo Sheriff's Department report recounted an interview of Powell by officer William Wammock in which, according to Wammock, Powell said he went to Laura Camargo's house on January 4, to "score a dime bag of grass"; Powell usually saw Camargo once or twice a week and knew she usually could sell him marijuana. (Id.). When Powell arrived, four teenage males were at Laura's house, drinking beer. (Id.). Powell paid Laura twenty dollars for the marijuana. (Id.). Petitioner contends his counsel should have presented Powell's testimony at the hearing on the modification of the verdict to show that Laura Camargo sold drugs and allowed teenagers to drink alcohol at her house. (Id.).

Stacie Lee Nath met Laura Camargo when they both lived in Nipomo. (Declaration of Stacie Lee Nath, ¶ 2, Exhs. to 1st St. Hab. Pet., Exh. J, at 1). Stacie was about 12 years old at the time and

used to babysit Laura's children. (Id.). Stacie went to Laura's house about every other day for the next two years and became very close to her children. (Id.). Laura had many male friends with whom she was sexually active. (Id., ¶ 3, at 1). Stacie recalls that Laura used to talk about having sex and that on occasions Laura would engage in sexual activities in front of Stacie and Laura's children. (Id.). When Nath was about thirteen, Laura brought home two men and told Stacie one of them was for her. (Id.). Stacie knew she was too young, told Laura she was not interested, and left. (Id.). Laura thought this was humorous. (Id.).

Petitioner alleges his counsel had or should have had: (1) handwritten notes by the officer who prepared the pre-sentencing report, stating that Robert Camargo's mother and stepfather tried to get custody of Shawna and Stephanie because "Laura may have been hooking and there was talk of drugs." (1st St. Hab. Pet., at 259). (2) a report by the San Luis Obispo Sheriff's Department which stated that, according to Barbara McCray, Laura Camargo's oldest child, a six year old named Sasha, lived with Camargo's mother in San Bernardino County. (Id.). (3) notes by sheriff's officers indicating that: Laura talked of group sex, liked young boys, was a poor housekeeper and unfit mother, and had loose morals and a temper; Laura bragged about sex with a 16 year old boy; Patricia Lamica reported that Laura made a lot of money by prostituting; Robert Camargo said he had heard that Laura was "screwing around" when they were married, that she didn't want to work or accept responsibility, and that she partied and had weird habits; he recounted an incident in which Laura initiated sex with him and another woman. (Id.). Laura would call Robert without

notice and tell him to pick up the children. (Id., at 259). Others reported that Laura was always partying, drinking beer and smoking pot and often left her children with strangers. (Id.).

Robert Camargo, father of Stephanie and Shawna, told the court of the impact of losing his daughters and asked the court to sentence petitioner to death. (4 R.T. 1230-32). Petitioner alleges Camargo's statement gave the court the false impression he was a caring, loving father who took responsibility for his children's well-being and would suffer accordingly by their deaths (2d Am. pet., at 246), when, in reality, the pre-sentencing report stated that after Laura gave birth to Stephanie and Shawna, Robert "walked out on her because he couldn't handle the responsibility." (4 C.T. 965). A report by a San Diego Police Department Child Abuse Unit officer states that Robert was suspected of molesting Stephanie. (Reports of San Diego Center for Child Protection, Exhs. to 1st St. Hab. Pet., Exh. AAA [Lodged Doc. # C2]). On November 22, 1985, Stephanie told Robert's half-sister that Robert had hurt her. (Id., at 9). She pointed to her vaginal area and buttocks, and stated "Daddy hurt me." (Id.). Robert's father called the police; Stephanie told a police officer, "I don't want to live with Daddy. I want to live with Grandpa and Grandma." (Id.). Robert told police his father and he were having difficulties and that his father had molested his sister when she was seven years old. (Id., at 10). The district attorney reportedly decided not to prosecute Robert in light of Stephanie's death. (Id., at 11). This report also stated that Robert was a possible suspect in his stepson's molestation case. (Id., at 10). A Medical Social Service Summary prepared by the Center for Child Protection states Stephanie

reported that her father had been touching her and hurting her, and that it happened several times. (Id., at 1-2). Stephanie reportedly told her grandparents, "I'm not supposed to talk about it . . . something bad will happen." (Id., at 3). A History and Physical Examination report stated that findings of trauma to Stephanie's vaginal area indicated sexual abuse. (Id., at 7).

Petitioner alleges that San Luis Obispo Sheriffs Department notes, which he says counsel should have had, show that Robert Camargo failed a polygraph regarding the charges of molesting Stephanie. (1st St. Hab. Pet., at 261). These notes allegedly show that Laura asked Robert to keep permanent custody of Stephanie and that the district attorney had to file charges to force Robert to pay court-ordered child support. (Id.). Court documents allege that Robert was $2,000 in arrears in child support payments in 1984 and was ordered to make restitution. (Records from Superior Court File in County v. Robert Camargo, Jr., San Luis Obispo County Sup. Ct. Case No. FS 776, Exhs. to 1st St. Hab. Pet., Exh. BBB, at 1).

Petitioner alleges counsel unreasonably failed to investigate other matters, and to object to erroneous information, in the pre-sentencing investigation report. (1st St. Hab. Pet., at 262). For example, the report said the legs of the three female victims were extended and spread in unnatural positions, making it apparent they had been positioned into sexual poses after their deaths. (4 C.T. 960). The report said black light flourescence showed seminal fluid in the pelvic area of the mother and daughters. (4 C.T. 961). Donald T. Reay,. M.D., a King County, Washington, Chief Medical Examiner, states that in the case of burned bodies, a forensic pathologist would not rely on the observation of fluorescence and

the positions of the bodies to assess whether there was physical evidence of assault. (Declaration of Donald T. Reay, M.D., ¶¶ 25-30, Exhs. to 1st St. Hab. Pet., Exh. BB, at 9-12).

The pre-sentencing report states petitioner's version of events was not believable and concludes Stephanie and Shawna must have known something was wrong and spent the last hours of their lives in terror. (4 C.T. 987). According to Dr. Reay, there is no evidence that the four victims were killed at significantly different times. (Reay Decl., ¶ 17, Exhs. to 1st St. Hab. Pet., Exh. BB, at 6).

The pre-sentencing investigative report says petitioner's stay at the Buchanan ranch was the happiest period of his life. (4 C.T. 975). The report notes petitioner had admitted to transient amnesia due to heavy alcohol and/or drug usage and that he began using intoxicants at age fifteen. (4 C.T. 977). Petitioner's probation officer reportedly said petitioner was hiding during the weeks before the offense. (4 C.T. 978).

Finally, the pre-sentencing report said petitioner probably was not telling the complete truth to police officers about the Camargo offenses. (4 C.T. 986). As discussed more completely in connection with claim 17(1), petitioner alleges the Buchanan ranch was an unlicensed foster home, where he was regularly tortured and sexually abused; petitioner's amnesia is not "transient" and is a product of his brain damage and memory deficits; petitioner began using drugs on the farm before age nine; petitioner was not "hiding" prior to the Camargo offenses but rather consistently attempted to get a ride to the probation office, as he lacked transportation; and petitioner was not lying when he talked to the police; rather, his inability to remember was due to the fact he was in a dissociative state at the

time of the Camargo offenses. (See 1st St. Hab. Pet., at 263 (citing supporting documentation)).

(c) Resolution of Claim

Petitioner's counsel's failure to present the evidence impeaching the prosecution's victim impact evidence was neither ineffective nor prejudicial. In deciding a motion for modification of the jury's death verdict, "'[u]nder section 190.4(e), the court reviews the evidence presented to the jury.'" People v. Benson, 52 Cal. 3d at 811 (quoting People v. Williams, 45 Cal. 3d 1268, 1329 (1988), cert. denied sub nom. Williams v. California, 488 U.S. 1050 (1989)). The California Supreme Court's holding that the trial judge's consideration of the prosecution's victim impact evidence and the pre-sentencing investigative report violated this California law, see Benson, 52 Cal. 3d at 811, is conclusive on that issue. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

The evidence petitioner contends trial counsel should have presented to impeach the prosecution's victim impact evidence and the pre-sentencing investigative report was itself inadmissible under state law at the hearing on petitioner's motion to modify, except to the extent it had previously been presented to the jury. To the extent claim 17(13) rests on trial counsel's failure to present to the court in connection with petitioner's motion to modify the verdict evidence not presented to the jury, the claim is that trial counsel's error "'deprived [petitioner] of the chance to have the state court make an error in his favor,'" which cannot constitute prejudice under Strickland. Lockhart v. Fretwell, 506

U.S. 364, 371 (1993) (citation omitted).[51]

Some of the potentially mitigating evidence petitioner contends counsel should have uncovered and presented to the jury in claim 17(1), concerning petitioner's background and character as mitigating evidence at the penalty phase, is also relevant to claim 17(13). In resolving claim 17(1), this Court has already determined that there is no reasonable likelihood this potentially mitigating evidence would have resulted in a sentence of life imprisonment without parole. To the extent claim 17(13) rests on the same evidence, it must, for the same reason, be denied.

Claim 17(13) fails, and the Court GRANTS summary adjudication on the claim in favor of respondent and against petitioner.

X. Unconstitutionality of Sentencing by Jury that Did Not Hear All Mitigating Evidence (Claim 18)

In claim 18, petitioner alleges that his being put to death pursuant to a sentence by a jury that "never heard about his childhood history of sexual, physical and emotional abuse, never heard about his mental deficits, the multiple insults to his brain during his development, never heard that substantial parts of the prosecution's case against [petitioner] were false, incomplete, and unreliable, and never heard evidence that Michael Bonano participated in and/or committed the crimes for which [petitioner] was being tried" "would constitute cruel and unusual punishment,

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[51] In any event, evidence "'trashing' Laura and Robert Camargo" (S.J. Mot., at 736; see 2d Am. Pet., at 246-48 (summarizing evidence)) likely would not have persuaded the trial judge to modify the death sentence even if such evidence were admissible at the hearing on petitioner's penalty modification motion. Courts (and juries) frown on attacking the victim of a crime, and, in this case, however unsavory aspects of Laura Camargo's conduct may have been, nothing could justify her murder and the murder of her children.

52 Cal.3d 754
Supreme Court of California,
In Bank.

The PEOPLE, Plaintiff and Respondent,
v.
Richard Allen BENSON,
Defendant and Appellant.

No. S004763.
|
Crim. 26387.
|
Dec. 31, 1990.
|
Rehearing Denied Feb. 20, 1991.

Synopsis
Defendant was convicted in the Superior Court, No. 162333, Santa Barbara County, Thomas R. Adams, J., of murders and lewd and lascivious acts with children under the age of 14. Death penalty was imposed. Automatic appeal was taken. The Supreme Court, Mosk, J., held that: (1) defendant's confessions were voluntary; (2) witness-killing special-circumstance findings were invalid; (3) there was no prosecutorial misconduct in course of opening and closing argument and summation during penalty phase; and (4) there was no error in instructions on determination of penalty.

Affirmed in part and set aside in part.

Attorneys and Law Firms

***833 *764 **335** Harvey Zall and Fern M. Laetham, State Public Defenders, under appointment by the Supreme Court, Larry Pizarro, Michael Tanaka and Kendall Goh, Deputy State Public Defenders, Los Angeles, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., **Richard** B. Iglehart, Chief Asst. Atty. Gen., Edward T. Fogel, Jr., Asst. Atty. ***765** Gen., John R. Gorey and Robert D. Breton, Deputy Attys. Gen., Los Angeles, for plaintiff and respondent.

Opinion

MOSK, Justice.

This is an automatic appeal (Pen.Code, § 1239, subd. (b)) from a judgment of death under the 1978 death penalty law (*id.*, § 190 et seq.).

On April 1, 1986, the District Attorney of San Luis Obispo County filed an information against defendant **Richard Allen Benson**. As subsequently amended, the information contained the following charges and allegations.

Offenses and accompanying weapon-use allegations. (1) On January 5, 1986, defendant committed a lewd or lascivious act with Stephanie Camargo, a child under the age of 14. (Pen.Code, § 288, subd. (a).) (2) On the same date, he committed another such act with Stephanie. (*Ibid.*) (3) On January 6 he committed yet another such act with Stephanie. (*Ibid.*) (4) On January 5 he committed a lewd or lascivious act with Shawna Camargo, a child under the age of 14. (*Ibid.*) (5) On the same date, he committed another such act with Shawna. (*Ibid.*) (6) On January 6 he committed yet another such act with Shawna. (*Ibid.*) (7) On January 5 he murdered Laura Camargo (*id.*, § 187); he used a deadly and dangerous weapon

(*id.*, § 12022, subd. (b)). (8) On the same date, he murdered Sterling Gonzales. (*Id.*, § 187.) (9) On January 6 he murdered Stephanie (*ibid.*); he used a deadly and dangerous weapon (*id.*, § 12022, subd. (b)). (10) On the same date, he murdered Shawna (*id.*, § 187); he used a deadly and dangerous weapon (*id.*, § 12022, subd. (b)). (11) On the same date, he committed arson of an inhabited structure. (*Id.*, § 451, subd. (b).) (12) On January 7 he kidnapped Karen Stange (*id.*, § 207, subd. (a)); he used a deadly and dangerous weapon (*id.*, § 12022, subd. (b)).

Special circumstance allegations. (1) Defendant committed multiple murder. (Pen.Code, § 190.2, subd. (a)(3).) (2) He intentionally killed a witness to a crime, viz., Stephanie Camargo. (*Id.*, § 190.2, subd. (a)(10).) (3) He intentionally killed a witness to a crime, viz., Shawna Camargo. ****336** (*Ibid.*) (4) He committed felony-murder based on a lewd or lascivious act with Stephanie. (*Id.*, § 190.2, subd. (a)(17)(v).) (5) He committed felony-murder based on a lewd or lascivious act with Shawna. (*Ibid.*)

"Prior offense" allegations. (1) Previously, defendant had been convicted of, and had served a prison term for, two violent felonies (***766** Pen.Code, §§ 667, subd. (b), 667.5, subd. (c)(6), 1203.066, subd. (a)(5)) involving a lewd or lascivious act with a child under the age of 14. (2) Prior to the commission of the offenses charged, he had been convicted, on charges brought and tried separately, of a serious felony (*id.*, § 667, subd. (a)), viz., kidnapping (*id.*, § 207). (3) Prior to the commission of the offenses charged, he had been convicted, on charges brought and tried separately, of two other serious felonies (*id.*, § 667, subd. (a)), viz., kidnapping (*id.*, § 207) and residential burglary (*id.*, § 459).

Defendant pleaded not guilty to the charges and denied the allegations. On his motion, the court changed venue from San Luis Obispo County to Santa Barbara County.

Trial was by jury. Before opening statements, the parties stipulated to the severance of count 12, which charged the kidnapping of Karen Stange. During the People's case-in-chief, defendant withdrew his denial as to the "prior offense" allegations and admitted their truth. The jury returned verdicts finding defendant guilty as charged on the remaining counts, determined each of the murders to be of the first degree, and found all the weapon-use *****834** and special circumstance allegations true. The jury subsequently returned a verdict of death for the murders. On the People's motion, the court dismissed count 12. It then entered judgment accordingly.

As we shall explain, we conclude that except as to the witness-killing special circumstances, the judgment must be affirmed.

I. FACTS

A. *Guilt Phase*

The evidence introduced at the guilt phase —which included parts of two confessions defendant made to the police and one he made to a police psychiatrist—establishes the following core of facts.

On the evening of Saturday, January 4, 1986, Laura Camargo set out to visit Barbara Lopez

and Katrina Flores. The three women were close friends. Laura lived in Nipomo with her children, Stephanie Camargo, age four, Shawna Camargo, age three, and Sterling Gonzales, age twenty-three months, in a small, two-room shack that shared an unattached bathroom with another unit. Barbara and Katrina lived with their children in an apartment in Oceano, which was about 10 miles away. Just before Thanksgiving of 1985, defendant had moved into the apartment; he was a jeweler by trade. Over the following weeks, he became acquainted with Laura and her children.

*767 On the evening in question, Laura secured a baby-sitter to care for Stephanie, Shawna, and Sterling, and then obtained a ride to Oceano. She socialized with Barbara, Katrina, and defendant. Before long, she decided to return home. Defendant arranged for a ride. Taking measures to conceal his destination from Barbara and Katrina, he accompanied Laura to Nipomo, carrying with him a heavy briefcase. As he later admitted, he "went out there with the intention of doing something to the kids."

Around midnight, defendant and Laura arrived at the shack, and the baby-sitter departed. Shortly thereafter, defendant took up a claw hammer he found in the shack, apparently positioned himself behind Laura, and repeatedly and violently struck her in the head, as he subsequently acknowledged, "to take her out." Laura fell; defendant thought she was dead; she gurgled loudly; he stuffed socks into and over her mouth; she soon expired. From that point on, he took pains to make it appear to Laura's neighbors that no one was in the shack. He proceeded to sexually assault Stephanie and Shawna.

Throughout Sunday, January 5, defendant continued to molest the two girls. A number of times that day, neighbors came **337 by the shack and the common unattached bathroom. More than once, Sterling coughed and cried; more than once, defendant quieted the child. After nightfall defendant—in words he later used—"realized ... that it was inevitable": in order to avoid discovery, he decided to kill Sterling. Although he met with resistance from the child as he attempted to smother and strangle him to death, he finally succeeded. With Laura and Sterling dead, he found himself in what he later described as "a molester's type of heaven": in the paraphrase of the police psychiatrist to whom he confessed, "it was like being in heaven, and being completely able to get what he wanted with no interference."

As Monday, January 6, approached, defendant continued to molest Stephanie and Shawna. At the same time, he began to consider whether he should kill the girls. As he later described his thoughts: "I knew it couldn't be put off and uh, in the state of mind that I was in at that time, the best thing, no I can't say it like that, the only option I had was to go ahead and finish the job and uh, try to keep from being implicated in it, okay. Uh, I had trouble bringing myself to do it.... [A]nd uh, you know, three, four times I set them up for it and I, I just couldn't do it...." As the sky began to lighten, however, defendant found himself able to carry through. He took up a heavy steel jeweler's mandrel which he carried in his briefcase; he repeatedly struck Stephanie and Shawna in the head; seeing that death did not come immediately, he seized the

claw ***835 hammer and used the instrument to dispatch the children. As he subsequently admitted, he killed Stephanie and Shawna, and Laura and Sterling before them, "to protect my *768 freedom." To cover his crimes, he proceeded to start a fire in the shack. About 8 a.m., just before the flames began to rage, he fled.

B. *Penalty Phase*

The People presented a case in aggravation. They set out to establish the circumstances of the crimes and the character of the criminal. To that end, they introduced, virtually in their entirety, defendant's two confessions to the police. The statements provided many details about the incidents in question. For example, to start the fire defendant used materials he carried in his briefcase: the items included pornographic magazines; they also included pages of an album with sexually suggestive photographs of men and women—with the faces of girls pasted over the faces of the women. The statements contained several expressions of remorse. But they also contained what appear to have been lies to minimize culpability. For instance, defendant portrayed himself as "Uncle **Richard**": he claimed that Laura "sold" Stephanie and Shawna to him in exchange for his promise to pay her $150, and had indeed pressured him into agreeing to the bargain; she initiated, and participated in, the sexual activity; he was gentle and caused no hurt; the children enjoyed the "play" and indeed took an active and enthusiastic role.

The People also sought to prove that on Tuesday, January 7, 1986, the day after he fled from Laura's shack, defendant kidnapped Karen Stange (Pen.Code, § 207, subd. (a)), through the use or threat of force or violence. Stange testified to the incident. She stated, inter alia, that on the afternoon of January 7, she and defendant met at the home of a mutual friend in Oceano; he asked her for a ride to Los Osos, she refused but offered to take him as far as San Luis Obispo, and he accepted; after they arrived at San Luis Obispo, he put a knife to her throat and displayed a needle whose prick he said would be fatal, and ordered her to drive to Los Osos; on the way, they stopped at a liquor store, and he instructed her to purchase pornographic magazines that "showed [a] progression from childhood to adult [hood]"; after they reached Los Osos, she managed to escape.

Finally, the People set out to prove that defendant had suffered certain prior felony convictions, and to establish that his conduct underlying such convictions involved the use or threat of force or violence. They offered stipulations as to the convictions, and the testimony of witnesses, including the victims, as to the underlying conduct. The tale told is as follows.

**338 In March 1972 defendant was convicted of committing a lewd or lascivious act with Joanna M., a child under the age of 14. (Pen.Code, § 288.) At *769 the time of the offense, Joanna was nine years old. Defendant made a forcible sexual attack on the child.

In January 1976 defendant was convicted of kidnapping Lisa W. (Pen.Code, § 207.) At the time of the offense, Lisa was eight or nine years old. Defendant forcibly assaulted the child.

Also in January 1976, defendant was convicted of committing a lewd or lascivious act with

Leslie H., a child under the age of 14. (Pen.Code, § 288.) At the time of the offense, Leslie was three years old. Defendant was acquainted with Leslie and her family. He made a forcible sexual attack on the child.

In December 1980 defendant was convicted of kidnapping Sara M. (Pen.Code, § 207) and of committing residential burglary (*id.*, § 459)—specifically, entering Sara's home in the nighttime with the intent to commit the kidnapping. At the time of the offenses, Sara was four years old. Defendant was acquainted with Sara and her family. He threatened the child with a forcible sexual attack.

Defendant presented a case in mitigation. He introduced evidence relating to his background and character. The information came from expert witnesses as well as lay, including defendant's family, friends, neighbors, teachers, and others.

***836** Defendant was born on April 18, 1947, the fourth child in a family of six boys and one girl. His father was an alcoholic; his mother also was an alcoholic, as well as a drug addict and prostitute. At the hands of his parents and a stepmother, he suffered neglect and abuse. Early on, he began to have run-ins with the law, abuse alcohol and drugs, and engage in pedophilia. From childhood into adulthood, he lived mainly in institutions of various sorts: foster homes, group homes, juvenile hall, the California Youth Authority, jail, and prison. Defendant's sister and two of his brothers testified on his behalf.

Experts offered opinion to the effect that defendant was a drug-dependent pedophile with an antisocial personality disorder, and that he may have been experiencing mental or emotional disturbance or diminished capacity at the time of the offenses in question as a result of his pedophilia and the ingestion of drugs. On direct examination, defendant elicited testimony suggesting he would not be dangerous in prison. On cross-examination, the People elicited testimony suggesting the opposite.

In addition to evidence relating to his background and character, defendant also introduced evidence concerning the nature of capital punishment. ***770** Specifically, he played a videotape of a brief segment of a television series called "Two on the Town," which dealt with San Quentin Prison and the infliction of the penalty of death.

In rebuttal, the People called one Mike Madding. Madding was the Public Information Officer at San Quentin Prison at the time the "San Quentin" segment was produced, and was interviewed on camera during the piece. He testified as to the nature of the penalty of life imprisonment without possibility of parole.

II. GUILT ISSUES

Defendant raises two claims bearing on the question of guilt. As will appear, neither is meritorious.

A. *Denial of Motion to Suppress Confessions to Police*

After the jury was sworn and before the People made their opening statement, defendant

moved to suppress his two confessions to the police. He had given those statements during interviews conducted on January 9 and 13, 1986, by officers including Detective Steven A. Bolts of the San Luis Obispo Sheriff's Department and Investigator Larry Wayne Hobson of the San Luis Obispo District Attorney's Office. As relevant here, the ground of the motion was that the confessions were involuntary under the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15, of the California Constitution (hereafter ****339** sometimes article I, sections 7 and 15). The argument in support was that the statements were assertedly obtained by what was claimed to be a promise of benefit, viz., a comment by Detective Bolts, "There's no death penalty here."

Imposing on the People the burden of proving that defendant's confessions were voluntary beyond a reasonable doubt in conformity with the decision in *People v. Jimenez* (1978) 21 Cal.3d 595, 602–609, 147 Cal.Rptr. 172, 580 P.2d 672,[1] the court held a hearing on the motion outside the presence of the jury. The People presented evidence of the interviews: they introduced fourteen 60–minute audiotape cassette recordings as well as a 227–page transcript of their contents; they also called Detective Bolts to the witness stand. Defendant too presented evidence of the interviews: he ***771** himself took the stand. After presenting argument, the parties submitted the matter.

1 Of course, since the crimes herein were committed after June 9, 1982, the effective date of article I, section 28, subdivision (d), of the California Constitution (*People v. Smith* (1983) 34 Cal.3d 251, 257–263, 193 Cal.Rptr. 692, 667 P.2d 149), the People were required to prove voluntariness only by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71, 260 Cal.Rptr. 273, 775 P.2d 1042.)

The next day, the court made its ruling. Determining, in substance, that there was no coercive police activity and that Detective Bolt's comment did not constitute a *****837** promise of benefit and in any event did not operate as an inducement, it concluded that the confessions were voluntary beyond a reasonable doubt.[2] It accordingly denied the motion to suppress the statements and, as noted, subsequently admitted portions at the guilt phase and virtually all at the penalty phase. As relevant here, its findings in support of the ruling were as follows.

2 Because of article I, section 28, subdivision (d), of the California Constitution (see fn. 1, *ante*), the court was required to make its determination of voluntariness only by a preponderance of the evidence. (See *People v. Markham, supra,* 49 Cal.3d at p. 71, 260 Cal.Rptr. 273, 775 P.2d 1042.)

"Now, let me just touch briefly on the factual setting that the Court is dealing with. [Defendant was advised of, and waived, his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, prior to each of the interviews.] By way of background, I think it is appropriate to note for the record that in my opinion we are dealing with Mr. **Benson** a defendant who is very articulate, very well-spoken, seems to the Court having read this transcript, that he's an intelligent young man.

"Secondly, by Mr. **Benson's** own account, he was experienced in the criminal justice system....

"It was also brought to the Court's attention yesterday that Mr. **Benson** was aware that he was a suspect in this, in the Nipomo homicide[s] very early on.... So he knew that going into the interview setting that we are focusing on.

"Now, let's talk about the interview itself. If I understand correctly, there were some one and a half to two hours of interview between Mr. **Benson**, Detective Bolts, and Detective Hobson in which there were no recordings made. And then the tape recorder was started, activated. And there was another time frame, I guess, of an hour or perhaps even more on that tape before the sequence came up that we are focusing on. Sequence being this, quote, 'There's no death penalty here,' close quote.

"The record should reflect that at least on the portion of the record, the transcript that I have of the discussion between Mr. **Benson** and the police officers up to that point of the statement by Detective Bolts, there was —oh, I guess for want of a better word— there was a lack of candor in Mr. *772 **Benson's** responses and some evasiveness to the detectives—responses to the detectives' questions about the kidnapping.

"And then the questioning shifts from the kidnapping area to the investigation of the Nipomo murders....

"...

"Yes. The focus of the questions now has shifted, and the detectives by way of **340 their questions to Mr. **Benson** have pointed out perhaps the obvious; that is, that his responses are not coinciding with responses made by other people who have given statements already....

"...

"Then there is this colloquy between the detectives and Mr. **Benson** about, 'Your friends, and they are kind of sucked into this situation now. And what's going to happen to them, they're stuck in the middle here.'

"Mr. **Benson** says, quote, 'Yeah, they don't deserve it.' Close quote.

"There is a statement by Detective Bolts where he's talking about things are different than they were in State Prison where people might lie for you.

"Then Detective Hobson says this, '**Richard**, tell us what happened. We want to hear your side of the story.'

"And Mr. **Benson** says, 'I don't know, man. It's horrible, and I don't even think I'm capable to do something like that.' Close quote.

"Okay. Now, to me, having heard these tapes of this portion of the interview and having reread my transcript, to me, it seems fairly clear that Mr. **Benson** was focusing on the horror of the situation. I think he said yesterday, and I think it shows up later in the transcript here that he had feelings of real, real strong mental ***838 feelings here of why this all happened. And I see—I think reviewing this, that those were motivating his thinking, those feelings of horror and shame and guilt, motivating his thinking at this time.

"Okay. Now, we go on and there's some further questioning, and then Detective Hobson says, 'What's going through your head right now, **Richard**?'

"Mr. **Benson** says, 'I don't think you'd believe it.'

***773** " 'DETECTIVE HOBSON: I'd like to believe it. Try me. We sat here with you all this time. That's why we're still here with you, because we care also.

" 'DETECTIVE BOLTS: We're caring, feeling human beings. We have compassion for a lot of things. We've seen a lot worse, believe me. This is not the end of the line by any means.

" 'DETECTIVE HOBSON: **Richard**, if we didn't care, we wouldn't be sitting here.

" 'MR. **BENSON**: I don't see—I don't see how you can say it's not the end of the line.

" 'DETECTIVE BOLTS: It's not.

" 'MR. **BENSON**: It is for me.

" 'DETECTIVE BOLTS: Why? There is no death penalty here.'

"Okay.

"Now, immediately thereafter, immediately after Detective Bolts says, 'Why? There's no death penalty here,' Mr. **Benson's** comment is, 'That doesn't matter.'

"And then Detective Hobson right away says, 'Wait a minute. Before we talk about that —' and another version of the transcript said, 'Before we talk about death penalty, we don't know what happened in that house.'

"Okay. Now, those are three important statements. Detective Bolts, 'Why? There's no death penalty here.'

"Mr. **Benson**, 'That doesn't matter.'

"Detective Hobson, 'Wait a minute. If—before we talk about that, we don't know what happened in that house.' Okay.

"Now, what happens then, did Mr. **Benson** immediately rely upon the statement of Detective Bolts? Did he totally discount what Detective Hobson said thereafter? 'Wait a minute. Before we talk about that,' or, 'Before we talk about death penalty, we don't know what happened in that house.' Did he discount that and open up immediately and start sharing his—[baring] his [soul] about this?

***774** "No way. Go on for a little bit. He says,

" 'DETECTIVE HOBSON: Laura had a temper, we know that. Maybe you were put into a position where you had to make a choice.

" 'MR. **BENSON**: It doesn't matter what choices I had.

" 'DETECTIVE HOBSON: Sure, it does.

****341** " 'MR. **BENSON**: No, because nothing justifies the outcome.'

"Okay. This is tied in exactly with what we were talking about before that statement was even made.

" 'What's in your mind?'

" '**RICHARD**: I don't think you'd even believe it. I don't know, man. It's horrible. I don't even think I'm capable of doing something like that.' That's in his mind now. He's thinking about the horror of it, and he says to the officer, 'It doesn't matter what choices I had because nothing justifies the outcome.' Okay.

"Then Detective Hobson says, 'Well, why don't you tell us and let us decide that.'

"And Mr. **Benson** says, 'The thing of it is I can't.'

"Detective **Benson**—or Detective Hobson, 'Why?'

"Mr. **Benson**, 'I don't know.'

"Detective Hobson, 'You don't know what?'

"Mr. **Benson**, 'I don't know what happened.' [3]

3 The colloquy quoted by the court appears as follows in the transcript introduced into evidence.
"Hobson: What's going through your head right now **Richard**?
"**Benson**: I don't think you'd believe it.
"Hobson: I'd like to believe it, try me. We sat here with you all this time and that's why we're still here with you, because we care also.
"Bolts: We're caring, feeling, human beings and we have compassion for a lot of things and we've seen a lot worse, believe me, this is not the end of the line by any means.
"Hobson: **Richard**, if we didn't care, we wouldn't be sitting here.
"**Benson**: I don't see, I don't see how you can say it's not the end of the line.
"Bolts: It's not.
"**Benson**: It is for me.
"Bolts: Why? There's no death penalty here.
"**Benson**: That doesn't matter.
"Hobson: Wait a minute, before we talk about that, we don't know what happened in that house ... [.]
"Bolts: Exactly. We know what kind of a person Laura could be.
"Hobson: Laura had a temper. We know that. Maybe you were put into a position where you had to make a choice.
"**Benson**: It doesn't matter what choices I had.
"Hobson: Sure it does.
"**Benson**: No, because nothing justifies the outcome.
"Hobson: Well, why don't you tell us and let us decide that.
"**Benson**: The thing ot [*sic*] it is, I can't.
"Hobson: Why?
"**Benson**: I don't know.
"Hobson: You don't know what?
"**Benson**: I don't know what happened."

***839 *775 "Okay. So then we go into several minutes of, again, less than candid responses. And then finally and slowly in the interview, they get around to the point where some candor is shown and those statements are made.

"Okay. Then—trying to look at this entire scenario here—then later on, perhaps as long as two hours later, Detective Hobson and Detective Bolts leave the room and a lieutenant that I cannot remember his name comes into the room with Mr. **Benson** and visits for a period of time. And Mr. **Benson** says something to [the] lieutenant of a nature that these two detectives, Hobson and Bolts, have done a very good job. And there are laudatory comments about they should be complimented for the good job that they've done in this interview session.

"Okay. Then a couple of days later in a subsequent interview, and this goes back to what I said early on about Mr. **Benson's**

knowledge of the system, and why he was there in that room, and what it was all about. This is a subsequent interview, and Detective Bolts and Detective Hobson are explaining to Mr. **Benson** what might happen now when he goes to court. They're talking about the arraignment process, 'And you'll enter your plea and you'll be given an opportunity.'

"And Detective Bolts says ...

" 'Not necessarily. You might not even be asked for a plea. They'll decide the counsel issue first. So that you've had time to discuss your plea or the situation with counsel and enter a plea. It's not uncommon for them to continue an arraignment for days or weeks in order for you to carefully consider your legal options. You know that—you know that all too well.

*776 **342 " 'MR. **BENSON**: I have enough knowledge of the legal system and the information that I have given you that nothing is going to change the fact that I did it and I admitted it. Now, this is going to be the end result. I did do it, and I did admit it. I don't understand how, I mean, I'm sure they can, now that you mention it, but I don't understand how they can ask me in a court of law how I plead and not accept my ...[.]'

"And then it goes on there, and then I think the next to last page of the transcript there is this colloquy.

" 'DETECTIVE BOLTS: Okay.

" 'We'll make sure that you get commissary, any other items that you need besides cigarettes?'

"Detective Bolts continues,

" 'For a few hours today, we'll probably be talking to you again if you so desire. Just so that I'm clear, is there something that we've said, as far as you know, threats that we have made to you, or promises, or any promises of leniency, anything that has caused you to tell us what you've told us?

" 'MR. **BENSON**: No. I'm surprised that that came up.

" 'DETECTIVE BOLTS: Well, I—you know, it's something that, you know, I've thought of that maybe something we said ***840 that you interpreted as some kind of threat or promise or some—

" 'MR. **BENSON**: You know what, if you guys started whipping me with billy clubs right now, you'd see me smile. So you know that's not a—a—now, no. You guys are good at your job. I complimented you to your lieutenant about it, as a matter of fact. I'm glad you are, because it served in getting me off the street, you know. I feel that in some sick, twisted way I helped a little bit, but you guys still—you did your job.'

"Now, I mean, when I was thinking about this, I was asked to focus my attention on those six words: 'Why? There is—Why? There's no death penalty here.' And I did some rough calculation on this transcript of the final hours of the interrogation, and there were in the area of 152,000, 153,000 words in this transcript.

"And I guess the suggestion is—I mean, I don't —I'm not sounding critical. I don't mean it to sound that way, but I guess when I was

focusing on those six words: 'Why? There's no death penalty here.' The argument *777 would have—would go that I should discount and not consider the other 152,600 [*sic*] words. And I think the case law suggests that that is inappropriate.

"I think the case law points out that it is necessary for me to consider the entire gamut of questions, the attitude of the participants, the factual setting. I ask myself some questions, some obvious questions: What is the nature of the benefit allegedly offered to Mr. **Benson** by this, 'Well, there's no death penalty? Why? There's no death penalty here,' statement. That, 'This is not the end of the line by any means. There's no death penalty here.' And then again the response, 'Well, it doesn't matter, nothing justifies the outcome.'

"...

"... [T]here is no suggestion that would be any worse or different if Mr. **Benson** confessed or if he didn't confess....

"...

"... Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness, at least in the hundreds of pages that I've read. To the contrary, it was strangely cordial and somewhat light, and not at all heavy-handed in the approach that was taken. There was open discussion in our—in the interview that I'm dealing with.

"The obvious question, did Mr. **Benson** rely on—was he induced by Detective Bolts' statement? I asked the obvious question, was there anything to rely on? ...

"... [T]here's no suggestion of different treatment if Mr. **Benson** chose to make any confessions or admissions....

"...

"... We don't have any tough guy cop approach. As I've commented, we had to **343 the contrary, officers who were patient and even-handed and fair in the way they approached their—this discussion.

"...

"... [T]here was no breaking down or loss of composure. Listening to the tape, it was clear that he was thinking clearly and appropriately. It was *778 clear to the Court in listening to it that, in fact, he hedged on the truth, understandably, for much of the interview until things started unraveling.

"Okay. When I compare ... 'The totality of the circumstances in viewing the interview in its entirety in light of all of the attendant circumstances,' I'm persuaded beyond a reasonable doubt that Mr. **Benson's** statements were not coerced by promise of leniency, but rather were made freely and voluntarily."

Defendant now contends that the court erred by denying his motion to suppress his confessions to the police as involuntary.

An involuntary confession, of course, is inadmissible under the due process clauses of both the Fourteenth Amendment (e.g., *Jackson*

v. Denno (1964) 378 U.S. 368, 385–386, 84 S.Ct. 1774, 1785–1786, 12 L.Ed.2d 908) and article I, sections 7 and 15 (e.g., *People v. Ditson* (1962) 57 Cal.2d 415, 438–439, 20 Cal.Rptr. 165, 369 P.2d 714 [decided under the predecessor of ***841** Cal.Const., art. I, § 15]). (See, e.g., *People v. Boyde* (1988) 46 Cal.3d 212, 238, 250 Cal.Rptr. 83, 758 P.2d 25, affd. *sub nom. Boyde v. California* (1990) 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316.)

A confession is involuntary under the federal (e.g., *Malloy v. Hogan* (1964) 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653) and state (e.g., *People v. Trout* (1960) 54 Cal.2d 576, 583, 6 Cal.Rptr. 759, 354 P.2d 231) guaranties of due process when it "was ' "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence[ ]" ' " (*Hutto v. Ross* (1976) 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (*per curiam*)). (See *People v. Berve* (1958) 51 Cal.2d 286, 290, 332 P.2d 97.) "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'...." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167, 107 S.Ct. 515, 521, 93 L.Ed.2d 473.) That is the law under the Fourteenth Amendment. (*Ibid.*) It is also the law under article I, sections 7 and 15. (*People v. Kelly* (1990) 51 Cal.3d 931, 973, 275 Cal.Rptr. 160, 800 P.2d 516 (conc. opn. of Mosk, J.).)

A confession is "obtained" by a promise within the proscription of both the federal and state due process guaranties if and only if inducement and statement are linked, as it were, by "proximate" causation. This is certainly true for the federal right. The requisite causal connection between promise and confession must be more than "but for": causation-in-fact is insufficient. (*Hutto v. Ross, supra,* 429 U.S. at p. 30, 97 S.Ct. at 203 (*per curiam*).) "If the test was whether a statement would have been made but for the law enforcement *779 conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action." (*U.S. v. Leon Guerrero* (9th Cir.1988) 847 F.2d 1363, 1366, fn. 1.) The foregoing is also true for the state right. (*People v. Kelly, supra,* 51 Cal.3d at p. 974, 275 Cal.Rptr. 160, 800 P.2d 516 (conc. opn. of Mosk, J.).)

When a challenge is mounted, the prosecution must prove that a confession is voluntary by a preponderance of the evidence under the Constitutions of the United States (e.g., *Lego v. Twomey* (1972) 404 U.S. 477, 489, 92 S.Ct. 619, 626, 30 L.Ed.2d 618) and California (*People v. Markham, supra,* 49 Cal.3d at p. 71, 260 Cal.Rptr. 273, 775 P.2d 1042).[4]

4 See footnote 1, *ante.*

On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation" **344 (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854). (E.g., *Davis v. North Carolina* (1966) 384 U.S. 737, 741–742, 86 S.Ct. 1761, 1764–1765, 16 L.Ed.2d 895 [reviewing federal constitutional claim]; *People v. Sanchez* (1969) 70 Cal.2d 562, 571–572, 75 Cal.Rptr. 642, 451 P.2d 74 [apparently

speaking of review of both federal and state constitutional claims].)

The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are apparently subject to independent review as well. The underlying questions are mixed; such questions are generally scrutinized de novo; that is especially true when—as here —constitutional rights are implicated (*People v. Louis* (1986) 42 Cal.3d 969, 984–987, 232 Cal.Rptr. 110, 728 P.2d 180 [articulating principles underlying both federal and state standard-of-review jurisprudence]).

Lastly, the trial court's findings as to the circumstances surrounding the confession —including "the characteristics of the accused and the details of the interrogation" (*Schneckloth v. Bustamonte, supra,* 412 U.S. at p. 226, 93 S.Ct. at p. 2047)—are clearly subject to review for substantial evidence. The underlying questions ***842** are factual; such questions are examined under the deferential substantial-evidence standard (*People v. Louis, supra,* 42 Cal.3d at pp. 984–987, 232 Cal.Rptr. 110, 728 P.2d 180 [articulating principles underlying both federal and state standard-of-review jurisprudence]).

Having considered the matter closely, we are of the opinion that the court did not err by denying defendant's motion to suppress his confessions to the police as involuntary.

***780** After independently reviewing the record in its entirety, we believe that the court properly concluded that the confessions were voluntary beyond a reasonable doubt. Examined de novo, each of the court's crucial determinations is sound.

First, the police activity here was clearly not coercive. Having weighed the evidence, including the audiotapes and the transcript, we agree with the court's assessment: "Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness.... To the contrary, it was strangely cordial and somewhat light, and not at all heavy-handed in the approach that was taken." "We don't have any tough guy cop approach.... [W]e had to the contrary, officers who were patient and even-handed and fair in the way they approached their—this discussion." "[T]here was no breaking down or loss of composure."

Defendant finds fault with the interrogation in several particulars. His complaints, however, simply fail to establish coercion on the part of the officers. He claims, for example, that the interrogation was "calculated" to secure a confession. But "calculation" does not necessarily imply compulsion.

Second, Detective Bolts's comment about the death penalty did not constitute a promise of benefit.

What the appropriate standard is for determining whether certain conduct amounts to a "promise" is apparently an open question: is it purely "objective" (i.e., from the perspective of a reasonable person); purely "subjective" (i.e., in accordance with the suspect's actual understanding); or purely neither and partly both? (See generally *People*

v. Conte (1984) 421 Mich. 704, 739–740, 365 N.W.2d 648 [choosing what is evidently a hybrid standard, viz., "whether the defendant is likely to have reasonably understood the statements in question to be promises of leniency"], and cases cited therein.) But as will appear, the question need not be resolved here.

The conclusion that Detective Bolts's comment did not constitute a promise follows if the remark is construed "objectively." Interpreted thus, it amounts to no more than an observation that ultimately proved to be incorrect—to the effect that the death penalty was not available here. Nothing in the surrounding circumstances transforms the comment's meaning or its ****345** force. Defendant claims in substance that Investigator Hobson's interjection, "Wait a minute, before we talk about that, we don't know what happened in that house," supported the "promise" he discerns in Bolts's words and conditioned that "promise" on his confession. We disagree. Hobson's words effectively "withdrew" the remark. And as defendant himselfconceded ***781** at the hearing, the remark was not "renewed": the officers "[n]ever again discuss[ed] the matter of the death penalty with" him.

The conclusion that Detective Bolts's comment did not constitute a promise follows even if the remark is construed "subjectively." Several times at the hearing, defendant made admissions bearing on the matter.

At one point, he stated that his interpretation was as follows: "That at that time there was no—that the death penalty was dormant in California, and that they weren't seeking the death penalty as far as what the interview, what the case was going to."

At another point, he said: "I felt that they were confirming what I already believed, that they weren't seeking the death penalty, and the reason they weren't seeking it is because at that time it wasn't being used in California."

*****843** At yet another point, he stated: "You know, I can't honestly say that anyone straightforward came out and said, 'What—if you talk to us, I'm not going to give you the death penalty.' I interpreted it to mean that the death penalty was—I mean, an officer, I mean, you know, handling the investigation is telling me, 'There is no death penalty here.' I assumed to be it wasn't being sought, or that because of legal things in the court, the death penalty was either out, or going to continue being dormant."

It is true that defendant also testified that he did indeed interpret Detective Bolts's comment as a promise. But the court clearly, albeit impliedly, found his testimony unworthy of credit. On this record, we must agree.

Third, Detective Bolts's comment about the death penalty did not operate as an inducement. On this record, it is difficult to conclude that the remark was even a cause-in-fact of the confessions. To Bolts's observation, "There's no death penalty here," defendant immediately responded, "That doesn't matter." The evidence practically compels the inference that insofar as the confessions were concerned, the comment in fact "didn't matter." We recognize that the remark preceded defendant's confessions. The intervening period of time, however, was not insubstantial. Moreover, temporal priority does

not establish causal force: it is a logical fallacy to reason *post hoc ergo propter hoc.* In any event, the evidence simply does not support an inference that the causal connection between Bolts' comment and defendant's confessions was more than "but for." As explained above, however, causation-in-fact is insufficient.

Again, it is true that defendant testified that he was indeed induced to confess by the comment. But again, the court clearly, albeit impliedly, ***782** found his testimony lacking in credibility. Again, on this record we must agree.

In conclusion, we are of the opinion that defendant's confessions were voluntary beyond a reasonable doubt. The court effectively determined that defendant spoke not because of coercion applied by the police but as a result of compunction arising from his own conscience. After independent review, we agree. Accordingly, the court did not err by denying the suppression motion.[5]

5 In support of his claim of error, defendant attempts to present other arguments attacking other aspects of the interrogation (e.g., "psychological coercion," "deception," and "threats"). But when, as here, a party did not raise an argument at trial, he may not do so on appeal. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251–1252, 270 Cal.Rptr. 451, 792 P.2d 251.) In any event, the arguments presented are simply without merit.

B. *Denial of Motion to Suppress Confession to Police Psychiatrist*

Defendant moved to suppress his confession to the police psychiatrist. He had given the statement during an interview ****346** conducted by the psychiatrist, William E. Gordon, a member of the Sexual Assault Response Team, on January 10, 1986—the day after his first confession to the police.

Defendant made the motion orally in the midst of Dr. Gordon's testimony as the People's first witness. The ground was evidently that the confession was involuntary under the due process clauses of the Fourteenth Amendment and article I, sections 7 and 15.[6] The argument in support was somewhat vague—to the effect that the statement was assertedly obtained by a promise of benefit and/or the improper influence of official deception. The "promise," it appears, was a statement by a jailer: late on the night of January 9, 1986, after giving his first confession to the police, defendant was placed on "suicide watch," and was put naked into a small, empty cell with foam-rubber padded walls and bare concrete floor—a so-called "rubber *****844** room"; he was told by the jailer that he would not be released until he was "cleared" by "Mental Health." The "deception," it appears, was the alleged substitution of Dr. Gordon in place of an expected visitor "from Mental Health" the next morning.

6 On appeal, defendant asserts that the motion rested on another ground as well, viz., that his confession to Dr. Gordon was "tainted" by his first, allegedly involuntary confession to the police. The record is otherwise. It was as an objection to the admission of this confession that defendant had raised the issue of "taint." That objection was impliedly overruled by the court, which reasoned—correctly—that the first confession was voluntary and, as such, could not carry any "taint."

The court conducted a hearing outside the presence of the jury. The evidence included live testimony by defendant; the testimony he had given ***783** at the hearing on the motion to suppress his confessions to the police; and, it appears, the transcript of those statements.

Concluding impliedly that the confession to Dr. Gordon was voluntary beyond a reasonable doubt, the court denied the motion. It determined, in substance, that defendant was properly advised of his *Miranda* rights by Dr. Gordon, and that he effectively waived those rights; that "there is no evidence ... of any kind of physical, or mental, psychological coercion upon Mr. **Benson** to talk with Dr. Gordon"; that the authorities made no promise and practiced no deception; and that defendant freely gave his statement out of compunction. As noted, parts of the confession were subsequently introduced at the guilt phase.

Defendant now contends that the court erred by denying his motion to suppress his confession to Dr. Gordon. We disagree. Reviewed de novo, the court's conclusion of voluntariness and its supporting determinations are all sound.

First, defendant was properly advised of, and effectively waived, his *Miranda* rights—nor does he claim otherwise.

Second, and of crucial importance, the necessary element of coercion on the part of the authorities is lacking. The record supports, indeed compels, the court's conclusion: "there is no evidence ... of any kind of physical, or mental, psychological coercion upon Mr. **Benson** to talk with Dr. Gordon."

Defendant claims that "The police secured the ... confession [to Dr. Gordon] by manipulating [his] custody so that he believed that the only way to secure his release from the 'rubber room' was to talk to the police psychiatrist." "Manipulation," however, is simply absent from the record.

We recognize that defendant was placed in a "rubber room" on "suicide watch." But we cannot discern any official coercion therein. Indeed, at the hearing defendant effectively conceded that the placement was justified. In giving his first confession to the police, he made statements that he admitted "someone could have interpreted ... as being suicidal."

We also recognize that defendant testified that he spoke with Dr. Gordon "[b]asically to get out of that cell." The court expressly found the assertion unworthy of credit. Its finding is supported by substantial evidence. But in any event, the assertion is insufficient: it does not establish official coercion.

****347** Third, there was no promise or deception by the authorities. The evidence introduced at the hearing, including defendant's own testimony, does ***784** not support the inference of any promise. Construed either "objectively" or "subjectively," the jailer's statement, i.e., that defendant would not be released until he was "cleared" by "Mental Health," was merely a statement. That same evidence does not support the inference of any deception. In fact, defendant himself admitted that prior to the interview, Dr. Gordon properly identified himself as a physician and a member of the Sexual Assault Response Team. His assertion that he nevertheless believed that Dr. Gordon "was from Mental Health" is of no consequence: his "belief" cannot properly be attributed to deceptive conduct on the part of the government.

Finally, defendant made his confession freely out of compunction. The court stated: "[I]t

seems to me clearly that Mr. **Benson** was going through some terribly draining emotional feelings. And that in his own heart and mind he felt it was necessary to get this off of his chest and to speak to somebody about it." We share the court's view.

In sum, the denial of defendant's motion to suppress his confession to Dr. Gordon was not error.

***845** III. SPECIAL CIRCUMSTANCE ISSUES

Defendant attacks the validity of two of the five special circumstance findings, specifically, those involving the killing of a witness. As will be shown, the attack is successful.

Defendant contends that the evidence is insufficient to support the witness-killing special-circumstance findings. As noted, two such special circumstances were alleged and subsequently found true, one involving Stephanie, the other Shawna.

Penal Code section 190.2, subdivision (a)(10) (hereafter section 190.2(a)(10)), defines the witness-killing special circumstance in relevant part as follows: "The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he or she was a witness...."

The elements of the witness-killing special circumstance have been stated thus: "(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed." (*People v. Garrison* (1989) 47 Cal.3d 746, 792, 254 Cal.Rptr. 257, 765 P.2d 419.)

***785** " 'In reviewing the sufficiency of evidence [for a special circumstance], the question we ask is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the [allegation] beyond a reasonable doubt.' " ' " (*People v. Bonin* (1989) 47 Cal.3d 808, 850, 254 Cal.Rptr. 298, 765 P.2d 460, italics in original.)

Defendant claims the evidence cannot support an inference that the murder of either Stephanie or Shawna "was not committed during the commission" of the murder of Laura within the meaning of section 190.2(a)(10). We agree. In *People v. Silva* (1988) 45 Cal.3d 604, 631, 247 Cal.Rptr. 573, 754 P.2d 1070, we held that the crime witnessed cannot be deemed "prior to, and separate from," the killing of the witness when both are part of "one continuous transaction" or "the same continuous criminal transaction." Here, the crime witnessed and the killings of the witnesses were such. The evidence is univocal: the murder of Laura and that of Stephanie and Shawna were integral parts of a single continuous criminal transaction against the entire family. Accordingly, the witness-killing special-circumstance findings are invalid.

IV. PENALTY ISSUES

Defendant raises several claims bearing on the question of penalty. As will appear, none is meritorious.

****348** A. *Denial of Defendant's Motion to Bar Admission of Photographs of the Victims in Death*

Prior to the commencement of the penalty phase, defendant moved *in limine* to bar admission of any and all photographs of the victims in death. (Some of the photographs had been taken at the crime scene, others during autopsy.) He argued that the photographs were not relevant under Evidence Code section 210 and, in any event, were excludable as unduly prejudicial under Evidence Code section 352. The former provision defines "relevant" as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The latter declares that "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." At the guilt phase, the court had barred admission of some of the photographs as unduly prejudicial, having determined in substance that the items were substantially more prejudicial than probative on the question of guilt.

*****846** ***786** The People opposed the motion. They argued in substance that (1) the photographs were relevant to issues that were both material and disputed, viz., the narrow question of the circumstances of the crimes and, certainly, the broad question of the appropriateness of death; and (2) they were not unduly prejudicial.

After reviewing the photographs, the court effectively denied the motion. As pertinent here, it determined in substance as follows: the photographs were relevant to the circumstances of the crimes and the appropriateness of death; they were indeed gruesome; but it was not the case that all were unduly prejudicial. It further determined that certain of the photographs were not unduly prejudicial and, as such, were admissible; and that others were in fact unduly prejudicial and, as such, were excludable. Subsequently, on the People's motion and over defendant's objection, it received into evidence the photographs it had held admissible.

Defendant contends that the court's ruling allowing the admission of the photographs in question was erroneous. The appropriate standard of review is abuse of discretion. The ruling comprises determinations as to relevance and undue prejudice. The former is reviewed under that standard. (See *People v. Green* (1980) 27 Cal.3d 1, 19–20, 164 Cal.Rptr. 1, 609 P.2d 468 [speaking generally].) So is the latter. (See, e.g., *People v. Pierce* (1979) 24 Cal.3d 199, 211, 155 Cal.Rptr. 657, 595 P.2d 91 [speaking specifically of photographs].)

Having considered the matter closely, we find no error. The court did not abuse its discretion when it determined that the photographs in question were relevant. Defendant's argument to the contrary is

unpersuasive. The photographs were indeed probative—and highly probative—of issues that were both material and disputed, viz., the circumstances of the crimes and therefore the appropriateness of death. Nor did the court abuse its discretion when it determined that the photographs were not unduly prejudicial. Again, defendant's argument is unpersuasive. To be sure, the photographs were gruesome. But as stated, they were also highly probative. The court could have reasonably concluded that their prejudicial force did not substantially outweigh their probative value.[7]

7 Defendant claims the court's ruling was error under the United States Constitution as well as the Evidence Code. He argues that the decision was violative of the Fifth, Eighth, and Fourteenth Amendments. We reject the point at the threshold. It is, of course, "the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548, 146 Cal.Rptr. 732, 579 P.2d 1048.) At trial, defendant failed to make any objection whatever based on any federal constitutional provision.

***787** B. *Denial of Defendant's Motion to Exclude Evidence of the Conduct Underlying His Prior Felony Convictions*

Prior to the commencement of the penalty phase, defendant moved *in limine* ****349** to exclude evidence of the conduct underlying his prior felony convictions. The ground was in substance that such evidence was not relevant, or at least not sufficiently relevant, to any issue material to penalty. As pertinent here, the argument was to the following effect: under penalty factor (c) of Penal Code section 190.3 (hereafter section 190.3), "The presence or absence of any prior felony conviction" was indeed material; but the evidence sought to be excluded had no tendency in reason—or at least, no sufficient tendency—to prove or disprove the existence of any such conviction. Defendant appears to have assumed that the People sought to prove only the fact of his prior felony convictions.

The People opposed the motion. They argued in substance as follows: contrary to defendant's assumption, they sought to prove not only the fact of his prior felony convictions, but also the underlying conduct; under penalty factor (b) of section 190.3, "The presence or absence of [other] criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" was also material; *****847** the evidence sought to be excluded had a substantial tendency to prove the existence of such criminal activity.

The court denied the motion. It determined in substance that evidence of the conduct underlying defendant's prior felony convictions was indeed relevant to the material issue of the existence of other criminal activity involving the use or threat of force or violence. In pertinent part, it reasoned: "I think that if the prior conviction involves violent criminal activity, then the Court has no alternative but to allow into evidence the circumstances surrounding any prior felony conviction. I don't know. I'm simply ignorant on what the facts are going to show or what the circumstances are surrounding any of the prior felony convictions." Without significant objection by defendant, the People subsequently introduced, and the court received, specific evidence concerning the conduct underlying the prior felony convictions.

Defendant now contends that the court's ruling was error. He must be deemed to challenge the crucial resolution of the question of relevance. As noted, such determinations are reviewed for abuse of discretion. No abuse appears. The People may, of course, seek to prove both the fact of ***788** prior felony convictions and any underlying criminal activity involving the use or threat of force or violence. (*People v. Karis* (1988) 46 Cal.3d 612, 640, 250 Cal.Rptr. 659, 758 P.2d 1189; *People v. Melton* (1988) 44 Cal.3d 713, 764, 244 Cal.Rptr. 867, 750 P.2d 741; see *People v. Gates* (1987) 43 Cal.3d 1168, 1203, 240 Cal.Rptr. 666, 743 P.2d 301.) Contrary to defendant's claim, the evidence sought to be excluded appears plainly, and highly, relevant to the material issue of the existence of such criminal activity. Defendant may be understood to argue that the People should have been allowed to prove only the *fact* of the criminal activity, and that they should have been permitted to use only the record of the prior felony convictions in making their proof. But in *People v. Karis, supra,* 46 Cal.3d at page 640, 250 Cal.Rptr. 659, 758 P.2d 1189, we effectively held that as a general matter, the People may prove any pertinent circumstance of the criminal activity, and may do so in any permissible way. Defendant does not persuade us that in this case the People should have been subjected to the restrictions he now urges.

Defendant also contends that the subsequent admission of the specific evidence concerning the conduct underlying his prior felony convictions was error in and of itself. The point lacks merit. The evidence was plainly, and highly, relevant to the material issue of the existence of other criminal activity involving the use or threat of force or violence.

Defendant claims that the ruling and subsequent admission of the specific evidence concerning the conduct underlying his prior felony convictions violated certain rights assertedly guaranteed criminal defendants by, inter alia, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution —viz., due process of law (U.S. Const., Amends. V, XIV); equal ****350** protection of the laws (*id.,* Amend. XIV); freedom from an impermissible risk of arbitrary and capricious decisionmaking (*id.,* Amends. VIII, XIV); and reliable penalty determination (*ibid.*).

We reject the point on procedural grounds. Defendant failed to put forth a sufficient constitutional argument when he made his motion *in limine.* He also failed to make a sufficient constitutional objection when the People introduced the specific evidence. Accordingly, he may not raise the underlying claim here. (See *People v. Gordon, supra,* 50 Cal.3d at pp. 1251–1252, 270 Cal.Rptr. 451, 792 P.2d 251 [dealing with absence of argument]; *People v. Rogers, supra,* 21 Cal.3d at p. 548, 146 Cal.Rptr. 732, 579 P.2d 1048 [dealing with absence of objection].)

We also reject the point on the merits. The United States Supreme Court "has often declared that states have the broadest possible range in deciding what negative aspects of the defendant's character and background are relevant to the sentencing determination." (*People v. Balderas* (1985) 41 Cal.3d 144, 204, 222 Cal.Rptr. 184, 711 P.2d 480.) Evidence of *****848** other ***789** criminal activity involving the use or threat of force or violence falls squarely within that range.

(*Id.* at p. 205, fn. 32, 222 Cal.Rptr. 184, 711 P.2d 480.) We are not persuaded that the admission of such evidence—in this particular case or generally—affects, in any constitutionally significant way, the fairness of the proceedings, the treatment of "similarly situated" defendants, the risk of arbitrary and capricious decisionmaking, or the reliability of the outcome. (See *People v. Karis, supra,* 46 Cal.3d at pp. 639–641, 250 Cal.Rptr. 659, 758 P.2d 1189 [impliedly concluding as much as to risk and reliability]; *People v. Balderas, supra,* 41 Cal.3d at pp. 204–205, 222 Cal.Rptr. 184, 711 P.2d 480 [impliedly concluding as much as to fairness, risk, and reliability].)

C. *Denial of Defendant's Motion to Exclude Evidence of Unadjudicated Criminal Activity or, in the Alternative, to Impanel a Separate Jury*

Prior to the commencement of the penalty phase, defendant moved *in limine* to exclude evidence of unadjudicated criminal activity or, in the alternative, to impanel a separate jury to consider such evidence. The motion was based expressly on the Fourteenth Amendment's guaranty of due process of law and impliedly on the Eighth Amendment's prohibition against cruel and unusual punishments. Defendant acknowledged that *People v. Balderas, supra,* 41 Cal.3d 144, 222 Cal.Rptr. 184, 711 P.2d 480, was fatal to his request. The guaranty of the Fourteenth Amendment—*Balderas* expressly held—did not bar the introduction of "other crimes" evidence at the penalty phase either absolutely or even before the same jury that sat at the guilt phase; nor—the case impliedly held—did the prohibition of the Eighth Amendment. (41 Cal.3d at pp. 204–205, 222 Cal.Rptr. 184, 711 P.2d 480.) In spite of *Balderas,* defendant proceeded with the matter because "this may come up some day...." Thereupon, the court denied the motion on the authority of that case. At the penalty phase, the People introduced "other crimes" evidence involving the kidnapping of Karen Stange.

Defendant contends that the court erred. He concedes that *Balderas* is controlling. He requests, however, that we reconsider and overrule that decision. We have declined similar invitations in the past. (See *People v. Medina* (1990) 51 Cal.3d 870, 906–908, 274 Cal.Rptr. 849, 799 P.2d 1282, collecting cases.) We decline defendant's now.

D. *Granting of the People's Motion to Introduce Evidence in Rebuttal on the Nature of Life Imprisonment Without Possibility of Parole*

Outside the presence of the jury, defendant moved for an order allowing him to introduce, and play for the jury, certain evidence referred to in the facts, viz., the videotape of a brief segment of a television series called "Two ***790** on the Town," which dealt with San Quentin Prison and the infliction of the penalty of death. He argued that the segment was admissible as "relevant ****351** to ... sentence" under section 190.3: it provided information as to the nature of the ultimate sanction.

The People opposed the motion. They argued in substance that the segment on San Quentin Prison was inadmissible because the proper focus of the penalty phase was defendant and his crimes, and that the proffered evidence was not pertinent thereto.

After viewing the "San Quentin" segment, the court granted defendant's motion. It reasoned in relevant part as follows. "[T]he 'San Quentin' film ... basically is simply kind of a news account of what [the] San Quentin death chamber is, the gas chamber, and how it has been used in the past, and how it is continually to be maintained under the assumption that some day in California it will be used again. [¶] And I've thought about that. Does that relate to quote, 'sentencing' unquote? Well, that is one of the sentences that—one of the penalties that could be imposed in this case. It seems that, therefore, it could be appropriate to allow the jury to see that tape so that they have clearly in mind the full and complete thrust of what a punishment ***849** of death decision could be. And so my ruling would be to allow them to see that tape."

Before the "San Quentin" segment was to be played, the People moved outside the presence of the jury for an order allowing them to introduce in rebuttal the testimony of Mike Madding as to the nature of the penalty of life imprisonment without possibility of parole. As noted in the facts, Madding was the Public Information Officer at San Quentin Prison at the time the "San Quentin" segment was produced, and was interviewed on camera during the piece. The People argued in substance that Madding's proffered testimony was admissible as "relevant ... to sentence" under section 190.3: it would provide, inter alia, information as to the nature of the penalty of life imprisonment without possibility of parole. The prosecutor stated: "It's my intention to call [Madding] in rebuttal ..., since counsel has convinced the Court that they should know exactly what their options are, to inform the jury on what life without possibility of parole means. In other words, what a person serving such a sentence can look forward to as far as his time in prison, what privileges are available, what liberties are not available. [¶] I think that in light of the Court's ruling on the gas chamber, I think that they should also have an informed choice to know exactly what that type of sentence means."

Defendant opposed the motion. Counsel argued in substance that the proffered testimony was inadmissible because it was speculative and in any event "[in]appropriate."

***791** The prosecutor responded: "[Y]ou can't say there are two penalties, and we're only going to show them, the jury, what one of them is. [¶] I don't think they should be shown either one. I've made that clear. I've been overruled on that point. And I don't think it's fair for them to see one and not the other. They're going to know what the death penalty is. I think they should equally be informed what life without possibility of parole is."

The court declined to rule on the People's motion. It reasoned in pertinent part as follows. "First of all, the reason I am allowing this tape to be shown is because I think that it goes, pursuant to 190.3 of the Penal Code, to the area of sentencing. [¶] The suggestion made by the District Attorney is that he should be allowed to present to the jury the other side, that is, the alternate to the possibility of the death penalty. And that also he should be allowed the opportunity to call this person, I guess, who they interviewed on this, who was at that time, I think it was the Public Affairs Officer at San Quentin.... [¶] I'm not going to rule

in a vacuum. I have no idea what this man would say. At the same time, I'm certainly not going to dismiss out of hand the District Attorney's request to present a rebuttal witness as it relates to the sentencing factors. [¶] So I suppose what we will end up doing is, if it in fact is still intended by the People to present such evidence, we'll have this person come in and probably outside the presence ****352** of the jury make an offer of proof as to what the testimony would be.... [¶] I understand the District Attorney's position, and it doesn't on its face seem totally unreasonable, but I certainly am not going to just give him carte blanche to come in and bring forward information that I don't think is appropriate. So I think it's premature. I'm not going to rule on that now."

Defendant proceeded to introduce into evidence, and play for the jury, the videotape of the "San Quentin" segment.

After the defense rested, the People made an offer of proof outside the presence of the jury. The prosecutor stated as relevant here: "[I]t is my intention to call [Madding] ... since, as Counsel eloquently observed, that the jury should know what the two alternatives are. Now that they know one, and that is the gas chamber, that they should now be familiar with what the life prisoner without possibility of parole is subject to." Called to the stand by the People in support of the offer of proof, Madding was examined by the prosecutor concerning such matters as the living accommodations and privileges available to persons sentenced to life imprisonment *****850** without possibility of parole, and also the living accommodations and privileges that defendant might himself obtain if he were sentenced to that penalty. Madding was cross-examined on these issues by defense counsel.

The court effectively granted the People's motion. Its ruling was as follows. "The matter that is before me is the question of whether or not it's ***792** appropriate for the District Attorney to ask questions of Mr. Madding as they relate to what would be the—I guess, the atmosphere or aspects of the sentence if the jury decided upon life imprisonment without the possibility of parole. [¶] ... There are a couple of issues that are really before the Court. [¶] First of all, it seems to me that it is appropriate to allow the District Attorney to show the other side of the coin, as it were, since I have allowed the defense to present briefly the videotape that shows the gas chamber at San Quentin. And so I would allow at least some presentation of what it is that makes up life imprisonment without the possibility of parole, issue number one. [¶] Issue number two, I think it is inappropriate to allow the witness to speculate on various matters, and it's—very much of the testimony that was elicited outside the presence of the jury certainly was speculative in nature. So I guess we'll take it on a question-by-question basis, and if there's objections, I'll rule upon those accordingly."

Thereupon, after calling Madding to the stand in the presence of the jury, the People conducted direct examination on, inter alia, the living accommodations and privileges of persons sentenced to life imprisonment without possibility of parole. For his part, defendant conducted cross-examination on these issues. Madding's testimony was brief and neutral.

Defendant now contends that the court erred by granting the People's motion for permission to introduce in rebuttal the testimony of Madding as to the nature of the penalty of life imprisonment without possibility of parole. He argues that the ruling was improper under, among other provisions, the cruel and unusual punishments and due process clauses of the Eighth and Fourteenth Amendments to the United States Constitution, and also under their counterparts in article I, sections 17 and 7 and 15, of the California Constitution.

The point must be rejected. Defendant himself raised the issue of the nature of the penalties available to the jury. He introduced evidence as to one. In response, the People introduced evidence as to the other. It may well be, as defendant now urges, that both were wrong. (See *People v. Thompson* (1988) 45 Cal.3d 86, 138–139, 246 Cal.Rptr. 245, 753 P.2d 37 [holding inadmissible evidence as to the nature of the two possible penalties].) Also, it may well be, in accordance with the adage on which defendant now relies, that "two wrongs do not make a right." But on this record, defendant must be held responsible for any error on the court's part and accordingly may not be heard to complain thereof. The basis of the challenged ruling was the broad construction of the phrase, ****353** "relevant to ... sentence," in section 190.3. That basis was laid by defendant himself. In any event, as noted Madding's testimony was brief and neutral. Prejudice could not have arisen therefrom.

***793** E. *Consideration of Invalid Witness-killing Special Circumstances*

Defendant contends that the court committed reversible error by allowing the jury to consider the invalid witness-killing special-circumstance findings. For the reasons stated in part III, *ante,* we agree that error occurred. But we cannot agree that reversal is required. Certainly, the error here is not prejudicial per se, but rather is subject to harmless-error analysis. Whether it violates state law only or implicates the United States Constitution as well is immaterial. It is harmless under both the "reasonable possibility" test of *People v. Brown* (1988) 46 Cal.3d 432, 446–448, 250 Cal.Rptr. 604, 758 P.2d 1135, and the "reasonable doubt" test of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705. "Although we presume that the jurors [followed their instructions and] considered the invalid special-circumstance findings independent of *****851** their underlying facts, we cannot conclude that they could reasonably have given them any significant independent weight." (*People v. Hamilton* (1988) 46 Cal.3d 123, 151, 249 Cal.Rptr. 320, 756 P.2d 1348.)

F. *Prosecutorial Misconduct*

Defendant contends that the prosecutor committed misconduct in the course of his opening and closing arguments in summation.

What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant. (See *People v. Bolton* (1979) 23 Cal.3d 208, 213–214, 152 Cal.Rptr. 141, 589 P.2d 396.) When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. (Cf. *People v. Warren* (1988) 45 Cal.3d 471, 487, 247 Cal.Rptr. 172, 754 P.2d 218 [holding that in

deciding whether an instruction is erroneous, a court must determine how it would have been understood by a reasonable juror]. But cf. *Boyde v. California, supra,* 494 U.S. 370, ——, 110 S.Ct. at p. 1198 [holding that in deciding whether an ambiguous instruction is erroneous for Eighth Amendment purposes, a court must determine whether there is a reasonable likelihood that the jury would have understood the instruction as the defendant claims].) If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable.

The first part of defendant's attack is made under the rubric, "Evidence Outside of the Record." The comments relevant here are as follows.

At one point in his opening argument, the prosecutor stated: "Now, I want to get to the reasons why I believe the death penalty is appropriate on ***794** the evidence of this case. The first and most important ... is this crime. *This crime is perhaps the most brutal, atrocious, heinous crime certainly that's been committed in San Luis Obispo County, probably in this County* [i.e., Santa Barbara], *and very likely in this State.*" (Italics added.)

Later in his opening argument, the prosecutor said: "No, they [i.e., the victims] can't come in front of you and ask you to give this man the death penalty. That's my job. That's what I have to do. *This crime is the most brutal crime that can be imagined. Quite frankly, if this crime doesn't deserve the death penalty, we shouldn't have one.*" (Italics added.)

Then, in his closing argument, the prosecutor stated: "The statement [of Detective Bolts] about the death penalty, he [i.e., Bolts] doesn't tell you anything about it. It could perhaps be the erroneous opinion that there is no death penalty in the State of California. Whatever it was, it certainly wasn't binding. *They've certainly sought the death penalty, as have I, because it's appropriate in this case.*" (Italics added.)

****354** Defendant claims that through the italicized words the prosecutor improperly presented "evidence" outside the record concerning the relative "brutality," "atrociousness," and "heinousness" of the crimes in question, and also vouched for the appropriateness of the penalty of death on behalf of the government and himself personally.

We reject the point on procedural grounds. It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (E.g., *People v. Green, supra,* 27 Cal.3d at pp. 27–34, 164 Cal.Rptr. 1, 609 P.2d 468.) In this case, defendant made no such assignment and request. It is true that the rule does not apply when the harm could not have been cured. (*Ibid.*) Such a situation, however, was not present here: any harm threatened was certainly curable.

Defendant argues the general rule should not be allowed to operate at the penalty phase of a capital case. In *People v. Miranda* (1987)

44 Cal.3d 57, 108, footnote 30, 241 Cal.Rptr. 594, 744 P.2d 1127, we disagreed. Defendant asserts that *Miranda* ***852 is unsound on this point: procedural rules, he seems to say, must yield when a man's life is at stake. He is not persuasive. (*People v. Gordon, supra,* 50 Cal.3d at p. 1269, 270 Cal.Rptr. 451, 792 P.2d 251.)

We also reject the point on the merits. To be sure, a prosecutor may not go beyond the evidence in his argument to the jury. (E.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 238, 233 Cal.Rptr. 404, 729 P.2d 839, and cases cited therein (conc. opn. of Mosk, J.).) To do so may suggest the existence of "facts" outside the record—a suggestion that is hard for a defendant to challenge and hence is unfair. The question here is close. But after review, we believe that a reasonable juror would not have understood the prosecutor's words as "evidence" outside the record concerning the relative "brutality," "atrociousness," and "heinousness" of defendant's crimes in comparison with other actual crimes not introduced at trial. Rather, such a juror would have heard the remarks as a comment on the nature of the offenses themselves—to the effect that they were of exceeding enormity. Comment of that sort is permitted if it is reasonably fair in light of the evidence. That is true not only of the crimes tried in the present proceeding. (See *People v. Hovey* (1988) 44 Cal.3d 543, 579, 244 Cal.Rptr. 121, 749 P.2d 776.) It is also true of other criminal activity involving the use or threat of force or violence. This is because the prosecutor may argue issues —such as these—that are material to penalty. (See *People v. Marshall* (1990) 50 Cal.3d 907, 929, 269 Cal.Rptr. 269, 790 P.2d 676.) The comment here, which pertained to the crimes tried in the present proceeding, was reasonably fair. But in view of the potential for unfairness noted above, similar remarks should be avoided in the future.

Next, a prosecutor may not, of course, vouch personally for the appropriateness of the verdict he urges. (See *People v. Kirkes* (1952) 39 Cal.2d 719, 723–724, 249 P.2d 1.) Nor, we believe, may he do so on behalf of the government. Vouching may suggest the existence of "facts" outside the record. A reasonable juror, however, would not have so understood the prosecutor's comments here. Instead, he would have heard them to state what was obvious and altogether unobjectionable —i.e., that it was the People's position that defendant's crimes called for the ultimate sanction.[8]

8 Defendant also claims that through the italicized words the prosecutor minimized the jury's role in determining punishment in violation of the Eighth Amendment principles enunciated in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231. Surely, a prosecutor may not seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (*Id.* at p. 341, 105 S.Ct. at p. 2646.) But a reasonable juror could not possibly have understood the prosecutor's comments to carry a meaning objectionable under *Caldwell.* Defendant's argument to the contrary must be rejected out of hand.

**355 The second part of defendant's attack is made under the rubric, "Victim Impact." In his opening argument, the prosecutor made the following comments relevant here.

"Let's look at his crimes. His prior crimes.... [T]he word 'molest' is somewhat of a soft word. Don't really know what happened....

"I felt it was essential to let you see what those crimes really were. It's not enough to just tell you, and it broke my heart to have to bring those ***796** victims in to tell you. Not not [*sic*] one of them was reluctant. Not one of them said, 'I can't do it. I don't want to do it.'

"*They all came in. They all testified. And it was heartbreaking. But it was important, because the only way you can really understand what a depraved individual this man is, is to look at the suffering that he has inflicted on others.*

"...

"There's another importance for bringing that in front of you. Throughout this whole thing, the defendant talks about molesting Shawna and Stephanie. The nice child molester. The nice Uncle **Richard**. How he didn't hurt them. How they liked it. How they were enthusiastic.

*****853** "No. That's the liar **Richard Benson.** They didn't like it. They liked it as much as those other girls liked it. They were three and four years old. They weren't any sophisticated sexual three or four year olds. They were just three and four year old little girls. That's where that comes in. It's another manifestation of his personality, of his lies, and of his cruelty.

"*You see, I can't prove to you by way of testimony the type of pain, the type of suffering those little girls went through. I can't do it. I can attempt to approximate it by showing you other little girls, what their experiences were, and how it scarred them for life.*" (Italics added.)

Defendant claims that through the italicized words, the prosecutor violated the Eighth Amendment principles stated in *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876.

In *Booth,* the United States Supreme Court concluded that it was generally violative of a criminal defendant's rights under the cruel and unusual punishments clause of the Eighth Amendment to introduce evidence concerning such matters as the victim's personal characteristics, the emotional impact of the crime on his family, and the opinions of family members about the crime and the criminal: the information is irrelevant to the decision whether the defendant is to live or die, and its admission creates a constitutionally unacceptable risk that the decisionmaker may impose the ultimate sanction in an arbitrary or capricious manner. (482 U.S. at pp. 502–509, 107 S.Ct. at pp. 2532–2536.) In *Gathers,* the court followed *Booth* and concluded that it is generally violative of those same rights to present argument relating to such matters. (490 U.S. at pp. ———–———, 109 S.Ct. at pp. 2210–2211.)

***797** In *People v. Marshall, supra,* 50 Cal.3d 907, 929, 269 Cal.Rptr. 269, 790 P.2d 676, we held impliedly, but unmistakably, that *Booth* and *Gathers* do not extend to evidence or argument concerning the nature and circumstances of the capital offense or the effect of that offense on the victim. The reason is plain: that information is uniquely relevant to the life-or-death decision and, as such, does not create a constitutionally unacceptable risk of arbitrary or capricious sentencing. We hold today that *Booth* and *Gathers* do not extend

to evidence or argument relating to the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims: in our view, that information is highly relevant to the life-or-death decision.[9]

9 We need not, and do not, decide whether *Booth* or *Gathers* applies to evidence or argument concerning such matters as the personal characteristics of a victim of other criminal activity involving the use or threat of force or violence, the emotional impact of such criminal activity on the victim's family, and the opinions of family members about the criminal activity and the criminal actor. (See *People v. Malone* (1988) 47 Cal.3d 1, 38, 252 Cal.Rptr. 525, 762 P.2d 1249 [assuming without deciding that *Booth* applies to argument of this kind].)

****356** We cannot reject the point on procedural grounds. As stated, it is the general rule that a defendant—like defendant in this case—who did not make an assignment of misconduct and a request for admonition at trial cannot complain of the asserted impropriety on appeal. "The rule, however, does not apply when, as here, the authority supporting the complaint postdates the conduct complained of." (*People v. Gordon, supra,* 50 Cal.3d at p. 1266, 270 Cal.Rptr. 451, 792 P.2d 251.)

But we do, and must, reject the point on the merits. A reasonable juror would have understood the prosecutor's words as comments on the nature and circumstances of defendant's present crimes and his other criminal activity involving the use or threat of force or violence. In light of the evidence, those comments were reasonably fair. Such a juror would not have understood the prosecutor's remarks as crossing the constitutional barrier marked by *Booth* and *Gathers* into such forbidden areas as the victims' personal characteristics, the emotional impact of the crime on their families, and the opinions of family members about the crimes and the criminal.

*****854** The third part of defendant's attack is made under the rubric, "Protection of Society." In his opening argument, the prosecutor made the following comments relevant here.

"Now, why is life without possibility of parole an insufficient punishment in this case? You may say, 'What good would it serve to give Mr. **Benson** the death penalty, and we can accomplish everything we want with life without possibility of parole?'

***798** "Well, first of all, that would be a rather selfish view. That means we're thinking about ourselves. We're thinking about us on the outside, thinking about the protection of that society. We're not thinking about the victims in this case when we make that assessment. We're not saying that, 'Look what he did. Let's just put him away. We don't have to think about him anymore.' That's not sufficient punishment for what he did. That's not sufficient punishment for his crimes.

"Would he still be dangerous? Would he still offend in the future? Certainly. He has that propensity....

"... *We know iff] given the opportunity, he will not only molest children again, he will murder again. That is not a 100 percent protection of society, and it's a selfish view of ourselves to say that that's the solution to this crime.*" (Italics added.)

Defendant claims that through the italicized words, the prosecutor presented an "argument"

that "was grossly improper. Like the Briggs Instruction held improper in *People v. Ramos* (1984) 37 Cal.3d 136, 207 Cal.Rptr. 800, 689 P.2d 430, it urged a death verdict based on impermissible speculation that [defendant], if sentenced to life without the possibility of parole, would nonetheless be released in the future to molest children and kill again."

Again, there was no assignment of misconduct or request for admonition.

Again, there is no merit in the point. A reasonable juror would not have understood the prosecutor's comment as defendant asserts. Rather, he would have heard it as a claim that defendant would be dangerous in prison if his life was spared.

Defendant may be understood to argue that such a comment was improper under *People v. Boyd* (1985) 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782: it referred to the issue of future dangerousness; the circumstances material to the determination of penalty are those defined in section 190.3; those circumstances, however, do not include future dangerousness. But the circumstances material to penalty include anything that the defendant proffers as a basis for a sentence less than death. (38 Cal.3d at pp. 775–776, 215 Cal.Rptr. 1, 700 P.2d 782.) To support a verdict of life imprisonment without possibility of parole, defendant elicited testimony from his experts suggesting he would not be dangerous in prison. On cross-examination, the ****357** prosecutor elicited testimony suggesting the opposite. "The prosecutor's cross-examination was proper: he could seek to disprove what defendant had sought to prove. [Citation.] Also proper therefore was the remark under challenge here: it was ***799** squarely based on the evidence." (*People v. Gordon, supra,* 50 Cal.3d at p. 1270, 270 Cal.Rptr. 451, 792 P.2d 251.)

G. *Claims of Error in the Instructions on the Determination of Penalty*

Defendant contends that the court committed several errors by instructing the jury as it did on the determination of penalty. It is, of course, virtually axiomatic that a trial court must correctly instruct on such legal principles as are applicable to the evidence (e.g., *People v. Anderson* (1966) 64 Cal.2d 633, 641, 51 Cal.Rptr. 238, 414 P.2d 366)—and on such legal principles alone. The failure or refusal to do so constitutes error. Defendant claims that in a number of particulars, the court failed or refused to instruct as required. We shall consider his points seriatim.

1. Instructions on the Determination of Penalty

The court instructed the jury on the determination of penalty, in relevant part, as follows.

*****855** "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance(s) found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

***800** "(f) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

"You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

"(g) You may further take into consideration the information provided by family members, teachers, neighbors and friends of the defendant in determining whether the defendant has any redeeming qualities, and any events in his life that reveal those qualities.

"...

"Mitigating circumstances are any circumstances that do not constitute a justification or excuse of the offenses in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

"Aggravating circumstances are any circumstances are any circumstances [*sic*] attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves.

"...

"The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You ****358** are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (Parentheses and brackets in original.)

***801** 2. Claim of Error as to Aggravating Circumstances and Mitigating Circumstances

It is settled that the cruel and unusual punishments clause of the Eighth Amendment prohibits the states from imposing a penalty that is disproportionate to a criminal defendant's personal culpability. (See, e.g., *People v. Marshall, supra,* 50 Cal.3d at p. 938, 269 Cal.Rptr. 269, 790 P.2d 676.) It also bars use of procedures that create a constitutionally unacceptable risk of such disproportionality. (See, e.g., *****856** *Booth v. Maryland, supra,* 482 U.S. at pp. 502–509, 107 S.Ct. at pp. 2532–2536.)

Similarly, it is settled that the due process clause of the Fourteenth Amendment prohibits the states from "attach[ing] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty...." (*Zant v. Stephens* (1983) 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235.) Evidently, it also bars use of decisionmaking processes that may be understood to incorporate such "mislabeling" and thereby threaten arbitrary and capricious results.

Defendant contends that the court erred by instructing the jury as it did on aggravating circumstances and mitigating circumstances. His attack is directed against the court's failure to identify which circumstances were "aggravating" and which "mitigating," and its failure to state that the absence of mitigation did not amount to the presence of aggravation.[10] He claims that in this regard the charge was inconsistent with the federal constitutional principles stated above.

10 Defendant implies that he had requested the court to give an instruction to the effect that the absence of mitigation did not amount to the presence of aggravation. He fails to cite to the record. Our review discloses no such request.

What is crucial for present purposes is the meaning that the instructions *communicated to the jury.* If that meaning was not objectionable, the instructions cannot be deemed erroneous. (See *People v. Warren, supra,* 45 Cal.3d at p. 487, 247 Cal.Rptr. 172, 754 P.2d 218.) It now appears that we are to determine the meaning of the instructions *not* under the strict "reasonable juror" test—i.e., could a reasonable juror have understood the charge as the defendant asserts (*Mills v. Maryland* (1988) 486 U.S. 367, 375–376, 108 S.Ct. 1860, 1866–1867, 100 L.Ed.2d 384)—but rather under the more tolerant "reasonable likelihood" test—i.e., is there is a reasonable likelihood that the jury so understood the charge (*Boyde v. California, supra,* 494 U.S. at p. ——, 110 S.Ct. at p. 1198). This is certainly true for purposes of the cruel and unusual punishments clause of the Eighth Amendment. (*Ibid.*) It appears ***802** to be true as well for purposes of the due process clause of the Fourteenth Amendment.

We must reject defendant's claim of error. Even under the strict "reasonable juror" test, the meaning that the instructions communicated was not objectionable.

To begin with, a reasonable juror would have understood the instructions as prohibiting him from imposing a penalty that was

disproportionate to defendant's personal culpability. This conclusion is virtually compelled by the plain language used in the definitions of "aggravating circumstances" and "mitigating circumstances," ****359** and in the description of the "weighing" process. Contrary to defendant's assertion, such a juror could not have interpreted the charge other than as barring disproportionality.

Further, a reasonable juror could not have "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty...." (*Zant v. Stephens, supra,* 462 U.S. at p. 885, 103 S.Ct. at p. 2747.)

Defendant's claim to the contrary notwithstanding, a reasonable juror would readily have identified which circumstances were "aggravating" and which "mitigating." Again, this conclusion is virtually compelled by the plain language used in the definitions of "aggravating circumstances" and "mitigating circumstances," and in the description of the "weighing" process. Certainly, such a juror could not have inferred—contrary to governing law (see *People v. Davenport* (1985) 41 Cal.3d 247, 288–289, 221 Cal.Rptr. 794, 710 P.2d 861 (plur. opn.))—that extreme mental or emotional disturbance and diminished capacity were circumstances in aggravation. Defendant argues in substance that a reasonable juror might have understood these *****857** circumstances as indicia of future dangerousness and hence as grounds for the ultimate sanction. We are not persuaded. It is pellucid in the very words of the instructions that both circumstances looked to the past, not the future, and supported life, not death.

Again notwithstanding defendant's claim, a reasonable juror could not have believed—contrary to governing law (see *People v. Davenport, supra,* 41 Cal.3d at pp. 288–289, 221 Cal.Rptr. 794, 710 P.2d 861 (plur. opn.))—that the absence of mitigation amounted to the presence of aggravation. The instructions made plain that aggravation required the *existence* of "circumstances attending the commission of the offenses in question which increase their guilt or enormity or adds [*sic*] to their injurious consequences, but which are above and beyond the essential elements of the offenses themselves"—and not merely the ***803** inonexistence of "circumstances ... which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."[11]

11 Defendant claims that the instructions were also inconsistent with the due process clauses of article I, sections 7 and 15, of the California Constitution. He predicates his point on the assertion that the charge "inject[ed] irrelevant factors into the jury's decision-making process...." The assertion, however, is unsupported. Therefore, the claim must fail.

3. Claim of Error on Refusal to Delete "Extreme" From "Extreme Mental or Emotional Disturbance"

Defendant requested the court to delete the adjective "extreme" from the penalty factor concerning "Whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance." (Italics added.) The court refused.

Defendant contends that the court erred. He argues in substance that the instruction as given, without the deletion requested, amounted to an incorrect statement of the law: (1) under both the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17, of the California Constitution, " ' "the sentencer ... [may] not be precluded from considering, *as a mitigating factor,* any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death [ ]" ' " (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, quoting in turn *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, italics in original (plur. opn. by Burger, C.J.) [construing federal constitutional provisions]); (2) defendant proffered mental or emotional disturbance, nonextreme as well as extreme, as a basis for life imprisonment without possibility of parole; and (3) contrary to the constitutional principle stated above, the challenged instruction implied that the ****360** jury could not consider mental or emotional disturbance less than extreme in mitigation of penalty.

The point must be rejected. To be sure, the major premise of his argument is sound. But a crucial minor premise is not: the instruction as given, without the deletion requested, did not carry the preclusive implication defendant claims it did.

Again, what is crucial for present purposes is the meaning that the instruction *communicated to the jury.* As noted in part IV.G.2, *ante,* insofar as the claim rests on the United States Constitution, the standard for determining the instruction's meaning is the "reasonable likelihood" test of *Boyde v. California, supra,* 494 U.S. 370, 110 S.Ct. 1190. ***804** Insofar as it rests on the California Constitution, our recent cases compel the conclusion that the same standard is applicable.

The jury was expressly told that they could take into account "Any ... circumstance"—in addition to those specified—"which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." *****858** (Brackets in original.) Defendant's argument to the contrary notwithstanding, there is no reasonable likelihood that the jury would have inferred from the foregoing that they could not consider mental or emotional disturbance *of any degree whatever* in mitigation of penalty. (Compare *People v. Medina, supra,* 51 Cal.3d at pp. 908–910, 274 Cal.Rptr. 849, 799 P.2d 1282 [rejecting a claim similar to defendant's].)

4. Claim of Error on Refusal to Instruct on Certain Specific "Mitigating Circumstances"

Defendant requested the court to instruct the jury as follows.

"You may consider as further mitigating factors, the following facts or circumstances:

"(a) **Richard Benson** had a deprived and chaotic childhood during which he received little or no religious or moral training.

"(b) **Richard Benson**, in his formative years, was warehoused in group homes and institutions where he received little, if any, personal attention or affection.

"(c) In spite of the inadequacies of **Richard Benson's** family life, his personal bonds with his brothers and sister still remained.

"(d) **Richard Benson**, in his formative years, was subjected to mental abuse by his parents.

"(e) **Richard Benson**, in his formative years, was subjected to emotional abuse by his parents.

"(f) **Richard Benson** is an abuser o[f] drugs and is addicted to drugs.

"(g) That these murders were committed while **Richard Benson** was under the influence of mental or emotional disturbance.

***805** "(h) That the capacity of **Richard Benson** to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

"(i) **Richard Benson** confessed in detail as to what he did and cooperated with the detectives of the District Attorney's Office and investigators of the San Luis Obispo Sheriff's Department as to his involvement.

"(j) That in his lengthy confession, **Richard Benson** repeatedly expressed remorse for his crimes.

"(k) Any other circumstance or circumstances arising form [*sic*] the evidence which you, the jury, deem to have mitigating value."

Subsequently, defendant withdrew his request as to factor (j), which dealt with remorse.

Determining that the instruction proposed was substantially argumentative, the court denied the request and refused to charge the jury accordingly.

Defendant contends that the court erred. We do not agree. "A court may—and, indeed, must —refuse an instruction that is argumentative, i.e., of such a character as to invite the jury to draw inferences favorable to one of the parties from ****361** specified items of evidence." (*People v. Gordon, supra,* 50 Cal.3d at p. 1276, 270 Cal.Rptr. 451, 792 P.2d 251.) As noted, the court determined the instruction was in fact substantially argumentative. We need not resolve the question of the appropriate standard of review. Under any standard, the court's conclusion was plainly sound. (Compare *ibid.* [holding proper the refusal of a similar instruction on the same ground]; *People v. Williams* (1988) 45 Cal.3d 1268, 1323–1324, 248 Cal.Rptr. 834, 756 P.2d 221 [same].)[12]

12 We recognize that in one of its parts, the instruction requested cannot be properly characterized as argumentative: it would have told the jury that they could consider certain specified penalty factors and also "Any other circumstance or circumstances arising form [*sic*] the evidence which you, the jury, deem to have mitigating value." But in that part, the instruction cannot be deemed to have been refused. As noted,

> the court instructed the jury that they could consider certain specified penalty factors and also "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (Brackets in original.) But even if the instruction requested is deemed to have been refused, no error appears. The instruction was duplicative. It is not erroneous to refuse such a charge. (E.g., *People v. Farmer* (1989) 47 Cal.3d 888, 913, 254 Cal.Rptr. 508, 765 P.2d 940; *People v. Wright* (1988) 45 Cal.3d 1126, 1134, 248 Cal.Rptr. 600, 755 P.2d 1049.)

***859** Defendant claims the court did indeed err by refusing the requested instruction. He argues he was entitled to the instruction under *People v.* ***806** *Sears* (1970) 2 Cal.3d 180, 189–190, 84 Cal.Rptr. 711, 465 P.2d 847. He is wrong. "Under *Sears* [a criminal defendant] ha[s] a 'right to an instruction that "pinpoint[s] the *theory* of the defense." ' " (*People v. Gordon, supra,* 50 Cal.3d at p. 1276, 270 Cal.Rptr. 451, 792 P.2d 251, italics in original.) The instruction here did not do so. (Compare *ibid.* [holding proper the refusal of a similar instruction on the same ground]; *People v. Howard* (1988) 44 Cal.3d 375, 442, 243 Cal.Rptr. 842, 749 P.2d 279 [same].)

Defendant also argues he was entitled to the requested instruction under the cruel and unusual punishments clause of the Eighth Amendment as construed in *Lockett v. Ohio, supra,* 438 U.S. 586, 98 S.Ct. 2954, and its progeny. Again he is wrong. "Under those cases [a criminal defendant] ha[s] a right to 'clear instructions which not only do not preclude consideration of mitigating factors, [citation], but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender ..." [citation].' " (*People v. Gordon, supra,* 50 Cal.3d at p. 1277, 270 Cal.Rptr. 451, 792 P.2d 251.) Defendant received such instructions. "But under those cases [a criminal defendant does] not have a right to an instruction"—like the one here —"that invites the jury to draw favorable inferences from the evidence." (*Ibid.;* see *People v. Howard, supra,* 44 Cal.3d at pp. 442–443, 243 Cal.Rptr. 842, 749 P.2d 279.)

Finally, defendant argues he was entitled to the requested instruction under the due process clause of the Fourteenth Amendment. He maintains: he had a "state created entitlement to such an instruction" under *Sears;* by refusing his request, the court arbitrarily denied him that "entitlement" and thereby violated due process. We are not persuaded. As explained above, he had no such "state created entitlement" under *Sears.* He also maintains the court assertedly gave a "pinpoint" instruction favorable to the prosecution; by refusing his request for a similar instruction favorable to the defense, it created an imbalance of forces between the accused and his accuser offensive to due process. Again, we are not persuaded. There was no imbalance attributable to "pinpoint" instructions: no such instructions were given. (Compare *People v. Gordon, supra,* 50 Cal.3d at p. 1277, fn. 15, 270 Cal.Rptr. 451, 792 P.2d 251 [finding a similar argument unpersuasive].)

5. Claim of Error on Refusal to Instruct the Jury Not to Consider Deterrence or Cost

Defendant requested the court to instruct the jury that "In deciding whether **362** death or life imprisonment without the possibility of parole is the appropriate sentence you may not consider for any reason whatsoever, the deterrent or non-deterrent effect of the death

penalty or the monetary cost to the state of execution or maintaining a prisoner for life." The court refused.

***807** Defendant contends that the court erred. As implied in the introduction to part IV.G, *ante,* it is error for a court not to give an instruction if that instruction is both correct in law and applicable on the record; it is not error if either condition is lacking.

Defendant claims the requested instruction was correct. He is right. Certainly, under the Eighth and Fourteenth Amendments "Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Thompson, supra,* 45 Cal.3d at p. 132, 246 Cal.Rptr. 245, 753 P.2d 37; see *Spaziano v. Florida* (1984) 468 U.S. 447, 461, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 [implying that the "deterrent function [of capital punishment] is primarily a consideration for the legislature"]; *Tucker v. Zant* (11th Cir.1984) 724 F.2d 882, 890 [stating that "Protection of *****860** the public fisc is not a proper justification for capital punishment"].)

Defendant then claims the requested instruction was applicable. He is wrong. The issue of deterrence or cost was not raised at trial, either expressly or by implication. In *People v. Ramos, supra,* 37 Cal.3d 136, 159, footnote 12, 207 Cal.Rptr. 800, 689 P.2d 430, we effectively held that the issue of commutation must be deemed raised at the penalty phase of all capital cases. Our evident assumption was that there was a significant possibility that some jurors might be aware of the possibility of commutation and proceed to take it into account in determining penalty. By contrast, we do not believe that the issue of deterrence or cost must be deemed raised at the penalty phase of all capital cases. Surely, we have no basis on which to make an assumption similar to that which we made in *Ramos.* Defendant may be understood to argue that such a basis does in fact exist. For support, however, he relies on little more than speculation and conjecture.[13]

13 We recognize that there is language in *People v. Thompson, supra,* 45 Cal.3d 86, 132, 246 Cal.Rptr. 245, 753 P.2d 37, which might perhaps be read to support the proposition that it would be proper for a court to instruct the jury not to consider deterrence or cost *whenever the defendant so requests:* "it would not have been error to give this requested instruction to forestall consideration of deterrence or cost...." The language, however, should not be read so broadly: its focus is solely the case under review. In any event, the words constitute dictum.

6. Claim of Error on Refusal to Instruct on the Burden of Proof Beyond a Reasonable Doubt as to Aggravating Circumstances

Defendant requested the court to instruct the jury to the following effect: (1) they could consider a circumstance in aggravation only if they were satisfied of its existence beyond a reasonable doubt; (2) they could fix the penalty at death only if they found that the aggravating circumstances outweighed the mitigating beyond a reasonable doubt; and (3) they could so ***808** fix the penalty only if they determined that death was appropriate beyond a reasonable doubt. The court refused.

Defendant contends that the court erred. He claims that the requested instruction correctly stated the law. In support, he argues that imposition on the People of the burden of proof beyond a reasonable doubt as to each of the issues identified above is required by

the 1978 death penalty law. He is altogether unpersuasive. He then argues that imposition of the burden is required by the Constitutions of the United States and California, specifically: (1) the cruel and unusual punishments clauses of the Eighth Amendment and article I, section 17; (2) the due process clauses of the Fourteenth Amendment and article I, sections 7 and 15; and (3) the equal protection clauses of the Fourteenth Amendment and article I, section 7. That is not the case. (E.g., *People v. Marshall, supra,* 50 Cal.3d at pp. 935–936, 269 Cal.Rptr. 269, 790 P.2d 676.)

****363** 7. Claim of Error on Refusal to Instruct on Mercy

Defendant requested the court to instruct the jury that "In this part of the trial you may consider pity, sympathy, *or mercy* for the defendant in deciding on the appropriate penalty for him." (Italics added.) The court refused.

Defendant contends that the court erred. He claims that the requested instruction was legally correct: the law, he says, grants the jury authority to choose life over death simply because the former is desirable and the latter is not. We disagree. Neither statute nor Constitution gives the jury the right to exercise what is essentially godlike power.

Defendant argues to the contrary. He says that the 1978 death penalty law grants the jury authority to dispense mercy. We are not persuaded: there is no adequate support for the assertion. He then says that the Eighth Amendment grants such authority. Again we are not persuaded. To be sure, "Nothing in any of [the] cases [of the United States Supreme Court] suggests that the decision to afford an individual defendant mercy violates the *****861** Constitution." (*Gregg v. Georgia* (1976) 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (lead opn. of Stewart, Powell, and Stevens, JJ.); accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 307, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262.) But nothing in any of those cases suggests that such a decision is in fact authorized by the Constitution. At its root, the Eighth Amendment is simply prohibitory: it bars imposition of punishment that is unduly severe. (See, e.g., *People v. Marshall, supra,* 50 Cal.3d at p. 938, 269 Cal.Rptr. 269, 790 P.2d 676.) It does not grant power, and hence does not authorize imposition of punishment that is unduly lenient. (Compare ***809** *People v. Andrews* (1989) 49 Cal.3d 200, 227–228, 260 Cal.Rptr. 583, 776 P.2d 285 [rejecting a similar claim of instructional error].)

H. *Failure to Instruct on the Presumption of Innocence and the People's Burden as to Evidence of Unadjudicated Offenses*

In *People v. Robertson* (1982) 33 Cal.3d 21, 188 Cal.Rptr. 77, 655 P.2d 279, we held that under the 1977 death penalty law (Stats.1977, ch. 316, § 4 et seq., p. 1256 et seq.) a defendant " '... during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes [in aggravation] only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]' " (33 Cal.3d at p. 53, 188 Cal.Rptr. 77, 655 P.2d 279 (plur. opn.); accord, *id.* at pp. 60–61, 188 Cal.Rptr. 77, 655 P.2d 279 (conc. opn. of Broussard, J.).) In *People v. Miranda, supra,* 44 Cal.3d 57, 97–98, 241 Cal.Rptr. 594, 744 P.2d 1127, we impliedly, but clearly, held that a defendant was

entitled to the same instruction under the 1978 death penalty law.

In conformity with the foregoing principle, the court instructed the jury: "Evidence has been introduced for the purpose of showing that the defendant [**Richard Allen Benson**] has committed the following criminal [act]: [kidnapping of Karen Stange] which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before you may consider any such criminal [acts] as an aggravating circumstance [*sic*] in this case, you must first be satisfied beyond a reasonable doubt that the defendant [**Richard Allen Benson**] did in fact commit such criminal [act]. You may not consider any evidence of any other criminal [act] as an aggravating circumstance." (Brackets and bracketed material, except for "[*sic*]," in original.)

The court, however, did *not* instruct the jury to the effect that defendant was presumed innocent of the offense until the contrary was proved or that the People bore the burden of proof on the issue.

Defendant now contends that the court erred by failing to instruct the jury sua sponte on the presumption of innocence and the People's burden. He claims the omission was contrary to the 1978 death penalty law and also violated certain rights assertedly guaranteed criminal defendants under the Fifth, Eighth, and Fourteenth Amendments to the United States constitution ****364** —viz., due process of law (U.S. Const., Amends. V, XIV) and a reliable penalty determination (*id.,* Amends. VIII, XIV).

The point must be rejected. We are not persuaded that the 1978 death penalty law requires an instruction that the defendant is presumed innocent of unadjudicated offenses offered in aggravation or that the People bear the ***810** burden of proof on the issue: the "requirement" cannot be discerned either within the words of the statute or without. Nor are we persuaded that the United States Constitution requires the instruction in question. We have never held that the Constitution requires such an instruction—neither, to our knowledge, has any other appellate court in a reported decision. And we decline to so hold now. In *People v. Miranda, supra,* 44 Cal.3d 57, 241 Cal.Rptr. 594, 744 P.2d 1127, we concluded that the special rules governing the consideration of "other crimes" evidence in aggravation are "statutorily based" (*id.* at p. 99, 241 Cal.Rptr. 594, 744 P.2d 1127) and "not constitutionally mandated" (*id.* at p. 98, 241 Cal.Rptr. 594, 744 P.2d 1127). Defendant fails to show that our conclusion was unsound.

*****862** Of course, under California law the reasonable-doubt standard plays a vital role with regard to evidence of unadjudicated offenses offered in aggravation at the penalty phase of a capital trial. That standard provides whatever substance is possessed by the presumption of the defendant's innocence and the imposition on the People of the burden of proof. The jury was effectively instructed on the reasonable-doubt standard. No more was required here.

I. *Failure to Instruct on Unanimity as to Evidence of Unadjudicated Offenses*

As noted in part IV.H, *ante,* the court instructed the jury that "Before you may consider" the evidence of the unadjudicated offense of kidnapping Karen Stange "as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant [**Richard Allen Benson**] did in fact commit such criminal [act]." (Brackets and bracketed material in original.) But it did *not* instruct them that their "satisfaction" must be unanimous.[14]

14 It is noted that defendant requested the court to instruct the jury as follows: "All twelve jurors must agree as to the existence of any aggravating factor before it may be considered by you. [¶] If the jury does not unanimously agree that the existence of an aggravating factor has been proven beyond a reasonable doubt, no juror may consider it in reaching their personal verdict." The court refused to do so.

Defendant now contends that the court erred by failing to instruct the jury sua sponte on the "requirement" of unanimous agreement. He claims the omission was contrary to the 1978 death penalty law and also violated certain rights assertedly guaranteed criminal defendants under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution—viz., due process of law (U.S. Const., Amends. V, XIV) and a reliable penalty determination (*id.,* Amends. VIII, XIV).

The point must be rejected. In *People v. Miranda, supra,* 44 Cal.3d 57, 241 Cal.Rptr. 594, 744 P.2d 1127, we clearly, albeit impliedly, held that the 1978 death penalty law does not ***811** require an instruction on unanimous agreement. (*Id.* at p. 99, 241 Cal.Rptr. 594, 744 P.2d 1127.) Further, we have never held that the United States Constitution requires such an instruction—neither, to our knowledge, has any other appellate court in a reported decision. And we decline to so hold now. As stated, in *Miranda* we concluded that the special rules governing the consideration of "other crimes" evidence in aggravation are "statutorily based" (*ibid.*) and "not constitutionally mandated" (*id.* at p. 98, 241 Cal.Rptr. 594, 744 P.2d 1127). Defendant fails to show that our conclusion was unsound. (Compare *People v. Gordon, supra,* 50 Cal.3d at p. 1273, 270 Cal.Rptr. 451, 792 P.2d 251 [rejecting essentially the same constitutional claim].)

In *People v. Ghent* (1987) 43 Cal.3d 739, 774, 239 Cal.Rptr. 82, 739 P.2d 1250, we said with regard to the 1977 death penalty law: "[W]e see nothing improper in permitting each juror individually to decide ****365** whether uncharged criminal activity has been proved beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." Here, we say the same with regard to the relevantly similar 1978 death penalty law.

J. *Constitutional Validity of the Verdict of Death*

The jury returned the following verdict: "We, the Jury, find that the aggravating factors outweigh the mitigating factors and having considered the totality of the circumstances of the case, we fix the penalty at death." They provided no written statement in support.

Defendant contends that the verdict of death is invalid. He claims that the cruel and unusual punishments clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment each require a supporting written statement. They do not. (E.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779,

230 Cal.Rptr. 667, 726 P.2d 113; see, e.g., *People v. Gordon, supra,* 50 Cal.3d at p. 1278, 270 Cal.Rptr. 451, 792 P.2d 251.) Contrary to defendant's ***863** assertion, there is no reason to revisit the question.

K. *Denial of Defendant's Verdict-modification Application*

Defendant made an application for modification of the verdict of death under Penal Code section 190.4, subdivision (e) (hereafter section 190.4(e)). At the hearing on the motion, the court allowed relatives of the victims to make statements with respect to sentencing pursuant to Penal Code section 1191.1. Also, it noted that it had read and considered a presentence report, which contained similar statements. The victims' relatives asked for a sentence of death, and described such matters as the victims' personal characteristics, the emotional impact of the crimes on their family, and the opinions of family members about defendant and his crimes. The court proceeded to deny the application and to impose the ultimate sanction.

***812** Defendant contends that the court erred. At the threshold he asserts that the court considered the statements of the victims' relatives, and the People assert the opposite. For purposes here, we shall assume that the court did in fact consider the statements in question.

Defendant first claims that the assumed consideration of the statements of the victims' relatives amounted to error of federal constitutional dimension under *Booth v. Maryland, supra,* 482 U.S. 496, 107 S.Ct. 2529, and *South Carolina v. Gathers, supra,* 490 U.S. 805, 109 S.Ct. 2207. We disagree. We acknowledge that read together, those decisions broadly hold that it is generally violative of a criminal defendant's rights under the cruel and unusual punishments clause of the Eighth Amendment to present information concerning such matters as the victim's personal characteristics, the emotional impact of the crime on his family, and the opinions of family members about the crime and the criminal—the very kind of information presented in the statements under review. But we have concluded that the broad holding of *Booth* and *Gathers* does not extend to proceedings relating to the application for modification of a verdict of death under section 190.4(e). (See *People v. Jennings* (1988) 46 Cal.3d 963, 994, 251 Cal.Rptr. 278, 760 P.2d 475.)[15]

15 Defendant also claims that the assumed consideration of the statements in question amounted to error of federal constitutional dimension under the due process clause of the Fourteenth Amendment. He argues that fundamental fairness was undermined. Having reviewed the record, we simply do not agree.

Defendant then claims that the assumed consideration of the statements of the victims' relatives amounted to error under state statutory law. Here we agree. "Under section 190.4(e), the court reviews the evidence presented to the jury" (*People v. Williams, supra,* 45 Cal.3d at p. 1329, 248 Cal.Rptr. 834, 756 P.2d 221)—which does not include the statements in question (or, for that matter, the presentence report).

We turn now from the "error" to its consequences. The ruling must be set aside, the penalty judgment vacated, and the cause remanded for reconsideration of **366 the verdict-modification application if and only if

the "error" was prejudicial. (See, e.g., *People v. Ramirez* (1990) 50 Cal.3d 1158, 1201–1202, 270 Cal.Rptr. 286, 791 P.2d 965.) The question of prejudice is apparently resolved under the so-called "reasonable possibility" test—i.e., is there a reasonable possibility that the error affected the decision? (See *id.* at p. 1202, 270 Cal.Rptr. 286, 791 P.2d 965.)

Applying that test, we find no prejudice. In support of its ruling, the court provided an extensive statement of reasons. From that statement it is manifest that the court made its decision solely in light of the applicable law and the relevant evidence. We assume, as noted above, that the court considered ***813** the statements of the victims' relatives. And we concede that those statements were quite moving. But on this record—and especially in view of the reasons expressed—we cannot conclude that the court actually took those statements into account in making its decision. Indeed, it appears that the court viewed the *****864** statements of the victims' relatives in the nature of formal allocutions addressing the question of sentencing broadly, and not as evidence or argument bearing on the verdict-modification application itself. Moreover, we cannot conclude that the statements would have affected the outcome even if they had been taken into account. It was "the Court's personal assessment ... that the factors in aggravation"—which plainly did *not* include the statements in question—"beyond all reasonable doubt far outweigh those matters in mitigation...."

Accordingly, we are of the opinion that there is not a reasonable possibility that the "error" affected the ruling.

L. *Constitutionality of the 1978 Death Penalty Law: Treatment of Evidence of Unadjudicated Offenses*

Defendant contends in substance that the 1978 death penalty law is unconstitutional insofar as it allows individual jurors to consider evidence of unadjudicated offenses in aggravation without first requiring at least a substantial majority of a 12–member panel to agree that the People have proved such crimes beyond a reasonable doubt. Specifically, he claims that in this regard the law violates certain rights assertedly guaranteed criminal defendants under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution—viz., due process of law (U.S. Const., Amends. V, XIV), trial by impartial jury (*id.*, Amends. VI, XIV), and a reliable penalty determination (*id.*, Amends. VIII, XIV).

The point must be rejected. As stated in part IV.I, *ante,* in a quotation from *People v. Ghent, supra,* 43 Cal.3d at page 774, 239 Cal.Rptr. 82, 739 P.2d 1250, "we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proved beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." We do not believe that in this regard the 1978 death penalty law implicates the guaranties of due process, jury trial, and reliable sentencing contained in the Fifth, Sixth, Eighth, and Fourteenth Amendments. In our view, the statutory scheme does not significantly affect, to the defendant's detriment, either the fairness of the penalty trial or the correctness of its outcome, nor does it ***814** impair whatever federal constitutional

right he might have to a determination by a jury.[16]

16 Having reviewed the record in its entirety, we conclude that the jury found that defendant actually killed, *and* intended to kill, the victims within the meaning of *Enmund v. Florida* (1982) 458 U.S. 782, 788–801, 102 S.Ct. 3368, 3371–3379, 73 L.Ed.2d 1140.) We also conclude that these findings are amply supported and adopt them as our own. Accordingly, we hold that imposition of the penalty of death on defendant does not violate the Eighth Amendment. (See *Cabana v. Bullock* (1986) 474 U.S. 376, 386, 106 S.Ct. 689, 697, 88 L.Ed.2d 704.)

V. DISPOSITION

For the reasons stated above, we conclude that the witness-killing special-circumstance findings must be set aside but that otherwise the judgment must be affirmed.

It is so ordered.

****367** LUCAS, C.J., and BROUSSARD, PANELLI, EAGLESON, KENNARD and ARABIAN, JJ., concur.

All Citations

52 Cal.3d 754, 802 P.2d 330, 276 Cal.Rptr. 827

S063126

IN THE SUPREME COURT OF CALIFORNIA

IN RE RICHARD ALLEN BENSON ON HABEAS CORPUS

The petition for writ of habeas corpus is denied on the substantive ground that it is without merit. Separately and independently, the first through eleventh claims therein (petn., pp. 66–115), and the fourteenth claim insofar as it alleges "deni[al of] meaningful appellate review" (*id.*, pp. 126–136), are each denied on the procedural ground (see *Harris* v. *Reed* (1989) 489 U.S. 255, 264, fn. 10) that it is untimely, without justification or excuse and outside any exception, including that for a fundamental miscarriage of justice (see generally *In re Clark* (1993) 5 Cal.4th 750, 763–799): it was not presented within a reasonable time after its legal and factual bases were, or should have been, discovered (see *id.* at pp. 784–785). Separately and independently, the third and fourth claims therein (petn., pp. 80–85) are each denied on the procedural ground (see *Harris* v. *Reed*, *supra*, 489 U.S. at p. 264, fn. 10) that it is pretermitted, without justification or excuse and outside any exception (see generally *In re Harris* (1993) 5 Cal.4th 813, 825, fn. 3, 829–841): it could have been, but was not, raised on appeal (see *In re Dixon* (1953) 41 Cal.2d 756, 759). Separately and independently, the fifth through seventh and eleventh claims therein (petn., pp. 85–94, 106–115) are each denied on the procedural ground (see *Harris* v. *Reed*, *supra*, 489 U.S. at p. 264, fn. 10) that it is repetitive, without justification or excuse and outside any exception (see generally *In re Harris*, *supra*, 5 Cal.4th at pp. 829–841): it was raised and rejected on appeal (see *In re Waltreus* (1965) 62 Cal.2d 218, 225).

Mosk, J., and Brown, J., would deny the petition solely on the merits.

George
Chief Justice