No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERNEST DEWAYNE JONES,

Petitioner,

vs.

RONALD BROOMFIELD,
Warden of California State Prison at San Quentin,

Respondent.

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

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES, *Petitioner-Appellee*, v. RONALD DAVIS, Warden, *Respondent-Appellant.*	No. 18-99003 D.C. No. 2:09-cv-02158-CJC OPINION

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted April 20, 2021
Pasadena, California

Filed August 12, 2021

Before: Jay S. Bybee, Michelle T. Friedland, and
Kenneth K. Lee, Circuit Judges.

Opinion by Judge Friedland

SUMMARY*

Habeas Corpus / Death Penalty

In a case in which Ernest Jones was convicted and sentenced to death for the murder of his girlfriend's mother, the panel reversed the district court's order granting relief on one claim in Jones's 28 U.S.C. § 2254 habeas corpus petition, and remanded for the district court to consider Jones's remaining claims.

The district court granted relief on Jones's claim that the state trial court violated his right to present a complete defense. Specifically, the district court held that Jones should have been permitted to testify during the guilt phase about events from his childhood and his mental health history, and that the trial court had erred by conditioning such testimony on the presentation of a psychiatric expert who would explain the testimony's relevance to Jones's mental state during the murder.

Reviewing de novo, the panel held that the condition the trial court imposed on Jones's testimony was neither arbitrary nor disproportionate to the valid purposes served by its ruling.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Supervising Deputy Attorney General; Lance E. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the Attorney General, Los Angeles, California; for Respondent-Appellant.

Nisha K. Shah (argued) and Cliona Plunkett, Habeas Corpus Resource Center, San Francisco, California, for Petitioner-Appellee.

OPINION

FRIEDLAND, Circuit Judge:

In 1995, Ernest Jones was convicted and sentenced to death for the murder of his girlfriend's mother. After the California Supreme Court affirmed his conviction and sentence and denied his state habeas petition, Jones filed a federal habeas petition, raising multiple challenges to both the guilt and penalty phases of his trial. The district court granted relief on Jones's claim that the state trial court violated his right to present a complete defense. Specifically, the district court held that Jones should have been permitted to testify during the guilt phase about events from his childhood and his mental health history, and that the trial court had erred by conditioning such testimony on the presentation of a psychiatric expert who would explain the testimony's relevance to Jones's mental state during the murder. Reviewing de novo, we hold that the condition the trial court imposed on Jones's testimony was neither arbitrary nor disproportionate to the valid purposes served by its ruling. Accordingly, we reverse and remand for the district court to consider Jones's remaining claims.

I.

A.

Shortly after midnight on August 25, 1992, Chester Miller returned home from work and noticed that his and his wife's car was missing from their driveway.[1] He entered the house and found his wife, Julia Miller, dead on the floor of their bedroom.[2] Miller was gagged, bound by her arms and legs, and naked from the waist down. She had sustained at least sixteen stab wounds. The fatal wound was a stab to her chest that perforated her aorta. Medical examiners later found semen in Miller's body that matched Jones's DNA. According to the examiners, the semen had entered her body within five to ten hours of her death.

At around 1:00 a.m., Miller's daughter, Pam, heard the doorbell of her apartment ring. Her grandparents had come to inform her of her mother's death. Pam asked Jones, with whom she lived, to accompany her to her grandparents' house; Jones told her that he would join her if he could get his sister's car. Pam then called her friend Shamaine, who lived near Pam's parents' house. Shamaine told Pam over the phone that Jones had come to her house earlier that evening to exchange jewelry for drugs. She urged Pam to come look at that jewelry. Pam did so and immediately recognized the jewelry as Miller's. She realized then that Jones had killed her mother.

[1] We provide the facts as presented at trial, drawing from the trial and state habeas records.

[2] For clarity, we refer to Julia Miller by her last name and to her daughter, Pam Miller, by her first name. We also refer to certain witnesses by their first names to protect their privacy.

Pam returned with several police officers to her and Jones's apartment to find it empty and the front and back doors barricaded with furniture. Officers later discovered Miller's station wagon parked near the apartment and began surveilling it. Sometime between 3:00 and 3:30 a.m., the officers saw Jones get into the car and drive off. The officers followed him; a few minutes into the drive, Jones pulled a rifle from the back seat of the car to the front seat and began speeding. A forty-minute pursuit ensued, during which Jones ignored red lights, ran stop signs, and blew out his left tires. Eventually, the car became totally disabled and came to a stop. Officers approached Jones and ordered him to exit the car, but he remained inside and shot himself in the chest with the rifle. Jones was hospitalized but survived.

B.

1.

Jones was tried on charges of first-degree murder, rape, robbery, and burglary. The State's theory at trial was that Jones had deliberately raped and killed Miller; stolen her jewelry, rifle, and car; and exchanged her jewelry for drugs after the murder. The State also sought to prove the special circumstance that Jones murdered Miller "in the commission of" a rape, robbery, or burglary—meaning that he murdered her while committing or attempting to commit one or more of those crimes, and that he murdered her to "carry out or advance the commission of" such a crime, to "facilitate the escape" from such a crime, or to "avoid detection" for such a crime. Only if the jury found true this special circumstance would Jones be eligible for the death penalty. Cal. Penal Code § 190.2(a)(17)(A), (C), (G). Jones did not deny that he raped and murdered Miller; he asserted only that he lacked the specific intent to do so because he blacked out right before those crimes.

To help prove Jones's intent, the State introduced evidence of a similar past crime. In 1985, Jones had raped a woman named Doretha, who was the mother of Jones's ex-girlfriend, Glynnis. At the Miller murder trial, Doretha testified that Jones had broken into her home, tied her up, and raped and sodomized her. She recounted how, after Jones's assault ended, he lay down on her bed and rested while she was still restrained. Sometime later, while still at Doretha's house, Jones had an emotional reaction to a photograph of himself with Glynnis and their infant son. He told Doretha he would allow her to live for his son's sake; then, he pointed a knife to his stomach and asked Doretha to kill him instead. Doretha refused, and Jones left her tied to the bed after taking money from her purse.

Jones testified in his own defense during the guilt phase of the Miller murder trial. On the stand, Jones admitted that everything Doretha had previously testified to was true, even if he could not remember all the events she described. He explained that he had been angry at Glynnis for breaking off their relationship, and that he had been looking for Glynnis when he broke into Doretha's home, but then "directed [his] anger at" Doretha.

Jones also recounted his version of the events surrounding Miller's murder. Jones testified that, on the day in question, he had turned to drugs for the first time since getting out of prison because he learned that Pam was having an affair. He purchased rock cocaine and marijuana from Shamaine that afternoon, paying in cash. After smoking, Jones became "very high" and "very paranoid." He stated that when Pam came home that evening, she gave Jones some jewelry to exchange for more drugs. Jones testified that, at the time, he did not recognize the jewelry as belonging to Miller. Jones bought a second batch of drugs

from Shamaine with the jewelry around 7:30 p.m. He became nervous about being approached by police while waiting for the bus home, so he decided to walk to Miller's house to ask for a ride.

Miller let him in. Although their interaction started cordially, she soon asked Jones how he had broken his thumb, which was in a cast. Jones admitted that he had injured it while grabbing Pam during an argument. Miller immediately became angry and took a knife out of a kitchen drawer. Jones grabbed another knife in response and the two began to physically fight. Miller ran to her bedroom and retrieved a rifle, but Jones knocked her down and she dropped it. As Jones was standing over Miller, she said, "Give it to me."

It was at this moment that Jones "slipped back into [his] childhood." Jones testified:

> In my mind, I was visioning when I was little, when I walked into a room with my mother who was with another man that wasn't my father, and I bent down, grabbed the knife off the floor, and I remember grabbing a rag or a cloth or something, and I picked up the knife and I started to stab [Miller].

Jones testified that the next thing he remembered was "being curled up in a ball crying, and [he] looked over at Ms. Miller and she was lying there tied up and she was dead." Realizing what he had done, Jones took a second rifle that was in the bedroom and left in Miller's car, intending to commit suicide. As he left, he started hearing voices saying, "They're going to kill you." Jones asserted that he had had no intention of harming Miller when he entered her house.

Jones testified that he continued to experience paranoia and hear voices on the way home. When Pam left with her grandparents later that night, Jones barricaded himself in the apartment. Sometime between 3:00 and 3:30 a.m., he left the apartment, taking Miller's car and planning to drive off a nearby cliff. He saw police pursuing him and again heard voices saying, "They're going to kill you." The chase ended when the car became disabled. Continuing to hear the voices, he shot himself in the chest with the Millers' rifle as the officers approached.

2.

During the guilt phase of the trial, defense counsel repeatedly sought to introduce evidence of Jones's traumatic childhood and prior mental health symptoms—specifically, his history of hearing voices, blacking out, and experiencing flashbacks.

The issue first arose when defense counsel asked Jones, while he was on the stand, whether he had received psychiatric treatment while in prison for the crimes against Doretha. The prosecution objected, arguing at a subsequent sidebar hearing that such testimony had no bearing on Jones's specific intent to rape and murder Miller years later absent a psychiatrist explaining its relevance or offering a diagnosis. Defense counsel countered that Jones was competent to testify without an expert about his own symptoms and treatment history as long as that testimony fell short of a diagnosis, and that Jones's lack of treatment would help explain his crimes as triggered by unaddressed mental health problems. He also noted his intention to ask Jones "about his background . . . his family problems, [and] the past times when he heard voices."

The trial court precluded Jones from testifying about his childhood or past treatment history without expert psychiatric testimony accompanying it. The court did, however, allow: (1) testimony that Jones was currently taking medication that "ma[d]e him feel better," to explain his demeanor on the stand; and (2) testimony that Jones had been attending counseling in the months leading up to the Miller murder in 1992. Accordingly, the jury heard that Jones was receiving medication in jail, which a jail physician later identified as anti-depressive and anti-psychotic medications, and that Jones had met with a psychiatrist in 1992 on the orders of his parole officer, a process that Jones described as simply "going through the motions."

Defense counsel revisited the court's evidentiary ruling during a break in Jones's cross-examination. Noting that state jury instructions did not prohibit the jury from considering evidence of mental disease without expert testimony, counsel offered a detailed proffer of the testimony he hoped to elicit from Jones about his abusive childhood; his family history of mental health issues; his witnessing his mother's infidelity; his past "dizzy spells, black outs, [and] hearing voices"; and other events that "all led to the explosion" on the night of the murder.[3] In

[3] Counsel's full proffer was as follows:

> The problems at school. He was in special education. Attended many schools. . . .
>
> Drug use; marijuana at 15, alcohol at 15; cocaine about 25 times; some evidence of LSD; family history of mental disease; Aunt Jackie shot herself to death; grandfather had delusions, ran down the street with a

response, the prosecution again contended that the jury would be unable to understand the relevance of such testimony to Jones's lack of specific intent without "a psychiatrist taking all these symptoms and linking them together and giving us a diagnosis." The prosecution observed that the court had appointed an expert psychiatrist for this very purpose, who had already written a report on Jones's mental state and who was available to testify for the defense. The trial court asked defense counsel if he intended to call an expert psychiatrist. When counsel answered that it was not his "present intention" to do so and that he

> gun; and a cousin and a son on Ritalin for A.D.D., attention deficit disorder.
>
> No food; no electricity many times because the family was spending the money on alcohol; both parents were alcoholics; a series of beatings with extension cords; brother who was killed, and the defendant saw the brother in the street; a mother who was promiscuous.
>
> And I believe the defendant already testified to, when he was about seven or eight, opening the door and seeing [his mother] in bed with another man.
>
> Other incidents of other men, dizzy spells, black outs, hearing voices, screaming at night—this is all the defendant—and also being told by his mother that she did not believe that his father—his father was not really his father.
>
> Also the fact that he was afraid to discuss his problems with others because he felt cut off already, and he felt that this would make him more cut off.
>
> And then the incidents which even the D.A. wants to get into, the incidents with both Glynnis and Pam, and particularly Pam's mother; the drug use which all led to the explosion.

"want[ed] to see the rest of Mr. Jones' testimony" before deciding, the court again precluded Jones from testifying about his childhood and past symptoms and denied defense counsel's motion for a mistrial on this basis.

The issue arose a third time in the wake of a question the prosecution had asked Jones during cross-examination: whether he had been "trying to kill [his] mother" when he murdered Miller. Jones had responded only that he did not "remember much." On redirect, defense counsel asked Jones about his relationship with his mother in an effort to ameliorate the impact of that question. After the trial court sustained the prosecution's objection, defense counsel argued once more that the court's earlier ruling was preventing Jones from establishing his credibility in the face of the prosecution's "disbelieving" and "dramatic" questioning. Unpersuaded, the court reaffirmed its ruling and denied counsel's second motion for a mistrial.

In his closing argument, the prosecution highlighted the dearth of evidence supporting Jones's defense that he lacked specific intent, asking the jury, "What evidence is there here of a mental disorder other than the defendant saying I flashed back to my childhood?" and positing that Jones "only blacks out the times that . . . he has no other explanation for." Defense counsel renewed his motion for a mistrial based on these statements, which the trial court again denied. The court did, however, instruct the jury that it could consider evidence regarding "a mental disorder . . . for the purpose of determining whether [Jones] actually formed the required specific intent."

After deliberating for several days, the jury found Jones guilty of first-degree murder[4] and rape. It also found true the special circumstance that the murder was committed in the commission of a rape, making Jones eligible for the death penalty. Cal. Penal Code § 190.2(a)(17)(C). The jury acquitted Jones of the robbery and burglary charges.

C.

Although Jones was prevented from testifying about his childhood and past mental health symptoms during the guilt phase, other witnesses offered testimony on those subjects during the penalty phase. Jones's childhood was, according to his aunt, "a living hell." Multiple family members testified that Jones's parents drank heavily, were physically abusive to each other and their children, and sometimes left Jones and his siblings hungry. According to Jones's aunt, Jones had once asked about the possibility of his father not being his biological father; he also suffered from screaming nightmares but would become withdrawn when asked about them. Jones's sister testified that their brother was murdered when Jones was younger and that Jones had witnessed his body lying in the street afterwards—an experience after which Jones "was not the same person." And Jones's father recounted that he arrived home one night to find his wife in bed with another man and a young Jones awake in the bed.

A family friend named Kim also appeared as a prosecution witness during the penalty phase. She testified

[4] The verdict did not specify on which theory the jury found Jones guilty of first-degree murder: that the murder was committed with "the specific intent to kill which is premeditated and deliberate"; or that it was committed with "the specific intent to commit" rape (*i.e.*, felony murder). *See People v. Jones*, 64 P.3d 762, 779 (Cal. 2003) (discussing the two possible theories underlying the murder verdict).

that in 1984—when Jones was about twenty and she was about twenty-three—he had raped her after they left a party together. But during the rape, she recounted, Jones seemed to take "on a new person, like he was in a trance, and then afterwards, he seemed to snap back." Jones was, in that moment, "an entirely different person than the person [she] knew." Kim successfully requested that the charges against Jones be dropped after the incident, but she asked for Jones to receive psychiatric treatment because she thought he needed help.

Jones's court-appointed expert psychiatrist, Dr. Claudewell Thomas, was the final penalty-phase witness. Based on previous physicians' reports on Jones and his own interviews of Jones, Dr. Thomas diagnosed Jones with schizoaffective schizophrenia: a disorder "characterized by psychotic responses" that could occur in "an intermittent and unpredictable pattern" in which "an individual's customary reality-oriented judgment is disrupted." According to Dr. Thomas, when Jones experienced "high emotionality" such as "rage," he underwent "an altered state of personality" and lost "the ability to control the normal functioning self." When Jones lost that control, Dr. Thomas continued, he entered an "inner reality" of the world "when he was growing up and subjected to the sadistic punishment of a domineering and promiscuous and alcoholic mother." Dr. Thomas opined that Jones's "destructive" childhood—including witnessing his mother's affair—contributed to the development of his disorder.

Based on this diagnosis, Dr. Thomas concluded that Jones had dissociated before raping Kim, Doretha, and Miller. The true object of Jones's assaults on Doretha and Miller, Dr. Thomas further opined, was Jones's mother.

Jones's account that he heard voices immediately after the Miller murder was another indication that his schizophrenia had influenced his thoughts and behavior.

The jury fixed the penalty at death. Defense counsel moved for a new trial, based in part on the trial court's earlier rulings limiting Jones's testimony. The court denied the motion, explaining that it had allowed Jones to testify freely about "what he was thinking or feeling or sensing at the time of the incident," but that counsel's proffer had provided "no nexus . . . to show the relevance of [the evidence] in the guilt phase." The court also expressed its view that counsel's decision not to call Dr. Thomas at the guilt phase was "a tactical decision," and one that the court understood after hearing Dr. Thomas's penalty-phase testimony. Jones was sentenced to death on April 7, 1995.

D.

On direct appeal before the California Supreme Court, Jones argued, as relevant here, that the trial court violated his right to present a complete defense by barring him from testifying about his "extensive history of hearing voices, flashbacks, and blackouts." Specifically, he contended that the trial court's ruling ran afoul of the constitutional requirement, established in *Rock v. Arkansas*, 483 U.S. 44 (1987), that restrictions on a criminal defendant's right to testify may not be arbitrary or disproportionate to the purposes those restrictions are meant to serve, *id.* at 55–56. Jones explained that the excluded testimony was "relevant to his ability or inability to form the specific intent to rape" and to the credibility of his admitted testimony that he flashed back and blacked out right before murdering Miller.

The California Supreme Court rejected this argument and affirmed Jones's conviction and sentence. *People v.*

Jones, 64 P.3d 762, 777, 787 (Cal. 2003). Observing that Jones had testified that he heard voices only after raping and murdering Miller, the court held that "any prior history of hearing voices would not have been relevant" to his specific intent to rape her. *Id.* at 777. The court accordingly held that "[t]here was no error" in the trial court's rulings on the issue. *Id.* There was no mention of Jones's proposed testimony regarding flashbacks and blackouts, or of whether that evidence would have been relevant to Jones's intent. The court also concluded that any error was harmless because Dr. Thomas had not mentioned Jones's history of flashbacks and blackouts in his penalty phase testimony—an omission that the court took to suggest that any such testimony by Jones would have been a "recent fabrication." *Id*.

The United States Supreme Court denied certiorari. *Jones v. California*, 540 U.S. 952 (2003). The California Supreme Court denied Jones's state habeas petition in 2009. Order, *In re Jones*, No. S110791 (Cal. Mar. 16, 2009).

Jones then filed a habeas petition in federal district court in which he, *inter alia*, challenged the exclusion of testimony about his childhood and mental health history. The district court granted habeas relief on one of Jones's other claims, but that ruling was reversed on appeal by our court.[5] Following our remand, the district court then granted relief on Jones's *Rock* claim. Observing that "Jones's testimony

[5] The district court had granted relief on Jones's claim that California's post-conviction review process creates such a delay between sentencing and execution that any executions that do occur are arbitrary in violation of the Eighth Amendment. We reversed on the ground that Jones's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), because it sought the benefit of a new constitutional rule. *Jones v. Davis*, 806 F.3d 538, 541 (9th Cir. 2015).

about his mental state was material, because his defense was that he lacked the intent to murder or rape Ms. Miller as a result of his mental disorder," the district court concluded that Jones's right to testify in his own defense had been violated and that the California Supreme Court's decision to the contrary was an objectively unreasonable application of *Rock* under 28 U.S.C. § 2254(d)(1).[6] The district court ordered that Jones either be released or granted a new trial. The State timely appealed.

II.

We review the district court's grant of habeas relief de novo. *Moses v. Payne*, 555 F.3d 742, 750 (9th Cir. 2009). Because Jones's federal habeas petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). AEDPA precludes habeas relief on a claim that was adjudicated on the merits in state court unless the court's denial of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* But we need not resolve whether AEDPA's standards are satisfied if a petitioner's underlying

[6] The court denied another of Jones's claims, which challenged the sufficiency of the evidence underlying the jury's rape-related findings, as procedurally barred. Jones did not appeal this decision.

constitutional claim fails even on de novo review. *See Fox v. Johnson*, 832 F.3d 978, 986 (9th Cir. 2016).[7]

III.

We do not consider AEDPA's requirements here because Jones's constitutional claim fails on de novo review.[8]

A.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and quotation

[7] The parties agree that the California Supreme Court's denial of Jones's claim constituted an adjudication on the merits within the meaning of § 2254(d).

[8] After argument, we directed the parties to submit supplemental briefs discussing whether Jones's claim seeks the benefit of a new constitutional rule and is thus barred by *Teague v. Lane*, 489 U.S. 288 (1989). In his supplemental brief, Jones argues that the State failed to adequately raise *Teague* as an affirmative defense either in the district court or on appeal. *See Arredondo v. Ortiz*, 365 F.3d 778, 781–82 (9th Cir. 2004). We agree with Jones that the State failed to raise and preserve its *Teague* defense, and we therefore decline to address it sua sponte. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (holding that a court "may . . . decline to apply *Teague*" when the state has not argued it); *Pensinger v. Chappell*, 787 F.3d 1014, 1024 (9th Cir. 2015) (declining to consider *Teague* sua sponte where, as here, the state "did not mention the defense" when responding to the relevant claim in its answer to the habeas petition before the district court, "even though it argued *Teague* as to several other claims in its answer," and where, as here, the state's appellate brief failed to adequately argue *Teague*).

marks omitted). This guarantee includes, "at a minimum, . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). In many criminal cases, the "most important witness for the defense" in that determination of guilt "is the defendant himself." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

Recognizing the critical role of a criminal defendant's own testimony, the Supreme Court held decades ago that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 55–56. The Court has since explained that a defendant's right to present a complete defense is abridged by any restrictions on defense evidence that are "arbitrary or disproportionate" and that infringe on the defendant's "weighty interest." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

Under this framework, the restriction of a defendant's evidence pursuant to an evidentiary rule is arbitrary when applying the rule serves no legitimate purpose in the case at hand. For example, the Supreme Court has invalidated convictions resulting from trials that excluded evidence pursuant to "rules that . . . did not serve any legitimate interests." *Id.* at 325; *see also, e.g.*, *Holmes*, 547 U.S. at 331 (holding that a rule that categorically barred evidence of third-party guilt when strong forensic evidence of the defendant's guilt was presented "is arbitrary in the sense that it does not rationally serve the end that . . . [it was] designed to further" (quotation marks omitted)); *Rock*, 483 U.S. at 61 (holding that a rule that categorically barred all hypnotically refreshed testimony "is an arbitrary restriction . . . in the absence of clear evidence by the State repudiating the

validity of all posthypnosis recollections"); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (holding that a statute that categorically barred accomplices from testifying for a defendant on trial for the same crime "cannot . . . be defended"). Exclusions of defense evidence may be arbitrary even when, "under other circumstances, [the rule] might serve some valid state purpose." *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) (holding that the application of the rule against hearsay to exclude exculpatory testimony violated the defendant's right to present a complete defense because the testimony was reliable). And application of an evidentiary rule to preclude defense evidence, even when doing so "legitimately serve[s]" a "state's interest" in the case at hand, is disproportionate when it infringes excessively on a defendant's right to "tell his own story." *Greene v. Lambert*, 288 F.3d 1081, 1091 (9th Cir. 2002) (holding that the exclusion of all mention of the defendant's dissociative identity disorder violated *Rock*, notwithstanding the legitimate goal of ensuring reliable testimony).

That said, an individual's right to present a defense, either through his own testimony or through other evidence, is not without limit. "The accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). A trial court therefore may, consistent with the Constitution, exclude defense evidence through the proper application of evidentiary rules that serve a valid purpose in a given case, including when proposed evidence is "only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes*, 547 U.S. at 326–27 (alteration omitted) (quoting *Crane*, 476 U.S. at 689–90); *cf. Perry v. Rushen*, 713 F.2d 1447, 1453–54 (9th Cir. 1983) ("[T]here clearly is some

point at which evidence may be so lacking in probity and so productive of confusion that it may constitutionally be excluded.").

B.

Jones's right to present a complete defense was not violated because the trial court's evidentiary ruling was neither arbitrary nor disproportionate to the purpose that it served. The court explained its decision as "a matter of relevance": it concluded that expert contextualization was needed to provide a "nexus" between the events in Jones's past and his specific intent during the crimes. Ensuring that the jury would have understood the relevance of Jones's testimony and that Jones's testimony would not have confused the issues at trial was a proper and proportionate application of the standard rules of evidence to which the right to testify is always subject. *See Taylor*, 484 U.S. at 410; *Holmes*, 547 U.S. at 326; *cf., e.g.*, Cal. Evid. Code § 210 (defining relevant evidence); *id.* § 350 (providing that only relevant evidence is admissible); *id.* § 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of . . . confusing the issues, or of misleading the jury.").

As a threshold matter, the trial court's challenged ruling is better described as imposing a condition than an absolute restriction. The record is clear that, had defense counsel planned to call an expert psychiatrist, the court would have permitted Jones to testify about his childhood and mental health history. We have previously considered the constitutionality of a condition on the admission of defense evidence in *Menendez v. Terhune*, 422 F.3d 1012 (9th Cir. 2005). There, the trial court prevented defendants who were on trial for murdering their parents from introducing third-

party testimony "that could explain why they feared their parents" without "first . . . lay[ing] a foundation" for that testimony by personally testifying "about their actual belief of imminent danger." *Id.* at 1030. We held that the state reviewing court acted reasonably in concluding that this condition did not violate the defendants' due process rights. *Id*. at 1031–32. *Menendez* did not hold, nor do we hold here, that a condition on the admission of defense evidence is immune from constitutional scrutiny. Still, the conditional nature of a ruling will often be relevant to whether it is arbitrary or disproportionate.

The trial court's condition on Jones's testimony was not arbitrary. Whether and how Jones's traumatic childhood and mental health history affected his ability to form specific intent years later were complicated questions. Counsel characterized the proposed testimony, which would have spanned the entirety of Jones's life, as describing a series of events that "all led to the explosion" culminating in Miller's murder. But at no point did counsel explain how Jones alone would have been able to draw that causal link for the jury. Nor would such a link necessarily have been apparent. The trial court therefore reasonably concluded that the relevance of Jones's proposed testimony required expert contextualization. *Cf. Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (describing the expert's role in "understanding . . . the defendant's mental history, and explain[ing] to the jury how" such history is "relevant to the defendant's mental condition" (quoting *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989))); *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) ("The jury did not, however, have the benefit of expert testimony to explain the ramifications of [childhood injuries and chemical exposure] on [the defendant's] behavior. Expert evidence is

necessary on such issues when lay people are unable to make a reasoned judgment alone.").

Nor was the trial court's condition disproportionate. Rather, it "was a measured means to serve an important purpose." *Williams v. Borg*, 139 F.3d 737, 740 (9th Cir. 1998). Unlike in *Rock*, there were no less drastic and "more traditional means" available to explain to the jury the relevance of Jones's proposed testimony. *Rock*, 483 U.S. at 61 (discussing the alternative option of cross-examination to ensure reliability). And the court imposed its condition only on evidence whose relevance it reasonably worried would not have been apparent without expert testimony. By contrast, the court admitted those parts of Jones's testimony that were clearly independently relevant, such as what Jones was thinking and feeling on the day of the murder, including the substantive content of his childhood flashback right before the crime. Accordingly, any impact of the court's ruling on Jones's right to tell his complete story was proportionate to the evidentiary purposes served here. *Cf. Greene*, 288 F.3d at 1091.[9]

We also place significant weight on the fact that the condition the court imposed was not onerous: an expert psychiatrist had already been appointed, had written a report, and was available to testify on Jones's behalf. *Cf. Williams*, 139 F.3d at 741 (observing that the defendant "had complete

[9] Jones also contends that telling the jurors that he previously experienced flashbacks, blackouts, and hearing voices would have made them more likely to believe his account that he blacked out right before murdering Miller. But even if so, it was reasonable for the court to conclude that the weak probative value of such testimony was outweighed by the risk of confusing the jury about which questions it had to answer to determine whether Jones had formed the requisite specific intent.

control over whether he could testify or not," because he could choose whether to satisfy the condition of submitting to cross-examination). That Jones may have been compelled to make a difficult tactical decision about whether introducing Dr. Thomas at the guilt phase was worth the risk of prejudicial cross-examination does not mean that the consequences of the court's condition were disproportionate to the interests it served. The "Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (quoting *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980)).

Jones's arguments to the contrary do not persuade us. First, Jones argues that the trial court's ruling was arbitrary because California law allows lay testimony about mental health conditions without accompanying expert testimony, and that therefore, the restriction served no legitimate interests. *See, e.g.*, *People v. DeSantis*, 831 P.2d 1210, 1228 (Cal. 1992) ("[T]here is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity or to similar cognitive difficulties." (citation and quotation marks omitted)). A state rule that lay witnesses are competent to offer mental health opinions, however, does not dictate that *any* lay testimony about mental health will be admissible notwithstanding other evidentiary rules. *Cf. United States v. Vallejo*, 237 F.3d 1008, 1015 (9th Cir. 2001) ("The particular facts of the case determine the relevancy of a piece of evidence."). To illustrate this point, the properly admitted testimony in one case Jones cites, *People v. Townsel*, 368 P.3d 569 (Cal. 2016), consisted of lay opinions that a defendant was not intellectually disabled, which were offered to rebut the defense that intellectual disability prevented the defendant from forming specific intent. *Id.*

at 589–91. Unlike Jones's proffer, the relevance of this testimony was apparent without additional evidence. *See id.* The state law principles Jones invokes do not prove that the trial court's ruling here—which was premised on a missing link between Jones's mental health history and his specific intent, rather than on Jones's competence to testify about that mental health history—was arbitrary. Indeed, state law supports the trial court's weighing the value of Jones's unaccompanied testimony against the risks of confusion it posed. *See* Cal. Evid. Code § 352.

Second, Jones's reliance on our opinion in *Greene* is misplaced. The defendant in *Greene* sexually assaulted his therapist. 288 F.3d at 1084–85. At trial, he contended that he suffered from dissociative identity disorder ("DID") and that an alternate personality was in control of his body during the assault. *Id.* The trial court barred "any mention of" DID, precluding expert testimony, witness testimony, and the defendant's own testimony. *Id.* at 1085. On habeas review, we relied on *Rock* to hold that this broad exclusion "impermissibly curtailed [Greene's] right to . . . describe his state of mind at the time of the attack." *Id.* at 1091. We reached this conclusion notwithstanding the fact that the court's preclusion "legitimately serve[d]" the "state's interest in preventing unreliable or confusing scientific testimony." *Id.*

Greene is distinguishable because the type of evidence excluded there—the defendant's description of "his own state of mind at the time of the attack," *id.* at 1092—was admitted here. Jones testified that right before the murder, he flashed back to a moment from his childhood and blacked out shortly after. Moreover, the trial court did not condition Greene's DID testimony on the introduction of an expert;

rather, it flatly excluded all DID evidence, *including* that offered by his expert. *Id.* at 1085.

Indeed, in *Greene*, we anticipated evidentiary rulings like the one Jones challenges here, observing that our holding "may have the consequence of requiring expert testimony to provide context for the finder of fact." *Id.* at 1093. This statement strongly suggests that it is constitutional to require expert testimony to accompany lay testimony about mental health symptoms that is offered to disprove specific intent. Jones attempts to explain away this statement as stemming from the fact that the trial in *Greene* took place in Washington, which, unlike California, has a rule mandating expert testimony whenever scientific evidence is admitted. But whether a particular evidentiary ruling is dictated by state law has little bearing on whether it would comport with federal constitutional law. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919–20 (9th Cir. 1991). Our suggestion in *Greene* that such a requirement would be constitutional under *Rock* thus supports the State's position here regardless of variations in state law.

Ultimately, what Jones challenges is a reasonable and measured determination that, without expert contextualization, his proffered testimony about past events and experiences would not assist the jury in determining his specific intent during an incident that occurred years later. This fact-specific ruling appropriately served valid rules of evidence and was not disproportionate to the purposes served by those rules. It was thus not unconstitutional.

IV.

For the foregoing reasons, we reverse the judgment of the district court and remand for consideration of Jones's remaining claims.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, Petitioner, v. RONALD DAVIS, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 09-2158 CJC **DEATH PENALTY CASE** ORDER GRANTING HABEAS RELIEF FOR DENIAL OF PETITIONER'S RIGHT TO TESTIFY IN HIS OWN DEFENSE

Our Constitution guarantees every person the right to be heard: to be heard through free speech, to be heard through democratic representation, to be heard through one's own words at one's own criminal trial. Whether accused falsely or rightly, a person brought to trial by the State has a right to tell what happened, in his or her mind, with his or her voice. Jurors often want to hear it, and defendants often want to tell it. Petitioner Ernest Jones sought to tell what was going on in his mind at the time he raped and killed his victim. He was denied that right. No matter the gravity of his crimes, no matter the reprehensibility of his actions, and no matter the unimaginable loss and suffering he caused his victim and her family, what he had to say, and giving him the chance to say it, were important, especially since the State was seeking to execute him.

FACTUAL BACKGROUND

Mr. Jones has been diagnosed as schizophrenic, with schizoaffective psychosis. (RT 4413-14, 4433.) His schizophrenia stems from a lifetime of abuse. (RT 4436-37, 4439-40.)

Mr. Jones's home life was "a living hell." (RT 4569); *Jones*, 29 Cal. 4th 1229, 1243 (2003). He and his five siblings often did not have food. (RT 4375, 4567, 4359, 4368); *Jones*, 29 Cal. 4th at 1243. His parents, who had their first child when they were 15 and 16 years old, were alcoholics who physically fought often. (RT 4357-62, 4366, 4378, 4568); *Jones*, 29 Cal. 4th at 1243. Police came to the home several times because of their fights. (RT 4390.) Mr. Jones's mother used knives in her violence toward the family. She was arrested for stabbing Mr. Jones's father, Earnest Lee,[1] in the hand with a knife and once held a knife to her daughter. (RT 4379-80, 4568); *Jones*, 29 Cal. 4th at 1243. She abused the children and hit them with whatever she had in her hands. (RT 4389); *Jones*, 29 Cal. 4th at 1243. She would "whip" Petitioner on his head with her fists and beat him with electrical cords. (RT 4436, 4578.) He had nightmares and would scream at night. (RT 4574.)

Petitioner's mother had many affairs. (RT 4362.) During arguments, in Petitioner's earshot, she would tell his father that Petitioner was not his son. (RT 4573); *Jones*, 29 Cal. 4th at 1243. Earnest Lee once walked in on her in bed with Earnest Lee's friend. (RT 4363-64.) *Jones*, 29 Cal. 4th at 1243. Petitioner and his sister were also in the bed at the time, and Petitioner was awake. (RT 4363-64); *Jones*, 29 Cal. 4th at 1243. After this incident, Earnest Lee beat Petitioner's mother regularly and once "stomped her and stomped her in her vagina . . . ." (RT 4571); *Jones*, 29 Cal. 4th at 1243. The family was one in which "[t]he males try to

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[1] The trial transcript reports the spelling as both "Earnest" and "Ernest." (RT 4354.)

dominate." (RT 4580; *see also* RT 4569.) The girls "were called bitches, dogs, fools, anything." (RT 4569.)

Mr. Jones formed a lasting impression of a "punitive, sadistic, at the same time seductive mother . . . ." (RT 4444.) He developed an "approach to the sadistic mother on a sexual level [that] is both a wish fulfillment and gratifying fantasy and the expression of punitive rage." (RT 4438-39.) His feelings culminated in a "forbidden wish" of "[t]he incest killing of the mother . . . ." (RT 4483.)

The wish Petitioner developed as a child lay dormant, until he committed a series of escalating attacks. (RT 4438.) First, in 1984, Petitioner raped a friend, Kim Jackson. She said he seemed to be in a trance, like he took on a new person. *Jones*, 29 Cal. 4th at 1243. In 1985, Petitioner raped Dorothea Harris, the mother of his girlfriend. *Id.* at 1240-41. He was sentenced to prison for twelve years and released on parole in 1991. *Id.* at 1241. Ten months later, he raped and murdered Julia Miller, the mother of his girlfriend at that time. *Id.*

On trial for his crimes against Ms. Miller, Mr. Jones conceded that he killed Ms. Miller and must have had sexual intercourse with her. *See id.* at 1242; (RT 3336). He wanted to explain what was in his mind at the time, however, to show that he did not intend his actions. He took the stand. He testified that as he began stabbing Ms. Miller with a knife, "I kind of slipped back into my childhood. [¶] In my mind, I was visioning when I was little, when I walked into a room with my mother who was with another man who wasn't my father." (RT 3335; *see also* RT 3480 ("I had slipped back into my childhood, and I was picturing my mother in the bed with another man when I was younger, and I walked into the bedroom and happened to open the door, and that's when I had kneeled and grabbed, I believe which was a knife and in a rag or something, and I started to stab her.").) He said that after the first few stabs, the next thing he remembered was "being curled up in a ball crying, and I looked over at Ms. Miller and she was lying there tied up and

she was dead." (RT 3335.) He saw blood on her clothing and knives in her neck. (*Id.*)

Mr. Jones wanted to explain to the jury his history of "blackouts," along with other aspects of his personal and family history. *Jones*, 29 Cal. 4th at 1252-53, 1253 n.8; (*see also* RT 3348-69, 3405-14). The prosecution objected that defense counsel:

> wants to elicit testimony from the defendant about a history of hearing voices, of family history and things of that nature, that without a psychiatrist to testify to the relevance of that. [¶] All he's really seeking to do is trying to get some sympathy for the jury to kind of leaving it hanging out here as kind of the poor me defense. 'I had a bad childhood.' [¶] That is most of the discovery. 'I had a bad childhood, and because I had a bad childhood, I hear voices,' and he wants to elicit that in front of the jury, and then there is no psychiatrist to say what that has to do with anything. [¶] How does that play into any defense in this case because he heard voices? . . . To elicit from Mr. Jones, 'Are you taking psychotropic or psychiatric medication,' I would object to any foundation. . . . [T]his is going to the heart of the case . . . . [I]f he wants to show that this defendant has a psychiatric problem, I don't think he can just elicit symptoms of that and sit down.

(RT 3355-56; *see also* RT 3409-12.)

The trial judge asked Mr. Jones's attorney whether he intended to call "a psychiatrist, psychologist, or whatever to discuss those matters." (RT 3413.) He said he did not at the moment but wanted to hear the rest of Mr. Jones's testimony to decide. (*Id.*) The trial judge ruled that Mr. Jones would not be allowed to tell the jury "all the history as a child" and the other topics Mr. Jones's attorney raised. (RT 3413-14.)

The prosecutor later asked Mr. Jones:

> Q. Now, that's the point in time you are telling us that you reverted back to your childhood; right?

> A. Yes.
>
> Q. Now – so you revert back to your childhood, and all of a sudden you are just stabbing her with a knife. [¶] Is that what you are remembering?
>
> A. Yes.
>
> Q. Can you give us anymore [sic] insight into what you were thinking there? [¶] Can you tell us anymore [sic] – were you trying to kill your mother? Is that what you are telling us?
>
> A. I don't remember much after that.

(RT 3660.) When it was his opportunity to question Mr. Jones about whether he was trying to kill his mother (*see* Cal. Evid. Code § 774 (redirect examination)), Mr. Jones's lawyer asked him:

> Q. Now, the district attorney asked you about your childhood and flashing back to your childhood. [¶] Do you remember that?
>
> A. Yes.
>
> Q. And what was your relationship to your mother?

(RT 3676.) The prosecutor objected, and the court sustained the objection. (*Id.*)

When both sides finished questioning Mr. Jones, his attorney asked the court to hear his reasons against the prosecutor's objection. (RT 3683.) He explained:

> [T]he court ruled previously in response to the D.A.'s objection that I could not get into Mr. Jones' childhood or the effect that maybe this woman lying there and saying something might have had on him because of certain experiences he had in his childhood. [¶] It is true that he was permitted to testify that he pictured his mother in bed with somebody, but there's a lot more things that led up to that, which I've listed partially in my offer of proof.
>
> But today the District Attorney asked him, and I think it was in a particularly disbelieving way and a very dramatic way, what exactly was flashing through his mind, what was going through his mind,

> what from his childhood occurred, what did this remind him of regarding his mother.
>
> And I wanted to expand on that based on the District Attorney's question because I think what the District Attorney is going to argue is that Mr. Jones is not being truthful, that these experiences in his childhood maybe either never happened or they were very minor and had no effect on his behavior.
>
> And this is the crucial point when he says he started stabbing, he grabbed the scarf, and then the next thing he remembers is he is curled by the side of the bed. [¶] If the jury doesn't believe that this is really related to a childhood experience, then they might not believe anything that he has testified to, and he is our main witness.
>
> So I think in spite of the court's ruling previously, the District Attorney has opened up the door in a crucial area, and I think I should be permitted to ask these questions.

(RT 3684-85.) The court ruled against Mr. Jones and sustained the objection. (RT 3685.)

After the case was submitted, the jury deliberated for four days and found Petitioner guilty of raping and murdering Ms. Miller. *Jones*, 29 Cal. 4th at 1237; (CT 247, 248, 251, 377).

DISCUSSION

I. Clearly Established Federal Law

"At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987) (holding that a state evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated the defendant's constitutional right to testify on her own behalf). A person's "*opportunity to be heard in his defense* – a right to his day in court – [is] basic in our system of jurisprudence . . . ." *Id.* at 51 (internal quotation omitted; emphasis in original). When standing trial by the government,

an accused has a right "to present his own version of events in his own words." *Id.* at 52; *see also Washington v. Texas*, 388 U.S. 14, 19 (1967) (discussing a defendant's "right to present [his or her] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"). The United States Supreme Court has recognized that the "most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52.

A defendant's right to present testimony has limits, and a state court may apply legitimate, justified evidentiary rules. *Id.* at 55-56. A state court may not, however, "permit[] a witness to take the stand, but arbitrarily exclude[] material portions of his testimony." *Rock*, 483 U.S. at 55. Mr. Jones's testimony about his mental state was material, because his defense was that he lacked the intent to murder or rape Ms. Miller as a result of his mental disorder. *See, e.g.*, *Jones*, 29 Cal. 4th at 1258 (noting prosecutor's arguments to the jury that evidence of a mental disorder could negate the specific intent required for rape felony murder and the rape murder special circumstance); *id.* at 1265 (observing, in a different context, that "the significance of defendant's claim that he blacked out prior to killing and raping Mrs. Miller was the implication that he was therefore incapable of the deliberation required for first degree murder"); (RT 3928 ("[V]oluntary intoxication and mental illness can stop you from the specific intent, and that's what we're talking about here. . . . The issue is, did he have the specific intent? And we're saying he did not."), 3935-36 (arguing that the circumstances of the killing "show[] a very sick violent person, not a planned killing")).

In Mr. Jones's case, California's rules of evidence would have allowed him to testify about his symptoms of mental illness. Under California law, "'there is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity' or to similar cognitive difficulties." *People v. Townsel*, 63 Cal. 4th 25, 51 (2016) (quoting *People v. DeSantis*, 2 Cal. 4th 1198, 1228 (1992) (finding error where the trial court reasoned that "a layperson is

incompetent to give a clinical medical diagnosis of his or her physical condition . . . [but defendant could] introduce expert testimony" and excluded a witness's statement that he "had trouble remembering things 'because of his brain cells'")). California law did not require a mental health expert to provide testimony on Mr. Jones's mental condition less than sanity or similar cognitive defects. *Compare Greene v. Lambert*, 288 F.3d 1081, 1093 (9th Cir. 2002) (noting that Washington state law, by contrast, may have required mental health expert testimony even though none was constitutionally required to permit defendant to testify). Mr. Jones's testimony was prohibited not by a state evidentiary rule, but by a trial judge's decision contrary to state law.

The defendant in *Greene v. Lambert* faced a situation similar to Mr. Jones's. Defendant Greene suffered from Dissociative Identity Disorder (DID), and he sexually assaulted his therapist. *Id.* at 1084. Defendant Greene's trial judge "forbade [his] testimony about his own state of mind and forbade testimony from the victim – his therapist – about what she observed of his state of mind." *Id.* at 1084, 1090-92. The trial judge ruled that Mr. Greene's Dissociative Identity Disorder-related defenses would not be helpful to the jury and were not admissible under Washington Rule of Evidence 702. *Id.* at 1085. Washington Rule of Evidence 702 stated that an expert may give his or her opinion if specialized knowledge would help the jury to understand or decide the evidence. *See id.* at 1085 n.1.

Defendant Greene's right to testify in his own defense was violated. *See id.* at 1091-92. "[T]he trial court's broad preclusion of all DID evidence here impermissibly curtailed Petitioner's right to tell his own story. Petitioner could not describe his state of mind at the time of the attack without referring at least in passing to the condition." *Id.* at 1091; *see also id.* at 1091-92 (holding state court unreasonably applied clearly established federal law in *Rock* and *Washington* under 28 U.S.C. § 2254(d)(1)).

II. State Court Decision

On appeal, Mr. Jones told the state court that his right to testify in his defense had been violated. He did not raise the claim again in state habeas proceedings. *Cf. In re Waltreus*, 62 Cal. 2d 218, 225 (1965) (state habeas petitioners may not raise claims rejected on appeal).

The California Supreme Court held on direct appeal:

> Defendant's proposed testimony with regard to his alleged history of hearing voices, experiencing flashbacks, and suffering blackouts was jumbled deep inside an extraordinary grab bag of a proffer that included such disparate allegations as that defendant 'attended many schools' and that 'Aunt Jackie shot herself to death.' . . .
>
> There was no error. Defendant testified he heard voices *after* he murdered and raped Mrs. Miller. He did *not* testify that the voices told him to attack her. Therefore, any prior history of hearing voices would not have been relevant to the question whether he specifically intended to rape Mrs. Miller.
>
> Moreover, any error in this regard was harmless. As the Attorney General points out, Dr. Thomas, the court-appointed psychiatrist, interviewed defendant at least three times, and he reviewed reports on defendant's background prepared by defendant's relatives, as well as the reports of numerous experts who had examined defendant. Therefore, if defendant had a history of flashbacks and blackouts, Dr. Thomas should have been aware of it. Accordingly, the fact that Dr. Thomas, when called by the defense in the penalty phase, failed to mention any such history suggests that defendant's proposed testimony concerning such a history would have been a recent fabrication.

Jones, 29 Cal. 4th at 1252-53 (emphasis in original).

III. Analysis

The state court's treatment of Mr. Jones's claim is flawed in several ways. For one, even though Mr. Jones did not say he heard voices telling him to commit the crimes, that he heard voices after still stood to show that he suffered from

schizophrenia. (*See* RT 4460-61 (Dr. Thomas's testimony that those auditory hallucinations were an "indication of the schizophrenic process getting involved in the problem solving").) Even if a fairminded jurist could think that the auditory hallucinations did not show Mr. Jones's mental state at the time of the crimes, hearing voices was hardly the only evidence at issue in the trial court's ruling. Sidestepping all other testimony the trial court excluded does not show that "[t]here was no error."

Most significantly, the trial court forbade Mr. Jones from telling the jury about his childhood history and his history of blackouts or flashbacks. The state supreme court thought any error in that ruling was harmless because it did not believe Mr. Jones had such a history.[2] It held up Dr. Thomas's testimony as "suggesting" that Mr. Jones was lying, because Dr. Thomas supposedly did not report a history of flashbacks and blackouts. A closer reading of Dr. Thomas's testimony shows the court's justifications to be false.

In his testimony, Dr. Thomas sometimes used or agreed with the term "flashback" to describe times when a person reverts to childhood reality. (RT

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[2] The state court's credibility determination without a hearing, standing alone, arguably shows a violation of 28 U.S.C. § 2254(d)(2). *See Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) ("In some limited circumstances, we have held that the state court's failure to hold an evidentiary hearing may render its fact-finding process unreasonable under § 2254(d)(2). For example, we have held that a state court's resolution of a 'credibility contest' between a petitioner and law enforcement officers was an unreasonable determination of fact where the evidence in the record was consistent with the petitioner's allegations." (quoting *Earp v. Ornoski*, 431 F.3d 1158, 1169-70, 1169 n.8 (9th Cir. 2005))). As discussed below, the evidence in the record was consistent with Petitioner's proffered testimony.

The Court does not base its decision on the sufficiency of the state court's factfinding process, however. Rather, the state court's harmlessness determination rested on factual findings that an appellate panel could not reasonably hold to be supported by the record. *See Hibbler*, 693 F.3d at 1146; *see also Murray v. Schriro*, 745 F.3d 984, 1001 (9th Cir. 2014) (noting the apparent "state of confusion as to whether § 2254(d)(2) or (e)(1), or both, applies to AEDPA review of state-court factual findings"). "'[T]he record satisfies either standard,'" 28 U.S.C. § 2254(d)(2) or § 2254(e)(1), in Petitioner's favor. *Murray*, 745 F.3d at 1001 (quoting *Kesser v. Cambra,* 465 F.3d 351, 358 n.1 (9th Cir. 2006)).

4457-58, 4461-62, 4529.) He more often discussed the experience in technical terms. He explained it as "an altered state of consciousness, taking him [Mr. Jones] back in time to the – to childhood and to the punishment induced sexual wishes of the child." (RT 4458-59.) Dr. Thomas described "an altered state of personality that when he [Mr. Jones] becomes psychotic, . . . he looses [sic] the ability to control the normal functioning self. And there are certain triggers that set that off." (RT 4435.) Petitioner then "responds to an inner reality as if it were external reality. [¶] The inner reality in this case being the world the way it was when he was growing up and subjected to the sadistic punishment of a domineering and promiscuous and alcoholic mother. That's the world that superimposes itself on his reality test." (RT 4465.)

Dr. Thomas reported a history of the same "psychotic self" acting during Mr. Jones's prior offense against Ms. Harris. (RT 4442.) He testified that during the time when Petitioner lay down after the attack on Ms. Harris, "the disorganized self reasserts itself. The prior existing personality structure takes time to reconstitute. [¶] So that at some point in that assault, Mr. Jones in my opinion was psychotic, and that that [sic] psychotic self reconstituted itself into a more normal appearing or lesser degree of psychosis, and that took time." (*Id.*; *see also* RT 4459-60, 4474-75.) When defense counsel asked Dr. Thomas, "Are you saying that the attacks on Mrs. Harris and Mrs. Miller, that he – he believed they were his mother?" Dr. Thomas responded, "Well, basically the attacks on Mrs. Harris and Mrs. Miller were the same crime. The object of that assault was the mother in each case. [¶] This punitive, sadistic, at the same time seductive mother was the object of the assault." (RT 4444; *see also* RT 4483 (Dr. Thomas's observation in the crimes against Ms. Harris and Ms. Miller of a "forbidden wish" of "[t]he incest killing of the mother" and agreement that Petitioner "did commit the incest portion with [Ms.] Harris").) Dr. Thomas's testimony that the same psychotic self, targeting maternal incest, acted in Petitioner's attack on Ms. Harris as in the attack

on Ms. Miller precludes a finding that Dr. Thomas "failed to mention any such history" of psychotic responses to an inner childhood reality, whether coined "flashbacks and blackouts" or not.

Moreover, the jury did not hear Dr. Thomas's testimony until the penalty phase of trial. The California Supreme Court concluded that the jury's guilt phase verdict would not have been affected by Petitioner's guilt phase testimony in light of penalty phase evidence. Its reasoning is convoluted at best. But if it is proper to consider penalty phase evidence when assessing the potential impact of guilt phase testimony, then Ms. Jackson's penalty phase testimony provides other corroborating evidence that Mr. Jones had a history of psychotically altered states of consciousness. Ms. Jackson testified that when Petitioner attacked her, "'he seemed to be in a trance. His eyes got big and glassy and his whole demeanor changed. [¶] It was like he took on a new person, like he was in a trance, and then afterwards, he seemed to snap back.'" *Jones*, 29 Cal. 4th at 1243. Dr. Thomas testified that Ms. Jackson's testimony provided supporting evidence of the altered states Petitioner experienced. (*See* RT 4467 (testifying about Ms. Jackson's account that "the person who assaults and kills is – represents an altered state of consciousness from the usual self. [¶] And I think what she is indicating is that this altered state has identifiable physical and physiological components"), 4525 (agreeing that Petitioner's account of his verbal exchanges with Ms. Jackson were "delusional and evidence of his psychiatric condition").) Ms. Jackson's testimony shows that Mr. Jones's history of psychotically altered states was not a recent product of his own invention.

Finally, Dr. Thomas himself testified that the recency of Petitioner's reporting of the "flashback" at the time of the crimes against Ms. Miller was understandable. He provided his understanding of why Petitioner did not report the flashback earlier when questioned by the prosecutor:

Q. Now, with respect to Mrs. Miller, he never told you about this flashback to walking in on his mother during any of your sessions; isn't that true?

A. In the very last session he mentioned that.

Q. In the very last session. [¶] When was that?

A. Oh it was – I guess it was a week ago Wednesday [February 1]. . . .

Q. Prior to February 1st had he ever mentioned that to you?

A. No, but it was mentioned in the report by the sister.

Q. That there was an incident to that effect?

A. That's right. . . .

Q. And doesn't it seem strange that Mr. Jones during his sessions with you never mentioned that, but for the first time it comes out here in court in front of a group of strangers? . . .

A. I don't know that that was the first time. The first time I heard it was with his counselor back on February 1st. . . .

Q. Okay. But my question remains. [¶] Assuming the first time it came out was in a setting like this [in court], wouldn't that be somewhat surprising to you?

A. Not really. [¶] One of the problems with all this is that as this goes on, the psychology, the individual, the human being, Mr. Jones is trying to assimilate, understand, and sort of reintegrate himself about all of these facts, including his own behavior. [¶] So that it would come out in the context of this court is not all that surprising to me.

Q. And that's, again, based upon your belief that he has this mental condition that you have testified to?

A. That's correct.

(RT 4529-31.) Dr. Thomas's explanation was only heard at the penalty phase of

trial. It nonetheless helps to show the unreasonableness of the state court's premise that Petitioner's purported failure to report the flashback, or other flashbacks, to Dr. Thomas sooner suggests that they were recent fabrications.

The state court could not reasonably have held that the violation of Petitioner's right to testify in his defense was harmless more generally, either. Petitioner's theory of the defense was that he lacked the requisite mental states at the time of the crimes. Defense counsel's proffer included evidence from Petitioner about:

> [a] mother who was promiscuous. And I believe the defendant already testified to, when he was about seven or eight, opening the door and seeing her in bed with another man. Other incidents of other men, dizzy spells, black outs . . . . And then the incidents which even the D.A. wants to get into, the incidents with . . . particularly Pam's mother [Ms. Miller] . . . .

(RT 3408-09.) As the prosecutor acknowledged in arguing his objection to evidence of Mr. Jones's "psychiatric medication," Mr. Jones's mental state "go[es] to the heart of the case." (RT 3356.) His jury deliberated for four days even without his proffered testimony. (CT 247, 248, 251, 377.) Had Mr. Jones been allowed to testify about his history of symptoms of mental illness, there is "more than a reasonable possibility" that the jury would have found that the murder was not willful, deliberate and premeditated and that he lacked the specific intent to rape, as required to find him guilty of rape felony murder and to find true the rape murder special circumstance allegation. *Davis v. Ayala*, 135 S. Ct. 2187, 2197-98 (2015) ("[R]elief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.") (internal quotations omitted). The California Supreme Court's harmlessness determination was objectively unreasonable. *See id.* at 2198-99 (explaining that when the state court has determined that any federal error was harmless beyond a reasonable doubt under *Chapman v. California*, 386

U.S. 18 (1967), "a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable" (internal quotation and emphasis omitted)).

To the extent the state court held that Mr. Jones's right to testify in his defense was not violated, *see Jones*, 29 Cal. 4th at 1253 ("There was no error."), that decision constitutes an unreasonable application of *Washington* and *Rock* under 28 U.S.C. § 2254(d)(1). *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("[A] habeas court must determine what arguments or theories 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."); *Greene*, 288 F.3d at 1091-92.

Claim 11 of the Petition, alleging that the trial court violated Mr. Jones's right to testify in his defense, is therefore GRANTED. (First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody, Docket No. 105 ("Pet.") at 154-61.)[3]

SUFFICIENCY OF THE EVIDENCE

Mr. Jones deserves a new trial. When a petitioner deserves a new trial, and he or she claims that as a matter of law the jury could not properly return a guilty verdict, the court must consider that claim. *See Burks v. United States*, 437 U.S. 1, 16-18 (1978) ("[Because] the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only just remedy available for that court is the direction of a judgment of acquittal." (internal quotation omitted)); *Robbins v. Smith*, 152 F.3d 1062, 1068-69 (9th Cir. 1997) ("Resolving other issues while leaving challenges to the underlying conviction unresolved potentially can cause grave injustice to defendants . . .

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[3] Claim 11 includes an allegation that Mr. Jones received ineffective assistance of counsel. (Pet. at 161.) The Court need not, and does not, reach that separate issue.

who . . . must await resolution of a renewed appeal while potentially deserving a retrial *and possibly an acquittal*." (emphasis added)), *rev'd on other grounds*, 528 U.S. 259 (2000). Mr. Jones makes that argument in Claim 9 about the rape, rape felony murder, and rape special circumstance allegations. (Pet. at 143-44.)

In California, if a convicted person believes the evidence was legally insufficient, he or she must raise that claim on direct appeal. *In re Lindley*, 29 Cal. 2d 709, 723 (1947) ("Upon habeas corpus, . . . the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration."). A convicted person must also raise all available claims on appeal and not on habeas review. *In re Dixon*, 41 Cal. 2d 756, 759 (1953). Mr. Jones did not raise Claim 9 on direct appeal. He raised it as Claim K in his first state habeas petition. The California Supreme Court held that it was barred under *Lindley*, was barred under *Dixon*, and failed on the merits. (Docket No. 29, Lodg. C7, *In re Jones*, Case No. S110791; *see also* Opposition to Petitioner's Opening 2254(d) Brief on Evidentiary Hearing Claims, Docket No. 91 ("Opp."), at 75-77 (asserting procedural bars).) Petitioner makes no attempt to show cause and prejudice to excuse his default.

Claim 9 is procedurally barred under *Lindley* and *Dixon*. (Opp. at 75-77.) 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). The *Lindley* rule is each. *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir. 2004). Petitioner does not show otherwise by arguing that the California Supreme Court sometimes reviews the claims on the merits without explaining when or why it will. (Petitioner's Reply Brief regarding the Application of 28 U.S.C. § 2254(d), Docket No. 100 ("Reply"), at 130 n.62); *see 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)).

The *Dixon* bar, as applied here, was also an independent and adequate state procedural bar. *Id.* at 1805 (holding that the *Dixon* bar was firmly established and regularly followed, at least as of June 10, 1999, when Lee filed her opening brief on direct appeal (two years before Mr. Jones filed his)). Mr. Jones fails to show that the rule serves no legitimate state interest. (*See* Reply at 19-26); *see 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).

ENTRY OF FINAL JUDGMENT AND ORDER

Because Mr. Jones is entitled to relief on Claim 11, a determination of the remaining claims (beyond Claim 9) is unnecessary. "Even if petitioner prevailed on one or more of his other claims, he could obtain no greater relief than that to which he already is entitled." *Buckley v. Terhune*, 266 F. Supp. 2d 1124, 1144 (C.D. Cal. 2002), *aff'd*, 441 F.3d 688 (9th Cir. 2006) (en banc). Ruling on Claims 9 and 11 without determining Petitioner's other claims does not risk a "grave injustice" as contemplated by *Robbins*, 152 F.3d at 1068-69. (*See supra* pp. 15-16.) Rather:

> the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal.

Blazak v. Ricketts, 971 F.2d 1408, 1414 n.7 (9th Cir. 1992) (per curiam).

Because there is no just reason for delay, the Court directs entry of a final judgment. *See* Fed. R. Civ. Proc. 54(b) ("When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . if the court expressly determines that there is no just

reason for delay.").

The Court GRANTS relief on the basis of Claim 11 of the First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody. The Court DISMISSES as procedurally barred Claim 9. All other remaining claims in the First Amended Petition are DISMISSED AS MOOT. Because there is no just reason for delay, the Court directs entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

The judgment of conviction in the matter of *People v. Ernest D. Jones*, Case No. BA063825 of the California Superior Court of Los Angeles County, shall be VACATED. The State of California shall, within 120 days, either release Petitioner or grant him a new trial.

Within 135 days of the date of this order, the State of California shall file in this Court a Notice of Compliance reporting the manner in which the State has complied with this order.

IT IS SO ORDERED.

Dated: February 2, 2018.

CORMAC J. CARNEY
United States District Judge

APPENDIX C

COPY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S046117
v.	)	
	)	
ERNEST DWAYNE JONES,	)	
	)	Los Angeles County
Defendant and Appellant.	)	Super.Ct.No. BA063825
	)	

A jury convicted defendant Ernest Dwayne Jones of the first degree murder (Pen. Code,[1] §§ 187, 189) and rape (§ 261) of Julia Miller, and it found true the special circumstance allegation that the murder was committed in the commission of the rape. The jury found that defendant was not guilty of burglary (§ 459) or robbery (§ 211) of Mrs. Miller, and it found not true the special circumstance allegations that the murder of Mrs. Miller was committed in the commission of burglary or robbery. Finally, the jury found true the allegations that defendant personally used a deadly weapon, i.e., a knife, to commit the crimes (§ 12022, subd. (b)) and that he had served a prior prison term (§ 667.5). The jury set the penalty at death. The trial court denied defendant's motion for a new trial (§ 1179

[1] All further statutory references are to the Penal Code unless otherwise designated.

SEE CONCURRING OPINION

et seq.) and his motion for modification of the sentence (§ 190.4, subd. (e)). This appeal is automatic. (§ 1239.)

We conclude the judgment should be affirmed in its entirety.

I. FACTS

A. Guilt Phase

1. The People's Case

Shortly after midnight on August 25, 1992, in Los Angeles, Chester Miller returned home from work and noticed the family station wagon was missing from the driveway. Mr. Miller went into his house and found his wife, Julia, lying dead at the foot of their bed. Mrs. Miller's robe was open, her nightgown was bunched above her waist, and she was naked from the waist down. A telephone cord and a purse strap had been used to tie Mrs. Miller's arms over her head, and a nightgown had been used to loosely tie her ankles together. Mrs. Miller had been gagged with two rags, one in her mouth and another around her face. Two kitchen knives were sticking out of her neck. Pieces of three other knives were found on or around her body.

Defendant and the Millers' daughter, Pam, lived together in an apartment about two and one-half miles from the Millers. Around 6:00 p.m. on the previous day, August 24, 1992, Pam had been on the phone with her mother. Defendant had interrupted Pam to ask her whether her parents were at home. Pam told defendant that her father was at work, but that her mother was home.

Around 7:40 p.m. the same evening, defendant left the apartment. Pam later noticed defendant had apparently switched off the ringer on their phone, something he had never done before. At 9:30 p.m., defendant returned to the apartment, smoked a joint of marijuana and cocaine, and then left again at 10:00 p.m. He had again switched off the phone ringer. Defendant returned in 20 minutes and rolled some more "joints."

Pam always slept with the television on, but this night defendant told her to turn it off because he had things on his mind. Around midnight she woke up and saw defendant looking out the window. At some point in the evening he had changed clothes. At 1:00 a.m., their doorbell rang. Defendant told Pam not to answer it. Hearing her name called, Pam looked out of the bedroom window and saw her grandmother, who told her to open the apartment door. When defendant did so, Pam's grandfather said her mother had been killed. Pam repeatedly asked defendant to accompany her to her grandparents' house, but defendant refused, saying he would come when he got his sister's car.

When Pam arrived at her grandparents' house, she called her friend Shamaine Love. Pam told Love that Mrs. Miller had been killed. Love, a childhood friend of Pam's, as well as a drug dealer who regularly sold cocaine to her and to defendant, lived near Mr. and Mrs. Miller. Love told Pam that several times during the day Mrs. Miller had been murdered defendant had been to Love's house to buy drugs from her. Two of defendant's trips to Love's house were in the afternoon; on both occasions he paid for the drugs in cash. Shortly after sunset, which would have been sometime between 7:30 and 7:55 p.m., defendant had again visited Love, this time paying for cocaine and marijuana with a gold chain. Later that night defendant again bought cocaine from Love, paying for it with a pearl necklace, pearl earrings, and a pearl bracelet. Pam identified the pearl jewelry, and later the gold chain, as Mrs. Miller's. Pam took the pearl jewelry to the Miller house and showed it to detectives there. Pam told the officers that she knew who had killed her mother and that they should go to the apartment.

At 3:00 a.m., police officers staked out the Millers' station wagon, which they found parked around the corner from the apartment. Shortly thereafter defendant got into the station wagon and drove away. The officers followed in their marked patrol car. Defendant looked back in the officers' direction, reached

into the back seat, and brought a rifle into the front seat. Defendant then sped up, and the officers gave chase, their lights and sirens on. Defendant ran red lights and stop signs. Other patrol cars joined in pursuit. Defendant hit a traffic island and blew out the tires on the driver's side of the station wagon. He continued driving on the rims, however, and entered a freeway. First the wheels, and then the rims on the station wagon disintegrated, forcing defendant to stop. The pursuit lasted 40 minutes. Defendant was ordered out of the station wagon, but instead he placed the rifle to his chest and shot himself. A subsequent search of the apartment revealed that the front and back doors had been barricaded with furniture.

The deputy medical examiner with the Los Angeles County Coroner's Office who performed the autopsy on Mrs. Miller's body concluded, on the basis of the following evidence, that she had been stabbed to death: Two knives were sticking out of Mrs. Miller's neck. She also had 14 stab wounds in her abdomen and one in her vagina, but the fatal stab wound, which penetrated to the spine, was the one in the middle of her chest. Aside from the stab wound, there was no evidence of trauma to the vaginal region.

At the crime scene, a criminalist with the Los Angeles County Coroner's Office took swabs of Mrs. Miller's vagina. Another criminalist found a great abundance of intact spermatozoa on the vaginal swab, leading him to conclude that ejaculation occurred no more than five to 10 hours before Mrs. Miller's death. A blood sample was taken from defendant. A molecular biologist for Cellmark Diagnostics performed deoxyribonucleic acid (DNA) testing on the blood sample taken from defendant and on the vaginal swabs taken from Mrs. Miller. This testing yields *banding patterns* that are, with the exception of identical twins, unique to every individual. There is only one chance in 78 million that a random individual would have the same DNA banding pattern as defendant. The tests

showed that the banding pattern in the DNA from defendant's blood sample matched the banding pattern of the semen on the vaginal swab taken from Mrs. Miller.

Defendant's prior conviction for sexually assaulting Dorothea H.

Previously, defendant had lived with Glynnis H. and their infant son in a garage behind the home of Glynnis's mother, Dorothea H. (Mrs. H.). After defendant and Glynnis broke up and Glynnis moved away, Mrs. H. told defendant to move out of the garage. On March 29, 1985, around 6:30 a.m., Mrs. H. heard the gate to her backyard rattle and then heard a window in the bedroom nearest the garage, the bedroom Glynnis had used, break. Mrs. H. investigated and found defendant standing in her hallway. Appearing desperate, defendant asked Mrs. H. where Glynnis and the infant were. When he learned they were not there, defendant, telling her not to scream, took Mrs. H. into her bedroom. Defendant gagged Mrs. H. and bound her arms and legs. The binding permitted Mrs. H.'s legs to be separated a bit. Defendant then raped and sodomized her.

After the assault, while defendant was resting on the bed, the doorbell rang. After peeking outside, defendant untied Mrs. H., told her not to say anything, and stood behind her as she opened the door. It was a delivery from the United Parcel Service—a package from Glynnis containing a photograph of Glynnis, defendant and their infant. When he saw the photograph, defendant began crying. He told Mrs. H. he was not going to kill her because Mrs. H., who was a teacher, could take care of the baby financially.

Defendant then took a knife from the kitchen drawer, placed it against his stomach, and asked Mrs. H. to kill him. When Mrs. H. said she couldn't, that it would be against her religion, defendant bound her to her bed, took $40 dollars from her purse, and asked her for her neighbor's phone number, saying that after

he left he would call her neighbor. Defendant did so, and the neighbor released Mrs. H.

As a result of this incident, defendant was convicted of first degree burglary (§§ 459, 460, subd. (a)), residential robbery (former § 213.5, repealed by Stats. 1986, ch. 1428, § 5, p. 5124; see now § 213), assault with a deadly weapon (§ 245, subd. (a)(1)), rape (§ 261, subd. (a)(2)), and sodomy (§ 286, subd. (c)(2)). In April 1986, defendant was sentenced to prison for 12 years, and he was paroled in 1991, 10 months before the murder of Mrs. Miller.

2. The Defense Case

Defendant testified as follows: Around 3:00 p.m. on the day he killed Mrs. Miller, defendant, feeling depressed, bought rock cocaine and marijuana from Shamaine Love, paying $20 in cash. He went to the apartment and smoked some of the drugs, and not having used drugs for seven years, became very high and paranoid. Pam came home to the apartment around 5:30 p.m. She was also high on drugs. Giving defendant a gold chain, pearl necklace, pearl earrings, and a pearl bracelet, Pam told defendant to use the jewelry to buy drugs from Shamaine Love. Defendant had seen Pam with Mrs. Miller's jewelry before, but he did not recognize this jewelry as belonging to Mrs. Miller. After Pam spoke on the phone with her mother, defendant took the bus to Shamaine Love's house, arriving around 7:30 p.m., and bought cocaine from her, paying $125 in cash plus the jewelry.

After waiting at a bus stop for 30 or 40 minutes, defendant decided to walk to the Millers' nearby home and ask Mrs. Miller for a ride back to the apartment. He did so for two reasons: He was feeling the effects of the drugs and liquor he had consumed throughout the day, and Love had told him police were patrolling the neighborhood. Mrs. Miller invited defendant into her house and agreed to give him a ride to the apartment.

A few weeks earlier, defendant had broken his thumb in six places. Defendant had previously given Mrs. Miller a more innocuous explanation—that he had broken it in the course of horseplay with Pam—but now Mrs. Miller asked him how he had really broken it. Defendant admitted that when Pam had come home late one night, he had confronted her, she had walked away from him, and he had grabbed at her waist and missed, jamming his thumb into the door frame.

Upon hearing this, Mrs. Miller became very angry. She told defendant she would kill him if he hurt Pam, and that she would lie to his parole officer to get him sent back to prison, a threat she had made on a previous occasion. Mrs. Miller took a knife from the kitchen drawer. Defendant pushed her. "You bastard," Mrs. Miller said, "My husband don't put his hands on me." As Mrs. Miller came at defendant with the knife, defendant responded by grabbing a knife out of the kitchen drawer himself. Defendant told Mrs. Miller he did not want to hurt her. Mrs. Miller swung at defendant with her knife, missing him. Defendant swung back at her, cutting her arm. "Just wait until I get my gun," Mrs. Miller said, running to her bedroom. Defendant followed Mrs. Miller and as she was taking a rifle out of the bedroom closet, defendant grabbed her from behind and spun her around. Mrs. Miller lost her grip on the rifle and fell to the floor. As defendant stood over her, Mrs. Miller said, "Give it to me."

Defendant then "kind of slipped back into [his] childhood" and had a vision of walking into a room where his mother was with a man "who wasn't [his] father." He picked up a knife and began stabbing Mrs. Miller. The next thing defendant knew he was curled up in a ball, crying, and Mrs. Miller was tied up on the floor with knives sticking out of her neck. Defendant remembered nothing after the first few stabs, but he admitted that he must have been the one who tied Mrs. Miller up, sexually assaulted her, and killed her. He insisted he had not come to the Miller house with the intention of robbing, raping, or killing Mrs. Miller.

After the killing, defendant "started experiencing things that [he] had not experienced for a while." He was "hearing . . . things in [his] head telling [him] to do certain things. [He] guess[ed] you could call it paranoia, thinking someone was coming to kill [him]." He grabbed a second rifle and bullets from the bedroom closet with the intention of taking his life. Defendant drove the Millers' station wagon to the apartment and parked around the corner, leaving the rifle in the station wagon. He locked all the windows and doors in the apartment, believing someone was coming to kill him, yet he went outside later to smoke some of the drugs he had purchased from Shamaine Love. When Pam's grandparents informed her of Mrs. Miller's death, and she left with them, defendant barricaded the doors of the apartment.

When defendant left the apartment he intended to drive the station wagon off a cliff and kill himself. Following the police chase, after the station wagon was disabled, a voice inside his head said, "They're going to kill you." Defendant then put the rifle to his chest and pulled the trigger. He was hospitalized for three weeks, recovering from the wound, and for the first week he was unconscious and on a respirator.

With regard to his prior conviction for sexually assaulting Mrs. H., defendant testified he was "not denying any of that."

B. Penalty Phase

1. The People's Case

Mr. and Mrs. Miller were married for 30 years, and he died eight months after Mrs. Miller was murdered. In Pam's opinion, Mr. Miller "grieved himself to death."

Gloria Hanks, defendant's sister, testified that defendant told her he "didn't give a fuck about Pam or her family."

During the entire year they lived together, defendant did not tell Pam he heard voices; he did not, in Pam's opinion, act like someone who was hearing voices; and he did not display such behavior when he returned to the apartment after killing Mrs. Miller.

The rape of Kim, J.

On May 28, 1984, Kim J. attended a barbecue party given by defendant's sister, Gloria Hanks. Kim and defendant smoked marijuana together at the party, and then they went to Kim's house and smoked some more. Kim considered defendant to be like a brother. However, when she suggested it was time for him to leave, defendant grabbed her by the throat, told her he would kill her if she screamed, and then raped her at knifepoint. While defendant was attacking Kim "he seemed to be in a trance. His eyes got big and glassy and his whole demeanor changed. [¶] It was like he took on a new person, like he was in a trance, and then afterwards, he seemed to snap back." Defendant apologized and asked Kim whether she was going to tell anyone. She said she would not, but later, urged by her mother to do so, Kim called the police. She testified against defendant at a preliminary hearing, but then dropped the charges because she had known defendant "practically all of his life" and she was "best friends with two of his sisters." "[F]or whatever reason I was thinking he needs a second chance."

2. The Defense Case

In the words of an aunt, defendant's home life was a "living hell." Defendant's father and mother were alcoholics. They also used marijuana in front of their children. The father and mother had "pretty rough fights" with one another, and on one occasion the mother stabbed the father in the hand. The mother had numerous affairs. Once, the father caught the mother in bed with one of the father's friends, and defendant and his sister were in the bed at the time. After that incident, the father began beating the mother and "stomped her in her

vagina." When the father left the family, the mother and her boyfriend drank heavily and often the family had no money for food. The mother beat the children. "Whatever she had in her hands, she might hit them with it." In defendant's presence, defendant's mother told his father that defendant was not in fact his child.

In the opinion of James Park, a corrections consultant and retired Department of Corrections employee, defendant was likely to be a good prisoner and unlikely to become involved in violence. Mr. Park based his opinion on the following factors: Younger prisoners are more likely to be violent, and at 30, defendant was older; during his previous eight-year prison term, defendant had relatively few infractions, and only one for fighting; finally, defendant had completed the requirements for a high school degree.

In the opinion of Dr. Claudewell S. Thomas, a psychiatrist appointed by the court at the request of the defense, defendant suffered from schizoaffective schizophrenia, a major psychiatric disorder. In reaching his diagnosis, Dr. Caldwell interviewed defendant and reviewed various documents: A 1985 report by a psychologist concluding that defendant's mental processes were intact and he was not psychotic; a 1985 report by a psychiatrist concluding defendant suffered from a chronic underlying depressive mental illness exacerbated by alcohol and drug abuse; a report by a psychologist who examined defendant in 1994 concluding that defendant was schizophrenic.

II. DISCUSSION

A. Pretrial Issues

1. Marsden Motion

Pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), defendant moved to have substitute trial counsel appointed. Defendant contends the trial court failed to conduct an adequate inquiry into the grounds for the motion before

denying it. The court's inquiry was adequate, and it did not abuse its discretion in denying the motion.

In *Marsden*, we said: "[A] judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' (*Spector v. Superior Court* (1961) 55 Cal.2d 839, 843.)" (*Marsden*, *supra*, 2 Cal.3d at p. 124.)

A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Earp* (1999) 20 Cal.4th 826, 876 (*Earp*); *People v. Memro* (1995) 11 Cal.4th 786, 857 (*Memro*).)

In this case, defendant interrupted pretrial proceedings to declare a conflict of interest with counsel. The court construed defendant's remarks as a *Marsden* motion, and defendant was given an adequate opportunity, before the court ruled on his motion, to explain why he was dissatisfied with his attorney.

Defendant stated the following grounds for the motion: (1) Defendant and counsel were not "getting along"; (2) counsel did not visit defendant prior to an earlier hearing in municipal court; (3) counsel did not do everything on the "long list" of tasks defendant had assigned him; and (4) counsel believed defendant guilty, as was evidenced by his discussion of a possible plea bargain.

Defense counsel addressed each of defendant's complaints: (1) Although defendant and counsel had had some disagreements, counsel saw "no reason" why he could not continue to represent defendant; (2) defendant was in local custody

and counsel had visited him on "numerous occasions"; (3) counsel had prepared "lengthy and detailed investigations requests," and counsel had informed defendant that he would visit defendant the following week "to cover any areas that were not covered in the requests"; and (4) counsel had discussed possible sentences with defendant at defendant's request, but no offer of a plea bargain had been made by the prosecution.

At the conclusion of the hearing, the court denied the *Marsden* motion. Defendant continued to express his dissatisfaction with counsel; he would be "happy," defendant said, if the court would appoint the lawyer of his choice to represent him. The court explained to defendant that "[i]t doesn't work that way."

We review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard. (*People v. Silva* (2001) 25 Cal.4th 345, 367; *Marsden*, *supra*, 2 Cal.3d at p. 123.) No abuse of discretion has been shown here, as defendant failed to demonstrate either inadequate representation or irreconcilable conflict. (*Earp*, *supra*, 20 Cal.4th at p. 876.) "To the extent there was a credibility question between defendant and counsel at the hearing, the court was 'entitled to accept counsel's explanation.' (*People v. Webster* [(1991)] 54 Cal.3d [411,] 436.)" (*People v. Smith* (1993) 6 Cal.4th 684, 696.) If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law. (*Memro*, *supra*, 11 Cal.4th at p. 857; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070 (*Berryman*), overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

2. Excusal of Prospective Jurors

Defendant contends that the trial court erred in sustaining the prosecutor's challenges for cause to two prospective jurors based on their views with regard to the death penalty, and that this error violated defendant's right to an impartial jury under the Sixth and Fourteenth Amendments to the federal Constitution.

The United States Supreme Court has held that a prospective juror may be excluded for cause without compromising a defendant's rights under the Sixth and Fourteenth Amendments to trial by an impartial jury if the juror's views on capital punishment " 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, fn. omitted; see *Darden v. Wainwright* (1986) 477 U.S. 168, 175-178.) We apply the same standard to claims under our state Constitution. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 (*Rodrigues*); *People v. Guzman* (1988) 45 Cal.3d 915, 955 (*Guzman*).) A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114; *Rodrigues*, at p. 1146.)

Generally, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1146; *People v. Kaurish* (1990) 52 Cal.3d 648, 675.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035; *Guzman*, *supra*, 45 Cal.3d at p. 954.) Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. (*Rodrigues*, at p. 1147; *People v. Hill* (1992) 3 Cal.4th 959, 1003.) "On review, if the juror's statements are equivocal or

conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 357 (*Carpenter*).)

Defendant challenges the excusal of Prospective Jurors U. and R. While U. ultimately stated, in response to a question from defense counsel, that he could vote to impose the death penalty "in the right case," U. earlier gave sharply conflicting statements,[2] and so the trial court's determination of U.'s state of mind, i.e., that U. would be *substantially impaired* in the performance of his duties as a juror in this case, is binding on us. (*Carpenter*, *supra*, 15 Cal.4th at p. 357.)

By contrast, almost all of Prospective Juror R.'s answers to the questions asked in the juror questionnaire and on voir dire with regard to his views on the death penalty were entirely unexceptionable.[3] Only two of his answers were problematic, and R. claimed that he had been confused when he gave those answers. Nevertheless, the trial court excused him, finding that he was

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[2] For example, in his juror questionnaire, U. stated he was "[a]gainst capital punishment," and, in response to a follow-up question, U. stated he would "always vote for life without parole and reject death" if a defendant were "found guilty of intentional, deliberate first degree Murder and at least one of the 'special circumstances' were found to be true."

[3] R. indicated on the juror questionnaire that he strongly disagreed with the statement that anyone who intentionally kills another should *never* get the death penalty, explaining that the propriety of imposing the death penalty depended on the events leading up to and surrounding the killing. At the beginning of the voir dire, R. responded affirmatively when asked by the court whether he felt that "the death penalty has a place in our society today as a punishment for special circumstance Murder." R. again responded affirmatively when asked by the court whether he could personally impose the death penalty if he felt it was factually warranted. R. also responded affirmatively when asked by the court whether, in a case involving murder in the course of forcible rape, burglary and robbery, he could vote for either the death penalty or life imprisonment without possibility of parole, depending on the evidence.

substantially impaired. The court did so because it did not find R.'s explanations credible. Based on R.'s "body language," on "something that doesn't come out in the transcript," the court concluded R. was tailoring his answers to stay on the jury.

Both of R.'s problematic statements had to do with the standard of proof to which he would hold the prosecution, i.e., whether he would require defendant's guilt to have been proven to an absolute certainty before he would vote to impose the death penalty. On the juror questionnaire, in response to a question with regard to his "general feelings" concerning the death penalty, R. stated that it should be imposed only when there is "no doubt" as to a defendant's guilt. However, in response to a follow-up question asked by the prosecutor on voir dire, R. sought to clarify that statement by saying that he understood that the prosecutor's burden in the guilt phase of the trial would be proof beyond a *reasonable* doubt, and that he further understood that proof beyond a reasonable doubt did not mean proof beyond all possible doubt.

The following colloquy then occurred:

"[Prosecutor]: Now, would you require at the penalty phase before you brought in a verdict of death[,] would you require absolute certainty that the defendant committed the crime?

"[Prospective Juror R.]: Could you rephrase that again?

"[Prosecutor]: Yes, certainly. I know it's kind of confusing and I know it's the first time you have been confronted with this. [¶] But the guilt phase is the proof beyond a reasonable doubt stage. . . . In [the] penalty phase, as the judge indicated to you, we don't give you a standard of proof. It's more open-ended than that. [] And we tell you and the other 11 jurors to go back and discuss the case and come out and tell us your recommendation of death or life without the possibility of parole. [¶] My question to you is: Before you return a verdict of

death, would you require that I as the prosecutor prove my case beyond all possible doubt as you've indicated—appear to indicate here?

"[R.]: Yes.

"[Prosecutor]: Would you require that?

"[R.]: Yes.

"[Prosecutor]: Okay. Thank you very much."

In response to follow-up questions by defense counsel, R. said that he understood "that it's impossible to absolutely prove anything. That's why the word reasonable comes in."

At the conclusion of voir dire, the court observed: "I am a little confused now because as to the questions of one attorney you've given an answer one way and [to] the questions of the other attorney you have given just the opposite [answer]. [¶] In answer to the prosecutor's question, you said you would require in order to return a death verdict . . . that the person's guilt be proved to an absolute certainty.

"[R.]: When he asked me that question, I was thinking he meant . . . beyond a reasonable doubt. The terminology is a little confusing, to tell you the truth.

"The court: It certainly is.

"[R.]: I am trying to understand, give you the honest answer that I feel, but it's a little confusing to me.

"The court: All right. Keeping in mind that nothing can be proved to an absolute certainty.

"[R.]: Right.

"The court: Are you saying that even though you are not convinced to an absolute certainty of someone's guilt that you still could[,] if the facts warranted it[,] you could return the death penalty?

"[R.]: Yes."

The prosecutor then challenged R. for cause, arguing that R. was substantially impaired, that he had indicated he would require proof to an absolute certainty before he would return a death penalty verdict, and that his explanations to the contrary simply showed that he was "savvy enough" to give answers he thought would keep him on the jury.

The court accepted the prosecutor's argument and excused R. "My feeling is he got dragged back across the line. Quite frankly, I have the feeling from the body language[,] the way the questions were answered[,] something that doesn't come out in the transcript[,] that he was trying to tailor his answers to come out with the correct answers. I am going to sustain the challenge of substantial impairment."

The explanations that Prospective Juror R. offered for his conflicting and problematic answers may well have been entirely sincere. However, "[o]n review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding." (*Carpenter*, *supra*, 15 Cal.4th at p. 357.) It is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1147; *People v. Hill*, *supra*, 3 Cal.4th at p. 1003.) No error appears in the excusal of R.

B. Guilt Phase Issues

1. Kelly Hearing

Defendant's next assignment of error is related to a question we decided in *People v. Venegas* (1998) 18 Cal.4th 47 (*Venegas*). In *Venegas*, "we recognized the general scientific acceptance of restriction fragment length polymorphism (RFLP) analysis as a means of comparing the DNA in a known sample (e.g., blood from a suspect) with the DNA in a questioned sample (e.g., blood or semen taken

from a crime scene). *Venegas* further found general scientific acceptance of the modified ceiling principle, recommended for use by the National Research Council (NRC) in 1992,[4] as a forensically reliable method of calculating the statistical probabilities of a match between the evidentiary samples and the DNA of an unrelated person chosen at random from the general population. We determined that calculations made under the modified ceiling approach—which modifies the product rule[5] in such a way as to select random match probability figures most favorable to the accused from the scientifically based range of probabilities—qualify for admission under the *Kelly* test.[6] (*Venegas*, *supra*, 18 Cal.4th at pp. 84-90.)" (*People v. Soto* (1999) 21 Cal.4th 512, 514-515 (*Soto*).)

In this case, in ruling on the question whether the prosecution had carried its burden under *Kelly*, *supra*, 17 Cal.3d at page 30, of establishing that RFLP analysis and the modified ceiling principle were generally accepted in the scientific community, the trial court, at the request of the prosecution, took judicial notice of, among other things, the testimony given by an expert witness, Dr.

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4 "See National Research Council (1992) DNA Technology in Forensic Science (hereafter 1992 NRC Report) at pages 91-93."

5 "The product rule states that the probability of two events occurring together is equal to the probability that the first event will occur multiplied by the probability that the second event will occur. (See Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts* (1993) 7 Harv. J.L. & Tech. 101, 127-128 (hereafter Kaye, *DNA Evidence*); Freund & Wilson, Statistical Methods (1993) p. 62.) Coin-tossing is illustrative—the probability of two successive coin tosses resulting in 'heads' is equal to the probability of the first toss yielding heads (50 percent) times the probability of the second toss yielding heads (50 percent), or 25 percent. (See Johnson, Elementary Statistics (4th ed. 1984) p. 143.)"

6 "See *People v. Kelly* (1976) 17 Cal.3d 24, 30 (*Kelly*) and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 . . . . In *Daubert v. Merrell Dow* (1993) 509 U.S. 579, the high court held, as a matter of federal jurisprudence, that *Frye* had been superseded by the Federal Rules of Evidence. The foundational requirement for admission of new scientific evidence in California is now referred to as the *Kelly* test or rule. (*People v. Leahy* (1994) 8 Cal.4th 587, 612.)"

Patrick Michael Conneally, in an earlier, unrelated trial in the same county (Los Angeles). This, defendant contends, was error. In making a *Kelly* ruling, defendant argues, a trial court may not, consistent with the hearsay rule and the constitutional right of confrontation, take judicial notice of expert testimony given in another case.

We need not reach the question whether it is error for a trial court to take judicial notice, over objection, of an expert's testimony in another *Kelly* hearing, for any error in this regard was clearly harmless here.

First and foremost, the trial court's conclusion—that RFLP analysis and the modified ceiling principle were generally accepted in the scientific community by the time the hearing was held in this case—was correct. In *Venegas*, we held that RFLP analysis and the modified ceiling principle were generally accepted in the scientific community in 1992, when the trial court in that case made its *Kelly* ruling (*Venegas*, *supra*, 18 Cal.4th at p. 57), and this case was tried two years later. Second, when the trial court granted the prosecution's motion that it take judicial notice of Dr. Conneally's testimony in the earlier case, the grant was expressly conditioned on defendant's having an opportunity to call and cross-examine Dr. Conneally. Defendant chose not to take advantage of that opportunity. Therefore, defendant effectively waived the confrontation issue. Finally, had the trial court declined to take judicial notice of Dr. Conneally's testimony in the earlier case, and thus forced the prosecution to call him in this case, there is no reason to believe his testimony would have differed in any significant respect from his earlier testimony. Defense counsel apparently came to that conclusion for he declined the trial court's invitation to call Dr. Conneally and cross-examine him.

Defendant contends he received ineffective assistance of counsel because his counsel did not call live witnesses to refute the expert *Kelly* testimony that was

given in the other case and judicially noticed in this case. Defense counsel gave a coherent explanation as to why he chose not to call live witnesses—he was satisfied that the evidence already in the record adequately demonstrated a lack of consensus in the scientific community. (We reiterate that this case was tried four years before we held in *Venegas*, *supra*, 18 Cal.4th 47, that RFLP analysis and the modified ceiling prinicple were generally accepted in the scientific community.) Accordingly, defendant's ineffective assistance of counsel claim lacks merit. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [whether to call certain witnesses is a matter of trial tactics, unless the decision results from unreasonable failure to investigate].)

The remaining arguments defendant makes with regard to the *Kelly* question also lack merit.

Defendant contends the trial court "candidly admitted that it had not even read" the 1992 NRC Report.[7] To the contrary, the record reveals the court had reviewed the report before making its ruling.

Defendant contends the trial court did not understand that in a *Kelly* hearing, the prosecution has the burden of proving that a new scientific technique has gained general acceptance in a particular field. The source of the confusion here was the trial court's statement that it would "bifurcate" the *Kelly* hearing, looking first to the evidence offered by the prosecution to see whether, standing on its own, it demonstrated the requisite general acceptance, and then the burden would shift to the defense to rebut that evidence. However, as the Attorney General points out, the court clarified that it did not mean that "in any way I feel the burden has shifted to the defendant. The burden has always been [on] the People." Rather, by bifurcating the process, the court was merely trying to

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[7] See footnote 5, *ante*.

expedite it, by pointing out if the prosecution had failed to make a prima facie case as to general acceptance, there would have been "no need for the defense to go any further." However, having concluded that the prosecution had carried its burden of proving general acceptance, the court wished the defense to understand that, "[f]rom a practical standpoint, you are faced with a situation of going forward or losing the issue."

2. Exclusion of Defense Evidence

Defendant contends the trial court erred by precluding him from testifying that he "had an extensive history of hearing voices, flashbacks, and blackouts." The testimony he was precluded from giving would have been critical, defendant asserts, to the question whether he was capable of forming the specific intent to rape Mrs. Miller. (See *post*, at p. 27.) Without the precluded testimony, defendant contends, the testimony he was permitted to give—that he experienced similar symptoms when he murdered Mrs. Miller—appeared "both contrived and fabricated, and as such was likely dismissed by the jury." Therefore, defendant argues, preclusion of the testimony violated his Fifth, Sixth, and Fourteenth Amendment rights by "den[ying] him the opportunity to present a complete defense to the capital charge."

Defendant's proposed testimony with regard to his alleged history of hearing voices, experiencing flashbacks, and suffering blackouts was jumbled deep inside an extraordinary grab bag of a proffer that included such disparate allegations as that defendant "attended many schools" and that "Aunt Jackie shot herself to death."[8] The prosecution objected that defendant was seeking to

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[8] Defense counsel: "I would just like to generally outline for the record the areas that I would like to get into that at this point at least the court has barred me from getting into.

(footnote continued on next page)

introduce, through his own testimony, family and personal history that suggested he was mentally ill, and so could not have formed the requisite specific intent to rape Mrs. Miller, without any foundational testimony from a mental health professional as to the relevance of his testimony. The trial court inquired whether defense counsel intended to call "a psychiatrist, psychologist, or whatever to discuss those matters." Defense counsel stated he did not. Based on defense counsel's representation, the trial court excluded defendant's proffered testimony.

There was no error. Defendant testified he heard voices *after* he murdered and raped Mrs. Miller. He did *not* testify that the voices told him to attack her. Therefore, any prior history of hearing voices would not have been relevant to the question whether he specifically intended to rape Mrs. Miller.

Moreover, any error in this regard was harmless. As the Attorney General points out, Dr. Thomas, the court-appointed psychiatrist, interviewed defendant at

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"The problems at school. [Defendant] was in special education. Attended many schools. . . .

"Drug use; marijuana at 15, alcohol at 15; cocaine about 25 times; some evidence of LSD; family history of mental illness; Aunt Jackie shot herself to death; grandfather had delusions, ran down the street with a gun; and a cousin and a son on ritalin for A.D.D, attention deficit disorder.

"No food; no electricity many times because the family was spending the money on alcohol; both parents were alcoholics; a series of beatings with extension cords; brother who was killed, and the defendant saw the brother in the street; a mother who was promiscuous.

"And I believe the defendant already testified to, when he was about seven or eight, opening the door and seeing her in bed with another man.

"Other incidents of other men, dizzy spells, blackouts, hearing voices, screaming at night—this is all the defendant—and also being told by his mother that . . . his father was not really his father.

"Also the fact that he was afraid to discuss his problems with others because he felt cut off already, and he felt that would make him more cut off.

"And then the incidents which even the D.A. wants to get into, the incidents with both Glynnis and Pam, and particularly Pam's mother; the drug use which all led to the explosion."

least three times, and he reviewed reports on defendant's background prepared by defendant's relatives, as well as the reports of numerous experts who had examined defendant. Therefore, if defendant had a history of flashbacks and blackouts, Dr. Thomas should have been aware of it. Accordingly, the fact that Dr. Thomas, when called by the defense in the penalty phase, failed to mention any such history suggests that defendant's proposed testimony concerning such a history would have been a recent fabrication.

3. Alleged Ineffective Assistance of Counsel

Defendant contends his trial counsel was ineffective because he failed to call his court-appointed psychiatrist, Dr. Thomas, in the guilt phase of the trial to testify as to whether defendant had the capacity to form the specific intent to rape Mrs. Miller. "Counsel's failure to put the court-appointed expert on the stand after [defendant] himself had been prohibited from presenting testimony about his past mental condition was incomprehensible and indefensible." The contention lacks merit.

" 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, quoting *Strickland v. Washington* [(1984)] 466 U.S. [668,] 689.) '[W]e accord great deference to counsel's tactical decisions' (*People v. Frye* (1998) 18 Cal.4th 894, 979), and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' (*People v. Scott* (1997) 15 Cal.4th 1188, 1212). 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) [¶] In the usual case, where counsel's trial

tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. (*People v. Earp*[, *supra*,] 20 Cal.4th [at p.] 896; see also *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission'].)" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926 (*Weaver*).)

As the Attorney General points out, the record suggests defense counsel may have had several sound tactical grounds, of which we will mention only two, for not calling Dr. Thomas in the guilt phase of the trial. First, Dr. Thomas's diagnosis of defendant was based on, among other things, information in defendant's probation report that he had raped and threatened to kill Kim. Had the defense called Dr. Thomas in the guilt phase, the prosecution would have been entitled to cross-examine him regarding the foundation for his opinion. (See Evid. Code, § 721, subd. (a); *People v. Coddington* (2000) 23 Cal.4th 529, 614-615.) Defense counsel may well have concluded, reasonably, that the potential benefit of Dr. Thomas's testifying in the guilt phase, namely, making defendant's self-serving statements regarding his personal and familial history admissible, was outweighed by the damage that would ensue from the revelation of defendant's attack on Kim. Second, defense counsel may have decided against calling Dr. Thomas in the guilt phase because the revelation of statements defendant made to Dr. Thomas would have undermined the credibility of defendant's own guilt phase testimony. For example, defendant initially told Dr. Thomas that he had consensual sex with Mrs. Miller, while he testified at trial that he had no memory of having sex with her.

4. Prior Crimes Evidence

Defendant contends the trial court erred by admitting, in the guilt phase of the trial, evidence relating to defendant's prior offenses associated with the rape of Dorothea H. in 1985. Defense counsel twice expressly withdrew his objections to the introduction of the evidence. Therefore, defendant has waived this issue on appeal. (See, e.g., *People v. Robertson* (1989) 48 Cal.3d 18, 44 ["Defendant, having withdrawn his objection to the evidence, cannot now complain of its admission"].)

Defendant contends that, because of the waiver, he was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 15 of the California Constitution. This contention also lacks merit. Defense counsel stated on the record that he was, after extensive discussion with defendant, withdrawing his objections for a tactical reason: The other crimes evidence would be admissible in the penalty phase of the trial and, if the jury heard it for the first time then, it might have a "devastating effect on my chances" of convincing the jury to return a verdict of life imprisonment without the possibility of parole. We will not " 'second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' (*People v. Scott*[, *supra*,] 15 Cal.4th [at p.] 1212)." (*Weaver*, *supra*, 26 Cal.4th at p. 926.)

Citing *People v. Frank* (1985) 38 Cal.3d 711, defendant argues that, because this is a capital case, we should disregard counsel's waiver of this issue and, instead, examine the whole record to determine whether there has been a miscarriage of justice. (See *id.* at p. 729, fn. 3 ["On an appeal from a judgment imposing the penalty of death, a technical insufficiency in the form of an objection will be disregarded and the entire record will be examined to determine if a miscarriage of justice resulted"].) The argument is meritless. "We previously have noted that '[t]he lead opinion in *Frank* was not signed by a majority of the

court, and although later cases from this court have never disapproved its language, they have cited it only for the purpose of distinguishing it.' (*People v. Diaz* (1992) 3 Cal.4th 495, 527.)" (*People v. Williams* (1997) 16 Cal.4th 153, 209.) Moreover, defendant's reliance on the *Frank* footnote is misplaced, as his waiver consisted not merely in raising technically insufficient objections, but in expressly withdrawing his objections. (See *Williams*, at p. 209; *People v. Poggi* (1988) 45 Cal.3d 306, 331.)

Defendant contends his counsel was "prompted" to withdraw his objection to the other crimes evidence because the trial court improperly deferred ruling on the admissibility of the evidence under Evidence Code section 352. The trial court did not err in deferring its ruling under Evidence Code section 352 until the prosecution had presented the rest of its evidence. (See *People v. Williams* (1988) 44 Cal.3d 883, 912-913.) Moreover, the fact that the court deferred its ruling was really irrelevant to the concern expressed by defense counsel in withdrawing his objection to the admissibility of the evidence, namely, that it might have more impact on the jury if it were heard by them for the first time in the penalty phase.

5. Instructions Regarding the Specific Intent for Rape Felony Murder

Defendant contends the instructions given with regard to rape and rape felony murder were "conflicting, inaccurate, and confusing," with the result that defendant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the California Constitution.

The jury found defendant guilty of first degree murder and found true the special circumstance that the murder was committed during the commission of a rape. The jury's first degree murder finding could have been based on one or both of the following theories: (1) that the murder was willful, deliberate and

premeditated; or (2) that it was committed during the perpetration of, or attempt to perpetrate, rape, i.e., that it was rape felony murder. (See § 189.)

Under the felony-murder doctrine, the perpetrator must have the specific intent to commit the underlying felony. (*Berryman*, *supra*, 6 Cal.4th at p. 1085.) Thus, although rape itself is a general intent crime, the jury here was required to find that defendant had the specific intent to rape in order to find him guilty of first degree felony murder. (*People v. Osband* (1996) 13 Cal.4th 622, 685-686.)

The jury was so instructed. In accordance with CALJIC No. 8.21, the court instructed the jury: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of a crime as a direct causal result of Burglary, Rape and/or Robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime. [¶] The specific intent to commit Burglary, *Rape* and/or Robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt."

The lesson of the instruction that is pertinent to this discussion—that rape felony murder requires a specific intent to rape—was reinforced by a modified version of CALJIC No. 4.21.1 on the significance of voluntary intoxication for general and specific intent crimes. The instruction given provided in pertinent part: "In order to find the defendant guilty of First Degree Murder on a Felony-Murder theory, of which the defendant is accused in Count[] 1, a necessary element is the existence in the mind of the defendant of the specific intent to commit the crime of Burglary, *Rape* and/or Robbery."

Defendant contends that the jury was likely confused by having been instructed that while rape is a general intent offense, rape felony murder requires a specific intent to rape. We rejected much the same contention in *People v. Ramirez* (1990) 50 Cal.3d 1158. "In accord with the general CALJIC

instructions, the trial court instructed the jury that rape and sodomy are general intent crimes, but that rape-felony-murder requires a finding that defendant had the specific intent to commit rape. Although defendant does not contend that the instructions erroneously stated the applicable legal principles, he maintains that the combination of general and specific intent elements could only have been confusing to the jury, requiring 'proof of contradictory mental states.' The Attorney General responds that the instructions were not misleading and did not require proof of contradictory mental states, but rather accurately set forth the different elements of the separate crimes with which defendant was charged. [¶] The Attorney General's position is well taken. The instructions did not require proof of contradictory mental states. Under the instructions, if the jury found that defendant did not act with the specific intent to rape, it could have found him guilty of rape but not of rape-felony-murder. If the jury found that defendant did act with the specific intent to rape, it could have found him guilty of both rape and rape-felony-murder. There was no inconsistency in the instructions." (*Id.* at pp. 1177-1178, fn. omitted.)

Moreover, both the prosecutor and defense counsel in their arguments to the jury emphasized repeatedly that rape felony murder requires a specific intent to rape, and a question asked by the jury revealed that the jurors understood this point perfectly well.

Defendant next contends that the modified version of CALJIC No. 4.21.1 given here told the jury, in effect, that voluntary intoxication or mental disorder could not be considered in determining whether defendant had the specific intent to commit rape. However, the language with which defendant specifically finds fault was not included in the instruction given. Instead, the jury was instructed that rape felony murder requires the specific intent to rape, and that where specific intent is an essential element of a crime, the defendant's voluntary

intoxication or mental disorder should be considered in determining whether he possessed the requisite specific intent.

Again, in his arguments to the jury, the prosecutor emphasized that voluntary intoxication and mental disease could negate the specific intent required for rape felony murder. "You got instructions on voluntary intoxication and the effect that could have on lessening a mental state, on lessening a specific intent. [¶] If you are so high you don't know what you're doing or you couldn't form an intent to kill or an intent—specific intent to burglarize or specific intent to rape for the purposes of felony rape murder, that can make—that can knock out that specific intent." "Let's make it real clear. He raped her and he killed her. We know he raped her. Did he have the specific intent to rape her. If yes, it's felony murder, first degree, just on that basis, and the special circumstance of rape is true. [¶] The only way to get rid of that specific intent is . . . with the . . . mental defect or disorder or the voluntary intoxication. Neither flies."

Moreover, defendant waived any objection to the modified version of CALJIC No. 4.21.1 given here by expressly agreeing to the modifications.[9] (See *Rodrigues*, *supra*, 8 Cal.4th at p. 1192 ["[I]f defendant believed the instruction was unclear, he had the obligation to request clarifying language"].)

Finally, defendant contends the trial court should have instructed the jury that the specific intent to rape must be formed before or during the act of violence. The claim lacks merit. "[A]n after-formed intent instruction is a pinpoint

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[9] As the Attorney General points out, during discussion of the proposed instructions, defense counsel expressed his concern that the standard version of CALJIC No 4.21.1 failed to make it clear that voluntary intoxication could negate the specific intent required for rape felony murder. After considering a modification suggested by defense counsel, the court suggested the modification actually given. Defense counsel stated that he "would be happy to use the court's" instruction and that the instruction was "agreeable."

instruction that a trial court has no obligation to give when neither party has requested that it be given. (*People v. Webster* (1991) 54 Cal.3d 411, 443.)" (*People v. Silva* (2001) 25 Cal.4th 345, 371.) Moreover, the trial court here gave the standard jury instruction on felony murder and burglary, rape, and robbery, which stated that a killing "which occurs during the commission or attempted commission of a crime as a direct causal result of Burglary, Rape and/or Robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime." A reasonable juror would necessarily have understood from this instruction that defendant was guilty of rape felony murder only if the intent to rape was formed before the murder occurred. (*Silva*, at p. 372; *People v. Hayes* (1990) 52 Cal.3d 577, 629.)

6. Verdict Form for Rape-felony-murder Special Circumstance

The jury found true the allegation that "[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of rape." Defendant contends the verdict form was fatally ambiguous because it is unclear whether the jury was finding defendant guilty of first degree murder on a rape-felony-murder theory (§ 189), or whether it was finding true the rape-felony-murder special circumstance (§ 190.2, subd. (a)(17)(C)).

As the Attorney General points out, defendant waived this issue by failing to object to the form of the verdict when the court proposed to submit it or when the jury returned its finding. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 330.)

In any event, " '[t]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]' " (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.) Here, the jury's intent—to find true the rape-felony-murder special circumstance—is unmistakably clear because the jury was instructed: "If you find the defendant in this case guilty of murder of the

first degree, you must then determine if one or more of the following special circumstances are true or not true: Murder during the commission of a Burglary, Rape and/or Robbery. . . . *You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.*" In his closing argument the prosecutor reiterated that the jury was to indicate on the verdict form whether it found the special circumstances allegations true or not true. Finally, in its verdict in the penalty phase of the trial, the jury stated that it had "found the special circumstance true."

Moreover, any error in this regard was harmless beyond a reasonable doubt. The jury found in its verdict that defendant committed the murder in the commission of rape. To find the rape-felony-murder special-circumstance allegation true, they needed to find that defendant had an independent purpose for the commission of the rape, that is, that the commission of the rape was not merely incidental to the murder. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.) The evidence is overwhelming that defendant had an independent purpose to rape Mrs. Miller. He tied her hands and feet, had intercourse with her, and ejaculated inside her. He had previously done the same thing to Mrs. H., whom he did not kill. Clearly, defendant obtained perverse sexual gratification from raping the mothers of his girlfriends, whether or not he killed them. There can be no reasonable doubt that the rape of Mrs. Miller was not merely incidental to her murder. (See *People v. Williams*, *supra*, 44 Cal.3d at p. 929 ["[T]he omission of an instruction that an independent felonious purpose is an element of the kidnapping special circumstance was harmless beyond a reasonable doubt since no rational jury could have failed to find that a purpose other than and in addition to killing [the victim] precipitated the kidnapping"].)

C. Penalty Phase Issues

1. Future Dangerousness

James Park, a defense expert witness, testified that, based on his review of defendant's prison records, defendant was not in his opinion likely to be violent if again sentenced to prison. On direct examination, defense counsel elicited the fact that defendant had been involved in one fight while previously imprisoned. However, defendant contends the trial court prejudicially erred in overruling his objection to the prosecution's cross-examination of the expert. The cross-examination concerned three other disciplinary infractions defendant committed while in prison, which are characterized by defendant as a "yelling match in a food line with another inmate that never escalated into a fight" and two attempts by defendant "to manufacture a crude form of alcohol in his cell."

"While the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief ([*People v.*] *Adcox* [(1988)] 47 Cal.3d [207,] 257), it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future. (*People v. Gates* [(1987)] 43 Cal.3d [1168,] 1211]; *People v. Coleman* (1989) 48 Cal.3d 112, 150.) As we said in *Gates*: 'If the defense chooses to raise the subject, it cannot expect immunity from cross-examination on it.' ([*Gates*, *supra*,] 43 Cal.3d at p. 1211.)" (*People v. Morris* (1991) 53 Cal.3d 152, 219, overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see *People v. Seaton* (2001) 26 Cal.4th 598, 679.)

Defendant is wrong when he says the three incidents were irrelevant to the question whether he was likely to be violent if he were again sentenced to prison. At first, the expert minimized the incident in the food line, characterizing it as "childish." "[Defendant] wanted another man's crackers and somehow they wouldn't give it to him, and he ended up yelling a lot. [¶] And again, he was kind

of young and nothing developed other than there was kind of a shouting match." However, he later admitted that when defendant started yelling, other inmates joined in, and a guard had to intervene because of the danger that the incident would escalate into violence. Defendant's attempts to make alcohol in his cell were also clearly relevant because defendant's murder of Julia Miller was preceded by alcohol, as well as drug, abuse, and there was expert testimony that defendant had a mental illness in which drug and alcohol abuse was a "major exacerbating factor, meaning those things made the mental illness worse."

Defendant contends that the court compounded its asserted error in permitting this line of cross-examination by precluding the defense expert from testifying that, if defendant were sentenced to imprisonment without possibility of parole, he would be confined in such a secure setting that he would be unlikely to engage in violence. The contention lacks merit. "[E]vidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense. (*People v. Daniels* (1991) 52 Cal.3d 815, 876-878; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.) Its admission is not required either by the federal Constitution or by Penal Code section 190.3. (*People v. Daniels*, *supra*, 52 Cal.3d at pp. 876-878; *People v. Thompson*, *supra*, 45 Cal.3d at pp. 138-139.)" (*People v. Quartermain* (1997) 16 Cal.4th 600, 632.) "Moreover, '[d]escribing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do. [Citation.]' (*People v. Thompson*, *supra*, 45 Cal.3d at p. 139.) Although defendant argues that 'this logic is incorrect and the matter should be revisited, at least as to the question of the admissibility of evidence about how a life without parole prisoner would live,' he advances no persuasive reason as to

why this is so." (*People v. Majors* (1998) 18 Cal.4th 385, 416.) We have been given no reason to reconsider our holdings in this regard. (See *People v. Ervin* (2000) 22 Cal.4th 48, 97.)

2. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct insofar as he implied that defendant was a member of a prison gang.

The alleged misconduct occurred during the prosecutor's cross-examination of the defense expert witness, Mr. Park. On direct examination, Mr. Park testified that defendant's records indicated that he had been disciplined for a fight while he was previously imprisoned, and that the person with whom defendant had fought was a gang member. "[Defendant] got into a fight with a prison gang member who—somebody who was identified by the staff as a gang member, and [defendant] was disciplined, not severely, but disciplined for that." On cross-examination, the prosecutor, after he had Mr. Park refresh his recollection by reviewing the disciplinary report on the fight, asked Mr. Park: "Now, actually what it says here is that Mr. Jones admits the charges and that he stated that he started the fight over Crip business. [¶] Isn't that what it says here?" Mr. Park responded, "That was his statement, yes, sir." The prosecutor pursued the point. "Okay. So doesn't that—I mean you said he got in a fight with another gang member. [¶] Wouldn't that indicate that he actually was fighting over gang business that he was involved in?" Mr. Park demurred. "Not necessarily. Because Mr. Jones would have to guard his reputation. He could have been fighting with this alleged Crip for a lot of reasons and he is not going to say." Later, the prosecutor asked, "And isn't it true in your experience that gang members actually get involved in a greater number of violent altercations than other inmates in the facility?" Again, Mr. Park demurred. "I couldn't say that independently now."

It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Ayala* (2000) 23 Cal.4th 225, 284; *Berryman*, *supra*, 6 Cal.4th at p. 1072; *People v. Ashmus* (1991) 54 Cal.3d 932, 976 (*Ashmus*).) Defendant concedes that defense counsel did not make a timely objection to the questions of which he now complains. However, defendant notes that defense counsel later requested that "all the testimony be stricken from the cross-examination about *that*," and defendant argues that *that* referred to the prosecutor's cross-examination of Mr. Park with regard to defendant's fight with the prison gang member. To the contrary, viewed in context, defense counsel's motion to strike was directed at questions asked by the prosecutor suggesting that a person imprisoned for crimes of violence is more likely than a person imprisoned for nonviolent offenses to commit acts of violence while in prison. It is true that the rule in question does not apply when the harm could not have been cured. (*Ashmus*, at p. 976; see *Memro*, *supra*, 11 Cal.4th at pp. 873-874.) Such a situation, however, was not present here; any harm threatened was certainly curable.

Defendant contends that defense counsel was ineffective in failing to preserve this issue for appeal. As the record on appeal does not reveal why defense counsel chose not to object to this line of questioning, this ineffective assistance of counsel claim would be more appropriately raised in a habeas corpus petition. (*People v. Hart* (1999) 20 Cal.4th 546, 619, fn. 21.)

Defendant further contends that, in referring to defendant as having fought with "another gang member," the prosecutor *falsely* implied that the disciplinary report on this incident indicated that defendant, as well as the prisoner with whom he fought, was a member of a prison gang. "[T]he inference raised by the line of

questioning was unwarranted—there was no evidence of gang membership other than the insinuations of the prosecutor." Again, this is a matter better raised on habeas corpus because the disciplinary report in question was not entered into evidence in this trial.

3. Privilege Against Self-Incrimination

Defendant contends that the trial court, by ordering the defense to provide the prosecution with unredacted copies of the reports prepared by the court-appointed psychiatrist, Dr. Thomas, before the doctor testified for the defense in the penalty phase of the trial, violated defendant's privilege against self-incrimination under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as the work-product and attorney-client privileges.

Prior to the penalty phase of the trial, defense counsel gave the prosecutor copies of reports that had been prepared by Dr. Thomas. The defense had redacted from Dr. Thomas's reports statements that defendant had made to the doctor, as well as conclusions that the doctor had drawn from defendant's statements to him. The prosecution moved that the defense be ordered to provide the prosecution with unredacted copies of Dr. Thomas's reports so that he might be effectively cross-examined. The defense opposed the motion on the ground that such an order would violate defendant's privilege against self-incrimination, his right to counsel, and the work-product and attorney-client privileges. Before ruling, the court inquired whether the defense "definitely" intended to call Dr. Thomas as a witness in the penalty phase, and the defense responded that it did. The court then ordered the defense to turn over the unredacted reports, explaining that providing them to the prosecution prior to Dr. Thomas's testimony would obviate the necessity of granting the prosecution a continuance to review the unredacted reports after Dr. Thomas testified. Dr. Thomas subsequently testified as a defense witness.

There was no error. By injecting his mental state as an issue in the case, and calling Dr. Thomas to testify, defendant waived any challenge to the contents of the interviews on which Dr. Thomas relied. (See *People v. Coleman*, *supra*, 48 Cal.3d at pp. 151-152.) Moreover, any error in this regard was clearly harmless under either the reasonable possibility standard or the beyond a reasonable doubt standard.[10] Challenged by the Attorney General to identify any harm resulting from the prosecution's having received Dr. Thomas's unredacted reports, defendant asserts that he was prejudiced by the revelation in Dr. Thomas's reports that defendant initially told Dr. Thomas that the victim, Julia Miller, consented to have sex with him. This revelation, defendant contends, "cut deep into the heart of his defense, specifically that he blacked out and did not recall the events prior to and during the murder." However, the significance of defendant's claim that he blacked out prior to killing and raping Mrs. Miller was the implication that he was therefore incapable of the deliberation required for first degree murder. The jury, by returning its verdict of first degree murder, had already clearly rejected that claim before Dr. Thomas testified in the penalty phase. Moreover, Dr. Thomas testified that he considered defendant's statement that Mrs. Miller consented to have sex with him a "delusional belief."

4. Lack of Remorse

During the penalty phase of the trial, in its case-in-chief, the prosecution called Gloria Hanks, defendant's sister, who testified that after the murder

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[10] State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447.) Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479; *Ashmus*, *supra*, 54 Cal.3d at p. 965.)

defendant told her he "didn't give a fuck about [the victim's daughter] Pam or her family." Defendant contends this evidence of his lack of remorse was improperly used by the prosecution as an aggravating factor.

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) "A murderer's attitude toward his actions and the victims at the time of the offense is a 'circumstance[] of the crime' (§ 190.3, factor (a)) that may be either aggravating or mitigating. [Citations.]" (*People v. Cain* (1995) 10 Cal.4th 1, 77, fn. omitted.) However, a lack of remorse expressed afterwards, as is the case here, is not an aggravating factor under the statute. (*Crittenden*, at p. 150, fn. 17.) On the other hand, "the absence of remorse is relevant to the determination whether the mitigating factor of remorse is present; thus, the prosecutor properly may suggest that an absence of evidence of remorse weighs against a finding of remorse as a mitigating factor. [Citations.]" (*Id.* at p. 148, italics omitted.)

As defendant points out, when counsel were arguing to the court the admissibility of Ms. Hanks's testimony, one of the remarks made by the prosecutor suggests that he considered defendant's lack of remorse an aggravating factor. "*Clearly it increases the heinousness of the crime* and it refutes what he does at the guilt phase which is to mitigate it, and I think it's clearly relevant for that." However, the second half of the prosecutor's statement reveals that he was really offering Ms. Hanks's testimony to rebut evidence of remorse that defendant had introduced in the guilt phase. Indeed, the prosecutor informed the court that he had originally intended to reserve Ms. Hanks as a rebuttal witness in the penalty phase in the event that defendant put on evidence of remorse in that phase, but then decided it would be more appropriate to call her in his case-in-chief in the

penalty phase because defendant had already presented evidence of remorse in the guilt phase.[11]

The defense evidence in the guilt phase of the trial as to defendant's conduct following the murder may, as defendant now argues, have been "offered as evidence of defendant's mental state at the time of [the] killings," i.e., that he "lacked the specific intent to rape," and not as evidence of remorse. However, defendant's testimony that he shot himself in an attempt to commit suicide was also susceptible of interpretation by the jury as an expression of remorse when, as defense counsel put it in his argument to the jury at the conclusion of the guilt phase of the trial, defendant "realized the terrible thing that he had done." Therefore, Ms. Hanks's testimony was properly admitted to assist the jury in determining whether defendant truly felt remorseful for his crimes. In argument to the jury at the conclusion of the penalty phase of the trial, the prosecutor cast Ms. Hanks's testimony in this light, and not as evidence in aggravation.

Defendant contends the prosecution failed to give him notice of Ms. Hanks's testimony required by section 190.3. Section 190.3 provides in pertinent part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been

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11 "As I thought about that [—reserving Ms. Hanks as rebuttal witness in the penalty phase—] over the weekend, I thought . . . actually I don't know if Mr. Jones is going to get on the stand and express remorse. I don't know if [Ms. Hanks's testimony] would be relevant as a rebuttal witness [to testimony given in the penalty phase], and clearly in the guilt phase, I think there is a sense of remorse that the defendant put on.

"He woke up next to the victim. He testified he was crying. All he wanted to do was kill himself, and I think he has wanted to have all his actions after this incident taken as remorse for the victim.

"I think that what [Ms. Hanks's testimony] does is show clearly that the defendant doesn't feel remorse towards the victim or the family."

given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." Here, defendant did not make his statement to Ms. Hanks until the trial started, and, as defense counsel acknowledged and the trial court found, the prosecution disclosed the statement to the defense as soon as the prosecution learned of it. Therefore, defendant received timely notice. Moreover, Ms. Hanks's testimony was introduced in rebuttal to mitigation evidence introduced by the defendant in the guilt phase. Therefore, notice was not required by section 190.3 in any event.

Finally, defendant contends Ms. Hanks's testimony should have been excluded on the ground that it was "confusing, misleading, and highly prejudicial while bereft of probative value." Defendant claims Ms. Hank's testimony was unreliable because she "was 'a bottle and a half' into her New Year's celebration" when she had the telephone conversation with defendant. Ms. Hanks admitted she could not remember the entirety of the conversation, "just bits and pieces of it," because she had been drinking. However, the fact that Ms. Hanks had been drinking when the conversation occurred goes to the weight of the evidence, not its admissibility. Pursuant to Evidence Code section 352, the trial court ruled the probative value of Ms. Hanks's testimony was not outweighed by its prejudicial effect. We find no error.

5. Constitutionality of the Death Penalty

Defendant contends the statutory scheme governing the death penalty in California is unconstitutional on several grounds. We have repeatedly rejected similar contentions and do so again here. Specifically, the death penalty law is constitutional though it (1) does not require the jury to make specific *written* findings as to aggravating factors (see, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 677 ["Written findings by the penalty phase trier of fact are not

constitutionally required"]); (2) does not require that the jury return *unanimous* written findings as to the aggravating factors (see, e.g., *People v. Seaton*, *supra*, 26 Cal.4th at p. 688; *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"]); (3) does not require that the jury be instructed on *the presumption of life* (see, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 190 [rejecting the contention that the death penalty statute is "constitutionally deficient because it 'fails to require a presumption that life without parole is the appropriate sentence' "]); (4) does not provide for intercase proportionality review (see, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 602 [rejecting the contention that intercase proportionality review is required "as a matter of due process, equal protection, fair trial, or cruel and/or unusual punishment concerns"]).

Defendant's argument that "one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life. [Citation.]" (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606.) Finally, death by lethal injection does not constitute cruel or unusual punishment. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 864.)

8. International Law

Defendant contends "[t]he due process violations and racial discrimination that [he] suffered throughout his trial and sentencing phase are prohibited by customary international law." Because defendant has entirely failed to establish the predicates of his argument—that he suffered prejudicial violations of due process or racial discrimination during his trial—we have no occasion to consider

whether such violations would also violate international law. (*People v. Bolden* (2002) 29 Cal.4th 515, 567.)

6. Cumulative Prejudice in Guilt and Penalty Phases

Defendant contends the cumulative effect of asserted errors denied him his federal constitutional rights to a fair trial and a reliable penalty determination, thus requiring reversal of both the guilt and penalty judgments. Our careful review of the record convinces us the trial was fundamentally fair and the penalty determination reliable. No basis for reversal appears.

III. DISPOSITION

The judgment is affirmed in its entirety.

BROWN, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
MORENO, J.

C O P Y

PEOPLE v. ERNEST DWAYNE JONES

S046117

CONCURRING OPINION BY KENNARD, J.

I concur generally with the majority opinion. I disagree, however, with its analysis of one issue, which I discuss below.

Defendant was charged with the first degree murder and rape of Julia Miller, and there was a special circumstance allegation that the murder occurred during a rape. In defendant's testimony at the guilt phase of his capital trial, he did not deny killing Miller and having sexual intercourse with her before she died. He testified, however, while struggling with Miller, he "kind of slipped back into [his] childhood." He had no recollection of having intercourse with Miller, but he remembered picking up a knife and stabbing her, and then "being curled up in a ball crying." When he looked at Miller, he realized she was dead. While driving away from Miller's house, he began "hearing certain little things in my head" which he described as "paranoia, thinking someone was coming to kill me." Based on this testimony, the defense argued that defendant lacked the specific intent to rape, a necessary element when, as here, the prosecution alleges under the felony-murder rule that an unlawful killing is first degree murder because it took place during a rape.

To support his claim that he lacked this intent, defendant sought to testify that he had a long history of untreated psychiatric problems. At a hearing to consider the admissibility of this testimony, defense counsel stressed that defendant had heard voices, that as a child he was placed in special education

classes, that other members of his family were mentally ill, that he had abused drugs, and that he was an abused child who grew up in poverty. Counsel also mentioned defendant's "dizzy spells, blackouts, [and] screaming at night . . . ." The trial court excluded the testimony on the ground that it was not supported by expert psychiatric testimony.

Defendant now claims the trial court prevented him from testifying that "he had an extensive history of hearing voices, flashbacks, and blackouts." The majority holds that the trial court properly excluded defendant's testimony, but it relies on a different ground than the trial court. The majority points out that defendant testified he heard voices only *after* he had intercourse with and killed Miller, so his previous history of hearing voices was irrelevant to his intent to rape her. (Maj. opn., *ante*, at p. 22.) True. But defendant testified that he blacked out and had a flashback to his childhood *before* he had sex with Miller, so the majority's reasoning does not address his claim that the court erroneously excluded testimony about his alleged history of blackouts and flashbacks. I would reject this claim because defense counsel's passing reference to blackouts, without any information as to when and how often they had occurred, was insufficient to show that the blackouts were probative on the question of whether defendant intended to rape Miller. Also, the trial court did not prevent defendant from testifying about flashbacks because defense counsel did not mention flashbacks in his offer of proof.

The majority also finds any error harmless. It reasons that at the penalty phase, a defense psychiatrist who had interviewed defendant did not mention defendant's history of blackouts or flashbacks. This, according to the majority, implies that defendant's proposed testimony was a recent fabrication. In my view, the expert's testimony has no bearing on whether the trial court's exclusion of defendant's testimony was harmless, because the expert testified at the *penalty*

phase, whereas defendant's testimony was offered at the *guilt phase*. Nevertheless, I agree with the majority that any error was harmless: defendant's offer of proof included nothing that could have altered the jury's determination that he intended to rape Miller when he had sexual intercourse with her before killing her.

KENNARD, J.

APPENDIX D

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES, Petitioner-Appellee, v. RONALD DAVIS, Warden, Respondent-Appellant.	No. 18-99003 D.C. No. 2:09-cv-02158-CJC Central District of California, Los Angeles ORDER

Before: BYBEE, FRIEDLAND, and LEE, Circuit Judges.

The panel has unanimously voted to deny Petitioner-Appellee's petition for rehearing. Judge Friedland and Judge Lee have voted to deny the petition for rehearing en banc, and Judge Bybee so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.