No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARY ELLEN SAMUELS,

Petitioner,

v.

JANEL ESPINOZA, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

APPENDIX (Vol. 1 of 1)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY ELLEN SAMUELS, Petitioner-Appellant, v. JANEL ESPINOZA, Warden, Respondent-Appellee.	No. 20-99005 D.C. No. 2:10-cv-03225-SJO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted November 18, 2021
Pasadena, California

Before: WARDLAW and HURWITZ, Circuit Judges, and BOUGH,** District Judge.

Mary Ellen Samuels, a California state prisoner, appeals the district court's judgment denying guilt-phase relief on her 28 U.S.C. § 2254 habeas corpus

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

petition.[1] We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Reviewing *de novo* under the standard set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *Demetrulias v. Davis*, 14 F.4th 898, 905 (9th Cir. 2021), we affirm.

The sole issue certified by the district court for appeal was its rejection of Claim 5, which asserted ineffective assistance of counsel ("IAC") by James Robelen, the attorney who represented Samuels at her preliminary hearing, whom Samuels claimed had a conflict of interest. The California Supreme Court could reasonably have determined that Robelen's representation of James Bernstein and Samuels was successive rather than concurrent because Bernstein died before Samuels's right to counsel attached. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981) (right to conflict-free counsel applies where a constitutional right to counsel exists); *United States v. Olson*, 988 F.3d 1158, 1160 (9th Cir. 2021) (per curiam) (the right to counsel attaches when a defendant is charged). We therefore do not presume prejudice. *See Cuyler v. Sullivan*, 446 U.S. 335, 348, 349-50 (1980) (prejudice is presumed only if petitioner demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected [her] lawyer's performance"); *Noguera v. Davis*, 5 F.4th 1020, 1036 (9th

[1] The district court granted habeas relief as to the death sentence imposed on Samuels. The state does not seek review of that decision.

Cir. 2021) ("[T]here is no clearly established Supreme Court precedent applying *Sullivan*'s presumed-prejudice standard to successive representation.").

Samuels cannot show actual prejudice from Robelen's failure to disclose Bernstein's alleged confession at the preliminary hearing because she cannot show a reasonable probability that, absent this failure, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (a claim of ineffective assistance of counsel requires a showing of both ineffective assistance and prejudice); *Noguera*, 5 F.4th at 1039 (quoting *Strickland*, 466 U.S. at 694) ("To establish prejudice, a petitioner 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"). As "the showing required at a preliminary hearing is exceedingly low," *Salazar v. Superior Ct.*, 83 Cal. App. 4th 840, 846 (2000), we affirm the district court's denial of Claim 5. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) (stating that when the California Supreme Court summarily denies a claim, the petitioner must show that "there was no reasonable basis for the state court to deny relief"); *Demetrulias*, 14 F.4th at 912 (AEDPA review of a state court's denial of a *Strickland* claim is doubly deferential).

Samuels seeks to expand the certificate of appealability ("COA") by presenting uncertified issues in her opening brief. *See* 9th Cir. R. 22-1(e). We expand the COA to include Claim 6, which asserts IAC because of trial counsel's

decision not to call Robelen to testify that Bernstein had confessed to the murder of Robert Samuels. We nonetheless affirm the district court's denial of Claim 6 because the California Supreme Court could reasonably have concluded that this was a reasonable strategic decision by trial counsel. *See Richter*, 562 U.S. at 106; *Demetrulias*, 14 F.4th at 912–13; *Jurado v. Davis*, 12 F.4th 1084, 1100 (9th Cir. 2021) ("[W]ide latitude is given to defense counsel in making tactical decisions.").

We decline to issue a COA on the remaining issues because Samuels has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARY ELLEN SAMUELS,

Petitioner,

v.

JANEL ESPINOZA,* Warden of Central California Women's Facility,

Respondent.

CASE NO. CV 10-3225 SJO

DEATH PENALTY CASE

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Mary Ellen Samuels was convicted of soliciting and conspiring in the murders of Robert Samuels, her husband, and James Bernstein, her husband's alleged killer. *People v. Samuels*, 36 Cal. 4th 96, 101 (2005). She was convicted of first degree murder as to Mr. Samuels and Mr. Bernstein. *Id.* The jury found true a multiple murder special circumstance allegation and a financial gain special circumstance allegation as to Mr. Samuels. *Id.* The jury returned a verdict of death. *Id.*

The California Supreme Court affirmed Petitioner's convictions and sentence on June 27, 2005. *Id.* Petitioner filed a state habeas petition on May 21,

* Janel Espinoza is substituted for her predecessors as Warden of Central California Women's Facility, pursuant to Federal Rule of Civil Procedure 25(d).

2004, and the California Supreme Court denied it on March 10, 2010. (Cal. Case No. S124998.) She filed a Petition for Writ of Habeas Corpus in this Court on March 7, 2011. (Docket No. 23 ("Pet.").) Because the facts are set forth at length in the California Supreme Court's decision on direct appeal, they are repeated here only to the extent necessary for the discussion of Petitioner's claims.

DISCUSSION

JURY SELECTION CLAIMS

I. Claims 18 and 3E(1)

A. Claim 18

Before jury selection began, defense counsel requested to question jurors about their opinions on the death penalty individually, rather than in open court. (2 RT 220-21.) The trial court denied the request. (2 RT 221-22.) In Claim 18, Petitioner alleges that the denial violated his constitutional rights because "it resulted in an unreliable foreshortened voir dire process in which most prospective jurors were asked, in lockstep fashion, the constitutionally required questions pertinent to death qualifications." (Pet. at 168.) Petitioner alleges that the trial court's "evident satisfaction with repeated monosyllabic and unconsidered, parroted responses, coupled with its refusal to permit counsel to conduct meaningful direct, individual, and sequestered questioning," prevented counsel from learning adequately about the jurors' views on the death penalty and determining whether their views would disqualify them from service. (*Id.* at 169-70.)

There is no independent constitutional requirement that the defense be permitted to question jurors individually. *See Mu'Min v. Virginia*, 500 U.S. 415, 419, 425 (1991) (finding no constitutional violation where trial court denied defense motion for individual voir dire to inquire about the content of the publicity of which they were aware); *Neal v. United States*, 342 F.2d 730, 736 (9th Cir. 1965) ("Appellant also complains that as a matter of law the court 'should have

sequestered the jury' or should have examined on voir dire each juror separately or individually[.] We have carefully reviewed the voir dire examination of the impanelled jurors and are satisfied that it was so conducted as to result in the selection of a fair and impartial jury."). Petitioner makes no particularized showing in Claim 18 of any juror whose views on the death penalty were unclear and for whom the trial court denied additional questioning by defense counsel. The California Supreme Court's denial of the claim on direct appeal was reasonable. *Samuels*, 36 Cal. 4th at 110-11 ("[T]he trial court's voir dire was adequate. The trial court asked the appropriate death-qualifying questions . . . , lengthy juror questionnaires were completed, and both sides had the opportunity to question each prospective juror."). Claim 18 is DENIED.

B. Claim 3E(1)

In Claim 3E(1) (Pet. at 64-65 ¶¶ 200-205), Petitioner alleges that trial counsel was ineffective for failing to make a showing in support of the request for individual voir dire that jurors would have been "more open when not subjected to the type of peer pressure which attaches to collective questioning . . . ." (*Id.* at 64 (citing 2 RT 221).) The California Supreme Court may have reasonably rejected the claim on the basis that Petitioner failed to show prejudice from any deficient performance by counsel. The California Supreme Court may have reasoned that Petitioner failed to show that the trial court denied additional questioning by defense counsel for any juror whose views on the death penalty were unclear. Claim 3E(1) is DENIED.

II. Claim 19

In Claim 19, Petitioner alleges that the trial court should not have granted the prosecution's challenge for cause to prospective juror R. P. On direct appeal, the California Supreme Court held:

> In his juror questionnaire R[.] P. . . . [was] uncertain if he could set aside his own feelings regarding what the law ought to be and follow

> the law as set forth by the court. When asked how he would address a conflict between an instruction of law and his own belief or opinion, R[.] P. wrote, 'Certain beliefs I hold strongly. For those I would have to talk to him [the judge]. I may not be willing to bend.' . . . During oral voir dire, . . . [h]e initially stated he was willing to set aside his own views and follow the law. However, when asked further about putting aside his personal feelings and following the law as explained by the court, R[.] P. admitted that 'there's certain things that I wouldn't be willing to bend on. . . . I don't know if any of those things are going to come up in this case, but I just wanted to leave the door open just in case to say that some things might happen. Mostly this has to do with my religious beliefs.' Further, when the prosecutor asked if there were any situations where he would be unwilling to follow the court's instructions, R[.] P. stated, 'Yes. And I don't know of an example to bring up, but . . . maybe something might.' Based on our review of the record, we find no federal error in the trial court's excusing R[.] P. for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Samuels, 36 Cal. 4th at 111-12 (internal citation edited); (*see also* (1 CT Supp. 97)).

The state court's decision does not show an unreasonable application of *Witt*. *See Uttecht v. Brown*, 551 U.S. 1, 7 (2007) "([R]eviewing courts are to accord deference to the trial court. . . . [W]hen there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State." (internal quotation and alterations omitted)). Claim 19 is DENIED.

GUILT PHASE CLAIMS

I. Claim 1 as to Guilt Phase of Trial and Claim 12

In Claim 1, in relevant part, Petitioner challenges the admission of allegedly prejudicial bad character evidence at the guilt phase of trial. (Pet. at 20-50.) In Claim 12, Petitioner challenges the admission of autopsy photographs and other allegedly gruesome photographs of Mr. Samuels. (Pet. at 133-36.)

Regarding claims that the admission of evidence at the guilt phase of trial violated a federal habeas petitioner's right to due process, the Ninth Circuit has explained:

> The Supreme Court has made very few rulings regarding the admission of evidence [at the guilt phase of trial] as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, *see Williams v. Taylor*, 529 U.S. 362, 375 (2000), it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ. Absent such clearly established Federal law, we cannot conclude that the state court's ruling was an unreasonable application. Under the strict standards of AEDPA, we are therefore without power to issue the writ . . . .

Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal quotation omitted; internal citation edited).

Because they lack support in clearly established federal law, Claim 1 as to the guilt phase of trial and Claim 12 are DENIED.

II. Claim 2

On habeas review, the California Supreme Court held that state Claim III, presented in Petitioner's federal Petition as Claim 2, was barred pursuant to *In re Dixon*, 41 Cal. 2d 756, 759 (1953). (Lodg. D5; *see also* Answer to Petition for Writ of Habeas Corpus, Docket No. 43 at 18 (asserting procedural bar as to Claim 2).)

California's *In re Dixon* procedural rule requires that all available claims be raised on appeal and not on habeas review. *In re Dixon*, 41 Cal. 2d at 759. A state procedural rule bars federal review when it is independent of federal law, firmly established, and regularly followed. *See Walker v. Martin*, 562 U.S. 307, 315-16 (2011); *see also Johnson v. Lee*, 136 S. Ct. 1802, 1806 (2016) ("California courts need not address procedural default before reaching the merits . . . . [T]he

appropriate order of analysis for each case remains within the state courts' discretion. Such discretion will often lead to seeming inconsistencies. But that superficial tension does not make a procedural bar inadequate." (internal quotation omitted)); *cf. Murray v. Carrier*, 477 U.S. 478, 490-91 (1986) (identifying legitimate state interests in rules requiring claims to be raised on direct appeal rather than postconviction review). A state court's application of its procedural bars is presumed correct unless "the state court's interpretation is clearly untenable and amounts to a subterfuge to avoid federal review . . . ." *Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007) (internal quotation omitted).

The United States Supreme Court has held that the *Dixon* rule is an independent and adequate state procedural bar. *Lee*, 136 S. Ct. at 1805 (holding that the *Dixon* bar was firmly established and regularly followed, at least as of June 10, 1999, when petitioner Lee filed her opening brief on direct appeal); (*see also* Lodg. B1 (filing of Petitioner's opening brief on direct appeal on November 7, 2002)). Petitioner does not allege in her federal Petition that appellate counsel was ineffective for failing to raise the claim, to show cause and prejudice to excuse the default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

This Court's order for briefing was limited to the merits of Petitioner's claims, as opposed to any procedural bars. (Docket No. 63.) Should Petitioner wish to oppose the application of the procedural bar to Claim 2, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

III. Claims 3D(1), 3D(6), 7, and 13

A. Background on Claim 7 and Analysis of Claim 3D(1)

In Claim 7, Petitioner alleges judicial bias in the trial court's evidentiary rulings in favor of the prosecution. (Pet. at 96-110.) On direct appeal, the California Supreme Court held the claim to be waived for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 114. The contemporaneous objection bar is addressed below.

The California Supreme Court went on to deny the claim on the merits. In summary, the California Supreme Court held:

(a) the trial court did not bar the defense from introducing expert testimony regarding the handwriting of Petitioner's daughter, Nicole Moroianu ("Nicole");

(b) the trial court did not bar the defense from cross-examining Detective George Daley, the lead investigator in the deaths of Mr. Samuels and Mr. Bernstein, about any information on the investigation he gave to witnesses or suspects;

(c) any error by the trial court in requiring the defense to disclose its notes from an interview with witness John Krall, the brother of Nicole's friend, was harmless and did not show bias;

(d) defense counsel "spirited[ly]" cross-examined David Navarro, who testified that Mr. Bernstein made statements to him regarding Petitioner's involvement in Mr. Samuels' murder, and counsel asked Mr. Navarro about his immunity agreement, such that Petitioner failed to show prejudice or judicial bias from the trial court's ruling that counsel could not ask who determined the truthfulness of his testimony;

(e) the trial court properly allowed the prosecution to cross-examine defense witness Anna Davis about her use of cocaine, after she testified she saw others using cocaine;

(f) the trial court properly limited defense counsel's cross-examination of Heidi Dougall, who testified that Petitioner made statements to her that she wanted Mr. Samuels dead and had a plan for him to be killed, about Ms. Dougall's mental health and medical condition;

(g) any error by the trial court in admitting evidence of a $1,500 check from Petitioner's account without proper foundation was harmless and did not show bias;

(h) defense counsel withdrew his question to Nicole about statements she made during interviews with the defense investigator not because of any threats or intimidation by the trial judge, but strategically to avoid cross-examination of the investigator on her lack of note-taking;

(i) the trial court did not err, and any error was harmless, in allowing Detective Daley to testify that Nicole cited attorney-client privilege and refused to cooperate in providing information to the police about her sexual abuse by Mr. Samuels;

(j) Petitioner failed to show bias or harm from the trial court's exclusion of testimony from Jeffrey Weiss, an employee at the Subway restaurant Petitioner and Mr. Samuels owned and operated, that he heard Nicole shout at Mr. Samuels to keep his hands off her and not to touch her;

(k) Petitioner failed to show bias or harm from the trial court's admission of Mr. Bernstein's criminal file, admission of Detective Richardson's testimony that he located no arrests or criminal complaints by Petitioner against Mr. Samuels, and exclusion of a police report on Dean Groover, Petitioner's later fiancé; and

(l) the trial court properly admitted testimony from Mr. Samuels' divorce attorney that Mr. Samuels intended to seek a reduction in spousal support and permission to operate the Subway restaurant. *Id.* at 114-20.

In Claim 3D(1), Petitioner alleges ineffective assistance of counsel in failing to object to the alleged bias. (Pet. at 62 ¶ 198(1).) The California Supreme Court

may have reasonably rejected the claim on the basis that a motion alleging judicial bias would have been meritless or that Petitioner failed to show prejudice from counsel's failure to bring such motion. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection."); *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, "the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit."). Claim 3D(1) is DENIED.

B. Background on Claim 13 and Analysis of Claim 3D(6)

In Claim 13, Petitioner alleges that the prosecutor injected inadmissible, false, or misleading evidence without a good faith belief in the truth or admissibility of the evidence. (Pet. at 137-43.) First, Petitioner alleges that the prosecutor asked defense investigator Robert Birney, a former police officer, whether he had been suspended from duty without introducing any source for that information. (*Id.* at 138.) Mr. Birney testified that witness Paul Gaul admitted to him that he told Petitioner he knew she was not involved in Mr. Samuels' murder but he had to testify that she was to keep his plea agreement. (25 RT 3301-02.) Second, Petitioner alleges that the prosecutor "set up a situation in which Nicole was made to appear to be lying about checks written to Mr. Bernstein and then blocked the defense from rehabilitating her" by objecting to defense counsel asking Nicole whether she would submit to handwriting analysis to confirm her testimony. (Pet. at 140.) Third, Petitioner alleges the prosecution "successfully avoided allowing" Detective Daley "to be impeached by promising to clear up the subject matter" of his sharing of information about his investigation with witnesses or suspects "at a later time, only to fail to do so." (*Id.* at 141.) Fourth, Petitioner alleges the prosecutor "exceeded the scope of the direct examination, treating [Annette] Bunnin-Church as if she had been a character witness in order

to raise before the jury Petitioner's supposed lack of truth and veracity." (*Id.* at 142.) The California Supreme Court held the claim to be waived for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 124.

In Claim 3D(6), Petitioner alleges ineffective assistance of counsel in failing to object and to request an admonition to those instances of alleged misconduct. (Pet. at 63 ¶ 198(6).) The California Supreme Court may have reasonably rejected the claims on the basis that Petitioner failed to show deficient performance or prejudice. The California Supreme Court reasonably concluded on direct appeal that: (a) "Birney's admission that there was an incident" similar to one described by the prosecutor outside the presence of the jury "that was investigated shows that there was some good faith basis for the prosecutor's asking whether he was suspended as a result of the investigation;" (b) the prosecutor committed no misconduct in objecting on relevance grounds to defense counsel's question about Nicole's willingness to submit to handwriting analysis and did not prevent the defense from introducing expert testimony; (c) "Detective Daley was recalled by the prosecution [and] . . . [d]efendant had the opportunity to thoroughly cross-examine" him; and (d) there was no reasonable likelihood that the jury construed any of the prosecutor's questions to Ms. Bunnin-Church "in an objectionable fashion," given her testimony "stating that she never had doubts about defendant's truthfulness . . . ." *Samuels*, 36 Cal. 4th at 114-15, 124-26. The court may have reasonably concluded on the same basis that counsel's objections or requests for admonitions would have been meritless or that Petitioner suffered no prejudice from their absence. *See Juan H.*, 408 F.3d at 1273; *Molina*, 934 F.2d at 1447. Claim 3D(6) is DENIED.

C. Contemporaneous Objection Bars as to Claims 7 and 13

Respondent has asserted contemporaneous objection procedural bars as to Claims 7 and 13. (Docket No. 43 at 18.) Where a petitioner "failed to object to [the alleged error] at trial, his forfeiture under California law constitutes a

procedural default." *Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012); *see also Fairbank v. Ayers*, 650 F.3d 1243, 1256-57 (9th Cir. 2011) (holding that "the California Supreme Court applied an independent and adequate state procedural rule that bars federal review" based upon the lack of objection at trial); *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999) (holding petitioner's claim was "procedurally barred by an adequate and independent state ground" through California's contemporaneous objection rule).

Because Petitioner cannot show cause and prejudice through the ineffective assistance of counsel to excuse the contemporaneous objection bar as to Claims 7 and 13, the Court would apply that bar to dismiss the claims. As noted above, however, the parties have not been given an opportunity to brief the application of procedural bars. Should Petitioner wish to oppose the application of the procedural bar to Claim 7 or 13, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

IV. Claims 3D(2), 3D(3), 3D(4), and 3D(5)

The California Supreme Court reasonably rejected Petitioner's claims that trial counsel was ineffective:

• for failing to object to the admission of testimony from David Navarro about alleged hearsay statements by Mr. Bernstein regarding Petitioner's involvement in Mr. Samuels' murder. (*See* 13 RT 1646-47 (counsel's objection)); *Samuels*, 36 Cal. 4th at 120 (rejecting the State's argument that defense counsel had failed to object and citing authority that "the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented" (internal citation omitted)); (Pet. at 62 ¶ 198(2) (Claim 3D(2)));

• for failing to object to the admission of testimony from Detective Daley regarding alleged hearsay statements by Detective Birrer that Mike Silva had been

identified as involved in Mr. Samuels' murder and had since died. *See Samuels*, 36 Cal. 4th at 122-23 (holding that Detective Daley's testimony about Detective Birrer's statements "was not used to prove that Mike Silva killed Robert Samuels . . . [but] to explain Detective Daley's reasons for obtaining search warrants and contacting Mike Silva [after] . . . defense counsel asked . . . whether Silva was ever arrested for Robert Samuels's murder," and that defense counsel acknowledged raising whether Mr. Silva had died and successfully excluded details about how he died); (Pet. at 62 ¶ 198(3) (Claim 3D(3)));

• for failing to object "on constitutional grounds" to the admission of testimony from Mr. Samuels' divorce attorney, Elizabeth Kaufman, that Mr. Samuels told her he intended to go through with the divorce. (Pet. at 62-63 ¶ 198(4) (Claim 3D(4)); *see infra* § XIII (finding no constitutional error in admission of the testimony)); *see Juan H.*, 408 F.3d at 1273; *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] from failure to file a motion," petitioner must show, in part, that "had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious"); *Molina*, 934 F.2d at 1447.

• for failing to object "on constitutional grounds" to Mr. Samuels' autopsy photographs. (Pet. at 63 ¶ 198(5) (Claim 3D(5)); *see supra* § I (finding no constitutional error in their admission)); *see Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990; *Molina*, 934 F.2d at 1447.

Claims 3D(2), 3D(3), 3D(4), and 3D(5) are DENIED.

V. Claims 3E(2), 3E(3), 3E(6), 3E(7)

A. Claim 3E(2)

On direct examination, Petitioner answered affirmatively when asked if Detective Daley "suggest[ed]" other suspect(s) to her. (32 RT 4299.) The prosecution objected, and defense counsel argued that the testimony would impeach Detective Daley's prior testimony that (in counsel's words) "he never

talked to anyone about other suspects." (32 RT 4299-4300.) The court ruled that it was not inconsistent but that defense counsel "might have an opportunity" to question Detective Daley on the topic when the prosecution recalled him and after a hearing under California Evidence Code § 402. (33 RT 4305.) In Claim 3E(2), Petitioner claims trial counsel was ineffective for failing to do so. (Pet. at 66 ¶¶ 206-209.)

The California Supreme Court may have reasonably determined that Petitioner showed no prejudice from counsel's failure to question Detective Daley on whether he told Petitioner about other suspects. Defense counsel had already questioned Detective Daley on whether he had revealed suspects to others, including Anne Hambly, Arienne Williams, and Larry Martino. (8 RT 886-89.) Detective Daley said "[i]t's possible" he told Ms. Hambly about suspect(s) and he told Ms. Williams "that we had suspicions relative to who might have done it and that these suspicions were forwarded to us by a friend of Mary Ellen Samuels who gave us her name." (8 RT 886-87.) When asked, "You wouldn't tell him [Mr. Martino] who your suspects were, would you?" Detective Daley responded, "I may or may not have mentioned people involved." (8 RT 888-89.) When Daley was recalled, defense counsel asked him on cross-examination if he had discussed "specifics of this case and the investigation" with people outside the police department, and he said, "[o]n several occasions, yes." (38 RT 5101; *see also* 38 RT 5102-10.) The California Supreme Court may have reasoned that questioning Detective Daley further on the subject would not have impeached him to a degree showing a reasonable probability of a different outcome at trial. Claim 3E(2) is DENIED.

B. Claim 3E(3)

In Claim 3E(3), Petitioner faults trial counsel for failing to investigate and present evidence that: (a) as of November 1988, Mr. Samuels wanted to reconcile with Petitioner, contrary to prosecution evidence that he wanted to move forward

with their divorce (Pet. at 66-67 ¶ 211 (citing Ex. 11, letter from Mr. Samuels to Petitioner)); and (b) no order had been entered removing Petitioner as the representative of Mr. Samuels' estate, meaning Susan Conroy, Mr. Samuels' sister, lacked standing to waive his attorney-client privilege at trial for his divorce attorney to testify. (*Id.* (citing Ex. 13).)

As to Mr. Samuels' desire to reconcile with Petitioner, the California Supreme Court may have reasonably found no deficient performance by counsel. The court may have reasoned that counsel made a strategic decision not to present the evidence in the exhibit Petitioner cites. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."). Presenting evidence that Mr. Samuels wanted to reconcile could have made Petitioner's situation even less sympathetic to the jury, and the letter contains details that could have been unflattering to Petitioner. (*See* Ex. 11 ("I want to be a good husband to you, but I can't do that when you . . . have your secret weekends with other people whom I don't know. . . . Unless, I take you somewhere for a week-end – you only stop over for a few hours and then your [sic] off and out with other people.").)

As to the representative of Mr. Samuels' estate, the record shows that defense counsel was following the developments and asserting Petitioner's interests. The prosecutor told the trial court that Ms. Conroy was Mr. Samuels' personal representative, and Ms. Conroy so testified. (30 RT 3923 (prosecutor's statement about Ms. Conroy, "The personal representative of Mr. Samuels is present in court."), 3927 ("The Court: . . . You indicated that somebody is a representative of the estate. [¶] Ms. Maurizi [the prosecutor]: Yes, Susan Conroy."), 3928 (Ms. Conroy's testimony that she was "the legally appointed administrator of the estate of Robert Samuels").) Defense counsel asked Ms. Conroy on cross-examination, "[I]sn't there a hearing set for the 12th of May, tomorrow, to determine whether you will continue to hold the position that you

hold any further than tomorrow?" (30 RT 3928.) Ms. Conroy said that was correct. (*Id.*) Later, on May 17, defense counsel argued to the court in another context:

> I would urge the court to find that at this point in time, and I have the probate file here, Mary Ellen Samuels is the administrator or the personal representative of the estate and she has the right to waive the privilege at that time. [¶] The fact she has been surpassed by another person at this point in time should not prevent her from waiving the privilege . . . .

(33 RT 4331.) The California Supreme Court may have reasonably concluded on the basis of the record that Petitioner failed to show deficient performance by counsel in Claim 3E(3). Claim 3E(3) is DENIED.

C. Claim 3E(6)

In Claim 3E(6), Petitioner alleges that had trial counsel properly cross-examined Paul Gaul and Darrell Edwards, who together admitted killing Mr. Bernstein, counsel could have presented evidence of their drug use sufficient to negate any specific intent and "preclude the giving of the damaging 'lying in wait' jury instruction . . . ." (Pet. at 69; *see also id.* at 69-70 ¶¶ 219-222.) Petitioner alleges that counsel should have provided the jury with "evidence upon which to reject the lying-in-wait special circumstance, instead of all but conceding it. Having failed to negate the issue of lying in wait, the court gave CALJIC 8.25, the lying-in-wait instruction, and the jury so found on evidence that could have been, and should have been, challenged." (*Id.* at 70 (citing 5 CT 1232).)

CALJIC 8.25 instructed the jury on a lying in wait theory of first degree murder. (5 CT 1232.) The prosecution did not allege, and the jury did not find true, a lying in wait special circumstance. (*Cf.* 38 RT 5114-15.) Counsel could not have been ineffective in failing to challenge a special circumstance that was not alleged.

To the extent Petitioner alleges that counsel was ineffective for failing to challenge adequately a lying in wait theory of first degree murder, the California Supreme Court may have reasonably found a lack of prejudice. Mr. Gaul and Mr. Edwards provided detailed testimony at trial regarding their intoxication, plan, and intentions on the day of Mr. Bernstein's murder. (*See, e.g.*, 17 RT 2154-56 (Mr. Gaul's testimony that on the day of Mr. Bernstein's murder, he and Mr. Edwards drank from 9:00 AM until 5:00 PM or 6:00 PM, consuming 30 or 40 drinks, and Mr. Gaul continued drinking before meeting Mr. Bernstein); 17 RT 2156-57 (Mr. Gaul's testimony that he planned with Mr. Edwards that Mr. Edwards would be able to break Mr. Bernstein's neck after they took him to a place near Frazier Park by telling him they "knew some drug dealers up there and that we would . . . rip them off"); 22 RT 2906-07, 2911 (Mr. Edwards' testimony that on the day of Mr. Bernstein's murder, he drank all day from 10:00 AM until he and Mr. Gaul left with Mr. Bernstein around 9:00 PM, including at least three or four beers between 6:00 PM and 9:00 PM); 22 RT 2907-10 (Mr. Edwards' testimony that before Mr. Bernstein's murder, Mr. Edwards and Mr. Gaul discussed a plan that they would tell Mr. Bernstein they were going to buy drugs from a place around Castaic, that "[f]rom a side distance of the driver's seat" Mr. Gaul would hit Mr. Bernstein in the throat as hard as he could to "knock the wind out of him," and that they would leave his body in an area near Frazier Park).) The court may have seen no reasonable probability of a different outcome at trial had counsel shown additional evidence of intoxication.

Claim 3E(6) is DENIED.

D. Claim 3E(7)

In Claim 3E(7), Petitioner faults trial counsel for raising no objection to testimony from Ms. Conroy about Frank Samuels, the brother of Ms. Conroy and

Robert Samuels. (Pet. at 70-71 ¶¶ 223-225.) Petitioner alleges that the questions and answers:

> portrayed Frank Samuels as having been medicated, disabled, and unemployable. They characterized the Samuels family as having been a close knit family, whose mother and father had both passed away. They portrayed Robert Samuels as having been a caring individual, who, despite the fact that Frank Samuels was the elder of the two brothers, had sought to take care of him and put him to work in his Subway store. (39 RT 5197-98.)

(Pet. at 71 (internal citation edited).) The California Supreme Court may have reasonably held that Petitioner failed to show prejudice or deficient performance by counsel, as the testimony was limited and counsel may have reasoned that an objection would have drawn the jury's attention to it. *Cf. Kennedy v. Lockyer*, 379 F.3d 1041, 1056 n.19 (9th Cir. 2004) ("It is likely that counsel concluded that an objection to [the] testimony . . . would have made matters worse by calling further attention to the prejudicial disclosure."). Claim 3E(7) is DENIED.

VI. Claim 3F

A. Claim 3F(1)

In Claim 3F(1), Petitioner faults trial counsel's opening statement and closing argument for failing to provide a "road map" for the jury, a "theme or version of the facts that the jury could employ when exposed to the testimony of the various witnesses." (Pet. at 72-73.) Petitioner contends that counsel failed to present the jury with any defense theory of the case. (*Id.* at 73.) She adds that in his opening statement, counsel promised to "show [the jury] beyond any doubt who is in fact responsible for the killing of Bob Samuels and for the killing of James Bernstein," but failed to do so by the conclusion of trial. (7 RT 726; *see* Pet. at 72.) Petitioner alleges that trial counsel lacked any "reasoned belief" that his promise would be fulfilled. (Pet. at 72.)

The California Supreme Court may have reasonably concluded that Petitioner failed to show deficient performance by counsel.

In his opening statement, defense counsel argued that Detective Daley made Petitioner a suspect after his investigation had been unsuccessful for more than a year and after Petitioner declined his romantic advances. (7 RT 718-20.) After being unable to collect evidence against her by other means, counsel argued, "the detective and the former district attorney make a deal with the devil and the deal is as follows: We are going to give immunity to certain people so that they will implicate Mary Ellen Samuels." (7 RT 721.) Counsel also told the jury they would hear evidence of Mr. Samuels' abuse of Petitioner and Nicole (7 RT 725-26), discussed below in Claim 3F(2). As set forth below, that evidence provided an independent motive for Mr. Bernstein and/or another third party to have killed Mr. Samuels.

In his closing statement, defense counsel spent considerable time attacking the credibility of the prosecution witnesses (*see* 41 RT 5432-88; 42 RT 5494-5510, 5514-20), including Detective Daley. (*See* 41 RT 5478-88 (arguing that Detective Daley lied, had significant memory problems, conducted a deeply flawed investigation, and admitted that he told Petitioner his wife worked as a flight attendant and may have told her his wife was away for a period of time).) Counsel argued the believability of the evidence of abuse. (*See* 42 RT 5520-22, 5532.) At the conclusion of his argument, counsel told the jury:

> [T]he prosecution in this case wants you to legitimize the unholy alliance between Detective Daley, Mr. Jenkins [the prior prosecutor in Petitioner's case, who requested immunity and other benefits for witnesses (*see, e.g.*, 10 RT 1135, 1147-48; 17 RT 2203-06; 26 RT 3389; *cf.* 41 RT 5450)] and the witnesses who testified in this case and convict Mary Ellen Samuels based on that testimony. . . . Ladies and gentleman, I'm going to ask you to send a message. [¶] I'm going to ask you to send a message to George Daley who is here. I'm going to ask you to send a message to the Los Angeles Police

> Department and to the District Attorney's Office. [¶] And that message is that based on the evidence presented in this case, that you will not stand nor tolerate for you being asked to bring in a guilty verdict in this case. [¶] I want you to tell the prosecution and Detective Daley that you do not believe the truth of their allegations and that you believe the defense.

(42 RT 5537, 5541.) The California Supreme Court may have reasoned that counsel's arguments adequately provided a "road map" for the jury to follow.

Regarding his statement that he would show the jurors the identities of the true killer(s), counsel said in his closing argument:

> I heard [from the prosecutor (*see* 41 RT 5415-16)] that I had made certain representations and promises to you in my original opening statement. [¶] So I went back and read the original opening statement because I wanted to see where I told you in that statement that David Navarro or some big drug dealer was going to kill Jim Bernstein. [¶] And having read it, ladies and gentlemen, and I'm sure you will recall, I never made those promises to you. But thanks to the honest testimony of Darryl Ray Edwards, we know who the drug dealers were who killed Jim Bernstein, who had a motive to kill Jim Bernstein, and they were none other than Anne Hambly and Paul Gaul.

(42 RT 5513.) Even if counsel intentionally or unintentionally left vague the identity of Mr. Samuels' killer, the California Supreme Court may have reasonably determined that counsel's strategy and performance were constitutionally adequate. *See Richter*, 562 U.S. at 105 ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. . . . It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. . . . The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." (internal quotations and citations omitted)). Claim 3F(1) is DENIED.

B. Claim 3F(2)

In Claim 3F(2), Petitioner alleges that trial counsel was ineffective for introducing evidence that Mr. Samuels had abused Nicole and Petitioner. (Pet. at 73-75.) Petitioner argues that the evidence of abuse provided an "alternate motive" for Petitioner to have killed Mr. Samuels. (*Id.* at 73.)

The California Supreme Court may have reasonably held that Petitioner failed to show deficient performance by counsel. The evidence provided an independent motive for Mr. Bernstein and/or another third party to have killed Mr. Samuels, without any solicitation or involvement by Petitioner. (*Cf.* 41 RT 5415-16 (prosecutor's statement in closing argument that this was the defense's theory of Mr. Samuels' murder based on trial counsel's questions during trial).) Trial counsel introduced evidence from Nicole that when Mr. Bernstein asked her if Mr. Samuels had sexually abused her, he "said that he hoped that he wouldn't do anything like that to me because if he did, he'd kill the son of a bitch." (29 RT 3896-97.) Defense counsel also introduced evidence from Petitioner that she said "probably loud[ly]" at a bar that she "wished the son of a bitch was dead," referring to her husband; that a man at the bar approached her and she told him she was "married to a child molester;" that the man cursed, responded that "there are people like that," and said he knew someone who "could take care of a situation like that;" and that when the man called her "a couple days later" when she was with Mr. Bernstein, she "explained" to Mr. Bernstein "how all of a sudden I remembered who [the man] was." (32 RT 4268-72.) Trial counsel presented that evidence to the jury in one sequence of questions, and in the same sequence asked Petitioner whether she ever suggested, requested, or offered money to Mr. Bernstein to kill Mr. Samuels. (32 RT 4268-73.) Trial counsel's questions suggested that Mr. Bernstein and/or the man at the bar could have been independently motivated by the abuse to kill Mr. Samuels. The California

Supreme Court may have reasoned that trial counsel's presentation of the evidence was constitutionally adequate. Claim 3F(2) is DENIED.

VIII. Claim 3H

In Claim 3H, Petitioner alleges that trial counsel was ineffective for presenting evidence damaging to the defense. (Pet. at 76-79.)

A. Claim 3H(1) as to the Guilt Phase of Trial

The California Supreme Court may have reasonably rejected for lack of prejudice Petitioner's claim regarding Anne Hambly's ongoing fear of Petitioner. (Pet. at 77 ¶¶ 249-251.) Petitioner alleges she "was prejudiced by this testimony as it made the jury believe Petitioner was more likely to commit the murders charged as to the guilt phase . . . ." (*Id.*) Defense counsel challenged Ms. Hambly's overall credibility in detail in closing argument. (*See* 42 RT 5495-5514, 5524.) The California Supreme Court may have reasoned that the jury was likely either to accept Ms. Hambly's testimony along with her purported fear of Petitioner or to reject it entirely. The California Supreme Court may have reasonably found on that basis no prejudice at the guilt phase of trial. Claim 3H(1) as to the guilt phase of trial is DENIED.

B. Claim 3H(2)

The California Supreme Court may have rejected for lack of deficient performance Petitioner's allegations that:

> [t]rial counsel was ineffective in eliciting inadmissible hearsay testimony that Petitioner was a thief and had stolen from her husband. When Annette Church was recalled by the defense, she was asked about a conversation she had had with Detective Daley in the hallway of the courthouse. The subject matter of this conversation was the instant case. Trial counsel asked Ms. Church to tell the jury about Detective Daley's statement to her that he knew Petitioner better than she did. Ms. Church then testified that Detective Daley told her that she really did not know Petitioner very well as Petitioner had 'robbed her own Subway store twice and was pocketing money from her

> husband.' (39 RT 5240.) Trial counsel then asked Ms. Church to recount to the jury Detective Daley's comments about the 'cheesecake' photographs that had been taken by Petitioner. (*Id.*)

(Pet. at 77-78 (internal citations edited); *see infra* § IIIC (Penalty Phase Claims) (discussing "cheesecake" photographs).) The California Supreme Court may have reasoned that trial counsel's questions were designed to support the theory of the defense that Detective Daley was improperly biased against Petitioner after she rejected his romantic advances. Claim 3H(2) is DENIED.

IX. Claim 3I

The California Supreme Court reasonably rejected Petitioner's claim that defense counsel conceded in closing argument the truth of the financial gain special circumstance allegation as to Mr. Samuels. (Pet. at 79.) Defense counsel argued:

> The other problem with the People's theory is that they want you to conclude that Mary Ellen Samuels knew things that even they can't prove she knew. . . . They want you to believe that she knew that there was a line of credit with an insurance policy attached to it. [¶] We submit she did, ladies and gentlemen. But in her own testimony, which I submit to you is credible, she said she wasn't certain how much the line of credit life insurance policy would be good for. [¶] I believe the evidence was 50,000. I believe the evidence was $63,000 due and owing [on the line of credit]. But this is the only factor that the People haven [sic] proven she knew about.

(41 RT 5429-30; *cf.* 35 RT 4561.) The California Supreme Court may have reasonably concluded that trial counsel did not make a concession of the financial gain special circumstance and did not provide ineffective assistance. Rather, he addressed a portion of Petitioner's own testimony and attempted to limit its significance, by arguing that she did not know the amount of the policy and, by implication, would not have solicited her husband's murder to receive it. (*See* 33 RT 4337 (Petitioner's testimony that she found out about the policy and its amount

from Mr. Samuels' insurance agent and "thought he had been mistaken"); *cf.* 40 RT 5328 (setting forth financial gain special circumstance requirement that "the defendant believed the death of the victim would result in the desired financial gain").) Claim 3I is DENIED.

X. Claim 5

A. Background and Allegations

Petitioner was represented by James Robelen from the time of her investigation through her preliminary hearing. (Pet. Ex. 1 ¶ 2; *cf.* 29 RT 3805-07.) While Mr. Robelen represented her, he began representing Mr. Bernstein on an unrelated matter. (26 RT 3433-34; 29 RT 3788, 3805-07; Ex. 1 ¶ 3.) During Petitioner's trial, Mr. Robelen testified at a hearing outside the presence of the jury that on two occasions, Mr. Bernstein told him that he hired two people, Mr. Navarro and his friend, to kill Mr. Samuels and he paid them in cocaine. (29 RT 3788, 3800, 3802.) Mr. Robelen testified that Mr. Bernstein told him that Mr. Samuels had raped Nicole and her friend and that Mr. Samuels was interfering with his relationship with Nicole. (29 RT 3803.) Petitioner's trial counsel made an offer of proof, and Mr. Robelen later signed a declaration, that Mr. Bernstein told Mr. Robelen that Petitioner was not involved in the plan to murder or the actual murder of Mr. Samuels. (29 RT 3773-74 (defense counsel's offer of proof that Mr. Robelen would testify "that Bernstein told him Mary Ellen knew nothing about the fact he had arranged this; he will testify Bernstein never asked Mary Ellen for money; Bernstein said that he did what he did for the purposes that I've brought forth and did not do so for money, was not asked to do it by my client for money as alleged by the People"); Ex. 1 ¶ 4 (declaration of Mr. Robelen that "Mr. Bernstein told me that he had become infatuated with Nicole Samuels, the daughter of Mary Ellen Samuels. He further related that, to ingratiate himself with Nicole Samuels, he arranged to have Robert Samuels murdered and that Mary

Ellen Samuels was not involved in either the plan for this murder or the actual murder.").)

Mr. Robelen testified that his secretary and a man who drove Mr. Bernstein to his office were present during the meeting. (26 RT 3440-42; 29 RT 3789-92, 3796; *see also* Ex. 1 ¶ 4.) The driver was present when Mr. Bernstein made the statements about Mr. Samuels' murder, and Mr. Robelen's secretary was generally "in and out," he said. (29 RT 3790, 3795-96.) Mr. Robelen testified that he wrote down Mr. Bernstein's statements. (29 RT 3797, 3803-05.) The court asked him:

> Did you feel the conversation that Jim Bernstein had with you regarding his statements, that there was an attorney-client relationship existing between you and Mr. Bernstein?
>
> [A.] The truth of the matter is, your honor, I didn't know at the time. But I didn't divulge it for fear that there might have been one. And before I got to the point where I could research it sufficiently to satisfy myself, I was off the case. And other things that happened in my life which caused me to eliminate the sort of research it any further.

(29 RT 3810; *see also* 29 RT 3805-06.) As for witnesses to Mr. Bernstein's statements, Mr. Robelen did not know or recall the identity of the driver. (26 RT 3440-41; 29 RT 3792-93, 3800.) Mr. Robelen was later convicted of killing the secretary present at the meeting. (29 RT 3811.)

Petitioner alleges in Claim 5 that:

> [d]ue to a conflct of interest in this dual representation, Mr. Robelen failed to disclose and preserve the admission that James Bernstein had made to him and failed to pursue the theory that Mr. Bernstein had acted on his own in killing Mr. Samuels. Mr. Bernstein himself was then killed, at which time the compelling evidence of Mr. Bernstein's sole culpability was no longer available. [¶] Mr. Robelen also murdered one of the other witnesses to Mr. Bernstein's

> exoneration of Petitioner and failed to identify and document the name and location of the sole surviving witness.

(Pet. at 89; *see also id.* at 90-93.)

B. Analysis

Petitioner's conflict of interest claim lacks support in clearly established federal law. The Ninth Circuit has "held that a state court's rejection of a conflict claim not stemming from concurrent representation is neither contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court." *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (discussing *Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007); *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005)). Petitioner's allegations do not show a concurrent representation during the time her constitutional right to counsel had attached.

"Under the Sixth Amendment, '*where a constitutional right to counsel exists*, there is a correlative right to representation that is free from conflicts of interest.'" *Rowland*, 876 F.3d at 1191 (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (internal alteration and ellipsis omitted; emphasis added)). The Sixth Amendment right to counsel "'does not attach until a prosecution is commenced.'" *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); internal citations omitted). The United States Supreme Court has, "for purposes of the right to counsel, pegged commencement to the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* (internal quotations omitted). Because a felony complaint for an order holding Petitioner to answer was filed only after Mr. Bernstein's death, Mr. Robelen's representation of Petitioner and Mr. Bernstein was not concurrent. (*See* 3 CT 590-95 (alleging that Petitioner committed the murder of Mr. Bernstein in Felony Complaint [for] Order Holding to Answer); 29 RT 3805-06 (Mr. Robelen's

testimony that Mr. Bernstein made the statements "long before anything occurred in the way of an arrest or anything of that nature").)

Because it lacks support in clearly established federal law, Claim 5 is DENIED.

XI. Claim 4 and Claim 6 as to Evidence of Third Party Culpability

In Claim 4, Petitioner faults trial counsel for failing to present alleged evidence that a third party, James Nowlin, committed Mr. Samuels' murder. (Pet. at 82-88.) Petitioner alleges that Mr. Nowlin, a reserve police officer:

> had a history of violent and outrageously disturbing behavior towards himself and others. Before Robert Samuels' death, Nowlin learned that his estranged wife had dated, and had been intimate with, Robert Samuels. Later, he told his girlfriend, Christine Merrick, that he knew of the relationship, and shortly before Samuels' death, he told Merrick that he was about to do a very bad thing for which he could go to jail for a long time. He later asked Merrick to vouch for his whereabouts at the time of Samuels' murder. Nowlin was originally a suspect in the police investigation, and was never officially 'cleared.'

(Brief in Support of Claims Asserted in Petition for Habeas Corpus on Behalf of Mary Ellen Samuels, Docket No. 69 ("Opening Br.") at 31; *see also, e.g.*, 3 CT 745-56 (Los Angeles Police Department investigation report discussing Mr. Nowlin).)

The California Supreme Court may have reasoned that Petitioner failed to establish deficient performance by counsel. "There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Richter*, 562 U.S. at 109 (internal quotations omitted). The record shows that Petitioner's counsel attempted to investigate Mr. Nowlin's potential culpability by requesting his law enforcement personnel file. (*See infra* Claim 8; *see also* 2 RT 97-101 (defense counsel's argument that request under *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974) could uncover evidence to support third party culpability of James Nowlin); 3 CT 722 (defense counsel's

Pitchess request as to Mr. Nowlin stating, "This defendant may claim that James Nowlin, an officer or former reserve officer of the Costa Mesa Police Department, is the person who murdered or caused to have murdered Robert Samuels").) During the trial, defense counsel continued considering whether to present evidence about Mr. Nowlin and attempted to present some evidence in that regard. (*See* 8 RT 873 ("Now I hadn't really at this point in time decided or changed my mind. I still don't think I'm going to present evidence of Jim Nolan [sic] committed the crime."); 8 RT 868-73 (seeking to question Detective Daley about whether James Nowlin was a suspect); 33 RT 4303-05 (same); 38 RT 5103 (eliciting testimony from Detective Daley that he told a friend of Mr. Samuels information about James Nowlin when updating her on the investigation).) In the absence of any other evidence regarding trial counsel's actions or reasoning, the California Supreme Court may have reasonably applied the presumption that defense counsel made a strategic decision not to pursue further any evidence regarding Mr. Nowlin's potential culpability. Claim 4 is DENIED.

In Claim 6, Petitioner faults trial counsel for failing to present evidence from Mr. Robelen "to testify that James Bernstein had confessed to the murder of Robert Samuels and had exonerated Petitioner in that confession." (Pet. at 94.) As noted above, by the time of Petitioner's trial, Mr. Robelen had been convicted of the homicide of his secretary, with whom he was in a romantic relationship. (*See id.* at 88.) Petitioner acknowledges a note in defense counsel Philip Nameth's file, authored by co-counsel Justin Groshan, stating counsel's decision not to call Mr. Robelen as a witness in part because his testimony "would hurt more tha[n] help . . . ." (*Id.* at 95 (citing Ex. 5 (so stating as to the guilt phase and explaining in the context of the penalty phase decision that it "could hurt more tha[n] he could help, because of his own conviction")).) The California Supreme Court may have reasonably concluded that trial counsel made a sound decision not to present testimony from Mr. Robelen in light of his conviction of an offense with similarity

to Petitioner's own charge. (*Cf.* 29 RT 3812.) The California Supreme Court may have also reasonably determined that Petitioner failed to present evidence to show that trial counsel was ineffective in not "investigating and determining the identity of the sole remaining witness to Mr. Bernstein's exoneration of Petitioner, the person present at the meeting where the conversation occurred," as he further alleges. (Pet. at 95; *cf.* Petitioner's Reply to Respondent's Opposition to Petitioner's Merits Brief, Docket No. 78, at 21 (acknowledging that "[b]y the time that the trial was conducted, . . . there was no way to identify the independent witness," without suggesting any means by which the alleged witness could have been identified previously).)

Claim 6 is DENIED.

XII. Claim 8

In Claim 8, Petitioner challenges the trial court's denial of his *Pitchess* requests for discovery of the personnel records of Detective Daley and Mr. Nowlin. (Pet. at 110-16.) The trial court reviewed Detective Daley's file and attached it to the record under seal. *Samuels*, 36 Cal. 4th at 110.

Petitioner makes no preliminary showing that either personnel file contains evidence material to his defense. As a result, he fails to show a due process violation from the denial of the discovery. *See Harrison v. Lockyer*, 316 F.3d 1063, 1066 (9th Cir. 2003) (finding no due process violation where defendant was denied access to all documents in the arresting officer's personnel file, because the defendant failed to make "a preliminary showing that [the] police personnel file contain[ed] evidence material to his defense," even while noting that "[w]e are not instructed on how a defendant in a criminal case will know, or be able to make, a preliminary showing that a police personnel file contains evidence material to his defense"). Claim 8 is, therefore, DENIED.

XIII. Claims 9, 10, and 11

In Claim 9, Petitioner challenges the admission of hearsay testimony from witnesses David Navarro, Rennie Goldberg, and Matthew Raue about statements Mr. Bernstein made to them. (Pet. at 58-63.) David Navarro testified that Mr. Bernstein said about Mr. Samuels' death that "[h]e had done it and Mike [Silva] had helped him. And that [Ms. Samuels] had paid him." *Samuels*, 36 Cal. 4th at 120. Rennie Goldberg testified that in April 1989, Mr. Bernstein told him that he was being solicited by Petitioner and Nicole to have Mr. Samuels murdered "and that he was considering doing so (even though Samuels had already been killed in December 1988)." *Id.* at 121; (*see* Pet. at 117). Matthew Raue testified that in the spring of 1989, Mr. Bernstein said he was approached by Petitioner and Nicole to help murder Mr. Samuels. *Samuels*, 36 Cal. 4th at 121; (*see* Pet. at 117).

In Claim 10, Petitioner challenges the admission of hearsay testimony from Detective Daley regarding alleged hearsay statements by Detective Birrer that Mike Silva had been identified as involved in Mr. Samuels' murder and had since died. (Pet. at 123-27.)

In Claim 11, Petitioner challenges the admission of hearsay testimony from Elizabeth Kaufman and Susan Conroy about statements Mr. Samuels made to them concerning his intentions in his pending divorce. (*Id.* at 128-33.)

Petitioner alleges that the admission of the hearsay testimony "rendered the trial fundamentally unfair and violated Petitioner's Sixth Amendment right to confrontation and the Fourteenth Amendment right to due process." (*Id.* at 120; *see also* Opening Br. at 67.)

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) that the Confrontation Clause does not apply to nontestimonial statements. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) ("In *Crawford*, we held that [the Confrontation Clause] bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and

the defendant had had a prior opportunity for cross-examination." A critical portion of this holding . . . is the phrase 'testimonial statements.' Only statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." (internal citation omitted)). The out-of-court statements at issue here are nontestimonial. *See id.* at 822. Petitioner's Confrontation Clause claims lack support in clearly established federal law.

Petitioner's due process claims fail on the same ground. The Ninth Circuit has applied its holding in *Holley*, 568 F.3d at 1101 ("The Supreme Court . . . has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ."), to a challenge to the admission of hearsay testimony at the guilt phase of trial. *Zapien v. Davis*, 849 F.3d 787, 794 (9th Cir. 2015) (discussing admission of "multi-level hearsay"). Because they lack support in clearly established federal law, Claims 9, 10, and 11 are DENIED.

XIV. Claims 14, 3D(7), and 3E(5)

A. Claim 14

In Claim 14, Petitioner alleges prosecutorial misconduct and trial court error in the admission of evidence surrounding Petitioner's polygraph examination. (Pet. at 144-47.) On direct examination, the prosecutor elicited testimony from Detective Daley that he "kept asking" Petitioner for certain information to assist his investigation in the two weeks following Mr. Samuels' death. (7 RT 784-86.) On cross-examination, the defense sought to present testimony that Petitioner cooperated with the investigation by taking a polygraph examination. (8 RT 856.) The prosecutor objected and argued, among other things, that if the evidence were admitted, it would open the door to evidence of statements Petitioner made to third parties about how to pass a polygraph exam. (8 RT 857-58.) The defense asked to review the polygraph results before stipulating to their admission. (8 RT 864-65.) The court then instructed the jury to disregard defense counsel's question

regarding the polygraph exam. (8 RT 866.)

Later, during her examination of Marsha Hutchison, Petitioner's former friend, the prosecutor elicited testimony that Petitioner told Ms. Hutchison a person could pass a polygraph exam by taking a certain drug, being a pathological liar, or telling the truth. (11 RT 1392; *cf.* 11 RT 1363.) The trial court admitted the testimony after ruling that Petitioner could not introduce evidence from Ms. Hutchison that Petitioner offered to take a polygraph exam, asked Ms. Hutchison to accompany her to take it, told Ms. Hutchison she had nothing to do with Mr. Samuels' murder, or was told she passed the exam. (11 RT 1370, 1387-90.) Petitioner alleges that in so ruling, the trial court prohibited her from introducing evidence in support of her defense and permitted the prosecutor to introduce misleading, related evidence. (Pet. at 147.)

The California Supreme Court held on direct appeal that the claim "lacks merit since polygraph evidence, absent a stipulation by all parties, is not admissible." *Samuels*, 36 Cal. 4th at 128 (citing Cal. Penal Code § 351.1). The court held that there was no misconduct in the prosecution's presentation of evidence of Petitioner's alleged statement to Ms. Hutchison and that the trial court properly admitted the evidence "on the basis that it demonstrated defendant's consciousness of guilt." *Id.* (noting, in any event, that any misconduct was harmless).

Petitioner's claims regarding the trial court's rulings lack support in clearly established federal law. First, as discussed above, no clearly established federal law provides a basis for finding a due process violation at the guilt phase of trial from the admission of evidence that is prejudicial or inadmissible under state law. *See Holley*, 568 F.3d at 1101. Second, Petitioner's claim that the exclusion of her proffered evidence denied her the ability to present a defense is foreclosed by *United States v. Scheffer*, 523 U.S. 303, 305, 309 (1998) (holding that military rule of evidence making polygraph evidence inadmissible did not unconstitutionally

abridge defendant's right to present a defense). California Evidence Code § 351.1(a) explicitly barred evidence of "*any reference* to an offer to take . . . or taking of a polygraph examination" absent a stipulation by the parties, and Petitioner presents no clearly established federal law to show that the statute unconstitutionally infringed her right to present a defense. Cal. Evid. Code § 351.1(a) (emphasis added).

The California Supreme Court also reasonably rejected Petitioner's claim of prosecutorial misconduct. At most, the prosecutor elicited testimony in violation of the state evidentiary code and selectively took issue with the admission of polygraph-related evidence. The California Supreme Court reasonably determined that Petitioner failed to show a constitutional violation in the prosecutor's conduct.

Claim 14 is DENIED.

B. Claims 3D(7) and 3E(5)

In Claim 3D(7), Petitioner alleges that counsel was ineffective in failing to object "on constitutional grounds" to Ms. Hutchison's testimony. (Pet. at 63 ¶ 198(7).) The California Supreme Court may have reasonably denied the claim on the ground that the objection would have been meritless. (*See supra* § XIV(A)); *Juan H.*, 408 F.3d at 1273; *Wilson*, 185 F.3d at 990; *Molina*, 934 F.2d at 1447.

In Claim 3E(5), Petitioner alleges with respect to the polygraph exam results that trial counsel's "lack of preparation and failure to perfect Petitioner's rights resulted in the court ordering that testimony regarding Petitioner's having willingly submitted to numerous polygraph examinations and the exonerating polygraph test results would be inadmissible . . . ." (Pet. at 68-69 ¶¶ 216-218 (citing 11 RT 1363-92).)

First, Petitioner misstates the trial court's ruling. The court held that it would allow the introduction of the statements it took to be evidence of consciousness of guilt, discussed above, and that it would give "an instruction at

the end of this trial *if the stipulation regarding the admission of the polygraph examination is not arrived at.*" (11 RT 1369-70 (emphasis added); *see also* 11 RT 1371-72 ("If there is not a stipulation, I will draft a jury instruction that says, 'I would not let them talk about what the results of the test are. You are not to speculate,' but much finer legalese than that.").) Thus, the court left open the possibility of the parties reaching a stipulation and the results being admitted.

Second, the record supports the presumption that counsel's actions were strategic, and Petitioner presents no evidence to the contrary. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation omitted)). The record shows that counsel was making an effort to investigate the polygraph results before presenting them to the jury. (*See* 8 RT 864-65; 11 RT 1366 ("[B]efore I make that stipulation I'm going to have an independent person other than myself or Mr. Lee from the Police Department tell me what those polygraph results are. [¶] I'm not going to stick her head on the chopping block without covering our respective rears."); 11 RT 1369.) Counsel explained:

> In no way would I ever have expected the issue of the polygraph to come up. . . . We all know what the polygraph – what the rules are of evidence regarding polygraphs. [¶] After we talked about the polygraph I found a person who would read the polygraph, and Mr. Groshan, co-counsel, prepared a declaration for Department 100 [for authorization for funding] and we have been moving expeditiously. [¶] I believe it was a day or two between when the polygraph was discussed and when Detective Richardson told me or Miss Maurizi told me they had the polygrams or whatever you call them. [¶] So we are not dragging our feet. And I'm doing it as fast as I can.

(11 RT 1369.) Counsel may well have decided, after investigating, that the results could have been questioned on cross-examination or were not as favorable as they

first appeared. Petitioner presents no evidence to the contrary. The California Supreme Court's denial of the claim was reasonable.

Claims 3D(7) and 3E(5) are DENIED.

XV. Claims 15, 16, 3D(8), 3D(9), and 3E(4)

In Claim 15, Petitioner alleges that the trial court violated her right to due process, to the presentation of a defense, and to the impeachment of witnesses when it "erroneously excluded an exculpatory tape recording of a secretly obtained conversation between Petitioner and Mr. Bernstein, where they did not know they were being recorded, while allowing Detective Daley to testify inaccurately to that conversation." (Pet. at 147-48; *see also id.* at 148-58.) In Claim 16, Petitioner alleges that the prosecution committed misconduct by knowingly presenting misleading testimony from Detective Daley and opposing the introduction of the tape recording. (*Id.* at 158-60.) In Claims 3D(8) and 3D(9), Petitioner faults defense counsel for failing to object "on constitutional grounds" and "under the Rule of Completeness" to Detective Daley's testimony. (*Id.* at 63 ¶¶ 198(8), 198(9).) In Claim 3E(4), Petitioner alleges that defense counsel was ineffective for failing to "perfect" Petitioner's request to play the tape recording. (*Id.* at 67-68 ¶¶ 212-215.)

First, the trial court did not exclude the tape recording. As Petitioner recounts in Claim 3E(4), the trial court left open the possibility of admitting the relevant portions of the tape. (*Id.* at 67-68.) The trial court allowed the defense to cross-examine Detective Daley about his testimony and did not prohibit Petitioner from introducing relevant portions of the tape recording. The California Supreme Court reasonably decided that Petitioner failed to show that the trial court violated her constitutional rights. *See Samuels*, 36 Cal. 4th at 130.

Second, the California Supreme Court reasonably observed on direct appeal that "defense counsel's vigorous questioning of Daley" elicited from him an accurate account of the conversation. *See Samuels*, 36 Cal. 4th at 129 (denying

Petitioner's claim of prosecutorial misconduct); (8 RT 878-80). The state court on habeas review may have reasonably concluded on the same basis that Petitioner failed to show prejudice from any deficient performance by counsel in objecting to Detective Daley's testimony or seeking to have the relevant portions of the tape admitted into evidence.

Claims 15, 3D(8), 3D(9), and 3E(4) are DENIED.

Finally, the California Supreme Court held on direct appeal that Petitioner's prosecutorial misconduct claim was barred for lack of contemporaneous objection. *Samuels*, 36 Cal. 4th at 128-29. Because Petitioner cannot show cause and prejudice through ineffective assistance of counsel to excuse the contemporaneous objection bar as to Claim 16, this Court would apply the bar to dismiss Claim 16. As noted above, however, the parties have not been given an opportunity to brief the application of procedural bars. Should Petitioner wish to oppose the application of the procedural bar to Claim 16, Petitioner shall file a brief no later than 21 days from the date of this Order. Petitioner's brief and any response shall be governed by the page limits and schedule set forth below.

XVI. Claim 17

A. Factual Background

As the California Supreme Court summarized on direct appeal:

> Paul Gaul testified for the prosecution pursuant to a plea agreement. He recalled a conversation that took place on a sheriff's bus with defendant. Gaul testified defendant stated she understood that he was testifying against her because he was given no choice. Gaul also testified that defendant said, 'You're the only one who can cut me loose. You already – I know you took your deal. You can cut me loose.' Gaul testified that he told defendant that this was not the case and that he was simply telling the truth.
>
> To impeach Gaul's testimony, defendant attempted to call Wanda Piety. Piety was also present on the bus during the conversation between Gaul and defendant and allegedly heard Gaul tell defendant

> that he knew she was innocent, but that he had to testify against her in order to get his plea agreement. However, when faced with the possibility of being cross-examined by the prosecution, Piety advised the court that she would assert her Fifth Amendment rights. The defense then moved the court to grant Piety immunity, which the court denied.

Samuels, 36 Cal. 4th at 127. In Claim 17, Petitioner raises a number of challenges to the prosecutor's and the trial court's actions. (Pet. at 89-99; Opening Br. at 161-68.)

B. Overbroad Cross-Examination

At the outset, Petitioner argues that the prosecution:

> overreached by asserting its intent to cross examine Piety on matters far beyond the direct and as to her guilt of the crime with which she was charged. The trial court then grievously erred in holding it would allow this improper cross examination, effectively denying Petitioner her right to compel and present an important witness on behalf of the defense. . . . [T]he trial court's decision to allow the prosecution to pursue cross examination as to whether Piety was guilty of a wholly unrelated crime apparently resulted from some . . . superficial similarity between the crimes with which Petitioner was charged and those with which Piety was charged. (28 RT 3636.)

(Opening Br. at 92-93 (internal citation edited); *see* Pet. at 163-68; *see also* 28 RT 3621-22 (prosecutor's statement to trial court that Ms. Piety was accused of attempting to kill a former romantic partner and attempting to hire someone to kill him after she failed to do so).)

While Petitioner presents clearly established federal law in support of her right to present witnesses, Petitioner cites only state authority regarding the proper scope of cross-examination. (*See* Opening Br. at 92-93.) The United States Supreme Court has held that "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." *Alford v. United States*, 282 U.S. 687, 694 (1931); *see also Davis v. Alaska*, 415

U.S. 308, 316 (1974) ("Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, . . . the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."). Prior conduct involving moral turpitude and feelings of hostility toward the opposing party are both appropriate subjects of inquiry under California law. *People v. Williams*, 43 Cal. 4th 584, 632-34 (2008) (prosecutor was permitted to cross-examine defense witness on prosecution of the witness's husband by the same District Attorney's Office, to show "a feeling of hostility towards the party against whom [the wintess] is called" (internal quotation omitted)); *People v. Wheeler*, 4 Cal. 4th 284, 300 n.14 (1992) (witness may be asked on cross-examination whether she committed conduct involving moral turpitude); *see also People v. Hinton*, 37 Cal. 4th 839, 888 (2006) (attempted murder involves moral turpitude). Petitioner's argument that the allegedly overbroad cross-examination violated her right to present a defense fails for lack of clearly established federal law in support.

C. Striking Testimony

Next, Petitioner argues that the trial court erred in "ruling that if Piety was called, and if she did plead the Fifth, her entire testimony would be stricken." (Opening Br. at 94 (emphasis omitted); *see* Pet. at 163, 166.) Petitioner argues that the "remedy of striking the testimony of one who pleads the Fifth" did not apply to Ms. Piety's situation in part because the "proposed cross-examination . . . did not, rationally, tend to show that Piety was biased in Petitioner's favor . . . ." (Opening Br. at 94, 95-96 (citing California authorities).)

First, the trial court did not strike Ms. Piety's testimony as a formal matter. The court ruled that the prosecution's proposed cross-examination would be allowed (28 RT 3634, 3643); Ms. Piety told the court that she would plead the Fifth Amendment (28 RT 3636-37); and the court ruled that the defense could not call Ms. Piety to assert her Fifth Amendment privilege before the jury (28 RT 3643-44).

Second, as held above, Petitioner presents no clearly established federal law to show a constitutional violation in the trial judge's implicit ruling that a person could be biased in favor of another accused of similar crimes (*cf.* 28 RT 3631 (trial judge stating, "I think these cases are not just similar. I think they are remarkably similar.")), or in disallowing testimony from a witness without cross-examination. *Cf. Kansas v. Cheever*, 571 U.S. 87, 94 (2013) ("We explained in *Brown v. United States*, 356 U.S. 148, 156 (1958), which involved a witness's refusal to answer questions in a civil case, that where a party provides testimony and then refuses to answer potentially incriminating questions, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" (internal citation edited)). Petitioner's claim lacks support in clearly established federal law.

D. Refusing to Allow the Defense Not to Rest

After the trial court's ruling discussed above, defense counsel asked that the defense be allowed not to rest in the presentation of its evidence until after Ms. Piety's case was concluded. (28 RT 3644-45; *see* Pet. at 163.) The trial court responded, "Her case won't be over, if she is convicted, until all the appeals are done and that's a couple of years. . . . If her case gets over before this case is over and she's found innocent, we will call here [sic] then and there wouldn't be any 5th [sic] Amendment issues." (28 RT 3644-45.) Petitioner alleges that the start of Ms. Piety's trial "was deliberately and strategically delayed by the prosecutor until after Petitioner's trial, [showing] improper coercion by the prosecution which should have been, but was not, ameliorated by the trial court." (Opening Br. at 96.) Petitioner fails, however, to present clearly established federal law to show that a defendant is entitled to delay the conclusion of its presentation of evidence under these circumstances.

E. Failure to Grant Immunity

Petitioner further alleges that the trial court erred by denying her request to require the prosecution to grant immunity to Ms. Piety. (*See* 28 RT 3645; Opening Br. at 97-98; Pet. at 163-65.) This claim, too, lacks support in clearly established federal law. *See Allen v. Woodford*, 395 F.3d 979, 996 (9th Cir. 2005) (holding that there is no established constitutional rule providing "a due process right to judicial immunity for . . . defense witnesses, independent of prosecutorial misconduct"). Petitioner has failed to show prosecutorial misconduct as to Ms. Piety and fails to show a constitutional violation in the trial court's denial of Petitioner's request for immunity.

F. Refusal to Admit Written Statement

Finally, Petitioner alleges that the trial court erred in refusing to admit Ms. Piety's written statement for lack of foundation. (Opening Br. at 98-99; Pet. at 162-63 (citing 36 RT 4781 (Ms. Maurizi: People further object to [Exhibit] K which is the Wanda Piety statement and there has been no testimony so therefore no foundation. The Court: That's right.")).) Petitioner argues that there was "no legitimate dispute" over its authenticity and that "[i]f Piety was precluded from even testifying that she wrote the statement, Defense Investigator Bob Birney could have testified that . . . he saw the writing made or executed." (Opening Br. at 98.) The California Supreme Court may have reasonably rejected this argument on the basis that Petitioner failed to show that a foundation was ever, in fact, laid for the document, and the trial court did not erroneously prevent Petitioner from doing so.

Claim 17 is DENIED.

XVII. Claims 21B, 21C, and 22

In Claim 21B, Petitioner challenges the trial court's preliminary instruction on proof beyond a reasonable doubt (CALJIC 2.90). The California Supreme Court reasonably rejected the claim, as the United States Supreme Court approved

of an identical instruction in *Victor v. Nebraska*, 511 U.S. 1, 8 (1994). (Pet. at 184-86); *see Samuels*, 36 Cal. 4th at 131.

In Claim 21C, Petitioner challenges CALJIC 2.01, instructing the jurors on circumstantial evidence that if one interpretation of the evidence appeared to be reasonable and the other interpretation to be unreasonable, it was their duty to accept the reasonable interpretation and to reject the unreasonable. (Pet. at 186-90.) The California Supreme Court reasonably rejected the claim. *See Gibson v. Ortiz*, 387 F.3d 812, 822-24 (9th Cir. 2004) (holding that "[h]ad the instructions ended" on reasonable doubt after CALJIC 2.01 and others were given, as opposed to proceeding to CALJIC 2.50.1, "our inquiry would have ended with a denial of [the] petition"), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009).

In Claim 22, Petitioner alleges that defense counsel was ineffective for failing to make a pretrial motion for the prosecution to identify alleged accomplices and for failing to make a proper argument after the presentation of evidence to have Heidi Dougall, Celina Krall, and David Navarro identified as additional accomplices. (Pet. at 197-99.) Petitioner presents no authority to support his argument that a pretrial motion was necessary to render constitutionally adequate assistance of counsel. Defense counsel did request the identification of Ms. Dougall, Ms. Krall, and Mr. Navarro as accomplices after the presentation of evidence. (37 RT 4913-22.) Petitioner fails to specify how competent counsel would have better supported that request. The California Supreme Court may have reasonably rejected the claim as conclusory.

Claims 21B, 21C, and 22 are DENIED.

XVIII. Claim 33 as to Guilt Phase of Trial

In Claim 33, Petitioner alleges, in relevant part, that the cumulative effect of errors at the guilt phase of her trial warrants habeas relief. (Pet. at 265-68.)

As a preliminary matter, the Court finds no prejudice from any ineffective assistance of counsel at the guilt phase of trial, considered cumulatively. (*See, e.g.*, *supra* Claims 3E(1) (request for individual voir dire); 3D(1) (objection to judicial bias); 3D(6) (objection or request for admonition in response to alleged prosecutorial misconduct); 3D(4) (objection to testimony from Mr. Samuels' divorce attorney); 3D(5) (objection to Mr. Samuels' autopsy photographs); 3E(7) (objection to testimony from Susan Conroy regarding Frank Samuels); 3E(2) (questioning of Detective Daley); 3E(6) (questioning of Paul Gaul and Darrell Edwards on drug use); 3H(1) (presenting evidence that Anne Hambly was afraid of Petitioner); 3D(8), 3D(9), and 3E(4) (objection to Detective Daley's testimony about Petitioner's recorded conversation with Mr. Bernstein and efforts to admit relevant portions of the recording).) The Court has not found any prosecutorial misconduct or trial court errors at the guilt phase of trial.

"[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based on trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)). Although "prejudice may result from the cumulative impact of multiple deficiencies," Petitioner fails to show any such prejudice here. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983). Claim 33 as to the guilt phase of trial is DENIED.

PENALTY PHASE CLAIMS

I. Background

A. Deliberations

The penalty phase verdict was not a foregone conclusion for the jurors. The jury deliberated at the penalty phase of trial for approximately five days. (*See* 48 RT 6094, 6095, 6101, 6111, 6146, 6148.) On the second full day of deliberations,

the jurors asked, "Does 'without the possibility of parole' mean no chance of parole – ever!" (49 RT 6102; 4 CT 1144.) The trial court responded by referring the jurors to the given instructions on the available penalties. (49 RT 6102-09; 4 CT 1144 ("Please refer to paragraph 2 of instruction 1 and paragraph 1 of instruction 27."); *see* 5 CT 1148 ("It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances alleged in this case have been specially found to be true."); 5 CT 1174 ("It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.").) On the third full day of deliberations, a juror sent a letter to the trial judge stating that she had "come to realize that [she had] serious questions about [her] ability to vote for the death penalty should [she] become convinced of its appropriateness in this case." (4 CT 1142-43; 49 RT 6112-27.) The trial judge asked the juror:

> The Court: Have they taken any votes in there?
>
> Juror [A. W.]: Yes.
>
> The Court: Is it 11 to 1?
>
> Juror [A. W.]: One of them was, yes. . . . Let me say it's gone, you know, it's still going back and forth. . . .
>
> The Court: . . . When the vote was the 11 to 1, were you the 1?
>
> Juror [A. W.]: Yes.
>
> The Court: Okay. And then did the vote change after that?
>
> Juror [A. W.]: Yes.
>
> The Court: And did it change again?
>
> Juror [A. W.]: We haven't done another one.

(49 RT 6127-28.) The court removed Juror A. W. (49 RT 6141-42), and the jury continued to deliberate for two days.

B. Prosecutor's Penalty Phase Closing Argument

In her penalty phase closing argument, the prosecutor made references to the Bible. She argued:

> To those of you who have deep seated religious beliefs . . . , perhaps the thornier question is will the Bible or any of your other strongly held religious beliefs in the end prevent you or cause you to reject the death penalty. . . . Those of you with such concerns, and for no other reason, I'd like to quote again very briefly from the Bible. . . . Genesis chapter 9 verse 6; Exodus chapter 21 verse 12; and the Book of Numbers chapter 35, verse 31 all repeat the same basic message: 'Whoever sheds the blood of man, by man shall his blood be shed, for in his image did God make man.' . . . 'He who fatally strikes a man shall be put to death.' [¶] Exodus even answers a common defense argument that only God can take a life. [¶] 'It is not man, not God who is to execute murderers. By man shall his, the murderers [sic] blood be shed.' [¶] Although some look to the New Testament and quote, 'Vengeance is mine, I will repay saith the Lord,' in the very next chapter, Romans, Paul calls for capital punishment by saying, 'The ruler bears not the sword . . . in vain for he is the minister God, a revenger to execute wrath upon him that doeth evil.'

(48 RT 6034-35, 6037-38.) The prosecutor then said to the jurors she was not telling them to use the Bible, but was telling them "not to use the Bible" because the law given from the judge, and not the Bible, is the law of the land. (48 RT 6038.) She said she read the quotes "for any of you who may have personal reservations against the death penalty because you believe that it is against your own beliefs." (48 RT 6038); *compare People v. Wrest*, 3 Cal. 4th 1088, 1106-07 (1992) ("Although the prosecutor's [improper] comments here were strategically phrased in terms of what he was not arguing, they embody the use of a rhetorical device – paraleipsis – suggesting exactly the opposite."); (49 RT 6105 ([Defense counsel to the Court:] "She argued it [future dangerousness] without argument.

You can argue it without saying it. You don't have to say the magic words. [The prosecutor:] However, I made an express statement to the contrary. [Defense counsel:] Great. So you argued out of both sides of your mouth.")).

Moral justifications for the death penalty were a main focus of the prosecutor's penalty phase closing argument. Of the approximately 38 pages of transcript recording her argument (48 RT 6000-35, 6037-40), approximately 12 pages discussed moral justifications for capital punishment. (*See* 48 RT 6028-33, 6034-35, 6037-40.) The prosecutor quoted from the Bible in the conclusion of her remarks. *Cf. McDermott v. Johnson*, No. CV 04-457 DOC, 2017 WL 10562953, at *25 (C.D. Cal. Aug. 15, 2017) ("[I]n view of the fact that these [biblical] arguments comprised nearly all of the last seven pages of the prosecutor's closing penalty argument, they served as a "grand finale" substantially overshadowing the earlier arguments." (internal citation omitted)) (remarking that prosecutorial misconduct in biblical arguments would warrant habeas relief if not procedurally barred); *Roybal v. Davis*, 148 F. Supp. 3d 958, 1051 (S.D. Cal. 2015) (granting relief where "[t]he misconduct [of the prosecutor's biblical arguments] was deliberate, substantial, and perfectly timed with crescendo effect at the close of argument").

Just as the prosecutor told the jurors they should not consider the Bible, she told the jurors not to consider the possibility that Petitioner's sentence could be commuted. She argued:

> Even in California there was a time when the death penalty was repealed and all those on death row had their sentences commuted. [¶] Now, please don't misunderstand me. I'm not suggesting that that will happen in this case. You cannot consider that and that's not the reason I bring it up. [¶] The only reason I bring it up is to suggest to you that such analogies and such comparisons are not fair.

(48 RT 6033.) The prosecutor also told the jury that Petitioner "will have appellate review." (48 RT 6029.)

II. Allegations

The prosecution's penalty phase presentation consisted of only one witness, Mr. Samuels' sister, who provided relatively brief victim impact testimony. (45 RT 5776-82 (testimony of Susan Conroy).) The prosecution's penalty phase case overwhelmingly rested on its guilt phase presentation. In Claims 3B, 3C, and 3G, Petitioner challenges trial counsel's failure to object to the admission of prejudicial character evidence, discussed in detail below.

In Claim 3G, Petitioner alleges that counsel, "having failed to make a generalized motion in limine, failed to limit and exclude the mass of bad character evidence that overwhelmed the trial. Trial counsel failed to understand the prosecution's theory was that bad people do bad acts and that Petitioner had to be portrayed as a 'bad person.'" (Pet. at 76.) In Claim 3B, Petitioner alleges, in relevant part, that the evidence "would have been inadmissible and could have been objected to under California Penal Code section 190.3 as aggravation evidence at the penalty phase of a capital trial," yet "by the time the penalty phase arrived, all of this evidence had already been presented." (*Id.* at 60.) In Claim 3C, Petitioner alleges that there was no reasonable strategy in allowing the admission of the evidence. (*Id.* at 61-62.)

Petitioner raised the claims on state habeas review. The California Supreme Court summarily denied them on the merits, as it did all of Petitioner's claims that were not premature. (*See* Lodg. D5); *see also Richter*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories . . . could have supported[] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.").

III. Defense Counsel's Presentation of Evidence and Failure to Object

The bulk of the objectionable evidence concerned Petitioner's use of cocaine and marijuana, her daughter Nicole's use of cocaine and Petitioner's

provision of cocaine to her, Petitioner's provision of cocaine to Nicole's friends, alcohol use by Nicole and her underage friends while out with Petitioner, and photographs Petitioner took with Nicole to enter a "cheesecake photo" contest. The evidence was not relevant to the crimes charged, even considering Nicole's alleged involvement in the crimes and considering relevance broadly.

A. Cocaine Use

1. Counsel's Unreasonable Strategy

Defense counsel sought to present evidence that:

> David Navarro is in fact one of the persons who participated in the killing of Bob Samuels. He did so on behalf of Jim Bernstein. [¶] He has a business arrangement, had one with Jim Bernstein during the time period where they both sold cocaine to persons such as Anne Hambly, Paul Gaul, and others. [¶] Mr. Navarro used cocaine and admitted doing so prior to one of the interviews with the Los Angeles Police Department. [¶] And I think this is my offer of proof as to issues that might arise, as well as the fact that Mr. Navarro had motive and opportunity and knew Miss Hambly, and we believe was involved in the killing of Jim Bernstein over Mr. Bernstein's drug business.

(10 RT 1167-68.)

In advance of Mr. Navarro's testimony, defense counsel told the trial court, "To my knowledge, to this day he [Mr. Navarro] has not been granted immunity. And I believe there are widespread 5th Amendment issues with this witness." (10 RT 1167.) The prosecutor responded:

> I have interviewed him. I do not believe, based on my interview, that there are any 5th Amendment privileges. . . . I don't believe that this witness will testify in any way, shape or form that he was involved in any one of those two incidents. That is, either one of the murders. [¶] He will testify that he was solicited by the defendant, and that he turned down that solicitation. [¶] As far as any indication of drug use, there's been a great deal of questions and answers about drug use since the beginning of trial. And I'm sure there will be up until the end. [¶] However, the People can't prosecute a drug use in the

> abstract based on statements. There has to be a corpus. There has to be some evidence of drugs. And there is none. [¶] So I don't believe, again at this time that there is any need for an attorney.

(10 RT 1167-69.)

The trial court had at times appointed counsel for witnesses to advise them on their privilege against self-incrimination. The prosecutor informed the court that one of Mr. Navarro's close family members was a criminal attorney and was present with him in court. (10 RT 1167, 1169.) The court and both parties considered the matter resolved. (*See* 10 RT 1169.) Defense counsel did not request a hearing under California Evidence Code § 402 to determine whether Mr. Navarro would invoke his Fifth Amendment privilege (*compare* 10 RT 1227-28), and none was held, even though the court held several such hearings as to other witnesses. (*See, e.g.*, 13 RT 1569-81, 1654; 14 RT 1726-29; 25 RT 3281-82; 26 RT 3425-29; 28 RT 3620-44.)

Later the same day, defense counsel sought to question Celina Krall, Nicole's close friend, about Mr. Navarro's and Mr. Bernstein's drug sales. (10 RT 1221.) The prosecutor objected:

> I think David Navarro's possible involvement in drugs is irrelevant in this case and it's also improper character evidence. If either one of them was under the influence or taking drugs such that it would affect credibility or actions being under the influence, that's one thing; but I think that it's irrelevant, improper character evidence and under [California Evidence Code section] 352 should not be allowed to be gone into.

(10 RT 1221-22.) Defense counsel responded that the drug transactions were relevant and counsel believed that Ms. Krall was involved in them. (10 RT 1222.)

Counsel argued that "the jury is allowed to hear what type of person she is as far as her character" and also that:

> Mr. Navarro and Mr. Bernstein were involved in this business together and Mr. Navarro made threats to kill Mr. Bernstein because of business issues that Mr. Navarro – Mr. Bernstein would not pay any jewelry bills that he charged off of Mr. Navarro's credit cards. . . . David Navarro and Jim Bernstein entered into an agreement to sell cocaine and that David Navarro, as part and parcel of his payment for his assistance in the Samuels homicide [at Mr. Bernstein's direction], David Navarro was given Jim Bernstein's cocaine business except Jim kept one or two good clients. . . . [I]t is a rift between Mr. Navarro and Mr. Bernstein regarding the line of credit involved. [¶] And Mr. Groover told me he heard Mr. Bernstein threaten Mr. Navarro and furthermore he saw Mr. Navarro at his home, being Navarro's, with a gun saying that he was going to go over and kill Mr. Bernstein. . . . Our theory is that Mr. Gaul and Mr. Edwards killed Mr. Bernstein but it was done through David Navarro . . . that Mr. Navarro is one of three people behind Jim Bernstein's murder and these are the motives. . . . It is the business relations between the two that provide a motive for Mr. Navarro to turn on Mr. Bernstein and have motive to kill him.

(10 RT 1222-27.)

Defense counsel told the court that when interviewed by police, Mr. Navarro admitted selling drugs. (10 RT 1224.) The prosecutor argued that "that should be gone into with the witness himself [Mr. Navarro] and not through" Celina Krall. (10 RT 1227.) Defense counsel responded that he had "a sneaky suspicion David Navarro, if over your objection it's allowed, David Navarro is going to have no recollection of dealing in cocaine . . . ." (*Id.*)

On voir dire, the prosecution elicited testimony from Ms. Krall that the first time she used cocaine, Jim Bernstein gave it to Petitioner and Nicole, and Petitioner supplied it to her. (10 RT 1234.) Ruling on the prosecutor's objection

to evidence of Mr. Navarro's drug sales, the court stated:

> I'm amazed at both your positions, but I have been amazed before. [¶] I'm going to admit all of it including the part the defendant supplied cocaine and everything else. [¶] I think out of an abundance of fairness demands it. It's amazing one would ask the question. I'm amazed the other side would object to it, but that's your right.

(10 RT 1250.) Defense counsel did not argue at any point that Ms. Krall's testimony should be limited to exclude prejudicial evidence of Nicole's or Petitioner's cocaine use.

When Mr. Navarro took the stand seven days later, he had been granted immunity. (13 RT 1626.) Petitioner does allege that the prosecution improperly failed to disclose any information regarding Mr. Navarro's immunity. On questioning by the prosecutor, Mr. Navarro openly testified to his cocaine sales and distribution with Mr. Bernstein. (13 RT 1615-29.) He testified that Mr. Bernstein's customers "had already transferred over" to him by the time Mr. Bernstein left town because he was afraid of the police. (13 RT 1625, 1648.) He also testified that at one point, Mr. Bernstein told him that "there was a hit on me [Mr. Navarro] or he was going to put out a hit on me." (13 RT 1621.) Mr. Navarro said he took it seriously and talked to his friends about it. (*Id.*) Defense counsel was able to ask Mr. Navarro, "Did you go over and tell Mr. Groover that you had a gun and you were going to blow Jim Bernstein's head off because he was cheating you in cocaine and didn't pay you for the jewelry?" to which Mr. Navarro replied, "I don't believe I said that or I don't remember saying that." (14 RT 1738-39.)

Defense counsel's push to allow questions about Mr. Navarro's and Mr. Bernstein's cocaine sales had repercussions throughout the trial. In one instance, the prosecution sought to question its own witness about whether he had ever been involved in the use or sale of cocaine, to establish that he had not and to bolster his credibility. (11 RT 1303-04.) Defense counsel attempted to argue that "just

because I raised it with a witness or two doesn't mean every other witness who comes on should be subject to, 'Did you ever use or sell cocaine?' [¶] I mean, it is improper character evidence. . . . I believe it is improper even though I raise the issue regarding other witnesses." (11 RT 1305-06.) The prosecutor asserted, "I didn't raise the issue of drug usage. In fact, I specifically made every attempt to keep it out of the consideration of the jury. [¶] It was only Mr. Nameth who introduced the issue of cocaine usage with regard to the lack of credibility of many of my witnesses." (11 RT 1304.) Defense counsel responded that he "brought up the cocaine issue with David Navarro. I never asked Celina if she should used [sic] cocaine. That was Miss Maurizi's line of questioning so she could get it in that Mary Ellen gave it to her on that occasion." (11 RT 1305.) The trial court ruled that it would decide whether each witness could be questioned about cocaine use or sales on an individual basis, "because Mr. Nameth did open the door." (11 RT 1306.)

At a later point in the trial, defense counsel moved to exclude testimony from Jim Bernstein's brother, Michael Bernstein, that he observed Petitioner using what she told him was the drug ecstacy. (18 RT 2254-57.) The prosecutor told the court:

> I don't know if this motion is limited just to statements about the taking of the drug ecstasy or not; however, . . . there's evidence that she in fact used cocaine during their presence. And since counsel has introduced the issue of cocaine usage and has cross-examined other witnesses as to their usage of it, I believe that that becomes relevant and is not excludable under 352.

(18 RT 2255.) Defense counsel responded that he was only asking to exclude the statement about ecstasy. (*Id.*) The trial judge ruled that he "ha[d] not heard anything" at that point to prompt him to exclude the evidence, but that defense counsel could raise an objection as the evidence was developed. (18 RT 2256-57.) The prosecutor did not ask Michael Bernstein about Petitioner's drug use.

Later, during the direct examination of witness Anna Davis, defense counsel elicited testimony that she witnessed a drug transaction between Mr. Bernstein and Mr. Navarro at Petitioner's home. (25 RT 3194 (preceding a successful objection by the prosecution for lack of foundation).) The trial judge warned defense counsel, "[I]f you want to paint your client out to be present when all these dope dealings are going on – you understand you are doing that?" (25 RT 3196.) Defense counsel responded by implying that Petitioner was not present at the time, and the judge reiterated, "I want to make sure you are aware of that." (*Id.*) Defense counsel responded, "With the good comes the bad sometimes." (*Id.*)

At a minimum, defense counsel would have been able to present the evidence about Mr. Navarro's cocaine sales with Mr. Bernstein through limited questioning of Mr. Navarro on his statements to police. Counsel need not have opened the door to extensive testimony about Petitioner's and Nicole's cocaine use by questioning Ms. Krall on the matter. Effective counsel would have confirmed that Mr. Navarro would not invoke his Fifth Amendment privilege and explored the availability of Mr. Navarro's beneficial testimony by requesting a hearing under California Evidence Code § 402. It was unreasonable for counsel to accede to "the bad" evidence entering with "the good." The record makes plain that counsel's unreasonable strategy allowed significant, damaging evidence to come before the jury. The evidence summarized below was admitted through defense counsel's own questioning or absent any objection from defense counsel, except as noted.

2. Evidence Presented

a. Petitioner Used Cocaine and Marijuana

Celina Krall testified on redirect examination by the prosecutor that Petitioner used cocaine at Petitioner's home in Celina's presence. (11 RT 1279-80.) Celina's brother, John Krall, testified on direct examination by the prosecution that he was present at Petitioner's home when Petitioner was smoking

marijuana. (12 RT 1434.) Anna Davis, on cross-examination by the prosecutor, testified that she saw Petitioner use cocaine twice and that others used cocaine often at Petitioner's home and in limousines Petitioner hired. (25 RT 3246-47, 3250.)

On direct examination, Petitioner denied using cocaine with Celina Krall, said Ms. Krall never used cocaine in her presence, and said that it was false that Petitioner bought cocaine from Mr. Bernstein that Petitioner, Nicole, and Celina used. (32 RT 4242.) She testified on direct examination that she "told off" Jim Bernstein in November 1987 because he attempted to sell drugs in her living room and told him never to do so again. (32 RT 4233-36.) Petitioner acknowledged on cross-examination that she used cocaine "maybe five or six times total," all in or around March 1988, and that the first time was on her birthday in March 1988. (34 RT 4445-47.) She testified on cross-examination that she used cocaine in a limousine with Anne Hambly and Heidi Dougall once. (34 RT 4445.) She denied on cross-examination using cocaine in her home and said she was not aware that there frequently had been cocaine in her home. (34 RT 4447.) She also testified on cross that she learned later from Anna Davis that cocaine was used at her home. (34 RT 4447-48.)

Defense counsel could have had no reasonable strategy in introducing the testimony on direct examination or in failing to object to the questions on cross-examination. Among other problems, counsel's failure to object allowed the jury to hear that Petitioner used cocaine herself approximately four months after telling her daughter not to do so and finding cocaine in her daughter's dresser. (*See infra* § II(A)(2)(b).)

b. Petitioner's Daughter Used Cocaine and Petitioner Provided it to Her

Defense counsel elicited testimony from Nicole that she first used cocaine in early 1987 (26 RT 3454; *cf.* 27 RT 3593, 3599-3600 (on cross-examination)),

when she was approximately 17 years old. (*See* 26 RT 3444.) Nicole testified on cross-examination that she was addicted from the second time she used cocaine, in the spring or summer of 1987, because she wasn't hungry and wasn't eating. (27 RT 3600, 3613-15; 28 RT 3680-81.) She testified on cross-examination that for the next three months, she used cocaine monthly. (27 RT 3612-13.) Defense counsel elicited her testimony that by late 1987, she was using cocaine every day. (26 RT 3459.)

Defense counsel elicited testimony from Nicole that Petitioner discovered her drug use when she found cocaine in one of her drawers in November 1987. (26 RT 3465-66.) Defense counsel elicited Nicole's testimony that when she found the cocaine, Petitioner "told me not to use it. And if she ever caught me using it, that I was going to be in trouble." (26 RT 3466.) On direct examination, Petitioner testified that in late 1987, she found drug paraphernalia with a white powdery substance in Nicole's room and confronted Nicole about her drug use. (32 RT 4238-39; *see also* 34 RT 4447 (same topic on cross-examination).) Petitioner further testified on direct that she found out that Jim Bernstein was supplying Nicole with cocaine when Nicole told her in 1987. (34 RT 4414.) Defense counsel elicited Nicole's testimony that she continued to use cocaine daily for almost a year, from late 1987 (26 RT 3459, 3465) to late 1988.

John Krall testified on questioning by the prosecutor that in the fall of 1988, he and Nicole were at Petitioner's home while Petitioner was smoking marijuana. (12 RT 1433-35; *cf.* 28 RT 3658 (Nicole's testimony on cross-examination that she, Nicole, had used marijuana once).) He testified on cross-examination by defense counsel that he and Nicole used cocaine on the way there. (12 RT 1449.) The prosecutor elicited Nicole's testimony that for the last four months of her cocaine use, from December 1988 through March 1989, she was using cocaine twice a day. (27 RT 3684.) Nicole testified on cross-examination that she quit

using cocaine by March or May 1989 (27 RT 3684; 28 RT 3660), around the time she turned nineteen. (*See* 26 RT 3444.)

Bonnie Bernstein testified, in response to questions posed by the prosecutor, that she saw Petitioner snort cocaine in a bathroom maybe five or six times one evening in March 1989, not only in Nicole's presence but with Nicole snorting cocaine as well. (18 RT 2295, 2299-2300.)

The prosecutor questioned Nicole in detail about her drug use and her use of cocaine in particular, including when her cocaine use began (27 RT 3592-93, 3599); from whom she got it (27 RT 3612; 28 RT 3686-87, 3714, 3726, 3730); if she snorted, smoked, or injected it (28 RT 3683); where and with whom she used it (27 RT 3599-3600, 3613); and whether she used it with Petitioner on the occasion Ms. Bernstein described. (28 RT 3706.) The prosecutor elicited testimony from Nicole that she liked cocaine because it helped her to lose weight. (27 RT 3613.)

Defense counsel's introduction of evidence regarding Nicole's cocaine use and Petitioner's response to her cocaine use was not based on an effective strategy, even under the deferential standards of 28 U.S.C. § 2254(d) and *Strickland*. Counsel's questions and failure to object allowed the presentation of evidence that Petitioner: (a) did not discover Nicole's cocaine habit until Nicole was using daily, after using and not eating for at least six months, and discovered it not through Nicole's behavior but in her dresser; (b) simply told Nicole not to use it and that she would be in trouble if she did; (c) used cocaine herself approximately four months later (*see supra* § II(A)(2)(a)); (d) failed to notice or act when Nicole arrived at her house under the influence of cocaine a year after she told Nicole not to use again, on an occasion when Petitioner was herself using marijuana in Nicole's presence; and (e) used cocaine with Nicole, according to one witness.

c. Petitioner Provided Cocaine to Her Daughter's Friend

Celina Krall, on redirect examination by the prosecutor, testified that she first used cocaine at Petitioner's home in the year after she graduated high school. (11 RT 1278; *see* 10 RT 1172.) She testified that Jim Bernstein handed the cocaine to Petitioner and Petitioner shared it with her. (11 RT 1278-79.) Ms. Krall said that Petitioner was using cocaine on that occasion and that she, Ms. Krall, knew what to do with it by watching Petitioner and Nicole. (11 RT 1280.) When the prosecutor asked if she remembered when she first used cocaine, defense counsel asked the trial judge, "May we approach?" (11 RT 1278.) The trial judge declined. (11 RT 1278.) Defense counsel did not object and did not make any other requests as the prosecutor continued her line of questioning. (11 RT 1278-80.) Counsel could have had no reasonable strategy in failing to do so.

B. Nicole and Her Friends Consumed Alcohol with Petitioner While Underage

1. Testimony from Celina Krall

Celina Krall, on direct examination by the prosecutor, testified that when she and Nicole were 17 and 16 years old, respectively, Petitioner began to take them to nightclubs where she and Nicole would drink alcoholic beverages. (10 RT 1173.) This continued over the course of thirty or more times before Celina graduated from high school, she testified. (10 RT 1174.) The prosecutor asked:

Q. Was there ever any problem with you getting into bars and being served alcoholic beverages at that time when you were that young?

A. No.

Q. Why not?

A. Because she knew most of the people there.

Q. Who is "she?"

A. Mary Ellen.

Q. I'm sorry. Did I interrupt?

A. So they didn't ask any questions.

(10 RT 1173.) On cross-examination, defense counsel asked Ms. Krall a series of questions about whether the nightclubs ever checked identification ("ID") or asked her for ID. (10 RT 1201-04.)

The prosecution primarily elicited testimony from Ms. Krall about: (a) a failed plan by Petitioner, Nicole, and Mr. Bernstein to have Mr. Samuels killed while stealing his car, and Petitioner's statements that she wanted a new plan (10 RT 1180-81); (b) Nicole's statements to Celina on the day Celina learned Mr. Samuels was dead and within the following week (10 RT 1184-87); (c) Petitioner's and Nicole's statements to her about their concern that Mr. Bernstein would talk to police and Nicole's statements to her that Mr. Bernstein "was going to be taken care of." (10 RT 1195-98.) Celina's alcohol use at bars with Petitioner was unrelated to that testimony, with the exception of her testimony that when discussing a place to have Mr. Samuels killed, Celina suggested a certain establishment, and "[t]here was talk that we would go there and have a drink and see how it was, you know. See if it could be done there" (10 RT 1182-83), and with the possible exception of her testimony that she met Petitioner's new fiancé at a club. (10 RT 1187.) Defense counsel could have had no strategic basis for failing to object to Ms. Krall's testimony.

2. Testimony from Petitioner, Nicole, and Anne Hambly

On direct examination, although defense counsel asked Petitioner if she did anything to get Nicole or Celina into the bar or night club or to "see that Nicole or Celina could drink," and she said, "[a]bsolutely not," counsel went on to ask if she saw Nicole drink alcohol. (32 RT 4183-84.) Petitioner then said "you had to have a mandatory cocktail if you sat down," which Nicole would "sip." (32 RT 4184.) On cross-examination, the prosecutor asked Petitioner whether it was her idea of

good parenting to teach her daughter to go bar hopping at 16 years of age. (35 RT 4545.) Petitioner said it was not. (*Id.*)

Nicole testified on cross-examination that she went to clubs with Petitioner when she was underage with a fake ID. (28 RT 3650-53.)

Petitioner's friend, Anne Hambly, who was 20 years old when she met Petitioner in 1984, testified on direct examination by the prosecutor that Nicole and her friends would sometimes go to clubs with Ms. Hambly and Petitioner. (20 RT 2520-23.)

Defense counsel could have had no strategic basis for introducing Petitioner's testimony on direct examination or in failing to object to the prosecutor's questions to Petitioner, Nicole, and Anne Hambly.

C. Petitioner and Nicole Posed for "Cheesecake" Photos

As noted above, in his opening statement at the guilt phase of trial, defense counsel argued that Detective Daley, the lead investigator in the deaths of Mr. Samuels and Mr. Bernstein, made Petitioner a suspect after his investigation had been unsuccessful for more than a year and after Petitioner declined his romantic advances. (7 RT 718-20.) Defense counsel told the jury that Detective Daley "carried around with him photographs of Mary Ellen Samuels that were taken by the police department from the crime scene and showed them to people. These were photographs, one of Miss Samuels in a negligee and one of Miss Samuels in a bathing suit." (7 RT 719.)

On direct examination, defense counsel elicited testimony from Petitioner about:

> five pictures or six pictures that were taken of me that I was in a teddy, bathing suit, in a teddy sitting down, different pictures like that. . . . My daughter and I were going to be in a mother and daughter contest, and they were taken at my home . . . by Anne Hambly, and we were going to send them in. She took pictures of both my daughter and I . . . . [W]e used up most of the roll, probably

> 24 pictures. . . . Maybe ten [were of Petitioner and others were of Nicole].

(32 RT 4313-14.) On cross-examination, the prosecutor asked Petitioner:

> Q. . . [W]ere you shy when you posed with your daughter for those mother-daughter cheesecake photos that you told us about on Tuesday?
>
> A. Yes. I still had my clothes on.
>
> Q. . . What is this contest that you and your daughter were entering?
>
> A. If I can remember, it was a mother-daughter contest. It goes on at the beginning of the year, I believe, and you are judged on figure, personality, things like that. . . .
>
> Q. Did the contest rules specify that you had to have pictures in lingerie and teddies and bikinis?
>
> A. They said swimsuits and sports outfits. . . .
>
> Q. Your idea of good parenting was to teach her [Nicole] to dress scantily and go bar hopping at 16, right?
>
> A. No, it was not.
>
> Mr. Nameth: Objection.
>
> The Court: Overruled.
>
> Q. By Ms. Maurizi: And your idea of good parenting . . . was to pose with her for mother-daughter cheesecake type photos, right?
>
> A. It wasn't a cheesecake type photo.

(34 RT 4472-73; 35 RT 4545; *cf.* 36 RT 4733 (defense counsel clarifying on redirect that Nicole was 18 years old at the time of the photographs).)

Even if defense counsel may have had a reasonable strategy in introducing the photographs to establish Detective Daley's romantic interest in Petitioner (*see, e.g.*, 32 RT 4312-13 (Petitioner's testimony that Detective Daley told her they were "great pictures" and that he would keep them until the investigation was over); 34 RT 4474 (Petitioner's testimony that Detective Daley commented to her

on photos of her in a teddy and a negligee)), counsel could have had no strategic basis for introducing testimony that the photos were taken as part of a session for a mother-daughter contest. Petitioner did not make clear until cross-examination that the photographs of her in a teddy and a negligee were not for the contest, but only for "having fun with the camera." (34 RT 4473-74; 35 RT 4545-46; *see also* 36 RT 4731-32 (redirect examination).) Defense counsel reasonably should have moved to exclude any evidence of Nicole's involvement in the photo shoot as irrelevant and prejudicial. Counsel could have had no reasonable strategy in introducing that evidence.

IV. Analysis

Counsel acknowledged the prejudicial nature of the evidence in his guilt phase closing argument:

> They [the prosecution] deal with the defense in a manner which is contrary to what Miss Maurizi asks you to do and that is not to look at the testimony but to look at the character. . . . [L]et's accuse her of being a bad mother. . . . Let's accuse her of taking her daughter and friends to bars. . . . I brought up the cheese cake photos on defense because the cheese cake photos were taken by Detective Daley. . . . But this is another red herring and another smoke screen that the prosecution is blowing in your face because the cheese cake photos were mother-daughter photos of her and Nicole. . . . Miss Maurizi got a couple jabs in about, you know, you think a good parent is somebody who has her daughter pose with a bathing suit on or whatever. . . . This is dodging the issues of the case. This is dirtying up the character of Miss Samuels. . . . [T]hey want you to find that the lifestyle of Mary Ellen Samuels is such that you will not like it and you will not like her. Therefore, you should convict her. . . . [T]he prosecution wants you to judge Mary Ellen Samuels not by her testimony, but by her lifestyle.

(42 RT 5522-23, 5530, 5537-38.) By that time, however, counsel's arguments against the prejudicial evidence rang hollow. When the trial progressed to a penalty phase, counsel did not object to the jury's consideration of the guilt phase

evidence. The only objection counsel raised was to the court's provision of the guilt phase exhibits in the jury room without a request from the jury. (49 RT 6096-97 ("[I]f they [the jurors] said, 'Can we see . . . certain exhibits from the guilt phase,' I wouldn't have a problem with that at all. But absent their request, to give them two boxes and charts and diagrams and pictures clearly overemphasizes one of the factors that they have to make a determination upon. . . . [I]t emphasizes the 'a' factor [the circumstances of the offense] . . . .").)

Notwithstanding the aggravating evidence presented at trial, counsel's failure to object to the evidence discussed above was prejudicial. The prosecution would not have been able to introduce it at the penalty phase of trial. "Under well-established law, evidence of a defendant's background, character or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." *People v. Carter*, 30 Cal. 4th 1166, 1202 (2003) (citing *People v. Boyd*, 38 Cal. 3d 762, 773-74 (1985)); *see also People v. Banks*, 59 Cal. 4th 1113, 1197 (2014), *abrogated on other grounds by People v. Scott*, 61 Cal. 4th 363, 391 n.3 (2015). The record shows that counsel did not make a strategic decision in the penalty phase to open the door to that evidence. *See People v. Lucas*, 12 Cal. 4th 415, 495 (1995) (discussing *People v. Noguera*, 4 Cal. 4th 599, 644 (1992)).

Petitioner's claims satisfy 28 U.S.C. § 2254(d). It would be unreasonable to conclude that the evidence was not prejudicial when considered at the penalty phase of trial or that counsel acted strategically in presenting or failing to object to it. *See Richter*, 562 U.S. at 103 (petitioner must show "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (decision must be "objectively unreasonable" (internal quotation omitted)); *Strickland*, 466 U.S. at 687. Had counsel adequately objected and refrained from introducing the evidence at the guilt phase of trial, there is a reasonable probability that the trial

court would have excluded it. There is also a reasonable probability that the jury would have returned a verdict for life without the possibility of parole. Because the existing record is adequate to decide the claims, the Court need not authorize discovery or an evidentiary hearing. *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("[A]n evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record." (emphasis in original)).

V. Remaining Penalty Phase Claims

The portions of Claims 3B, 3C, and 3G pertaining to evidence not discussed above are DENIED. The California Supreme Court may have reasonably concluded that Petitioner failed to show deficient performance or prejudice as to that evidence because the evidence was properly admissible.

In the penalty phase portion of Claim 1, Petitioner alleges a constitutional violation in the trial court's admission of prejudicial character evidence. The United States Supreme Court has stated that the "test prescribed . . . for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.'" *Kansas v. Carr*, 136 S. Ct. 633, 644-45 (2016) (quoting *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994)). This Court has not identified a case "in [Petitioner's] favor" on the matter, however. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (internal quotations and alterations omitted)). Since this Court has determined that trial counsel's presentation of and failure to object to the evidence was deficient and prejudicial, it does not reach the penalty phase portion of Claim 1. The penalty phase portion of Claim 1 is DENIED AS MOOT.

Petitioner's remaining penalty phase claims and penalty phase portions of claims are DENIED AS MOOT.

ORDER

Claims 3D(1), 3D(2), 3D(3), 3D(4), 3D(5), 3D(6), 3D(7), 3D(8), 3D(9), 3E(1), 3E(2), 3E(3), 3E(4), 3E(5), 3E(6), 3E(7), 3F(1), 3F(2), 3H(2), 3I, 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 21B, 21C, and 22 are DENIED. As to the guilt phase of trial, Claims 1, 3H(1), and 33 are DENIED.

Claims 3B, 3C, and 3G are GRANTED IN PART AND DENIED IN PART as discussed above.

Claim 1 as to the penalty phase of trial and all remaining penalty phase claims are DENIED AS MOOT.

Claims 2, 7, 13, and 16 are subject to dismissal as procedurally barred. Should Petitioner wish to oppose the application of the procedural bars, Petitioner shall file a brief, limited to 20 pages, no later than 21 days from the date of this Order. Respondent shall file a response, limited to 20 pages, no later than 14 days from the date of Petitioner's brief. Petitioner shall file any reply, limited to 10 pages, no later than 7 days from the date of Respondent's brief. Should Petitioner elect not to challenge the application of procedural bars within 21 days from the date of this Order, the Court will issue an order dismissing Claims 2, 7, 13, and 16.

IT IS SO ORDERED.

Dated: 11/21/19, 2019.

SJO

S. JAMES OTERO
United States District Judge

KeyCite Yellow Flag - Negative Treatment
Habeas Corpus Conditionally Granted by Samuels v. Espinoza, C.D.Cal., March 9, 2020

36 Cal.4th 96
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Mary Ellen SAMUELS, Defendant and Appellant.

No. S042278.
|
June 27, 2005.
|
As Modified on Denial of Rehearing Sept. 21, 2005.*

* George, C.J., did not participate therein.

|
Certiorari Denied April 17, 2006.
|
See 126 S.Ct. 1771.

Synopsis
Background: Defendant was convicted in the Superior Court of Los Angeles County, No. PA002269, Michael R. Hoff, J., of the first degree murders of her husband and the man she hired to kill him, and jury found true special circumstances allegations of multiple murders and murder for financial gain. Defendant was sentenced to death and appeal was automatic.

Holdings: The Supreme Court, Brown, J., held that:

evidence of defendant's lavish lifestyle after murder of husband was relevant;

any erroneous evidentiary rulings did not show judicial bias;

defendant had no right to obtain judicial immunity for witness;

evidence supported removal of juror during penalty phase;

prosecutor's biblical references in penalty phase were harmless;

prosecutor's references to defendant's appellate rights and Governor's commutation powers were not misconduct, and

standard instruction on life without possibility of parole was sufficient.

Affirmed.

Concurring opinion by Werdegar, J., with Kennard, J., concurring.

Concurring and dissenting opinion by Kennard, J.

Attorneys and Law Firms

***109** Joel Levine, under appointment by the Supreme Court, for Defendant and Appellant.

***110** Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sharlene A. Honnaka and Kyle S. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Opinion

BROWN, J.

***101** **1129** A jury convicted defendant Mary Ellen Samuels of the first degree murders of Robert Samuels and James Bernstein, soliciting the murders of Robert Samuels and James Bernstein, and conspiring to murder Robert Samuels and James Bernstein. (Pen.Code, §§ 187, subd. (a), 653f, subd. (b), 182, subd. (a)(1); hereafter all statutory references are to the Penal Code unless otherwise indicated.) The jury found true the financial gain special circumstance as to the murder of Robert Samuels, the multiple-murder special circumstance, and the allegation that a principal in the murder of Robert Samuels had used a firearm. (§§ 190.2, subd. (a)(1), (3), 12022, subd. (a)(1).)

The jury returned a death verdict for each murder. The trial court denied defendant's motions for a new trial and to reduce the penalty verdict. The court imposed a death sentence. This appeal is automatic. (§ 1239, subd. (b).)

We affirm the judgment in its entirety.

I. STATEMENT OF FACTS

A. Guilt Phase

Defendant was married to Robert Samuels. On October 31, 1986, defendant filed for divorce. Even after the divorce proceedings were initiated, defendant and Robert Samuels were cordial, and defendant continued to work in the Subway restaurant she and Robert Samuels owned. However, by November 1988, just before his murder, Robert Samuels was depressed and had a less than friendly relationship with defendant.

***102** On October 31, 1988—approximately two months before he was killed—Robert Samuels went to his divorce attorney, Elizabeth Kaufman, and signed a document seeking changes to his divorce agreement. Robert Samuels wanted to run the Subway restaurant because he was unemployed and felt he would be better at running the business. He also wanted to reduce spousal support payments below the $1,200 per month level because he was no longer able to pay that amount. The modification was never filed because Kaufman was waiting for Robert Samuels to complete a portion of the paperwork.

1. The Solicitation and Murder of Robert Samuels

Beginning in 1987, defendant solicited people to murder Robert Samuels on numerous occasions.

Anne Hambly, defendant's friend, testified defendant told her that after several attempts to find someone to kill Robert

Samuels had failed, defendant was able to get James Bernstein to agree to commit the murder. Bernstein was dating defendant's daughter, Nicole Samuels. Bernstein was apparently angered when defendant told him that Robert Samuels had abused Nicole. A month before Robert Samuels was murdered, Bernstein said he wanted Samuels "taken care of permanently" because he was a child molester and batterer. He asked his employer, Charles Mandel, if he knew anyone who could "take care of it." Mandel provided Bernstein with the phone number of Mike Silva. Also, during November and December 1988, Bernstein asked a friend who owned a gun shop if he could get some weapons.

On December 7, 1988, defendant told Anne Hambly that Robert Samuels was dead and that she planned to "discover" his body in two days. On December 8, ***111** 1988, Nicole Samuels called her friend, David Navarro, and said "it's done" in reference to Robert Samuels's murder.

****1130** On December 9, 1988, the Los Angeles Fire Department responded to a call from Robert Samuels's home. Robert Samuels was found dead. He had been dead for over 12 hours and was killed by a shotgun blast fired into his head from close range. Samuels also suffered a blunt force trauma to his head that was a contributing factor to his death.

Defendant and Nicole Samuels were present when the police arrived. Defendant and Nicole worked to make it appear that there had been a struggle in the house. Defendant told the police she discovered Robert Samuels's body while dropping off the family's dog. Defendant sought to bolster this story by leaving messages on Samuels's answering machine regarding her plans to drop off the dog.

***103** Anne Hambly testified that she also went to Robert Samuels's house the night he was found dead. Referring to the murder of Robert Samuels, defendant told Hambly that she could not believe that "it had finally happened" and that she had given Bernstein money six months earlier to arrange the killing. Defendant feared being caught and was also afraid to speak because she thought the police had "bugged" her car, purse, and home.

At trial, the prosecution introduced evidence showing defendant collected on several insurance policies after Robert Samuels's death. The total amount of these policies was in excess of $240,000. In addition, the prosecution introduced evidence that a sandwich shop owned by Robert Samuels and defendant was sold in early 1989, and defendant kept the proceeds of approximately $70,000. Additional evidence introduced by the prosecution showing how defendant benefited from Robert Samuels's death included: (1) defendant kept a car owned by Robert Samuels; (2) she received approximately $6,000 in uncashed payroll checks of Robert Samuels; and (3) she refinanced the family home after Robert Samuels's death, thereby gaining possession of an additional $160,000.

Defendant began to live a lavish lifestyle after Robert Samuels died. In addition, defendant made several incriminating statements after his death. For example, when asked by Anne Hambly who Mike Silva was, defendant told Hambly that Silva was hired by Bernstein to kill Robert Samuels. Defendant also told a friend, Marsha Hutchinson, that if she were not careful in her divorce proceedings, then Hutchinson's husband might decide to put a hit on her. Defendant also spoke and acted in a manner that led Bernstein's older brother and sister-in-law to believe that defendant had Robert Samuels killed.

James Bernstein also made incriminating statements after Robert Samuels's death. He told his employer, Charles Mandel, that Robert Samuels's murder had been taken care of and that he received money from defendant to pay Silva for his part in the crime.

2. The Solicitation and Murder of James Bernstein

On June 27, 1989, James Bernstein was killed. The circumstances leading to his murder are as follows: David Navarro and James Bernstein met in February 1989. Navarro testified he met Bernstein through Nicole Samuels, who was a friend of Navarro's girlfriend.

Navarro and Bernstein became friends and they sold drugs together until Bernstein disappeared in June 1989. Bernstein and Navarro were together once when Bernstein received a page, called the number he had been sent, and then went to ***112** meet Mike Silva. Bernstein referred to Silva as the "hit man."

***104** Navarro made an anonymous call to the police and provided them with the phone number Bernstein received via the page and Mike Silva's name. Navarro also provided the names of defendant and Bernstein to the police. Los Angeles Police Officer John Birrer received Navarro's call on May 1, 1989. After Navarro provided this information, the police served search warrants. Police searched Bernstein's apartment on May 16, 1989, in connection with the murder of Robert Samuels. The police also searched the victim's house.

In late May or early June 1989, Bernstein told a friend, Rennie Goldberg, he was feeling remorseful and frightened of being ****1131** caught. He wanted to confess his involvement in Robert Samuels's murder. By June 1989, Bernstein had become so afraid that he wanted to move out of the area. By the end of June 1989, Bernstein was ready to go to the police and admit what he knew. He told Navarro that he and Mike Silva had killed Robert Samuels and that defendant had paid them for it. He repeatedly said that defendant had solicited him to murder Robert Samuels. Bernstein stated that defendant wanted Robert Samuels killed for insurance money, and that one person had been paid but did not do the job so she approached Bernstein to see if he would do it. On June 26, 1989, Bernstein told his older brother that he was frightened and that he was the only person who could "burn Mary Ellen."

After Robert Samuels's murder, defendant told Anne Hambly that she wanted Bernstein killed because she thought he would go to the police and disclose her involvement in the murder. In March or April of 1989, Anne Hambly introduced Paul Gaul to defendant. Gaul was Hambly's live-in boyfriend. Hambly believed Gaul could help defendant with her trouble with Bernstein. Defendant and Gaul had several conversations about Robert Samuels's death. In the first conversation, defendant mentioned she received insurance money from Robert Samuels's death and that Bernstein was blackmailing her for her involvement in the murder. In the second conversation, defendant repeated the substance of the first conversation and added that she wanted Robert Samuels killed because he had abused Nicole and she wanted insurance money. During a third conversation, defendant mentioned a failed attempt to kill Robert Samuels. Defendant also said that she had paid for Robert Samuels's murder, but that the murder was done sloppily and that she had not expected it to be done in her house with blood everywhere.

Even in their first conversation, Gaul came to believe that defendant wanted his help in killing Bernstein. Gaul testified that it was not until a later conversation that defendant expressly asked Gaul for help. She told Gaul that she wanted Bernstein killed because he was blackmailing her. She also told ***105** Gaul that Bernstein was selling drugs to children.[1] Defendant told Gaul that she would pay for Bernstein to be killed. Defendant spoke with Gaul five to 10 times about killing Bernstein, discussing payment two to four times.

[1] Gaul testified that his brother had been killed by drug dealers and that he had been angered by it.

Prior to Bernstein's murder, defendant called Gaul. She told Gaul that she was taking a trip to Cancun and wanted Bernstein murdered before she returned. Defendant agreed to pay Gaul $5,000 for killing Bernstein. Another form of payment was that defendant would forgive a loan *****113** made to Anne Hambly. To assist him in killing Bernstein, Gaul solicited Darryl Ray Edwards. Edwards agreed to kill Bernstein for $5,000.

In June 1989, at defendant's request, Bernstein moved in with Anne Hambly and Paul Gaul. When he moved out of his apartment, Bernstein told his apartment manager that he was moving out of town to avoid the police. Bernstein moved in with Hambly and Gaul because he was afraid the police were closing in on him.

On June 27, 1989, Paul Gaul and Darryl Ray Edwards killed James Bernstein. On that morning, Gaul met Edwards at a bar and they started drinking. Their plan to murder Bernstein involved getting Bernstein to go up to an area near Frazier Park. Gaul and Edwards planned to tell Bernstein that Edwards knew some drug dealers in Frazier Park and that Gaul, Edwards, and Bernstein would go and rob them.

The two men separated, planning to meet at Anne Hambly's later that day. Gaul returned to Hambly's house around 5:00 or 6:00 p.m. Edwards arrived approximately two hours later. Bernstein was at Hambly's house. Gaul, Edwards, and Bernstein talked about going to rip off drug dealers. Although he did not initially agree to the plan, Bernstein was curious and wanted more information. Subsequently, Gaul, Edwards, and Bernstein left Hambly's house in defendant's car. Gaul was the driver.

After approximately 40 minutes, they ended up on an isolated dirt road. However, it turned out to ****1132** be a private driveway and several dogs came running at the car. Edwards told Gaul to immediately get out of the driveway, so Gaul placed the car in reverse and drove away. About five to 10 minutes later, Edwards yelled "Now" or something similar. Gaul slammed on the car's brakes, put the car in park, and turned off the headlights. Edwards grabbed Bernstein's neck from behind and began to choke him. Bernstein began to scream, but Gaul twice hit him in the side of the head or neck to keep him quiet. Gaul accidentally hit Edwards, which loosened Edwards's grip on Bernstein. Bernstein opened the car door and jumped out. Edwards and Gaul got out of the car and chased ***106** after Bernstein. Edwards caught Bernstein and wrestled him to the ground. Gaul held Bernstein's legs, while Edwards choked him. Bernstein asked, "Why?," and Gaul said that it was because he talked too much. Gaul stopped holding Bernstein's legs and joined in with Edwards. Bernstein struggled for three to five minutes, then stopped. Gaul put his ear to Bernstein's chest to listen for a heartbeat, but did not hear one. An autopsy on Bernstein confirmed that he had been strangled to death.

Gaul and Edwards placed Bernstein's body in the backseat of the car. Edwards drove to a dark and isolated area. During the drive to this area, Gaul took off Bernstein's belt, which had the name "James" on it, and threw it over a cliff. Gaul also threw Bernstein's pager over an embankment.

When Edwards stopped the car, he and Gaul pulled Bernstein's body out of the backseat and put it over an embankment. Gaul and Edwards then drove back to Anne Hambly's house. Upon returning to Hambly's house, Gaul, Edwards, and Hambly discussed what had happened. Gaul and Edwards told Hambly that they had killed Bernstein.

Anne Hambly made a phone call to defendant, who was in Cancun, Mexico, at the time, and let her know that Bernstein was dead. Hambly did so by using a "code" that she and defendant had agreed to. The code involved Hambly's calling defendant to say that Hambly had spoken *****114** to her sister. This statement was a signal to defendant that Bernstein was dead and that it was safe for defendant to return from Mexico.

3. Defense Case

The defense case centered on defendant's testimony and the testimony of her daughter, Nicole. Defendant testified that her six-year marriage to Robert Samuels had been stormy. Defendant claimed Samuels developed a drinking problem and was abusive when he drank.

Defendant testified that she moved out of her residence with Robert Samuels on October 3, 1986, because of Samuels's drinking. According to defendant, during the separation period, she and Samuels were able to generally agree on subjects, such as custody, child and spousal support, as well as the operation of the couple's Subway restaurant. Defendant testified that she considered reconciling, but decided not to when she learned that Samuels had physically and sexually abused Nicole.

Despite learning that Robert Samuels had physically and sexually abused Nicole, and physically abused her, defendant testified she never wanted to kill Samuels and never asked anyone else to do so. She also denied involvement in any physical attacks on ***107** Samuels, including an incident where she allegedly struck Samuels with a pipe. She also testified that her financial situation in 1987 was fine, even after her separation from Samuels.

With respect to Robert Samuels's murder, Nicole Samuels denied any involvement in a plot to murder him. She testified that Robert Samuels physically and sexually abused her and that she moved out of her family's home because of this abuse. Nicole stated that she did not tell her mother of the abuse until after the couple had separated because she was afraid that the couple would separate for this reason. Although she testified that she told several people, including friends and a school counselor, about these incidents, she never reported the abuse to law enforcement officials.

With respect to the murder of James Bernstein, Nicole testified that she and Bernstein met at a party in the beginning of 1986. Bernstein would subsequently visit the Subway ****1133** restaurant where Nicole worked and she and Bernstein developed a friendship. For her part, defendant testified that she started to socialize with Bernstein toward the end of 1986. With respect to the prosecution's allegation that she was concerned with Bernstein speaking to the police about Samuels's murder, defendant testified she was not concerned because she had nothing to do with the murder. She stated that Bernstein never

threatened or blackmailed her and that she did not want him dead, let alone conspire to have him killed. Defendant testified she felt terrible upon learning Bernstein was dead.

B. Penalty Phase

Susan Conroy, Robert Samuels's sister, was the only witness the prosecution presented during the penalty phase. She testified with respect to victim impact evidence and described her good relationship with Robert Samuels.

Defendant offered the testimony of several witnesses who attested to her good character.

Myrna Aaron, an outreach worker for the Jewish Committee for Personal Service, visited defendant on an ongoing basis. Aaron found defendant to be a sensitive person and able to cheer up others despite her own circumstances. Aaron testified that defendant would be an "invaluable source of support" for other inmates if she were allowed to live.

***115** Dawn Goodall, a fellow county jail inmate of defendant, testified that defendant was a "wonderful woman" who would do much more for others if allowed to live. She testified that defendant never exhibited a temper and tried to break up altercations between inmates.

*108 Jacquelyne Gunn was defendant's fellow inmate for almost two years. Gunn testified that defendant would give Bible study classes almost every night. Gunn testified that when she could not afford to buy an item while in prison, defendant would buy it for her with no expectation of anything in return. Gunn also stated that defendant helped sick inmates by giving them soup, water, and warm towels. Gunn confirmed that defendant would help defuse altercations between inmates. Gunn also testified about an incident in prison when she received bad news and became suicidal. Gunn called for defendant, and her presence spiritually comforted and made Gunn feel safe. Gunn said that defendant aligned herself with weaker inmates and her friends were all people of color. Gunn asked the jury to let defendant live.

Defendant's childhood friend, Barbara Favilla, testified that defendant was fun to be with and easy to get along with. Favilla testified that she wanted to see defendant get a life sentence.

Defendant's first husband, Ronnie Lee Jamison, testified about their marriage. Citing their good marriage and her redeeming values, Jamison asked the jury to spare defendant's life.

Stephanie Hughes, defendant's former stepdaughter, testified that defendant had treated her as if she were her own daughter and that they had a great relationship. Hughes also asked the jury to allow defendant to live.

Ellen Gurnick, defendant's mother, testified that she had throat cancer and would be going into surgery the next day. She testified that defendant had a normal childhood, was a popular girl, and a good enough actress to get the lead part in a high school drama production. Although Mrs. Gurnick had not seen defendant much since Robert Samuels's death, she testified that she and defendant frequently communicated via the telephone and mail. She asked the jury to spare defendant's life.

Alexander Gurnick, defendant's father, testified about defendant's numerous friendships as a girl. He recalled defendant babysitting for her younger brother while he and his wife worked. He asked the jury to let defendant live.

In addition, three sheriff's deputies testified on defendant's behalf. Timothy Murakami, Gary Mann, and Dennis Ransom testified that they had experienced no problems with defendant during her incarceration, although on cross-examination, Murakami testified **1134 he believed defendant was a manipulative person.

***109 II. DISCUSSION**

A. Pretrial Issues

1. Denial of Pitchess Requests

Defendant moved for discovery of the personnel records for former Police Officer James Nowlin and Detective George Daley, which the trial court denied.

Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305, allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. ***116** (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82, 260 Cal.Rptr. 520, 776 P.2d 222.) This court has held that the good cause requirement embodies a "relatively low threshold" for discovery and the supporting declaration may include allegations based on "information and belief." (*Id.* at p. 94, 260 Cal.Rptr. 520, 776 P.2d 222.) Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid.Code, § 1045, subd. (b).) The statutory scheme balances two directly conflicting interests: the peace officer's claim to confidentiality and the defendant's compelling interest in all information pertinent to the defense. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53, 19 Cal.Rptr.2d 73, 850 P.2d 621.) Here, the trial court denied defendant's *Pitchess* motions. Defendant claims the court erred in denying the motions and this error also violated her constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

a) James Nowlin's records

Although James Nowlin was not involved in the murder investigation of Samuels or Bernstein, defendant sought Nowlin's records from the Costa Mesa Police Department where Nowlin had been a reserve police officer. Defendant asserted that Nowlin was violent and unstable and had a motive to kill Robert Samuels. In support of her request, defendant alleged numerous facts including: (1) Nowlin was initially investigated as a suspect in Samuels's death because Samuels had a brief sexual relationship with Nowlin's estranged wife and Nowlin was known to be jealous and violent; (2) Nowlin owned shotguns and had been suspended from the Costa Mesa Reserve Police Officer Program because he fired a handgun during an argument with his wife and then lied about the incident; (3) a former ***110** policeman reported that Nowlin's girlfriend had told him that Nowlin said he had done "something very bad and that he could go to prison for a long time," and that Nowlin had asked the girlfriend to give him an alibi; (4) Nowlin reconciled with his wife on the day that Samuels's body was discovered.

The trial court denied the motion, holding that defendant failed to lay a proper foundation under *Pitchess*. Here, even if the trial court erred because defendant made a showing of good cause in support of his request (see *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 29 Cal.Rptr.3d 2, 112 P.3d 2), such error was harmless in light of the extensive evidence linking defendant to the murders of Samuels and Bernstein. (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.)

b) Detective Daley's records

George Daley was the homicide detective assigned to the Samuels case. With respect to Daley, defendant claims his files "might have led to discovery of prior instances of improper sexual advances, as the defense asserted he had made toward defendant. Moreover, the request sought to examine prior instances of dishonesty on any matter, which might have detracted from Daley's credibility." The trial court reviewed Daley's records in camera and concluded there was nothing to disclose.

Regarding Daley's file, the records were made part of the record on appeal but were sealed, and appellate counsel has not been permitted to view them. ****1135** We have independently examined the materials and conclude the trial court did not abuse its discretion by refusing to disclose the contents of Daley's personnel files. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039, 130 Cal.Rptr.2d 672, 63 P.3d 228.)

2. Failure to Conduct Individual Sequestered Voir Dire

The trial court rejected defendant's request to question each juror individually *****117** on the issue of the death penalty. Defendant contends that as a result the trial court's voir dire did not allow the parties to make intelligent decisions about whether a prospective juror was qualified to sit as a juror. Defendant claims this error violated her constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution.

Contrary to defendant's contention that the trial court improperly restricted voir dire, the record shows the trial court's voir dire was adequate. The trial court asked the appropriate death-qualifying questions required by *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 and *Wainwright v. Witt* (1985) 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, lengthy juror questionnaires were completed, and both sides had the opportunity to question each prospective juror. There is no indication that the trial ***111** court abused its discretion during voir dire. (*People v. Burgener* (2003) 29 Cal.4th 833, 865, 129 Cal.Rptr.2d 747, 62 P.3d 1.)

Defendant also argues that she was entitled to individually sequestered voir dire pursuant to our decision in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301, and that the trial court erred in denying her request. As in the past, we reject this argument. Proposition 115, passed June 5, 1990, enacted Code of Civil Procedure former section 223, which abrogated our decision in *Hovey*. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1198–1199, 120 Cal.Rptr.2d 477, 47 P.3d 262.)

3. Removal of Prospective Juror Robert P.

Defendant contends the trial court erroneously excused Prospective Juror Robert P. for cause. Defendant claims this error violated her federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

The United States Supreme Court has stated that the proper standard to excuse a juror for cause based on his or her views on capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Wainwright v. Witt, supra,* 469 U.S. at p. 424, 105 S.Ct. 844.)

In his juror questionnaire Robert P. provided a series of contradictory answers to questions regarding his views on the death penalty. For example, although he indicated that the state should impose the death penalty on everyone who intentionally kills another person, Robert P. admitted that he might be tempted to find special circumstances to be false, no matter the evidence presented, in order to avoid the death penalty question. Robert P. was also uncertain if he could set aside his own feelings regarding what the law ought to be and follow the law as set forth by the court. When asked how he would address a conflict between an instruction of law and his own belief or opinion, Robert P. wrote, "Certain beliefs I hold strongly. For those I would have to talk to him. I may not be willing to bend." Finally, on the final page of his questionnaire, Robert P. wrote: "I feel the death penalty should be used in certain cases. I do not think I could be the one to pull the switch. I have thought much about how I would handle evidence that pointed to the death penalty. I would vote for it, but I would not feel good about it. I cannot say until actually faced with the situation, but *****118** I might become hesitant as the issue turns from abstract discussion to reality."

During oral voir dire, Prospective Juror Robert P. also made contradictory statements about his ability to follow the law. He initially stated he was ***112** willing to set aside his own views and follow the law. However, when asked further about putting aside his ****1136** personal feelings and following the law as explained by the court, Robert P. admitted that "there's certain things that I wouldn't be willing to bend on.... I don't know if any of those things are going to come up in this case, but I just wanted to leave the door open just in case to say that some things might happen. Mostly this has to do with my religious beliefs." Further, when the prosecutor asked if there were any situations where he would be unwilling to follow the court's instructions, Robert P. stated, "Yes. And I don't know of an example to bring up, but ... maybe something might." Based on our review of the record, we find no federal error in the trial court's excusing Robert P. for cause. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424, 105 S.Ct. 844.)

B. Guilt Phase Issues

1. Alleged Error in Admitting Evidence of Defendant's Bad Character

Defendant sets forth numerous instances of alleged trial court error in admitting character evidence. Defendant claims these evidentiary errors violated her due process and fair trial rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. With respect to many of these claims,[2] such as those showing the lavish lifestyle defendant enjoyed after Robert Samuels's death, there was no error. The evidence was relevant to prove defendant's financial motive for killing Samuels. (*People v. Sapp* (2003) 31 Cal.4th 240, 313, 2 Cal.Rptr.3d 554, 73 P.3d 433.)

[2] As noted above, these claims relate to evidence that after Robert Samuels's death defendant not only lived a lavish lifestyle and made extravagant purchases, she was callous and indifferent to Samuels's death. Evidence of defendant's extravagant purchases included a new Porsche automobile; costly custom clothing from a store called "Trashy Lingerie"; scuba equipment for Dean Groover; a 30–inch television and a car phone; and a fur coat. Additional evidence of defendant's lavish lifestyle included a trip to Mexico and the purchase of property in Cancun, Mexico; a financial investment in Groover Productions; paying for the cost of others to travel to Las Vegas, San Francisco, and Cancun; being free with her money; throwing a birthday party for herself at a country club; using limousines for transportation; and expending most, if not all, of the money she received from Robert Samuels's death within one year. Evidence of defendant's callousness and indifference included defendant's posing for a photograph while covered only in money; commencing a relationship with Dean Groover; forging Robert Samuels's mother's signature; and refinancing the home she inherited after Samuels's death and providing fraudulent information on the related loan documents.

In addition, certain evidence was properly admitted to rebut defendant's claim that defendant was upset about Robert Samuels's death. (See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 913, 8 Cal.Rptr.2d 678, 830 P.2d 712; ***113** *People v. Barnett* (1998) 17 Cal.4th 1044, 1131, 74 Cal.Rptr.2d 121, 954 P.2d 384.) This included evidence showing that defendant did not pay for Samuels's funeral and that she did not give Samuels's car or money to his brother, and testimony from police officers who were present at the crime scene that related how defendant dressed and acted provocatively. In addition, defendant failed to object to the admission of this evidence, so any claims with respect to this evidence are waived. (*People v. Lewis* (2001) 25 Cal.4th 610, 673, 106 Cal.Rptr.2d 629, 22 P.3d 392.)

****119** Also, the prosecution's questioning of Nicole Samuels about the possibility she stole proceeds from the Subway restaurant was not error because it was relevant to the prosecution's cross-examination of Nicole with respect to her credibility.

With respect to evidence relating to defendant's dressing in an unseemly manner and her attempt to teach a bird how to call

Detective Daley derogatory names, the trial court erred in admitting this evidence, but such error is harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

As to the remaining instances of alleged error in admitting character evidence, even if the evidence was admitted in error, any error was harmless in light of the prosecution's extensive case against defendant.[3] (*People v.* ****1137** *Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

3 These instances include: defendant requested that Paul Gaul steal paperwork for her in Mexico; defendant attended bars and clubs; defendant received pornographic letters; defendant used drugs; defendant allowed her daughter to drop out of high school; defendant allowed her daughter to leave the family home at age 16; defendant took her minor daughter and her minor friends to bars; defendant's daughter and her daughter's friends used drugs supplied by defendant while at defendant's house; defendant influenced her daughter and her daughter's friends to dress inappropriately; defendant allowed her daughter to take a trip to Mexico with James Bernstein; defendant's daughter allowed herself to be photographed in a suggestive position; defendant's daughter refused to return or pay for jewelry she had "hocked" that had been bought for her by James Bernstein with David Navarro's credit and suggested that a false insurance claim be made; defendant's daughter was engaged to James Bernstein while engaged to another man.

Finally, after reviewing the record on appeal, we believe that any evidentiary error by the trial court, cumulative as well as individual, was harmless. The prosecution presented other evidence that overwhelmingly linked defendant to the murders of Robert Samuels and James Bernstein. This evidence included testimony from Anne Hambly and Paul Gaul, one of Bernstein's admitted killers, both of whom implicated defendant in the murders. It is not reasonably probable the jury would have reached a different result had the evidence been excluded. The evidence about which defendant complains shows her to be an indifferent, self-indulgent, and careless parent who set a poor example. It added little to the compelling case against her. ***114** Accordingly, any evidentiary error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.) Assuming defendant's constitutional claims are preserved, they fail "because generally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91, 24 Cal.Rptr.3d 507, 105 P.3d 1099.)

2. Alleged Judicial Bias

Defendant contends the trial court made inconsistent evidentiary rulings, thereby demonstrating the court's bias, and depriving her of her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Failure to raise the issue of judicial conduct at trial waives claims of statutory or constitutional error. Because defendant failed to raise a proper objection, the issue is waived on appeal. (*People v. Wright* (1990) 52 Cal.3d 367, 411, 276 Cal.Rptr. 731, 802 P.2d 221.) In any event, as set forth below, after reviewing these rulings, we reject defendant's claim of judicial bias. (*People v. Clark* (1992) 3 Cal.4th 41, 143, 10 Cal.Rptr.2d 554, 833 P.2d 561.)

*****120** *a) Handwriting exemplar of Nicole Samuels*

Defendant claims the trial court erred by preventing Nicole Samuels from providing a handwriting exemplar. As a result of this alleged error, defendant claims she was prevented from rehabilitating Nicole. We disagree. On cross-examination by the prosecution, Nicole admitted to signing some checks she gave to James Bernstein. On redirect examination, defense counsel asked Nicole if she would be "willing, if asked by the prosecution, to give your handwriting exemplar so it might be matched." The prosecutor objected on relevance grounds and the trial court upheld this objection. Defense counsel attempted to have the judge reconsider his ruling, but he stated, "You can have a handwriting expert do the same thing. You are forcing

one side to do the other person's work." There was no error and defendant sets forth no reason for how she was prevented from introducing the evidence.

b) Cross-examination of Detective Daley

Defendant claims that on direct examination Detective Daley testified that he never told witnesses or suspects any specifics about the status of the investigation or evidence recovered. During defendant's testimony, defense counsel attempted to elicit testimony about references Daley made concerning the investigation. The prosecutor objected on hearsay grounds and the court sustained the objection. Defendant claims the prosecutor promised Detective Daley would be recalled and asked about any disclosures. Detective Daley ***115** was recalled by the prosecution, but defendant complains the prosecutor failed to ask Detective Daley about any disclosures and the trial court's rulings in this context ****1138** supporting the prosecution exhibited bias. This claim lacks merit. Defendant had the opportunity to thoroughly cross-examine Detective Daley on this issue and to impeach his credibility, yet failed to do so.

c) Disclosure of investigator's interview notes

The prosecution called John Krall as a witness to testify about an incident where defendant allegedly struck Robert Samuels with a pipe. Defendant sought to impeach Krall with questions relating to an interview Krall had with a defense investigator. At trial, the prosecution requested the defense to disclose any interview notes it had with respect to this interview. Defense counsel objected, claiming that he did not intend to call the investigator as a witness or refer to the notes. Initially, the trial court ruled defendant must disclose the interview notes. However, the trial court ruled it would examine the written notes to determine if the notes contained any work product or material protected by the attorney-client privilege. After doing so, the trial court held that there was no work product or privileged material and that defendant was required to turn over the notes.

Even if the trial court erred in requiring the defendant to turn over the notes to the prosecutor (see *People v. Sanders* (1995) 11 Cal.4th 475, 520, 46 Cal.Rptr.2d 751, 905 P.2d 420), in light of the overwhelming evidence against defendant, such error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.) In addition, any erroneous evidentiary ruling by the trial court does not show that the court was biased. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312, 153 P.2d 734; *Scott v. Family Ministries* (1976) 65 Cal.App.3d 492, 510, 135 Cal.Rptr. 430 ["A possibly erroneous ruling ****121** on evidence does not establish prejudice of the trial judge"].)

d) Alleged improper denial of defendant's right to cross-examine prosecution witness David Navarro

On cross-examination of David Navarro, defendant inquired about his immunity agreement with the prosecution. During the course of this cross-examination, defendant asked Navarro his opinion as to "who was the person who determines whether your testimony is truthful?" The prosecutor objected on the grounds that the question was asked for a legal conclusion and an improper opinion. The trial court sustained the objection. Defendant claims she was precluded from properly cross-examining Navarro because of this ruling and that this ruling exemplified the court's bias. We disagree. When the trial court sustained the prosecution's objection, defense counsel did not ***116** object to this ruling. Rather, he continued with his spirited cross-examination of Navarro, including further questions with respect to his immunity agreement with the prosecution. There is no showing of judicial bias in this ruling nor that defendant suffered any prejudice in cross-examining Navarro.

e) Impeachment of Anna Davis

On direct examination, defense witness Anna Davis testified that when she was in a limousine with defendant, Heidi Dougall, and Anne Hambly, she saw Dougall and Hambly use cocaine. On cross-examination, the prosecution inquired into Davis's use of cocaine. Defendant objected to this line of questioning claiming it was improper impeachment. After appointing counsel for Davis, the trial court allowed the prosecution to continue with this line of questioning. The trial court did not commit error. As set forth above, Davis testified on direct examination on cocaine use by Dougall and Hambly in a limousine, so defendant initially raised the issue. On cross-examination, Davis admitted that she and defendant also used cocaine with Dougall and Hambly. The trial court properly allowed the cross-examination into Davis's cocaine use because it was relevant to Davis's credibility. Again, defendant fails to show how this ruling shows judicial bias.

f) Cross-examination of prosecution witness Heidi Dougall

Defendant attempted to cross-examine Heidi Dougall by inquiring about her psychiatric hospitalization and attempted suicide. The prosecution objected on the grounds that Dougall's credibility was at issue, not her ****1139** mental health. Defendant claims the trial court was biased because it refused to permit any reference to Dougall's hospitalization or attempted suicide.

"[T]he mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question." (*People v. Gurule* (2002) 28 Cal.4th 557, 591–592, 123 Cal.Rptr.2d 345, 51 P.3d 224.) Here, the record contradicts defendant's claims that she was not permitted to adequately cross-examine Dougall. The trial court ruled that it was appropriate to ask Dougall whether she had taken any medications, drugs, or alcohol that could have influenced her observations. The trial court allowed defendant to inquire whether Dougall had taken any medications that changed her powers of recollection. Defendant was allowed to ask Dougall whether she was in the care of doctors, but not if she was ever institutionalized. The trial court disallowed defendant's questioning about Dougall's suicide attempt, stating that it was irrelevant unless *****122** defendant could show some factor in the case was related to it. Defendant promptly proceeded with her cross-examination of Dougall, ***117** asking questions with respect to her treatment by doctors and her medical condition between July 1988 and December 1989.

Based on our review of the record, the trial court correctly limited defendant's cross-examination to questions relevant to Dougall's credibility, and defendant's claim that she was precluded from making any inquiry about Dougall's medical condition lacks merit. Thus, there was no showing of bias with respect to the court's rulings on Dougall.

g) Admission of check

The trial court admitted into evidence a $1,500 check drawn from defendant's personal account dated October 17, 1989, and made out to "cash." Defendant objected on relevance grounds and that no foundation had been laid for the check's admission. On appeal, defendant claims this ruling was erroneous and exhibited the trial judge's bias. This claim lacks merit. The check was relevant because the prosecutor set forth that the financial gain circumstances involved in the case were still pending when this check was dated, and the check therefore supported the prosecution's theory of the case. But we agree with defendant that the record is less than clear that the prosecutor laid a proper foundation for the admission of the check. However, even if the trial court erred in admitting this evidence, such error was harmless in light of the extensive evidence against defendant and the minor effect this check would have on the jury. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

h) Alleged threats to defense counsel

Defendant called her daughter, Nicole Samuels, as a witness. Nicole testified that she had been sexually abused by Robert Samuels. On cross-examination, the prosecutor attempted to attack Nicole's credibility by asking her why she waited until May 1994 to reveal this information. On redirect examination, defendant sought to introduce testimony from Nicole about statements she made during interviews with defense investigator Marty Jensen with respect to the alleged sexual abuse.

Outside the presence of the jury, the prosecutor objected, claiming that defendant failed to turn over any discovery statement pursuant to section 1054.3. Defense counsel responded by stating no written statement from the interview existed, so there was no disclosure requirement. After defense counsel admitted prior knowledge about Nicole's statements to the investigators, the trial court noted its frustration at defense counsel for springing this information on the court during the trial. However, the trial judge never made any threats that exhibited bias. Although the trial judge said he would ***118** consider monetary sanctions, he concluded they would not be effective. In fact, the trial court did not prohibit the defense counsel from asking questions about the interview. Rather, the record reflects defense counsel withdrew his question about Nicole's interviews with the investigator because he realized it would allow the prosecution to elicit testimony from the investigator stating that ****1140** she did not take any notes because she was following the express instructions of former counsel. Defense counsel therefore withdrew his question, not because of threats or intimidation by the trial judge, but for strategic purposes.

i) Alleged improper impeachment of Nicole Samuels

Defendant claims the trial court erred by allowing Detective Daley's rebuttal testimony *****123** relating to Nicole Samuels's refusal to provide any information to the police about her alleged sexual abuse by Robert Samuels. Daley testified that Nicole had refused to cooperate, claiming the attorney-client privilege. The defense objected to this testimony on the grounds that it was improper rebuttal because it exposed the jury to learning that Nicole had exercised her Fifth Amendment rights. The prosecution claimed that because Nicole testified that she had told Daley about the sexual abuse, Daley's testimony was highly relevant to Nicole's credibility.

Over defendant's objection, the trial court allowed this testimony, stating it was a "prior inconsistent or consistent statement" with Nicole's prior testimony that went to the issue of credibility. Defendant alleges that because of this ruling the trial judge "continued its role as either chief prosecutor or at least co-prosecutor." We disagree. There was no error in the ruling, and even if the trial court erred in this ruling, there is no showing of bias. The record shows that after considering the parties' arguments the trial court simply made an evidentiary ruling. (*Kreling v. Superior Court, supra,* 25 Cal.2d at p. 312, 153 P.2d 734; *Scott v. Family Ministries, supra,* 65 Cal.App.3d at p. 510, 135 Cal.Rptr. 430.)

j) Exclusion of Jeffrey Weiss's testimony

Defendant claims the trial court exhibited bias by excluding the testimony of Jeffrey Weiss. Defendant claims Weiss would have testified with respect to an incident where he heard Nicole Samuels shout at Robert Samuels, "Keep your hands off me. I don't want you to touch me." Without analysis, defendant claims this testimony was improperly excluded and evidenced the court's bias. Defendant merely states, "The Court excluded this testimony, and predictably so." No basis for concluding there was judicial bias appears. Even if there was error, such error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

***119** *k) Manipulation of evidence*

Defendant contends the trial court exhibited bias by manipulating evidence of official files and reports. Defendant claims the trial court did so by making favorable rulings to the prosecution with respect to three rulings. These rulings related to the trial

court allowing the prosecution to admit James Bernstein's criminal file and allowing the testimony of Los Angeles Police Detective Terry Richardson. Detective Richardson testified about his search on the police department's computer database with respect to Robert Samuels and his opinion that Robert Samuels was never arrested and never had a criminal complaint filed by the defendant against him. Defendant also believes the trial court improperly excluded Exhibit F, which was a police report relating to Dean Groover.

Even if these evidentiary rulings were erroneous, such error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.) In addition, the record is bereft of any indication the trial court was biased in its rulings. On the contrary, the record indicates the trial judge—as he did throughout the trial—went to great lengths to ensure that both parties were allowed to make their arguments before he made an evidentiary ruling. (*Kreling v. Superior Court, supra,* 25 Cal.2d at p. 312, 153 P.2d 734; *Scott v. Family Ministries, supra,* 65 Cal.App.3d at p. 510, 135 Cal.Rptr. 430.)

l) Admission of Elizabeth Kaufman's testimony

Elizabeth Kaufman was Robert Samuels's divorce attorney. She testified ***124** that Samuels intended to seek a change in spousal support and permission to operate the Subway restaurant. At trial, testimony was elicited that on the day Samuels's body was discovered, defendant told the police that she had a good relationship with Samuels. ****1141** In addition, defendant stated to a sheriff's deputy that she hoped that she and Samuels would get back together again. The prosecution also introduced testimony at trial that Samuels had a "less than cordial" relationship with defendant, had missed a support payment, and had fought with defendant over her continuing to work at the Subway restaurant. Under all these circumstances, the jury could reasonably infer defendant knew about, and was angered by, Robert Samuels's intention to finalize his divorce and reduce her financial support—thereby providing her a motive to have him killed. Accordingly, the challenged testimony was admissible because it was relevant to show Robert Samuels's state of mind concerning defendant. (*People v. Smithey* (1999) 20 Cal.4th 936, 971–972, 86 Cal.Rptr.2d 243, 978 P.2d 1171.) There was no error, and necessarily no constitutional violation.

***120** As set forth above, despite defendant's lengthy catalogue of alleged biases, we conclude the record does not support any display of bias by the trial court. (*Kreling v. Superior Court, supra,* 25 Cal.2d at p. 312, 153 P.2d 734; *Scott v. Family Ministries, supra,* 65 Cal.App.3d at p. 510, 135 Cal.Rptr. 430.)

3. Alleged Inadmissible Hearsay

a) Testimony of David Navarro, Rennie Goldberg, and Matthew Raue

Defendant claims the trial court improperly admitted hearsay from three witnesses with respect to their conversations with James Bernstein. These witnesses were David Navarro, Rennie Goldberg, and Matthew Raue. Defendant claims this error denied her rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

(1) David Navarro's testimony

David Navarro testified that in discussing Robert Samuels's death, Bernstein said, "He had done it and Mike [Silva] had helped him. And that [defendant] had paid him." Navarro further testified that Bernstein said defendant had paid him, that Bernstein had skimmed money off the top for himself, and then paid the balance to Mike Silva. Bernstein also told Navarro

that he paid Silva in cocaine "in lieu of the money."

Despite the People's contention that defendant has waived this issue, the record reflects that defendant preserved this issue for appellate review. (*People v. Scott* (1978) 21 Cal.3d 284, 290, 145 Cal.Rptr. 876, 578 P.2d 123 ["In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented"].)

Nevertheless, the claim fails on the merits. Bernstein's statement to Navarro was properly admitted as a statement against penal interest. Under that exception, an otherwise inadmissible hearsay statement may come into evidence if the statement, when made, subjected the declarant to serious risk of civil or criminal liability or to various other serious risks. (Evid.Code, § 1230.)

This case is distinguishable from *People v. Lawley* (2002) 27 Cal.4th 102, 153–154, 115 Cal.Rptr.2d 614, 38 P.3d 461, upon which defendant relies, for Bernstein's facially incriminating comments were in no way exculpatory, self-serving, or collateral. Defendant argues that Bernstein's assertion "that [defendant] had paid him" for the killing was either collateral to his statement against penal interest, or an attempt to shift blame. We ***125** disagree. ***121** This admission, volunteered to an acquaintance, was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to defendant incorporated within this admission as itself constituting a collateral assertion that should have been purged from Navarro's recollection of Bernstein's precise comments to him. Instead, the reference was inextricably tied to and part of a specific statement against penal interest. (See *People v. Wilson* (1993) 17 Cal.App.4th 271, 277, 21 Cal.Rptr.2d 420.) Moreover, the differences between the trustworthiness of the statements involved in this case and those excluded in *People v. Lawley, supra,* 27 Cal.4th at pages 151–154, 115 Cal.Rptr.2d 614, 38 P.3d 461 (in which we found no abuse of discretion in the trial court's exclusion, following an offer of proof, of proposed testimony recounting a prisoner's assertions that the Aryan Brotherhood was involved in a homicide he claimed to have committed) are palpable. In any event, even **1142 had the trial judge erred, any such error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.)

(2) Testimony of Rennie Goldberg and Matthew Raue

Rennie Goldberg testified that in April 1989 Bernstein told him that he was being solicited by both defendant and her daughter Nicole to have Robert Samuels murdered and that he was considering doing so (even though Samuels had already been killed in December 1988). Matthew Raue testified that in the spring of 1989, Bernstein said he was approached by defendant and Nicole to help them murder Robert Samuels. Defendant moved to exclude the testimony of Raue and Goldberg on hearsay grounds. The prosecutor argued that the testimony was admissible as either an admission of a coconspirator or as a statement against Bernstein's interest. The trial court denied this motion, ruling that the coconspirator exception applied. Defendant claims the trial court erred by allowing this testimony.

With respect to Bernstein's statements made to Raue and Goldberg, defendant is correct that none of the statements could be admitted under the hearsay exception for statements made in furtherance of a conspiracy. Raue and Goldberg testified that their conversations with Bernstein took place after Robert Samuels had been murdered. Therefore, Bernstein's statements could not have been made in furtherance of any conspiracy.

Defendant also argues the statement against penal interest exception to the hearsay rule is not applicable to Goldberg and Raue's testimony. Even assuming the admission of these statements was error, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836, 299 P.2d 243.) In addition, assuming defendant's constitutional claim was properly preserved on appeal see *122 *People v. Yeoman* (2003) 31 Cal.4th 93, 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), it fails on the merits. (*People v. Benavides, supra,* 35 Cal.4th at p. 91, 24 Cal.Rptr.3d 507, 105 P.3d 1099.)

b) Testimony of Detective George Daley

Defendant claims that Detective Daley's testimony about Mike Silva was inadmissible and the trial court's error violated her Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. We disagree.

During the prosecution's case-in-chief, Detective John Birrer testified that an anonymous caller had identified Mike Silva as the hit man used by James Bernstein to ***126** kill Robert Samuels. Detective Daley later testified that as a result of an anonymous call to Detective Birrer, Detective Daley located and interviewed Mike Silva.

Defendant argues that the trial court erred by allowing Detective Daley to testify about his conversation with Detective Birrer. Defendant contends that this testimony was hearsay and irrelevant. Because defendant failed to make a specific and timely objection on hearsay grounds, she failed to preserve this claim for review. (*People v. Waidla, supra,* 22 Cal.4th at p. 717, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

In any event, Detective Daley's testimony was not hearsay or irrelevant. It was not used to prove that Mike Silva killed Robert Samuels. Instead, the testimony was used to explain Detective Daley's reasons for obtaining search warrants and contacting Mike Silva—subsequent action by a law enforcement officer during his investigation into a murder. Accordingly, the trial court did not err.

Defendant also contends that Detective Daley's testimony should have been excluded because it exceeded the scope of his cross-examination. It did not. During Detective Daley's cross-examination defense counsel asked questions about Mike Silva, including whether Silva was ever arrested for Robert Samuels's murder. Therefore, Detective Daley's testimony on redirect examination did not exceed the scope of his cross-examination. (See *People v. Brown* (1991) 234 Cal.App.3d 918, 939, 285 Cal.Rptr. 824.)

Defendant also claims Detective Daley should not have been allowed to testify that Mike Silva was dead. The record indicates **1143 that Silva's death was relevant because defendant had placed it at issue. In fact, after acknowledging this fact during a discussion outside of the jury's presence, defendant requested the prosecutor not elicit details about how Silva's death occurred. *123 The trial court then directed the prosecutor not to elicit details on Silva's death. Thus, defendant is barred from challenging this testimony. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139, 124 Cal.Rptr.2d 373, 52 P.3d 572.) Finally, assuming defendant's constitutional claim was properly preserved on appeal (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), no constitutional or other error occurred.

c) Testimony of Elizabeth Kaufman and Susan Conroy

As set forth above, Elizabeth Kaufman was Robert Samuels's divorce attorney. She testified that Samuels intended to seek a change in spousal support and court permission to operate the Subway restaurant. Susan Conroy was Samuels's sister. Conroy testified that Samuels told her that he intended to finalize his divorce from defendant. Defendant contends the trial court erred by admitting Samuels's statements to Kaufman and Conroy with respect to Samuels's intent to seek a change in spousal support and to finalize his divorce from defendant. Defendant claims these statements were inadmissible because they were hearsay, irrelevant, and violated her constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Defendant objected on hearsay grounds, but not on constitutional grounds.

For the reasons set forth in part B.2.*l* (*ante,* 30 Cal.Rptr.3d at pp. 123–24, 113 P.3d at pp. 1139–41), the trial court properly admitted this testimony. In addition, assuming defendant's constitutional claim was properly preserved on appeal (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), no constitutional or other error occurred.

***127** *4. Alleged Error in Admitting Photographs*

Defendant argues that the trial court erred by admitting certain photographs of Robert Samuels, thereby violating her constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution. Defendant argued at trial that the photographs were cumulative, offensive, and had no probative value.

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 133–134, 36 Cal.Rptr.2d 474, 885 P.2d 887.)

The autopsy photographs depicted Robert Samuels's body as it lay on a table in the county morgue. The photographs depict that Samuels was shot in **124** the back of the head by a shotgun and were relevant to illustrate and corroborate the testimony supplied by Dr. Christopher Rogers, Deputy Medical Examiner for Los Angeles County. Dr. Rogers testified for the prosecution with respect to Robert Samuels's autopsy and established the manner in which Samuels was killed and other relevant matters. (*People v. Crittenden, supra,* 9 Cal.4th at p. 132, 36 Cal.Rptr.2d 474, 885 P.2d 887.)

Nor was the probative value of the autopsy photographs clearly outweighed by their prejudicial effect. "We have described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.] As we previously have observed, victim photographs and other graphic items of evidence in murder cases always are disturbing. [Citation.]" (*People v. Crittenden, supra,* 9 Cal.4th at p. 134, 36 Cal.Rptr.2d 474, 885 P.2d 887.)

Our independent review of the photographs leads to the conclusion that, although the photographs are unpleasant, they are not unduly shocking or inflammatory. Accordingly, **1144** the trial court did not abuse its discretion in admitting the photographs.

To the extent defendant also argues that the photographs are cumulative, we reject her argument. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 134–135, 36 Cal.Rptr.2d 474, 885 P.2d 887 ["We often have rejected the contention that photographs of a murder victim must be excluded as cumulative simply because testimony also has been introduced to prove the facts that the photographs are intended to establish"].) In addition, assuming defendant's constitutional claim was properly preserved on appeal (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), it fails on the merits.

5. Alleged Prosecutorial Misconduct in Questioning Witnesses

Defendant contends the prosecutor committed misconduct by injecting inadmissible evidence at trial and then abandoning it after the jury was contaminated. She claims her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution were violated. Defendant failed to object or seek a curative admonition, therefore this issue is waived on appeal. (*People v. Brown* (2004) 33 Cal.4th 382, 398–399, 15 Cal.Rptr.3d 624, 93 P.3d 244.) However, there is no error.

***128** " 'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " ***125** (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, 40 Cal.Rptr.2d 456, 892 P.2d 1199.) " 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 427, 79 Cal.Rptr.2d 408, 966 P.2d 442.) Finally, "when the claim focuses upon comments made by the

prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841, 64 Cal.Rptr.2d 400, 938 P.2d 2.)

Defendant cites several incidents at trial where the prosecutor allegedly committed misconduct.

a) Impeachment of Robert Birney

Robert Birney, a defense investigator, testified on behalf of defendant. Birney testified that he had been a police officer for the City of Los Angeles for approximately 21 years. On cross-examination, the prosecutor asked Birney if he had ever been suspended from his duties with the Los Angeles Police Department. Defendant objected and the parties discussed the matter outside of the jury's presence. The prosecutor stated that a former colleague of Birney's had informed her that Birney had been suspended for improper conduct with respect to a suspect he once booked and his involvement with an underage female related to that suspect. This suspension allegedly occurred 10 or 11 years earlier.

Outside of the jury's presence, Birney testified that he recalled an incident similar to the one described by the prosecutor. However, Birney stated that he was not suspended and had not taken any voluntary days off because of this incident. The prosecutor stated that she would call the source as a witness to impeach Birney's testimony. The prosecutor then withdrew her question until other witnesses could be called or she could prepare a motion pursuant to *Pitchess v. Superior Court, supra,* 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305. On redirect examination, Birney testified that he had not been suspended.

Although defendant objected to the prosecutor's question about Birney's alleged suspension, defendant failed to request an admonition. (See *People v. Brown, supra,* 33 Cal.4th at pp. 398–399, 15 Cal.Rptr.3d 624, 93 P.3d 244.) Nevertheless, there was no misconduct. Birney's admission that there was an incident that was investigated shows that there was some good faith basis for the prosecutor's asking whether he was suspended as a result of the investigation. In addition, ****1145** the prosecution's withdrawal of the question combined with Birney's testimony stating that he was never suspended do not lead to a reasonable likelihood ***126** that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Prieto* (2003) 30 Cal.4th 226, 260, 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

b) Cross-examination of Nicole Samuels and handwriting exemplars

On cross-examination by the prosecution, Nicole Samuels admitted to signing some checks she gave to James Bernstein. Defendant claims that the prosecutor committed *****129** misconduct by preventing Nicole from providing a handwriting exemplar showing that certain sections of the checks were not in her handwriting. As a result of this alleged misconduct, defendant claims the prosecutor prevented Nicole Samuels from rehabilitating herself. We disagree.

The relevant factual context is recounted above. (See *ante,* 30 Cal.Rptr.3d at pp. 119–20, 113 P.3d at pp. 1136–38.) For the reasons stated in our rejection of defendant's claim of judicial bias, there is also no prosecutorial misconduct based on the prosecutor's relevance objection. Again, defendant was free to seek a handwriting sample from Nicole and have an expert testify as to any discrepancies between the exemplar and the check.

c) Alleged preclusion of impeachment of Detective Daley

For the reasons set forth in part B.2.b (*ante,* 30 Cal.Rptr.3d at p. 119, 113 P.3d at p. 1137), we reject defendant's contention

that the prosecutor committed misconduct by precluding defendant from impeaching Detective Daley.

d) Alleged improper cross-examination of defense witness Annette Bunnin–Church

Defendant claims the prosecution improperly cross-examined defense witness Annette Bunnin–Church by asking her questions about defendant's character for truth and veracity. Defendant failed to raise objections to the initial questions about her character and, even after defendant objected, she failed to request a timely admonition, which would have cured any prejudice from the alleged misconduct. Accordingly, she cannot raise this claim on appeal. (*People v. Prieto, supra,* 30 Cal.4th at pp. 259–260, 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

On the merits, the record indicates the prosecutor did not introduce improper subject matter into Bunnin–Church's cross-examination. Bunnin–Church's testimony stating that she never had doubts about defendant's truthfulness does not lead to the conclusion that there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Prieto, supra,* 30 Cal.4th at p. 260, 133 Cal.Rptr.2d 18, 66 P.3d 1123.) There was no misconduct.

***127** *6. Alleged Error in Failing to Grant Immunity to Wanda Piety*

Paul Gaul testified for the prosecution pursuant to a plea agreement. He recalled a conversation that took place on a sheriff's bus with defendant. Gaul testified defendant stated she understood that he was testifying against her because he was given no choice. Gaul also testified that defendant said, "You're the only one who can cut me loose. You already—I know you took your deal. You can cut me loose." Gaul testified that he told defendant that this was not the case and that he was simply telling the truth.

To impeach Gaul's testimony, defendant attempted to call Wanda Piety. Piety was also present on the bus during the conversation between Gaul and defendant and allegedly heard Gaul tell defendant that he knew she was innocent, but that he had to testify against her in order to get his plea agreement. However, when faced with the possibility of being cross-examined by the prosecution, Piety advised the court that she would assert her Fifth Amendment rights. The defense then moved the court to grant Piety immunity, which the court denied.

Defendant claims the prosecutor committed misconduct by not granting Piety *****130** immunity, thereby subjecting Piety to possible cross-examination with respect to the ****1146** facts of her own case. We have previously stated, "[A]lthough the prosecution has a statutory right, incident to its charging authority, to grant immunity and thereby compel testimony [citation], California cases have uniformly rejected claims that a criminal defendant has the same power to compel testimony by forcing the prosecution to grant immunity." (*In re Williams* (1994) 7 Cal.4th 572, 609, 29 Cal.Rptr.2d 64, 870 P.2d 1072.) Accordingly, the prosecutor did not commit misconduct.

Defendant also claims the trial court's failure to grant Piety immunity compounded the prosecutor's alleged misconduct and violated defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the federal Constitution.

"[O]ur court [has] characterized as 'doubtful' the 'proposition that the trial court [possesses] inherent authority to grant immunity.' [Citations.]" (*People v. Stewart, supra,* 33 Cal.4th at p. 468, 15 Cal.Rptr.3d 656, 93 P.3d 271.) However, we have stated that it is "possible to hypothesize cases" where "judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter* (1989) 49 Cal.3d 957, 974, 264 Cal.Rptr. 367, 782 P.2d 608.) To the extent we assume there is such a judicial authority, we hold that the trial court properly denied defendant's request. Piety's testimony would have been cumulative of testimony previously offered by other witnesses, ***128** such as Susan Jasso, who testified that she heard the same conversation that Piety would have described.

(*Stewart,* at p. 470, 15 Cal.Rptr.3d 656, 93 P.3d 271.) In addition, in light of Jasso's testimony, Piety's testimony was not essential. (*Id.* at p. 469, 15 Cal.Rptr.3d 656, 93 P.3d 271.)

7. Alleged Error with Respect to Polygraph Evidence

Defendant argues the prosecutor committed misconduct by improperly using evidence relating to polygraph examinations in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The prosecution was allowed to present testimony with respect to defendant's lack of cooperation with the police during the investigation of Robert Samuels's death. However, the trial court refused to allow her to present evidence of her willingness to submit to, and her successful completion of, a polygraph test. Defendant argues such evidence would have contradicted the prosecution's claim that she was not cooperative during the investigation. This claim lacks merit since polygraph evidence, absent a stipulation by all parties, is not admissible. (Evid.Code, § 351.1; *People v. Wilkinson* (2004) 33 Cal.4th 821, 849–852, 16 Cal.Rptr.3d 420, 94 P.3d 551.)

Defendant also argues the prosecutor committed misconduct by eliciting testimony from Marsha Hutchinson that related to statements defendant made to her about how to "beat" a polygraph test. There was no misconduct. The trial court properly admitted this testimony on the basis that it demonstrated defendant's consciousness of guilt. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224, 56 Cal.Rptr.2d 49, 920 P.2d 1254.) Even if there was misconduct, the admission of such evidence could not be prejudicial under any standard given the ample evidence against defendant.

8. Alleged Prosecutorial Misconduct with Respect to Injecting Misleading Testimony

Defendant contends the prosecutor committed misconduct and violated certain of ***131** her constitutional rights by injecting the false and misleading testimony of Detective George Daley with respect to a conversation between defendant and James Bernstein. Daley's disputed testimony relates to discussions between defendant and Bernstein that Daley overheard and recorded at a police station. These statements involved someone named "Dave" who had approached defendant at a nightclub and agreed to kill Robert Samuels for money. In addition, Daley testified that the conversation between defendant and Bernstein was "cordial and suspicious."

As a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request **1147 an admonition to cure *129 any harm. (*People v. Brown, supra,* 33 Cal.4th at pp. 398–399, 15 Cal.Rptr.3d 624, 93 P.3d 244.) Defendant failed to object to the alleged prosecutorial misconduct or to request an admonition. Accordingly, defendant has failed to preserve this claim.

Nonetheless, defendant's claim also lacks merit. Defendant merely assumes Daley misremembered or misrepresented the conversation, and that this problem could have been avoided had the trial court admitted the conversation in recorded and transcribed form. As set forth (*post,* 30 Cal.Rptr.3d at pp. 130–33, 113 P.3d at pp. 1146–48), the trial court properly excluded the tape and transcription of the conversation. In any event, such an assumption is speculative as it appears defense counsel's vigorous questioning of Daley failed to show that Daley's testimony was false or misleading.

9. Improper Exclusion of Taped Conversation

a) Best evidence rule

Defendant contends the trial court violated Evidence Code section 1521 by permitting Detective Daley to testify, during the prosecution's case, with respect to a recorded prearrest conversation between defendant and James Bernstein.[4] Defendant claims this error violated her constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution. On appeal, defendant claims the tape of the entire conversation should have been admitted under the secondary evidence rule, codified in Evidence Code section 1520 et seq. We disagree.

4 Detective Daley interviewed Bernstein at the police station on April 24, 1989. After this interview, Daley asked defendant to come to the police station. Daley placed defendant and Bernstein in the same room and listened to their conversation from a monitoring room in the police station.

The secondary evidence rule was not effective until January 1, 1999. Since the instant trial commenced prior to January 1, 1999, the secondary evidence rule is not applicable. Accordingly, we apply the law that was applicable at the time, Evidence Code former section 1500 et seq.,[5] commonly referred to as the "best evidence rule." (See *In re Kirk* (1999) 74 Cal.App.4th 1066, 1073, 88 Cal.Rptr.2d 648.)

5 Evidence Code sections 1500 to 1511 were effective until January 1, 1999. (Stats.1998, ch. 100, § 1.)

Applying the best evidence rule to this case, "[i]t is well settled that where both a tape recording of a conversation and a witness to the conversation are available at trial, the testimony of the witness is not barred by the best evidence rule. [Citations.]" (*People v. Patton* (1976) 63 Cal.App.3d 211, 220, 133 Cal.Rptr. 533.) We have stated, "The so-called best evidence rule is ***130** inapplicable under such circumstances. Since the officer was testifying *****132** to what he had seen and heard, his testimony was 'primary evidence' whether or not 'part of the same matter was incorporated into a sound recording.' [Citation.] In other words, he was not testifying as to what the recording contained but 'as to what he observed and knew because he heard it.... [His] testimony ... is not rendered incompetent by the fact of the existence of the [recording].' [Citations.]" (*People v. Sweeney* (1960) 55 Cal.2d 27, 38, 9 Cal.Rptr. 793, 357 P.2d 1049.)

Assuming defendant's constitutional claim was properly preserved on appeal (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), it fails on the merits.

b) Rule of completeness

Defendant further contends the trial court erred and violated her constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the federal Constitution by denying her motion to admit the entire tape recording and transcript of the conversation between defendant and James Bernstein under Evidence Code section 356. That section provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; ****1148** when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

The purpose of Evidence Code section 356 is to avoid creating a misleading impression. (*People v. Arias* (1996) 13 Cal.4th 92, 156, 51 Cal.Rptr.2d 770, 913 P.2d 980.) It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. (*People v. Zapien* (1993) 4 Cal.4th 929, 959, 17 Cal.Rptr.2d 122, 846 P.2d 704.) Statements pertaining to other matters may be excluded. (*People v. Williams* (1975) 13 Cal.3d 559, 565, 119 Cal.Rptr. 210, 531 P.2d 778.)

At trial, defendant sought to introduce the entire tape of the conversation, which covered areas outside of Detective Daley's

testimony. The prosecution objected on hearsay grounds, and the trial court sustained the prosecution's objection. In addition, the trial court stated the tape was too long and would confuse the jury. The trial court informed defendant that she was free to seek admission of those portions of the tape that were purportedly relevant. The record indicates defendant failed to do so. There was no error.

***131** *10. Alleged Instructional Error*

a) Definition of reasonable doubt

Defendant contends that CALJIC No. 2.90, defining reasonable doubt, is a violation of her due process rights under the Fourteenth Amendment of the United States Constitution. We have rejected this argument in the past and find no persuasive reason to revisit the issue. (*People v. Seaton* (2001) 26 Cal.4th 598, 667–668, 110 Cal.Rptr.2d 441, 28 P.3d 175.)

b) CALJIC No. 2.01

Defendant argues that the trial court erred by instructing the jury with CALJIC No. 2.01, because it undermined the requirement of proof beyond a reasonable doubt. Defendant claims this error violated her constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the federal Constitution. Defendant claims the instruction directed jurors to accept an incriminating interpretation of the evidence if it appeared to be reasonable, *****133** thereby allowing a conviction based on an appearance of guilt.

Defendant acknowledges we have previously held that "these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn. Particularly when viewed in conjunction with other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt. [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 375, 75 Cal.Rptr.2d 716, 956 P.2d 1169.) We see no reason to revisit the question and reject defendant's claim.

C. Penalty Phase Issues

1. Removal of Juror Audrey W.

Defendant claims the trial court erred by removing Juror Audrey W. during the penalty phase deliberations. Defendant argues this error violated her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Section 1089 provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be ***132** unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." " 'We review for abuse of discretion the trial court's determination to discharge a ****1149** juror and order an alternate to serve. [Citation.] If there is any substantial evidence

supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror must " 'appear in the record as a demonstrable reality.' " [Citation.]' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 474, 106 Cal.Rptr.2d 313, 21 P.3d 1225.) We have also stated a court may remove a juror "who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances." (*Ibid.*)

Substantial evidence supports the trial court's decision. Here, Audrey W. requested that she be removed from the jury. In a letter to the court, Audrey W. wrote, "I have come to realize that I have serious questions about my ability to vote for the death penalty should I become convinced of its appropriateness in this case. I have not been able to resolve this conflict to my own satisfaction."

When questioned by the parties and the trial judge about her situation, Audrey W. provided statements indicating she would not be able to perform her duty as a juror. For example, when asked by the prosecutor whether she was "at the point now where you believe that perhaps you would under no circumstances ever be able to impose the death penalty in a case where you thought it was appropriate," Audrey W. stated, "Well, that's where I am afraid that I might not have the courage to do that. I think I explained to you on the form and also when I was questioned, theoretically I do believe in the death penalty. I was concerned about whether I would be able to act on it. And when I actually found myself faced with an actual case and having to consider that, I just found that it was—I was just afraid that I wouldn't be ***134** able to do that." The prosecutor then followed up by asking, "Is that what you are finding now, that you are just not able to consider it?" Audrey W. answered, "I'm afraid that I couldn't act on it."

Audrey W. also could not separate her discomfort over the death penalty from the facts and circumstances of the case. She stated, "I can't separate them and that's—that is what is causing me the issue right now. It was not a problem before I was able to keep them separate but now I've got that so I can't get them separated out."

In addition, when asked by the prosecutor whether her physical, emotional, or mental state was being impaired or would be impaired if she **133** continued to deliberate, she stated that she "was not in a good place to continue." The court determined that "there was enough there to raise some red flags in my concern."

Accordingly, the record reflects that Audrey W. was distressed and volunteered to the court that she could not follow her oath and instructions to consider imposition of the death penalty in this case. She also admitted she lacked "courage" to impose the ultimate punishment if appropriate under all the circumstances, and that she feared she "couldn't act" on her obligation to do so. Therefore, after a meaningful inquiry, the trial court credited Audrey W.'s expressions of her state of mind and determined there was a demonstrable reality that she was unable to perform as a juror. We defer to this finding and the underlying record. The trial court did not abuse its discretion by dismissing Audrey W. (*People v. Cleveland, supra,* 25 Cal.4th at p. 474, 106 Cal.Rptr.2d 313, 21 P.3d 1225.)

2. Alleged Prosecutorial Misconduct

a) Closing argument

Defendant claims the prosecutor committed misconduct by improperly referring to defendant's bad character, in violation of her constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. We disagree. "The claim was waived by [defendant's] failure to object to the statement at trial. [Citation.]" (*People v. Staten* (2000) 24 Cal.4th 434, 465, 101 Cal.Rptr.2d 213, 11 P.3d 968.) The claim also lacks merit. Defendant mischaracterizes the prosecutor's statements. The comments at issue were part of the prosecutor's argument that defendant had failed to show any remorse. We have "consistently rejected claims of prosecutorial misconduct based on a prosecutor's reference to the defendant's lack of remorse." (*People v.* ****1150** *Lewis* (2001) 25 Cal.4th 610, 673, 106 Cal.Rptr.2d 629, 22 P.3d 392.)

b) Biblical references

Defendant also claims that, over her objections, the prosecutor committed misconduct by referring to the Bible.[6] Defendant claims that as a result of ***134** this misconduct, her constitutional rights under the Sixth, Eighth and Fourteenth Amendments *****135** of the United States Constitution were violated.

[6] In referring to the Bible, the prosecutor stated: "Genesis chapter 9, verse 6; Exodus chapter 21, verse 12; and the Book of Numbers chapter 35, verse 31 all repeat the same basic message: 'Whoever sheds the blood of man, by man shall his blood be shed, for in his image did God make man.' ... 'He who fatally strikes a man shall be put to death.' Exodus even answers a common defense argument that only God can take a life. 'It is not [*sic*] man, not God, who is to execute murderers. By man shall his, murderers blood be shed.' Although some look to the New Testament and quote, 'Vengeance is mine, I will repay saith the Lord,' in the very next chapter, Romans, Paul calls for capital punishment by saying, 'The ruler bears not the sword—' ... '—the sword in vain for he is the minister [of] God, a revenger to execute wrath upon him that doeth evil.' "

We have previously stated, " '[t]he primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and ... imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." ' [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 389, 116 Cal.Rptr.2d 401, 39 P.3d 432.)

Even if the prosecutor's argument was error, such error was harmless. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1211, 120 Cal.Rptr.2d 477, 47 P.3d 262.) The prosecutor's biblical argument was only a small part of her argument, the bulk of which focused on arguing to the jury why it should find that the statutory aggravating factors outweighed the mitigating factors.

c) Prosecutor's alleged statements suggesting ultimate responsibility for imposing the death penalty did not rest with the jury

Defendant claims that the prosecutor committed misconduct by suggesting that the ultimate responsibility for imposing the death penalty did not rest with the jury. Defendant bases this argument on references the prosecutor made to defendant's appellate rights and the Governor's power of commutation, and argues that such references should have resulted in the trial court granting her motion for a mistrial.

The first statement defendant relies on was made when the prosecutor contrasted the imposition of the death penalty as so-called state-sanctioned murder with the killing of Robert Samuels. The prosecutor said, "It seems somewhat incredible that some people can't grasp the moral difference between the taking of an innocent life and the state enforcing laws and taking a life. [¶] The defendant has had all of the guarantees that our system of justice has entitled her to. She has had her preliminary hearing. She has had a fair trial. She has had a penalty phase. She will have appellate review. What rights did the victims have?" The other statement was made by the prosecutor in anticipation that defense counsel would argue "that there are others in California who have committed far more brutal crimes who didn't get the death penalty." The prosecutor stated, "Well the fact of the matter is in California the death penalty is the law of the land. That's not true in all states. Even in California there was a time when the death penalty was repealed and all those on death row had their sentences commuted. Now please don't misunderstand me, I'm not suggesting that that will happen in ***135** this case. You cannot consider that and that's not the reason I bring it up. The only reason I bring it up is to suggest to you that such analogies and such comparisons are not fair."

Here, there is no reasonable likelihood a juror would have understood the prosecutor as suggesting that the responsibility for

imposing a death sentence rested elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328–329, 105 S.Ct. 2633, 86 L.Ed.2d 231.) There was no misconduct and there was no basis for the trial court to grant defendant's request for a mistrial.

****1151** *3. Alleged Instructional Error*

a) Meaning of life imprisonment without the possibility of parole

Defendant claims that the trial court erroneously instructed the jury on the meaning of life imprisonment without the possibility of parole in violation of her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of *****136** the United States Constitution. We reject this claim.

Here, the trial court read to the jury CALJIC No. 8.84, which stated that defendant's punishment would be "death or confinement in the state prison for life without the possibility of parole...." Our cases hold that CALJIC No. 8.84 adequately informs the jury of defendant's ineligibility for parole. (*People v. Prieto, supra,* 30 Cal.4th at pp. 269–271, 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

Defendant seeks to distinguish *Prieto* on the ground that here the jury manifested some confusion as to the meaning of life imprisonment without the possibility of parole, as evidenced by its note to the judge asking, "Does 'without the possibility of parole' mean no chance of parole—ever!" After receiving this note, the trial court conferred with counsel and, over defendant's objection, decided to repeat its prior instructions. The trial court stated it would reiterate these instructions and "see what happens." The trial court stated, "If they ask a further question, they'll get a further answer."

Unlike the situation in *Prieto,* here the jury expressed confusion regarding CALJIC No. 8.84's meaning. However, we reject defendant's claim because the trial court's refusal to respond more fully to the jury's question did not constitute prejudicial error. In so holding, we follow *People v. Bonillas* (1989) 48 Cal.3d 757, 798, 257 Cal.Rptr. 895, 771 P.2d 844, and *People v. Silva* (1988) 45 Cal.3d 604, 641, 247 Cal.Rptr. 573, 754 P.2d 1070, in which we observed no prejudicial error in refusals to respond to comparable jury requests for clarification as to the possibility of defendant's release from prison. Here, as there, "[t]he [court's] response left the jury in the same ***136** position as when the jury asked the question—i.e., uncertain of the answers. It is inconceivable that such uncertainty affected the jury's penalty verdict." (*Silva,* at p. 641, 247 Cal.Rptr. 573, 754 P.2d 1070.)

b) Use of special verdict forms

Defendant was found guilty of count 1, the first degree murder of James Bernstein. The jury failed to reach a verdict on the special circumstance allegation that the murder was committed for financial gain under section 190, subdivision (a)(1). Defendant was also found guilty of the first degree murder of Robert Samuels as set forth in count 2. The jury found that defendant committed this murder for financial gain under section 190, subdivision (a)(1). In addition, the jury found "the allegation that the offenses charged in Counts I and II are a special circumstance within the meaning of Penal Code section 190.2(a)(3) [multiple murder] to be true."

Over defendant's objection, the jury was given separate verdict forms for counts 1 and 2. The verdict form relating to count 1 read: "We the jury in the above entitled action, having found the defendant, Mary Ellen Samuels, guilty of the crime of murder in the first degree and the special circumstance of multiple murder to be true as related to Count I of the information, hereby fix the penalty at: death." The verdict form for count 2 stated: "We the jury in the above entitled action, having found the defendant, Mary Ellen Samuels, guilty of the crime of murder in the first degree and the special circumstances of multiple

murder and murder for financial gain to be true as related to Count II of the information, hereby fix the penalty at: death."

On appeal, defendant argues that the use of separate verdict forms misled the jury by stating that the jury had found—at the guilt phase—a special circumstance for multiple murder for count 1. ***137** Defendant also claims this error violated her constitutional rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Defendant's argument rests on a faulty factual premise. The jury found defendant guilty of multiple murder under **1152 section 190.2, subdivision (a)(3) based on the allegations set forth in counts 1 and 2. In addition, the trial court instructed the jury that it could consider the multiple-murder special circumstance only once. The jury was not misled and the trial court did not commit any error. In addition, assuming defendant's constitutional claim was properly preserved on appeal (see *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133, 2 Cal.Rptr.3d 186, 72 P.3d 1166), it fails on the merits.

c) Alleged instructional error in the death selection process used to condemn defendant

Defendant further claims section 190.3, factor (a), which allows the consideration of the circumstances of her crime in the penalty phase, has been *137 applied so arbitrarily and capriciously that its application in her case violated the state and federal Constitutions. We have rejected this claim in prior decisions, and defendant has failed to offer grounds for reconsidering those holdings. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1050–1053, 95 Cal.Rptr.2d 377, 997 P.2d 1044.)

Nor was the trial court required to delete any inapplicable factors from the penalty phase instructions (*People v. Taylor* (2001) 26 Cal.4th 1155, 1179–1180, 113 Cal.Rptr.2d 827, 34 P.3d 937), designate aggravating and mitigating factors (*id.* at p. 1180, 113 Cal.Rptr.2d 827, 34 P.3d 937), or submit written findings and reasons for its death verdict (*People v. Jenkins, supra,* 22 Cal.4th at p. 1053, 95 Cal.Rptr.2d 377, 997 P.2d 1044).

Defendant claims the trial court did not adequately define the meaning of the term "mitigating." Defendant contends that CALJIC No. 8.88 as read to the jury was reasonably likely to lead the jury to believe it was limited by the type of mitigating evidence it could consider. We have previously rejected this argument and do so again. (*People v. Taylor, supra,* 26 Cal.4th at pp. 1180–1181, 113 Cal.Rptr.2d 827, 34 P.3d 937.)

In addition, defendant claims the trial court should have instructed the jury that if the factors in aggravation did not outweigh the factors in mitigation, then it should return a sentence of life imprisonment without the possibility of parole. We reject this claim. (*People v. Duncan* (1991) 53 Cal.3d 955, 978, 281 Cal.Rptr. 273, 810 P.2d 131.)

d) Alleged trial court error by failing to instruct jury on core adjudicative principles

We also conclude there is no constitutional requirement that the jury be instructed concerning the burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances (other than other-crimes evidence), the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence, and no requirement that the jury achieve unanimity as to the aggravating circumstances. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 1053–1054, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, have not altered our conclusions regarding the burden of proof or jury unanimity. (See *People v. Prieto,* ***138** *supra,* 30 Cal.4th at pp. 263, 275, 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

We also reject defendant's argument that the court's failure to instruct the jury on the presumption of life violated the state and federal Constitutions. (See, e.g., *People v. Hughes, supra,* 27 Cal.4th at p. 404, 116 Cal.Rptr.2d 401, 39 P.3d 432.)

***138** *4. Constitutional Claims*

We reject defendant's claim that the death penalty law is unconstitutional by failing to adequately narrow the class of death-eligible offenders. (*People v. Prieto, supra,* 30 Cal.4th at p. 276, 133 Cal.Rptr.2d 18, 66 P.3d 1123.) We also reject defendant's claim that the death penalty law is constitutionally deficient because the prosecution retains discretion whether to seek the death penalty. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1095, 119 Cal.Rptr.2d 859, 46 P.3d 335.)

****1153** In addition, "[i]ntercase proportionality review is not required." (*People v. Combs* (2004) 34 Cal.4th 821, 868, 22 Cal.Rptr.3d 61, 101 P.3d 1007.) We similarly reject defendant's claims that the state and federal Constitutions are violated by the alleged influence of political pressure on this court in determining capital appeals. There is no basis for this claim and we have previously rejected it. (*People v. Kipp, supra,* 26 Cal.4th at pp. 1140–1141, 113 Cal.Rptr.2d 27, 33 P.3d 450.)

5. Alleged Cumulative Error

Defendant argues that the cumulative effect of the errors at her penalty trial requires reversal of her death sentence. We disagree. Any errors we have found are no more compelling when considered in combination. Their cumulative effect does not warrant reversal of the judgment.

III. DISPOSITION

We affirm the judgment in its entirety.

WE CONCUR: GEORGE, C.J., BAXTER, CHIN, and MORENO, JJ.

Concurring Opinion by WERDEGAR, J.

Having found no error requiring reversal, I concur in the majority's decision to affirm the judgment. I write separately, however, to suggest the time has come to modify our position concerning whether a jury in a capital case should be completely informed of the meaning of life imprisonment without the possibility of parole.

The trial court in this case delivered CALJIC No. 8.84, the standard jury instruction concerning the penalties applicable in a capital case. That instruction states in pertinent part: "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be *death or imprisonment in the state prison for life without possibility of parole* in any case in which the special circumstance[s] alleged in this case [has] [have] been specially found to be true." (Italics added.) We have, in prior cases, ***139** rejected the contention that the term "life without possibility of parole," as used in this instruction, "confuses jurors or has a technical meaning that requires a sua sponte definitional instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 1009, 86 Cal.Rptr.2d 243, 978 P.2d 1171; see, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 270–271, 133 Cal.Rptr.2d 18, 66 P.3d 1123; *People v. Ochoa* (1998) 19 Cal.4th 353, 457, 79 Cal.Rptr.2d 408, 966 P.2d 442; *People v. Sanders* (1995) 11 Cal.4th 475, 561–562, 46 Cal.Rptr.2d 751, 905 P.2d 420.) Our position on this issue has

been clear and consistent.

Jurors, however, faced with making the enormous decision whether or not to impose society's ultimate criminal penalty, ***139** apparently are not so confident about the plain meaning of CALJIC No. 8.84. For example, in *People v. Snow* (2003) 30 Cal.4th 43, 132 Cal.Rptr.2d 271, 65 P.3d 749, the jury, after retiring to deliberate, sent out a note asking the trial judge: " 'If we give life imprisonment without possibility of parole, can we be assured he will never be[ ] released from prison[?]' " (*Id.* at p. 123, 132 Cal.Rptr.2d 271, 65 P.3d 749.) Similarly, in *People v. Hart* (1999) 20 Cal.4th 546, 85 Cal.Rptr.2d 132, 976 P.2d 683, the jury, prior to closing argument, sent the trial court a note asking: " 'Does life in prison without the possibility of parole mean he will never get out under any circumstances?' " (*Id.* at p. 654, 85 Cal.Rptr.2d 132, 976 P.2d 683.) In *People v. Bonillas* (1989) 48 Cal.3d 757, 257 Cal.Rptr. 895, 771 P.2d 844, the jury, after retiring to deliberate, sent out a note asking: " 'Is there any way at all that a parole could be granted[?] Please list the ways.' " (*Id.* at p. 797, 257 Cal.Rptr. 895, 771 P.2d 844.) In *People v. Silva* (1988) 45 Cal.3d 604, 247 Cal.Rptr. 573, 754 P.2d 1070, the jury asked this question: " '[D]oes life in prison without possibility of parole mean just that, or is parole possible at some future date? If so, under what circumstances?' " (*Id.* at p. 640, 247 Cal.Rptr. 573, 754 P.2d 1070.) The instant case is no different; here, the jury sent out a note during deliberations that asked: "Does 'without the possibility of parole' mean no chance of parole—ever![?]"

Defense attorneys, aware of this potential confusion, often propose a special instruction in an attempt to clarify the meaning of a sentence of life imprisonment without the **1154 possibility of parole. For example, in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 124 Cal.Rptr.2d 373, 52 P.3d 572, the defendant proposed an instruction that would have informed the jury that " life without the possibility of parole means 'defendant will be imprisoned for the rest of his life.' " (*Id.* at p. 1159, 124 Cal.Rptr.2d 373, 52 P.3d 572.) In *People v. Thompson* (1988) 45 Cal.3d 86, 246 Cal.Rptr. 245, 753 P.2d 37, the defendant proposed this instruction: "[I]f you determine that life without the possibility of parole is the proper sentence, you are instructed that the defendant will never be released from prison." (*Id.* at p. 129, 246 Cal.Rptr. 245, 753 P.2d 37.) In the instant case, defendant proposed this penalty phase instruction: "You are instructed that life without possibility of parole means exactly what it says: The defendant will be *140 imprisoned for the rest of her life. [¶] ... [¶] For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors."

We generally affirm a trial court's rejection of such proposed instructions on the ground the instruction is technically incorrect (see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271, 74 Cal.Rptr.2d 212, 954 P.2d 475) because a defendant, sentenced by a jury to life imprisonment without the possibility of parole, could still gain his freedom if a state or federal appellate court grants relief on appeal, or if the Governor exercises his commutation or clemency power (*People v. Thompson, supra,* 45 Cal.3d at p. 130, 246 Cal.Rptr. 245, 753 P.2d 37). Although rare, these possibilities nevertheless exist.

Because the jury in this case specifically asked the trial court for guidance on the question of the possibility of parole, we know it was concerned about this issue. Given that the jury had already been instructed and had retired to deliberate, its question came at a critical point in the trial. Under the circumstances, the trial court should have answered the question. Penal Code section 1138 provides: "After the jury have retired for deliberation, ... *if they desire to be informed on any point* ***140** *of law arising in the case,* they must require the officer to conduct them into court. Upon being brought into court, *the information required must be given* in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." (Italics added.)

Some jurors may have been concerned that the primary actor in a conspiracy that resulted in two murders could eventually go free were they to vote for life imprisonment instead of death. By simply rereading CALJIC No. 8.84—the same instruction already provided to the jury—the trial court failed to clarify the legal issue that concerned the jury and thus ran the risk that some jurors, erroneously believing release on parole was a possibility, voted to impose the death penalty as a way of ensuring defendant would never be released to kill again. A death penalty verdict reached under such circumstances may implicate a defendant's right to due process of law. (See *Simmons v. South Carolina* (1994) 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (plur.opn.) [due process violated when state imposes death sentence based in part on the defendant's future dangerousness when jury not informed the alternative penalty of life imprisonment was without parole].)

Providing the jury with a more complete picture of the legal effect of a sentence of life without the possibility of parole, admittedly, may encourage it to speculate on matters irrelevant to its penalty decision. We faced a similar situation in *People v. Ramos* (1984) 37 Cal.3d 136, 207 Cal.Rptr. 800, 689 P.2d 430, concerning whether a trial judge in a capital trial should inform the jury of the Governor's commutation power. We concluded: "When the jury raises the commutation issue itself—either during voir dire or in a question ***141** posed to the court during deliberations—the matter obviously cannot be avoided and is probably best handled by a short statement indicating that the Governor's commutation power applies to both sentences but emphasizing that it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence." (*Id.* at p. 159, fn. 12, 207 Cal.Rptr. 800, 689 P.2d 430.)

****1155** We should apply the same approach to a jury's question concerning the meaning of life imprisonment without the possibility of parole. Thus, although CALJIC No. 8.84 seems clear on its face, some jurors may nevertheless believe a life prisoner will still be able to obtain release on parole sometime in the future. If the jury submits a question on this topic, I believe the trial court should respond with a short statement explaining that, in unusual cases, future action by the judiciary or the Governor may permit the defendant to obtain parole, that such possibilities apply whether the jury imposes a sentence of death or of life without the possibility of parole, that the jury should assume such future actors will follow the law, and that the jury should not speculate on such possibilities and should assume the sentence it reaches will be carried out.[1] (See *People v. Thompson, supra,* 45 Cal.3d at p. 131, 246 Cal.Rptr. 245, 753 P.2d 37; see generally *People v. Davis* (1995) 10 Cal.4th 463, 547, 41 Cal.Rptr.2d 826, 896 P.2d 119 [quoting *****141** extensive instructions concerning the import of a sentence of death or of life without the possibility of parole and the factors the jury cannot properly consider].) In that way, the jury is fully informed as to its sentencing choices but is instructed not to consider matters irrelevant to its decision. A contrary conclusion, in which we tolerate a jury reaching a penalty decision while uncertain of the true meaning of the applicable penalty choices, seems unwise.

[1] Of course, care should be taken not to suggest that the jury's responsibility for its verdict is in any way diluted by the possibility of an appeal or future commutation or grant of executive clemency. (See *People v. Memro* (1995) 11 Cal.4th 786, 878–879, 47 Cal.Rptr.2d 219, 905 P.2d 1305; *People v. Fierro* (1991) 1 Cal.4th 173, 245, 3 Cal.Rptr.2d 426, 821 P.2d 1302; see generally *Caldwell v. Mississippi* (1985) 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231.) When a jury asks for greater elucidation on this subject, however, some mention of the possibility of appellate review or commutation may be unavoidable.

In the present case, the trial court indicated that if the jury were again to question the meaning of "life without possibility of parole" it would provide "a further answer." No further question was asked. Because nothing in the record suggests the trial court's failure to clarify the law in response to the jury's question convinced a juror to vote for death instead of life imprisonment, I cannot now conclude the trial court's failure to clarify CALJIC No. 8.84 was prejudicial. Accordingly, I concur.

I join the concurring opinion: KENNARD, J.

***142** Concurring and Dissenting Opinion by KENNARD, J.

I join the majority in affirming the judgment. I write separately to express my disagreement with the majority's analysis of two issues, one pertaining to financial motive to kill, the other involving the prosecutor's biblical references.

I

At the guilt phase of defendant Mary Ellen Samuels's capital trial for the murders of her estranged husband and an accomplice who, she feared, would report the killing of her husband to the police, the prosecution presented this evidence: As a beneficiary of her husband's life insurance policy defendant received more than $240,000 in proceeds; she got $70,000 for selling a sandwich shop that she and her husband had owned; and she obtained $160,000 by refinancing the family home. She then spent the money on such things as an expensive sports car, a large television, limousine service, property in a Mexican resort, and clothing from a store called Trashy Lingerie.

Defendant challenges the trial court's admission into evidence of how she spent the money, contending it was inadmissible character evidence. The majority brushes the contention aside with this cursory comment: "[T]here was no error. The evidence was relevant to prove defendant's financial motive for killing Samuels. (*People v. Sapp* (2003) 31 Cal.4th 240, 313 [2 Cal.Rptr.3d 554, 73 P.3d 433].)" (Maj. opn., *ante,* 30 Cal.Rptr.3d at p. 118, 113 P.3d at p. 1135.) The majority's citation of *Sapp* is puzzling; no issue in that case bears the faintest resemblance to ****1156** the merry widow's spending spree at issue here.

In *Sapp,* a jury convicted the defendant of murdering three people. Thereafter, in closing argument at the penalty phase, the prosecutor referred to evidence at the penalty phase that the defendant had also killed his mother (a crime for which he was not convicted), and argued that like the other murders, the defendant had a financial motive to kill his mother, because he owed her $60,000. On appeal, the defendant in *Sapp* contended that the trial court should have instructed the jury that in determining whether he had killed his mother (a prerequisite for using that fact against him as an aggravating circumstance at the penalty phase), the jurors should not infer, based on his commission of the charged murders, that he had a propensity toward criminal behavior. This court held that the evidence did not warrant such an instruction. (*People v. Sapp,* *****142** *supra,* 31 Cal.4th at pp. 312–313, 2 Cal.Rptr.3d 554, 73 P.3d 433.)

Sapp is inapposite. (1) At issue there was the trial court's failure to give a particular jury instruction; at issue here is the admissibility of evidence. ***143** (2) *Sapp* involved the penalty phase of a capital trial; this case involves the guilt phase. (3) In *Sapp,* the prosecutor tried to use evidence of three murders to prove the commission of a fourth murder; here, the prosecutor used evidence of defendant's spending spree after her husband's death to prove that she killed him.

The only aspect of *Sapp* that remotely resembles this case is the prosecutor's reference in *Sapp* to evidence that the defendant had a "financial motive" (*People v. Sapp, supra,* 31 Cal.4th at p. 312, 2 Cal.Rptr.3d 554, 73 P.3d 433) to kill his mother because he owed her money. But that evidence is wholly unlike the evidence of financial motive at issue here, which pertains to how defendant spent the inherited money; in any event, this court's opinion in *Sapp* did not address the admissibility of that evidence. Thus, *Sapp* has no bearing on the issue here: Whether, as the majority holds, the manner in which defendant spent the money she inherited from the murder victim shows that she had a financial motive to kill him. The issue ought to be resolved by applying established principles on the admissibility of evidence.

Only relevant evidence is admissible. (Evid.Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid.Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts...." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, 24 Cal.Rptr.2d 664, 862 P.2d 664.) Motive is a material fact. (*Ibid.*)

Evidence that a defendant charged with murder inherited property or collected life insurance benefits from the victim is relevant, and therefore admissible, when the defendant knew of the policy's existence at the time of the victim's death. (*People v. Goedecke* (1967) 65 Cal.2d 850, 860, 56 Cal.Rptr. 625, 423 P.2d 777.) Such evidence would tend to show that the defendant had a motive for the murder. Thus, here the prosecution was entitled to introduce evidence that defendant collected life insurance benefits and inherited property on the death of her estranged husband, because it is reasonable to infer that she knew she would be entitled to them when her husband died. *But what she did with those assets* has no bearing on her motive to kill. How one disposes of inherited money or property differs from person to person. Some may choose to invest in

the stock market or to support a favorite charity. Others may decide to use the inherited wealth to indulge in a buying spree largely for their own benefit and enjoyment, as occurred here. In either situation, *how* the inheritance is spent has no "tendency in reason" (Evid.Code, § 210) to establish a motive for the killing by which the funds were obtained.

***144** Thus, the evidence of defendant's spending habits after her husband's death served only to show, as defendant puts it, that she was outside "the norm of middle class women," and that she was "a person of poor judgment" who was "loose with money." Assuming, as does the majority, that defendant objected with sufficient specificity to preserve ****1157** the issue, the trial court erred by admitting, at the guilt phase of defendant's capital trial, evidence of how she spent the money she inherited from her murdered husband.

*****143** The error, however, was harmless, because there was overwhelming evidence of defendant's guilt. Three witnesses (Heidi Dougall, Celina Krall, and Marsha Hutchison) testified that defendant told them that she wanted her husband dead, and another witness (David Navarro) testified that defendant had solicited him to kill her husband. Defendant's close friend, Anne Hambly, testified that defendant told her she had persuaded James Bernstein to hire a "hit man" to kill defendant's husband. Defendant also told Hambly that she later had Bernstein killed because she was afraid that he would tell the police of her involvement in her husband's death. Paul Gaul, who killed Bernstein with the assistance of an accomplice, testified that defendant had asked him to commit the murder because Bernstein was blackmailing her by threatening to tell the police of her role in her husband's murder. Given the strength of this evidence, it is not "reasonably probable" (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243) that the outcome of defendant's trial would have been different if the trial court had excluded the evidence of how she spent the money she inherited after his death.[1]

[1] Defendant also argues that in addition to violating state law, admission of the evidence showing how she spent her inheritance violated her right to due process under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. She cites authority holding that "the admission of bad act testimony violates due process where 'the admission of the testimony was arbitrary or fundamentally unfair.' " (*Terrovona v. Kincheloe* (9th Cir.1988) 852 F.2d 424, 429.) Assuming for the sake of argument that this standard, which pertains to the admission of prior *criminal* conduct by the defendant, is applicable here, I perceive no violation of defendant's constitutional rights. The trial court's admission of the evidence in question, although erroneous under state law, was not so damaging as to make the trial fundamentally unfair.

I now turn to the prosecutor's biblical references at the penalty phase.

II

In her closing argument to the jury, the prosecutor said: "Genesis chapter 9, verse 6; Exodus chapter 21, verse 12; and the Book of Numbers chapter 35, verse 31 all repeat the same basic message: 'Whoever sheds the blood of man, by man shall his blood be shed, for in his image did God make man.' " Defendant raised an objection, which the trial court overruled. The prosecutor then continued, " 'He who fatally strikes a man shall be put to death.' [¶] ***145** Exodus even answers a common defense argument that only God can take a life. [¶] 'It is not [*sic*] man, not God, who is to execute murders. By man shall his, the murderers [*sic*] blood be shed.' [¶] Although some look to the New Testament and quote, 'Vengeance is mine, I will repay saith the Lord,' in the very next chapter, Romans, Paul calls for capital punishment by saying, 'The ruler bears not the sword ... in vain for he is the minister [of] God, a revenger to execute wrath upon him that doeth evil.' "

The prosecutor followed those biblical quotations with these comments: "Now that's enough said. And please understand I'm not telling you to use the Bible. *I'm telling you not to use the Bible. The Bible is not the law of the land.* [¶] *I only read those brief quotes for any of you who may have personal reservations against the death penalty because you believe that it is against your own beliefs.* [¶] *Please don't misunderstand because there was no other reason for reading those sections other*

than that. [¶] Ladies and gentlemen, ... a free society requires of its citizen jurors strength and vigilance and courage and resolve in making the tough decision that is before you now. [¶] It is ***144** much easier to beg you to spare a life than to ask you to take a life. That's because those of us who live within the norms of society have a natural compassion, a natural reference [*sic*] for life. [¶] It would be very easy for you to ... walk away, to say that [defendant] will spend the rest of her life in prison. [¶] But there is a greater principle here. If you believe that the death penalty is appropriate, then to walk away and to take the easy road because it was convenient or because it's easy to live with, I submit you are ignoring the ****1158** laws of the land that capital punishment should be applied when you decide it is appropriate." (Italics added.)

Defendant argues that the prosecutor's biblical references violated her rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. The majority does not resolve the issue. It simply concludes that even if improper, the prosecutor's argument did not prejudice defendant. The majority explains: "The prosecutor's biblical argument was only a small part of her argument, the bulk of which focused on arguing to the jury why it should find that the statutory aggravating factors outweighed the mitigating factors." (Maj. opn., *ante,* 30 Cal.Rptr.3d at p. 135, 113 P.3d at p. 1150.)

If I were to find that the prosecutor's biblical references in this case were improper, I would conclude that they prejudiced defendant. The majority is wrong when it says that a prosecutor's improper reliance on religious authority is harmless if it is only a "small part" of the prosecutor's closing argument. I explained why in my dissenting opinion in *People v. Slaughter* (2002) 27 Cal.4th 1187, 120 Cal.Rptr.2d 477, 47 P.3d 262. There, this court used reasoning identical to that used by the majority here to find that the prosecutor's improper biblical references in his closing argument at the ***146** penalty phase of a capital case were harmless. I dissented, with these comments: "The majority's assertion that the prosecutor's improper argument must be considered harmless because it was 'part of a longer argument that properly focused upon the factors in aggravation and mitigation' ... makes little sense. Under that logic, prosecutors may freely refer to biblical authority when making their penalty arguments to juries in capital cases, secure in the knowledge that this court will never reverse a resulting death judgment for this misconduct, provided only that the prosecutors also present an argument focusing on the statutory aggravating and mitigating factors. Appeals to divine authority in jury arguments in capital cases are prejudicial when jurors for whom the aggravating and mitigating factors appear closely balanced use religious considerations to resolve their doubts, as the prosecutor's improper argument invites them to do." (*Id.* at p. 1228, 120 Cal.Rptr.2d 477, 47 P.3d 262 (dis. opn. of Kennard, J.); see also *People v. Vieira* (2005) 35 Cal.4th 264, 309, 25 Cal.Rptr.3d 337, 106 P.3d 990 (dis. opn. of Kennard, J.).) The majority here employs the same faulty logic used by the majority in *Slaughter.*

Because, in my view, an impermissible reliance on religious authority by the prosecutor may be prejudicial even when, as here, the biblical references are only a short part of the prosecutor's argument, I must decide whether the prosecutor's biblical references in this case *were* improper. On point here is this court's decision in *People v. Hughes* (2002) 27 Cal.4th 287, 116 Cal.Rptr.2d 401, 39 P.3d 432, in which I joined. There the prosecutor, as in this case, quoted several biblical passages supportive of the death penalty in his closing argument at the penalty phase of a capital trial. But he went on to explain to the jury that he was not trying to argue that the Bible provided a basis for imposing the ***145** death penalty, but only to show that the Bible was " 'not an impediment to imposing the death penalty.' " (*Id.* at p. 391, 116 Cal.Rptr.2d 401, 39 P.3d 432.) This court held the comments were permissible: "The prosecutor's references were part of a straightforward argument that jurors should not be persuaded either way by biblical and religious teachings, and that the ultimate penalty decision was an individual determination. The prosecutor did not imply or suggest that another, higher law should be applied instead of the court's instructions...." (*Id.* at p. 392, 116 Cal.Rptr.2d 401, 39 P.3d 432.)

"Because any use of biblical references in argument must be carefully scrutinized, cautious prosecutors will choose to avoid such references" (*People v. Harrison* (2005) 35 Cal.4th 208, 248, 25 Cal.Rptr.3d 224, 106 P.3d 895); "[a] prosecutor who mentions the Bible in closing argument runs a grave risk that a reviewing court will ... reverse the defendant's conviction" (*ibid.*). ***147** But here, as in *Hughes,* the prosecutor's biblical references "were part of a straightforward argument that jurors should not be persuaded either way by biblical and religious teachings...." ****1159** (*People v. Hughes, supra,* 27 Cal.4th at p. 392, 116 Cal.Rptr.2d 401, 39 P.3d 432), but should instead base their penalty decision on "the laws of the land." Thus, under this court's decision in *Hughes,* the prosecutor's argument did not violate defendant's constitutional rights.

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