No. _____

IN THE

Supreme Court of the United States

MAUREEN MCDERMOTT,

Petitioner,

v.

DEBORAH K. JOHNSON,

Respondent.

On Petition for a 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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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAUREEN MCDERMOTT, *Petitioner-Appellant,* v. DEBORAH K. JOHNSON, Warden, Central California Women's Facility, *Respondent-Appellee.*	No. 17-99005 D.C. No. 2:04-cv-00457-DOC OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted June 20, 2023
Seattle, Washington

Filed October 26, 2023

Before: Kim McLane Wardlaw, Ronald M. Gould, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Wardlaw

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Maureen McDermott's 28 U.S.C. § 2254 habeas corpus petition challenging her California conviction and death sentence for attempted murder and first-degree murder.

In the petition, McDermott argued, *inter alia*, that the prosecutor committed prejudicial misconduct during penalty-phase closing arguments by referencing Biblical verses to persuade the jury to impose a death sentence. Applying the extremely deferential standard required by the Antiterrorism and Effective Death Penalty Act (AEDPA), the panel affirmed the district court's denial of that claim because the state court habeas decision was not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States."

The panel granted a Certificate of Appealability (COA) as to McDermott's claim that the prosecutor improperly used peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). After conducting a comparative juror analysis, the panel concluded that, under AEDPA's deferential standard of review, the California Supreme Court's finding that the trial court did not err in determining there was no purposeful discrimination was an objectively reasonable determination of the facts.

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

The panel denied COAs as to McDermott's remaining ineffective assistance of counsel claims.

COUNSEL

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OPINION

WARDLAW, Circuit Judge:

On April 3, 1990, Maureen McDermott was sentenced to death after a California jury found her guilty of attempted murder and first-degree murder of Stephen Eldridge, finding true the special circumstances of lying in wait and murder for financial gain. McDermott now appeals the district court's denial of her 28 U.S.C. § 2254(d) habeas petition.

In her federal habeas petition, McDermott argues, *inter alia*, that during trial the prosecutor committed prejudicial

misconduct during penalty-phase closing arguments by quoting the Bible. Because the state court habeas decision was not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States," Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), we affirm the district court's denial of McDermott's prosecutorial misconduct claim.

Further, we grant a Certificate of Appealability ("COA") as to McDermott's claim that the prosecutor improperly used peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), but nevertheless affirm the district court's denial of habeas relief on that claim. Finally, we deny COAs as to McDermott's remaining ineffective assistance of counsel claims.

I.

On April 28, 1985, Stephen Eldridge was stabbed to death in the home he shared with McDermott. *People v. McDermott*, 28 Cal. 4th 946, 962–66 (2002). McDermott hired Jimmy Luna, McDermott's former coworker and friend, to murder Eldridge. Luna, in turn, hired the brothers Marvin and Dondell Lee to assist him. The three jointly stabbed Eldridge to death on April 28, 1985.

At the time of the murder, McDermott was a 37-year-old registered nurse working at Los Angeles County-USC Medical Center during the day, while providing nursing care to an individual named Lee LaPorte at his home in the evening. Eldridge was a 27-year-old self-employed landscaper. Eldridge and McDermott lived together in a home that they owned as joint tenants. In December 1984, McDermott and Eldridge each bought $100,000 in life insurance, designating the other as the sole beneficiary. In

early 1985, McDermott and Eldrige's relationship deteriorated.

Near the end of February 1985, McDermott and Luna planned Eldridge's murder. McDermott told Luna that she was the beneficiary of Eldridge's insurance policy and offered him $50,000 to kill Eldridge. Luna agreed. McDermott told Luna that she wanted Eldridge stabbed because a gun would make too much noise and that she wanted the murder to look like a "homosexual murder" so that the police would not investigate it as vigorously as other killings.

On three occasions, McDermott arranged for Luna to be in the house with Eldridge to facilitate the murder; however, each time Luna became frightened and did not carry out the plan. McDermott then suggested that Luna find someone to assist him.

In March 1985, Luna asked his friend Marvin Lee to help him commit the murder. He offered Marvin $3,000, and Marvin agreed. On March 21, 1985, Luna and Marvin attempted to kill Eldridge, threatening him with a knife, cutting his buttocks and yelling homosexual epithets. Again, the murder attempt failed. Eldridge ran away, and Luna and Marvin left. Eldridge was taken by ambulance to a hospital for treatment.

After the failed murder attempt, McDermott and Luna spoke on several occasions during which they discussed the plan to kill Eldridge and what they would do with the anticipated insurance proceeds.

On April 28, 1985, Luna met with Marvin and Marvin's brother Dondell Lee. Luna offered Dondell money to help commit the murder. Luna then called McDermott, and they

once again discussed the plan: McDermott would leave a front bedroom window open for them to enter the house, and Luna would tie her up so that it looked as if she was a robbery victim.

When Eldridge arrived home, Dondell met him with a rifle (owned by McDermott and provided to him by Luna). Marvin then grabbed Eldridge by the neck in a chokehold and Luna stabbed him repeatedly until he slumped to the floor. At McDermott's request, Luna also cut off Eldridge's penis.

The autopsy found that Eldridge had been stabbed 44 times and that his penis was severed postmortem. McDermott was arrested in August 1985 and charged with attempted murder, murder, and special circumstance allegations of murder for financial gain and lying in wait.

II.

On March 2, 1990, a jury found McDermott guilty of attempted murder and first-degree murder of Eldridge, finding true the special circumstances of murder for financial gain and by means of lying in wait. On April 3, 1990, the jury returned a verdict of death.

McDermott's capital conviction was automatically appealed to the California Supreme Court ("CSC") under California state law. Cal. Const. art. VI; § 11; Cal. Penal Code § 1239. On August 12, 2002, the CSC affirmed McDermott's conviction and sentence. *McDermott*, 28 Cal. 4th at 1006. On October 30, 2002, the CSC modified its opinion, holding that the trial court did not violate McDermott's statutory rights or her right to due process. The United States Supreme Court denied certiorari. *McDermott v. California*, 538 U.S. 1014 (2003).

On November 8, 2000, McDermott filed her first state habeas petition in the CSC. On January 14, 2004, the CSC summarily denied the petition "on the merits."

On January 14, 2005, McDermott filed this federal habeas petition and simultaneously filed her second state habeas petition in the CSC. The district court granted McDermott's motion to stay the federal proceedings pending resolution of the state proceedings. On January 3, 2007, the CSC denied the second state habeas petition both on the merits and on procedural grounds.[1] The district court lifted the stay of the federal proceedings on January 25, 2007.

On March 23, 2007, McDermott filed the First Amended Petition ("FAP") in the federal habeas proceeding. On June 25, 2010, the district court granted an evidentiary hearing on several of McDermott's claims, but vacated the hearing after the Supreme Court issued its opinion in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (holding that federal court review under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits.").

On January 5, 2015, the district court denied on the merits the claims for which it had previously granted an evidentiary hearing and directed the parties to submit briefs addressing the merits of the remaining unadjudicated claims. On August 15, 2017, the court issued an order denying the remaining claims, but granting a COA on McDermott's prosecutorial misconduct claim. McDermott filed a motion to alter, amend, or vacate the judgment, asking the district court to permit further briefing on the procedural bar that formed the basis of its decision on the certified claim. On

[1] On August 10, 2007, McDermott filed a third state habeas petition. On May 21, 2008, the CSC denied the petition on the merits.

April 2, 2018, the district court denied the motion. McDermott then filed a motion to expand the COA to include her motion to alter, amend, or vacate the judgment, which the district court denied on May 14, 2018.

III.

We review de novo a district court's denial of habeas relief. *Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019). Because McDermott filed her federal habeas petition after April 24, 1996, AEDPA applies to this case. 28 U.S.C. § 2254; *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014).

IV.

A.

The district court did not err in denying McDermott's prosecutorial misconduct claim. McDermott argues that the prosecutor committed misconduct during the penalty phase closing argument by referencing Biblical verses to persuade the jury to impose a death sentence. McDermott argues the following statements were misconduct:

> Now, I'm [not] a biblical scholar. I don't know much about the Bible. But most biblical scholars, as I understand it, interpret the commandment "Thou shalt not kill" as in actually meaning "thou shall not commit murder."
>
> And there are in fact several references to the death penalty in the Bible. In Exodus 21, verse 12, the Bible states, "Whoever strikith [sic] a man a mortal blow must be put to death."

> And in verse 14, which I would suggest to you is incredibly apropos for this situation, "When a man kills another [man] after maliciously scheming to do so, you must take him from my altar and put him to death."

McDermott did not raise a prosecutorial misconduct claim until her direct appeal. The CSC denied the claim in a reasoned decision, applying California's contemporaneous-objection rule. Citing to *People v. Hill*, 17 Cal. 4th 800, 820 (1998), the CSC stated that "a defendant may not complain on appeal of prosecutorial misconduct 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." *McDermott*, 28 Cal. 4th at 1001. The CSC also rejected McDermott's claim that her trial counsel was ineffective for not objecting to the alleged prosecutorial misconduct, explaining that "[b]ecause the record does not show the reasons for counsel's actions, defendant's claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding." *Id.* at 1001–02.

McDermott reasserted the prosecutorial misconduct claim in her second state habeas petition. The CSC summarily denied the claim (1) "on the merits;" (2) as untimely; and (3) as successive because it had been raised and rejected on direct appeal. The CSC cited *In re Harris*, 5 Cal. 4th 813, 824–29 (1993), and *In re Waltreus*, 62 Cal. 2d 218, 225 (1965), in support of its summary denial.

McDermott argues on appeal that the CSC's denial of this claim was an unreasonable application of clearly established law. In response, the State argues primarily that the prosecutorial misconduct claim was procedurally

defaulted because defense counsel failed to object to the alleged misconduct at trial.

We disagree that McDermott's prosecutorial misconduct claim is procedurally barred. Although the prosecutorial misconduct claim was initially procedurally defaulted under the California contemporaneous objection rule, a procedural bar is removed "[i]f the last state court to be presented with a particular federal claim reaches the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991).

Therefore, the parties dispute which of the state courts' decisions is "the last" state decision that resolved this claim on the merits for purposes of our review. *DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009) ("When reviewing a state court's analysis under AEDPA," we "look[] to the last reasoned decision as the basis for its judgment." (quotation marks omitted) (quoting *Forn v. Hornung,* 343 F.3d 990, 995 (9th Cir.2003))); *Ylst*, 501 U.S. at 805.

The CSC addressed the prosecutorial misconduct claim first on direct appeal and then again in response to McDermott's second state habeas petition. *McDermott*, 28 Cal. 4th at 1001. Because the second state habeas decision was a reasoned decision that denied McDermott's prosecutorial misconduct claim (referred to as "Claim 12") "on the merits," we must look to that decision for purposes of AEDPA.

The second state habeas decision also invoked procedural bars, alternatively denying the claim as untimely and successive under *In re Waltreus*, 62 Cal. 2d at 225. However, the State did not invoke those procedural bars in its briefings on this appeal, and therefore it has forfeited any reliance on them. *See Clark v. Chappell*, 936 F.3d 944, 982

(9th Cir. 2019). Because the CSC's merits determination in its second habeas decision removed the procedural bar that had applied on direct appeal, *see Ylst*, 501 U.S. at 801, McDermott now does not need to overcome any procedural bars to obtain habeas relief on the merits of the prosecutorial misconduct claim. *See Ayala v. Chappell*, 829 F.3d 1081, 1095 (9th Cir. 2016) (applying AEDPA deference to a state court's merits determination, even where the state court had, in the alternative, rejected the claim for procedural reasons).

Nonetheless, McDermott's prosecutorial misconduct claim fails because McDermott cannot overcome the high bar to relief established by AEDPA. Under AEDPA, a state prisoner whose claim has been "adjudicated on the merits" in state court cannot obtain federal habeas relief unless that adjudication: "(1) 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 (2) 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." 28 U.S.C. § 2254(d)(1)-(2).

For purposes of AEDPA review, "clearly established Federal law" means the Supreme Court's holdings as of "the time of the state-court adjudication." *Greene v. Fisher*, 565 U.S. 34, 37 (2011); *Pinholster*, 563 U.S. at 182. A decision is "contrary to" the Supreme's Court's clearly established law if it "'applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent.'" *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A finding that a

state court erred in applying clearly established law is insufficient to show an "unreasonable application" of Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Rather, "the question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

Accordingly, the "clearly established Federal law" standard is "difficult to meet, because the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene*, 565 U.S. at 43 (internal quotation marks omitted). Further, because here the state court habeas merits decision was unexplained, under AEDPA we must determine whether McDermott can show that "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98; *Pinholster*, 563 U.S. at 217–18 (Sotomayor, J., dissenting) (When a state court "summarily denies a claim without explanation," federal courts consider whether "there is any reasonable argument" supporting the denial of the petitioner's claim).

The CSC's denial of McDermott's prosecutorial misconduct claim is not contrary to clearly established Supreme Court precedent. Although a prosecutor's references to the Bible in closing argument in a capital case have been held unconstitutional as violative of the Eighth Amendment under our circuit precedent, *see Sandoval v. Calderon*, 241 F.3d 765, 776–77 (9th Cir. 2000), only Supreme Court precedent operates as "clearly established" law for AEDPA purposes. *See* 28 U.S.C. § 2254(d)(1); *Lopez v. Smith*, 574 U.S. 1, 7 (2014) (per curiam) (holding

that "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced'" (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013))).

Indeed, the Supreme Court has never announced a rule about invocations of religious authority in a closing argument; it has only recited general principles about prosecutorial misconduct related to sentencing and the death penalty. McDermott relies on *Caldwell v. Mississippi*, in which the Supreme Court articulated the general principle that an argument that transfers the jury's notion of responsibility for its own verdict of death to another entity is impermissible. 472 U.S. 320, 328–29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."). *Caldwell* held that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court was improper because the argument encouraged the jury to delegate its feelings of responsibility to a higher court. *Id.* at 323.

McDermott also cites *Godfrey v. Georgia*, in which the Supreme Court affirmed that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." 446 U.S. 420, 427 (1980) (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). In *Godfrey*, the Supreme Court concluded that the Georgia Supreme Court erred by affirming a death sentence based on a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." *Id.* at 426. The Supreme Court clarified that the jury's decision must be "based on reason

rather than caprice or emotion." *Id.* at 433 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

But neither of these Supreme Court opinions—nor any other Supreme Court decision—discusses the use of religious authority during closing arguments, or even the use of religious authority in general during trial. Accordingly, the only Supreme Court decisions binding the CSC in 2007 were the Supreme Court's general statements about the Eighth Amendment and due process. There was not then (and is not now) clearly established Supreme Court precedent holding that invoking religious principles generally or the Bible specifically during closing arguments violates the Constitution.

To be clear, we have no doubt that the prosecutor's references to quotations of Biblical verses during closing arguments were unconstitutional prosecutorial misconduct, and prejudiced McDermott. As we explained in *Sandoval*, "religious arguments have been condemned by virtually every federal and state court to consider their challenge." 241 F.3d at 777; *see also Roybal v. Davis,* 148 F. Supp. 3d 958, 1044 (S.D. Cal. 2015) ("It is well settled that biblical law has no proper role in the sentencing process.").

If we were reviewing de novo, we would conclude that the prosecutor's statements were unconstitutional, as we did in *Sandoval*. Invocations of religion by a prosecutor for sentencing purposes "cloak[] the State with God's authority," and thus improperly appeal to the passions and biases of jurors and divert the jury from its task. *Sandoval,* 241 F.3d at 776, 779. Moreover, such appeals are contrary to the principles of separation of church and state upon which this nation was founded. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause

against establishment of religion by law was intended to erect a wall of separation between Church and State." (internal quotation marks omitted)).

However, we are constrained by AEDPA and Supreme Court precedent. And under AEDPA's extremely deferential standard, the CSC's denial of McDermott's prosecutorial misconduct claim was not contrary to, or an unreasonable application of, Supreme Court precedent. *See Lopez*, 574 U.S. at 6 (holding that the Ninth Circuit erred by "rely[ing] heavily on its own decision" because no Supreme Court case law addressed "the specific question presented"). We therefore conclude that McDermott's prosecutorial misconduct claim fails under AEDPA.

B.

In an uncertified claim, McDermott, who is white, argues that the prosecutor violated her Fourteenth Amendment rights by impermissibly using peremptory challenges to remove prospective jurors on the basis of race. *See Batson*, 476 U.S at 97. Specifically, McDermott contends that the prosecution violated *Batson* by improperly using eight of its twenty-four peremptory challenges to exclude Black venirepersons from the jury pool.

McDermott first brought a *Batson* motion during trial, after the prosecution struck eight Black prospective jurors.[2] The trial court found a prima facie showing of purposeful

[2] At the point when the trial court addressed McDermott's *Batson* objection, the prosecutor had exercised peremptory strikes against eight Black prospective jurors. The prosecution then struck a ninth Black individual, prospective alternate Isaac J. But McDermott's counsel did not reassert the *Batson* objection at that time. Thus, the decision to strike Isaac J. was not part of the totality of the circumstances the trial court considered when ruling on McDermott's *Batson* challenge.

discrimination, but ultimately denied the *Batson* motion, finding that with respect to each peremptory strike, there was "a reasonable relationship of the views expressed either in the questionnaire or orally by the prospective juror that has been excluded and the issues in this case."

The CSC denied McDermott's *Batson* claim in a reasoned opinion on direct appeal. *McDermott*, 28 Cal. 4th at 966–81. The CSC stated that "the trial court understood that the overriding reason for challenging the eight prospective jurors was the attitude of each toward the death penalty." *Id.* at 970. The CSC determined that substantial evidence supported the trial court's findings as to each prospective juror. *Id.* at 971–79.

McDermott again raises the *Batson* claim in her federal habeas petition. The district court determined that the trial court's credibility findings for the prosecutor's stated reasons "were reasonable in view of the record and the comparative juror analysis."

We may not review McDermott's *Batson* claim, which the district court declined to certify for appellate review, unless we grant a COA. 28 U.S.C. § 2253(c)(1)(A) ("Unless a . . . judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding."). To obtain a COA, McDermott "must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (*Miller-El I*) (internal quotation marks and alteration omitted).

On the factual record before us, we think that reasonable jurists could debate whether the prosecutor used the peremptory challenges to purposely discriminate against black jurors. "Courts frequently look to numeric evidence to detect impermissible discrimination, including the percentage of a particular group removed from the venire by the challenged strikes and the percentage of strikes directed against members of a particular group." *United States v. Mensah*, 737 F.3d 789, 797 (1st Cir. 2013) (internal quotation marks omitted). Here, the prosecutor struck nine out of twelve prospective Black jurors, i.e. 75 percent of the Black jurors, and used nine of her twenty-four peremptory challenges to strike Black jurors, i.e. 37.5 percent. Black jurors comprised only about 15 percent of the petit venire. As McDermott points out, the prosecutor "challenged Black jurors at a rate of more than twice the percentage of the Black prospective jurors in the jury pool." These numbers constitute some evidence of discriminatory purpose. *See Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002).

Indeed, when the twenty-five day jury selection concluded, a jury with no Black members was seated. The state trial court found that defense counsel had made a prima facie showing of purposeful discrimination, throwing the burden to the prosecutor to present a race-neutral explanation for each of the eight strikes. And no state court conducted a comparative analysis. ["I]n order for *us* to discharge our responsibility under AEDPA to review a Batson claim under section 2254(d)(2), we often will have to conduct a formal comparative juror analysis, and our responsibility to conduct a comparative juror analysis is not contingent on whether the state court previously performed or did not perform a formal comparative juror analysis." *Murray*, 745 F.3d at 1005; *see also Jamerson v. Runnels*, 713

F.3d 1218, 1225 (9th Cir. 2013) ("[W]e must perform in the first instance the comparative analysis that the state court declined to pursue.").

We therefore think that the *Batson* claim is reasonably debatable. Especially in light of the contrast between the number of Black potential jurors in the venire pool and the marked absence of *any* Black jurors on the seated jury, we grant a COA on McDermott's *Batson* claim. Nonetheless, after conducting a comparative juror analysis, we deny McDermott's *Batson* claim.

The Equal Protection Clause forbids the prosecution from challenging potential jurors on the basis of race. *Batson*, 476 U.S. at 89. Peremptory challenges based on race are prohibited even if, as in this case, the defendant is of a different race than the stricken jurors. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). *Batson* established a three-step analysis to determine if this prohibition has been violated: First, a trial court must determine whether a defendant has made a prima facie showing of "purposeful discrimination," by considering whether the totality of the facts give rise to an inference of discriminatory purpose. *Batson*, 476 U.S. at 93–94. Second, if a prima facie showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the jurors. *Id.* at 97. Third, the court must determine whether the defendant has carried the burden of proving purposeful discrimination. *Id.* at 98.

Because there is no dispute that McDermott made a prima facie showing of purposeful discrimination and the prosecutor proffered ostensibly race-neutral reasons, the parties agree that this appeal turns on *Batson*'s third step. To meet her burden, McDermott "need not prove that all of the prosecutor's race-neutral reasons were pretextual, or even

that the racial motivation was 'determinative.'" *Currie v. McDowell*, 825 F.3d 603, 605 (9th Cir. 2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008)). She must demonstrate, however, that race was a "substantial motivating factor" in the prosecutor's exercise of at least one strike. *Id.* at 606. The third step requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Moreover, the inquiry includes comparing the reasons given for striking a Black venireperson with the circumstances surrounding those non-Black venirepersons who remained on the jury panel. *Jamerson*, 713 F.3d at 1224 (citing *Briggs v. Grounds*, 682 F.3d 1165, 1170 (9th Cir. 2012)).

We must apply AEDPA deference to the CSC's determination affirming the trial court's finding of no purposeful discrimination.[3] We review the determination whether a prosecutor's strikes were purposefully discriminatory at *Batson*'s step three under 28 U.S.C. § 2254(d)(2), asking whether the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See Sifuentes v. Brazelton*, 825 F.3d 506, 517 (9th Cir. 2016) ("Because the district court's determination whether the prosecutor's strikes were purposefully discriminatory is a 'pure issue of fact,' AEDPA § 2254(d)(2) applies."); *Rice v. Collins*, 546 U.S. 333, 338, 341 (2006) (reviewing a Batson third step analysis under § 2254(d)(2) and declining to consider § 2254(b)(1) because there was no allegation that

[3] The parties agree that CSC's opinion on direct appeal is the last reasoned state court decision on this issue.

the court misapplied the Batson framework). Under 28 U.S.C. § 2254(d), a state court finding that the prosecutor did not engage in purposeful discrimination is entitled to "a statutory presumption of correctness." *Currie v. McDowell*, 825 F.3d 603, 609 (9th Cir. 2016). Because the CSC applies deference to the trial judge's credibility determinations, our review on federal habeas is "doubly deferential." *Jamerson*, 713 F.3d at 1225. "This is because the question of discriminatory intent 'largely will turn on evaluation of credibility' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). Thus, unless the CSC was objectively unreasonable in concluding that the trial court's credibility determination at *Batson*'s third step was supported by substantial evidence, we must uphold the denial of the *Batson* claim. *See Briggs*, 682 F.3d at 1170 (citing *Rice*, 546 U.S. at 338–42).

Here, McDermott's contention that the CSC's decision to deny her *Batson* claims was an unreasonable determination of the facts is not supported by the record. We begin by analyzing the four jurors for whom the prosecutor provided specific justifications for striking. We then analyze the remaining four jurors for whom the prosecutor gave a general justification for using a peremptory challenge—that the jurors had expressed views disfavoring the death penalty. After conducting our own comparative analysis and "reevaluat[ing] the ultimate state decision in light of this comparative analysis and any other evidence tending to show purposeful discrimination," we conclude that the CSC was not "unreasonable in finding the prosecutor's race-neutral justifications to be genuine." *Jamerson*, 713 F.3d at 1225.

We examine the facts surrounding each exercise of the prosecution's peremptory challenge of the Black jurors in turn:

1. Prospective Juror Keia M. The prosecution used a peremptory strike against potential juror Keia M., a nineteen-year-old Black woman without children, who lived with her boyfriend. The prosecutor explained that her reason for using a peremptory strike against Keia M. was that Keia M. was not mature enough to consider whether a death sentence was warranted and because Keia M.'s views on the death penalty were not "thought out at all."

The CSC determined that the trial court's finding that Keia M. was not a good prosecution juror with respect to the death penalty was supported by the record because Keia M. initially "expressed the view that there was really no difference" between life without the possibility of parole ("LWOP") and the death penalty "in terms of severity." *McDermott*, 28 Cal. 4th at 978.

Both of the prosecutor's justifications for striking Keia M.—her immaturity and her death penalty views—are supported by the record. Many of Keia M.'s answers in the jury questionnaire were vague or superficial. For instance, Keia M. believed doctors were "not friendly enough"; lawyers had an "interesting job"; police had a "very hard job"; psychologists were "pushy"; and psychiatrists earned "easy money." With regard to the death penalty in particular, her voir dire answers included statements like "I don't know if I can explain this." While she stated that she thought society should have a death penalty, she struggled to name a crime that would merit it, saying "[t]here is nothing." Accordingly, the CSC reasonably concluded that substantial evidence supported the trial court's finding that the

prosecutor's stated rationale was not a pretext for racial discrimination. *Nguyen v. Frauenheim*, 45 F.4th 1094, 1103 (9th Cir. 2022) ("Lack of maturity and life experience are nondiscriminatory reasons for a peremptory strike.").

Furthermore, a comparison of Keia M. to the seated jurors and stricken white jurors supports the reasonableness of the CSC's determination that the prosecutor's justification was not pretextual. First, Keia M. was much younger than the seated jurors and the alternates. In addition, the youngest seated juror had provided more nuanced and specific answers in the questionnaire and elaborated on them during voir dire. Accordingly, a reasonable inference can be drawn that the prosecutor believed that jurors with life experiences and maturity would be better equipped to vote for the death penalty and not that the prosecutor was discriminating on the basis of race.

Given McDermott's burden of persuasion and the deference owed to the trial court's assessments of credibility, maturity and demeanor, the CSC's rejection of McDermott's *Batson* claim as to Keia M. was not based on an unreasonable determination of the facts. *See Rice*, 546 U.S. at 343 (Breyer, J., concurring) (observing that appellate courts "must[ ] grant the trial courts considerable leeway in applying *Batson*" because, "in a borderline case," the trial judge is best situated to decide if "a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision").

2. Prospective Juror Theola J. The prosecution exercised a peremptory strike against potential juror Theola J., a fifty-nine-year-old, Black, divorced mother of five children, who had served as a postal worker for 20 years. The prosecution explained that its reason for using a

peremptory strike against Theola J. was that she was "very, very stupid;" she "couldn't see herself ever giving the death penalty"; and she was "as bad as you could get."

The CSC upheld the trial court's finding that the prosecutor could reasonably view Theola J. as having views on the death penalty that were unfavorable to the prosecution. *McDermott*, 28 Cal. 4th at 974–75. The CSC stated that "[a]lthough [Theola J.'s] responses were confused and inconsistent, and her final statements indicated neutrality on the death penalty, two of her answers could cause the prosecutor legitimate concern." *Id.* at 975.

The CSC did not make an unreasonable determination of the facts in concluding that the prosecution had race-neutral reasons for challenging Theola J. For example, when asked during voir dire whether she felt the State should have the right to execute someone found guilty of first degree premeditated, deliberate murder, Theola J. stated, "No. I don't think so." Further, Theola J.'s other responses implied that "she might enter the penalty phase with something like a presumption in favor of the alternate penalty of life without parole." *Id.* at 975. Moreover, in her juror questionnaire, Theola J. "failed to provide any meaningful responses to many of her questions," and others were "left blank." Both the trial court and the parties had to repeat questions to Theola J. several times, and they occasionally failed to obtain a clear answer from her even after multiple attempts. Therefore, Theola J.'s views on the death penalty and her perceived intelligence provided race-neutral reasons that the prosecutor exercised a peremptory strike against her.

That there was no purposeful discrimination in striking Theola J. is reinforced by a comparative analysis of Theola J. with seated and stricken jurors. For instance, McDermott

argues that seated juror Kathryn P. stated twice that she would need to be convinced that the death penalty was the appropriate punishment. Kathryn P.'s questionnaire responses, however, were far more articulate than Juror Theola J.'s responses.

The record shows that the prosecutor had a reasonable basis to believe Theola J. lacked the intellectual capacity to understand and apply the law. This, in combination with her negative views toward the death penalty, support the CSC's denial of McDermott's *Batson* claim as to Theola J.

3. Prospective Juror Gerald W. The prosecution used a peremptory strike against potential juror Gerald W., a thirty-five-year-old Black, single male, with one child who had some college education and worked as a cashier. The prosecutor justified her peremptory challenge against Gerald W. as follows: "[Gerald W.] said that he favored the death penalty only in situations if a person had a criminal record. That was his initial statement. And then he changed his mind later. He is in favor, if you look at his statement in the questionnaire, basically of rehabilitation and counseling before punishment such as the death penalty."

The CSC determined that the trial court's finding as to Gerald W. was supported by substantial evidence because "his answers suggested that in making the penalty determination he would be heavily influenced by the presence or absence of a prior criminal record and that at least initially he was not inclined to impose the death penalty on one who did not personally participate in the killing." *McDermott*, 28 Cal. 4th at 979.

The CSC's ruling as to juror Gerald W. is not an unreasonable determination of the facts. The record shows that Gerald W. favored the death penalty only for the direct

killer and for repeat offenders. The prosecutor was reasonably concerned about jurors who favored the death penalty for those reasons because McDermott did not have a prior criminal record and did not herself commit the murderous act. For example, when Gerald W. was asked whether his ability to vote for the death penalty would be determined by a person's prior criminal record, he stated that "[i]t would have a lot to do with it," and that he did not think he could see himself voting for the death penalty in a situation where he found the person guilty for participation in the crime, but the person did not "pull[] the trigger." And "[a]lthough he later modified his answer, his initial pre-occupation with whether the defendant was the direct perpetrator, as well as his pre-occupation with the defendant's criminal history, supports the race-neutral reasons given by the prosecutor for" using a peremptory challenge against Gerald W.

A comparative juror analysis confirms that the CSC's rejection of this *Batson* claim was not unreasonable in light of the record. While a seated white juror, Kathryn P., expressed ambivalence about the death penalty, she did not state that she would have a hard time voting in favor of the death penalty for a person without a criminal record who did not personally participate in the murder.

4. Prospective Juror Gilbert K. The prosecution used a peremptory strike against potential juror Gilbert K., a forty-year-old, Black, married man without children who worked as an accountant. The prosecutor justified the strike on Gilbert K. as follows: "[Gilbert K.] stated that he would consider the death penalty if the crime was particularly brutal. But, and I have that underlined, he doesn't want the death penalty unless the defendant would kill again in prison.

And I didn't feel that was a realistic prospect for the defendant in this case."

The CSC determined that Gilbert K.'s "earlier responses, questioning the need to execute someone who posed little or no threat of violence in prison, could be a matter of legitimate concern to the prosecutor in this case." *McDermott*, 28 Cal. 4th at 973-74.

The CSC did not make an unreasonable determination in concluding that the prosecution had race-neutral reasons for exercising a peremptory strike against Gilbert K. Indeed, Gilbert K. stated that if he "did not feel the person would kill again" it was "very doubtful" that he could see himself voting for the death penalty. After further questioning, he modified his views, but the record supports the prosecutor's concern that Gilbert K. would not vote for the death penalty because there was no evidence that McDermott would likely kill again if sentenced to life without parole. In light of the record, the CSC's rejection of McDermott's *Batson* claims concerning Gilbert K. is not based on an unreasonable determination of the facts.

5. Prospective Juror Brenda B. The prosecution used a peremptory challenge against potential juror Brenda B., a forty-one-year-old divorced, Black woman, who is a registered Democrat, with children, and who identified as a "loner." The prosecution did not provide any particular justification for striking Brenda B., apart from its general reason for striking all eight stricken Black jurors—that they were not "good prosecution jurors on the issue of the death penalty."

The CSC concluded that the trial court's findings as to Brenda B. were supported by the record. It stated: "Because defendant had no prior criminal record, the prosecutor might

reasonably conclude that Brenda B.'s focus on rehabilitation made her an unfavorable jury [sic] for the prosecution on the penalty issue." *McDermott*, 28 Cal. 4th at 976.

The CSC did not make an unreasonable determination of the facts. While Brenda B. did identify herself as an eight out of ten on a scale in favor of the death penalty (with ten being most in favor), she also stated that she believes in the death penalty "only when there can be no rehabilitation at all." Moreover, Brenda B. provided hesitant, inconsistent answers and repeatedly returned to the issue of rehabilitation throughout voir dire. Therefore, Brenda B.'s response supports the prosecutor's rationale for exercising a peremptory strike.

McDermott contends that a comparison of Brenda B.'s views with that of white seated juror Kathryn P. shows the pretextual nature of the prosecutor's justification because Kathryn P. was "significantly more anti-death penalty." While Brenda B. and Kathryn P. both emphasized the role of remorse and rehabilitation in deciding whether the death penalty was appropriate, Kathryn P. eventually suggested that she could impose the death penalty if the circumstances of the murder were bad enough. She explained in voir dire that she may impose the death penalty "[b]ecause it may be that I just felt, you know, under those circumstances this person—this is the penalty that they should get for what they did." Brenda B., on the other hand, continued to emphasize that if rehabilitation was possible, she would not impose the death penalty.

This is not a situation where the comparative juror analysis demonstrates obvious pretext. Although it is a close question, reasonable jurists might disagree about the prosecutor's reasons for using a peremptory strike against

Brenda B. Thus, in view of the level of deference at play in our analysis, we conclude that the CSC's finding that "Brenda B.'s views on the death penalty, rather than her race, were the basis for the prosecution's peremptory challenge" is not an unreasonable determination of the facts. *McDermott*, 28 Cal. 4th at 976.

6. Prospective Juror Patricia M. The prosecution used a peremptory strike against potential juror Patricia M., a Black, forty-four-year-old, separated mother of two children, whose husband suffered from addiction. The prosecution did not provide any particular justification for striking Patricia M., apart from its general reason for striking all eight stricken Black jurors—that they were not "good prosecution jurors on the issue of the death penalty."

The CSC found that Patricia M.'s "view that the death penalty did not serve any purpose and her stated inclination to impose life imprisonment rather than death for a premeditated murder carried out for financial gain" supported the trial court's finding that the strike was not pretextual. *McDermott*, 28 Cal. 4th at 972.

The CSC's determination as to Patricia M. is supported by the record and by a comparative juror analysis. For example, when asked what the appropriate penalty would be if she were to find McDermott guilty of first-degree murder with special circumstances, Patricia M. stated that she "would probably be more apt to say life without the possibility of parole." And when asked whether a premeditated murder for financial gain was "the type of murder [she] would consider the death penalty for," she replied "[p]ossibly." Moreover, she stated that she felt the death penalty does "[n]ot really" serve any purpose. Additionally, during voir dire, Patricia M. provided

inconsistent answers on her feelings about the death penalty in a case of first-degree murder with special circumstances of lying in wait and financial gain special circumstances.

While there were several seated and alternate white jurors who, like Patricia M., expressed equivocation on which punishment was worse, most of these jurors were strong prosecution jurors for other reasons, and none of them felt that the death penalty served no purpose. Accordingly, the CSC's rejection of McDermott's *Batson* claim as to Patricia M. is not based on an unreasonable determination of the facts.

*7. **Prospective Juror Kathryn S.*** The prosecution exercised a peremptory strike against potential juror Kathryn S., a thirty-two-year-old, Black, single woman who worked for the U.S. Postal Service. The prosecution did not provide any particular justification for striking Kathryn S., apart from its general reason for striking all eight stricken Black jurors—that they were not "good prosecution jurors on the issue of the death penalty."

The CSC determined that the trial court's finding was supported by the record because Kathryn S. "expressed considerable doubt that the death penalty was a harsher punishment than [LWOP] and she could not explain why she would ever choose the death penalty over [LWOP]." *McDermott*, 28 Cal. 4th at 977.

Here again, the CSC's determination that the prosecution had race-neutral reasons for challenging Kathryn S. is not an unreasonable interpretation of the record. For instance, when Kathryn S. was asked whether she would ever give the death penalty, she stated: "I don't know that I would . . . I don't know why I would ever give it or if I would." Further, Kathryn S. stated that in her view "life without possibility of

parole" was worse than the death penalty. Although many of Kathryn S.'s responses were neutral toward the death penalty, some of her statements indicate that she carried doubt about whether she would ever impose the death penalty, providing sufficient reason for the prosecution to strike her.

The CSC's reasoning is also supported by the fact that the prosecutor offered to stipulate to Kathryn S.'s excusal because she felt that Kathryn S. had displayed a lack of comprehension and thus was "a total wild card for both sides." This statement provides a "contemporaneous indication" of the prosecutor's state of mind and suggests that she thought the juror's unfitness was clear enough that the defense would agree to her dismissal. *See Hoyos v. Davis*, 51 F.4th 297, 313 (9th Cir. 2022). In light of the record and a comparative juror analysis, the CSC's decision as to Kathryn S. is not based on an unreasonable determination of the facts.

8. Prospective Juror James T. The prosecution exercised a peremptory strike against potential juror James T., a forty-one-year-old, Black, married man with two children, who had worked as a postal worker and served in the military, and who was active in the Baptist church. The prosecution did not provide any particular justification for striking James T., apart from its general reason for striking all eight stricken Black jurors—that they were not "good prosecution jurors on the issue of the death penalty."

The CSC determined that the trial court's finding as to James T. was supported by the record due to James T.'s "expression of doubt about the moral legitimacy of the death penalty." *McDermott,* 28 Cal. 4th at 978.

The CSC's determination that "substantial evidence supports the trial court's finding that the prosecutor could reasonably view James T. as unfavorable on the penalty issue" is not an unreasonable determination of the facts. *Id.* Although he stated that imposing the death penalty would not conflict with his religious views, he also stated that he would probably vote against the death penalty if it was on the ballot because "simply killing is wrong." *Id.* at 978. No seated juror stated that they would vote against the death penalty if it was on the ballot. Therefore, the record illustrates a legitimate non-racial reason for using a peremptory strike on James T.

McDermott relies on the fact that James T. repeatedly stated that his religious views did not conflict with the death penalty laws. However, many of James T.'s answers are to the contrary and show that he did not actually reconcile his religious beliefs with such laws. Furthermore, the prosecution questioned prospective non-Black jurors about their religious views, indicating that this was an important consideration. In light of the record, the CSC's decision as to James T. was not unreasonable.

Overall Analysis. In sum, despite the numerical evidence, a comparative juror analysis demonstrates that the CSC's conclusion that the prosecutor's justifications for striking the eight Black jurors were non-pretextual was not unreasonable.

In addition to the comparative analysis, further evidence from the record supports the CSC's conclusion. First, the prosecution emphasized that it preferred Black jurors because McDermott is white and she made multiple racist statements that would come into evidence. *McDermott*, 28 Cal. 4th at 968. Second, the ethnicity of two prosecution

witnesses Marvin and Bell—who are both Black—tends to undercut any motive for the prosecutor to exclude Black individuals from the jury. *See Hernandez*, 500 U.S. at 369–70 (noting that the ethnicity of victims and prosecution witnesses could be taken as evidence of the prosecutor's sincerity).

Third, the trial court took a recess and reviewed the stricken jurors' questionnaires before assessing the prosecutor's credibility, suggesting that the court was not rubberstamping the prosecutor's strikes. *See Aleman v. Uribe*, 723 F.3d 976, 983 (9th Cir. 2013) (no purposeful discrimination where "the trial court conducted a thorough review of the record and twice assessed the prosecutor's credibility"); *Mitleider v. Hall*, 391 F.3d 1039, 1051 (9th Cir. 2004) (same where "the trial judge took a recess before ruling on the adequacy of the prosecutor's reasons").

Fourth, the prosecutor consistently questioned non-Black jurors on the same issues as she did the stricken Black jurors. The consistency in her lines of questioning and the questions' relevance to the circumstances of the case support the credibility of the prosecutor's justification for using peremptory strikes on these jurors. *Cf. Flowers v. Mississippi*, 139 S. Ct. 2228, 2246–47 (2019) (prosecutor's voir dire evidenced discrimination when prosecutor on average "asked 29 questions to each struck [B]lack prospective juror" but only "one question to each seated white juror").

And finally, there is no evidence of any misrepresentation of the record by the prosecutor when she was defending the strikes. *Cf. id.* at 2243. Indeed, the prosecution adequately presented race-neutral reasons for using a peremptory challenge on each of the jurors—

primarily their anti-death penalty views. Accordingly, the above factors weigh against a finding of pretext, and support the CSC's conclusion that discrimination did not motivate the prosecution's use of peremptory strikes.

Under AEDPA's deferential standard of review, the CSC's finding that the trial court did not err in determining that there was no purposeful discrimination was an objectively reasonable determination of the facts. McDermott cannot show that the only explanation for the prosecutor's use of peremptory challenges against the eight Black prospective jurors was on the basis of race. Therefore, although we grant a COA as to McDermott's *Batson* claim, we affirm the district court's denial of this claim.

C.

Finally, we decline to grant COAs as to McDermott's remaining claims. McDermott claims she received ineffective assistance of counsel at three distinct trial phases: (1) during voir dire; (2) during the guilt phase; and (3) during the penalty phase. We may not review McDermott's uncertified claims unless we first grant a COA. 28 U.S.C. § 2253(c)(1)(A). Here, McDermott cannot show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further" as to her ineffective assistance of counsel claims. *Miller-El I*, 537 U.S. at 336 (internal quotation marks omitted). Accordingly, we decline to address McDermott's remaining claims.

V.

Under AEDPA's deferential standard of review, we must affirm the district court's denial of McDermott's

prosecutorial misconduct claim because the CSC did not issue a decision contrary to clearly established Supreme Court precedent on that claim. Further, although we grant a COA as to McDermott's *Batson* claim, we affirm the district court's denial of the *Batson* claim because the CSC's finding of no purposeful discrimination was not an unreasonable determination of the facts. Finally, we deny COAs as to McDermott's remaining claims.[4]

AFFIRMED.

[4] The Court grants McDermott's unopposed motion to expand the record (Docket No. 18). The Court grants in part McDermott's unopposed motion to take judicial notice (Docket No. 41), as to the documents included in the state court record, but denies the motion as moot in part as to the *People v. Sandoval* transcripts.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAUREEN MCDERMOTT, Petitioner-Appellant, v. DEBORAH K. JOHNSON, Warden, Central California Women's Facility, Respondent-Appellee.	No. 17-99005 D.C. No. 2:04-cv-00457-DOC Central District of California, Los Angeles ORDER

Before: WARDLAW, GOULD, and FRIEDLAND, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and rehearing en banc (Dkt. 88). The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAUREEN MCDERMOTT, **Petitioner,** **v.** **DEBORAH K. JOHNSON, Warden, Central California Women's Facility,** **Respondent.**	**Case No. CV 04-0457 DOC** **DEATH PENALTY CASE** **ORDER RE: PETITIONER'S BRIEF RE: APPLICATION OF 28 U.S.C. § 2254(d)**

The Court has reviewed Petitioner's Opening Brief Re: Application of 28 U.S.C. § 2254(d) to Claims for which the Court Has Ordered an Evidentiary Hearing (Brief), Respondent's Opposition, and Petitioner's Reply, which closed and was taken under submission on September 26, 2013. Now, the Court issues the following Order.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

The facts, as set forth in the Court's June 25, 2010 Order and by the California Supreme Court on direct review, People v. McDermott, 28 Cal. 4th 946, 962-66 (2002), are summarized, as follows:

On April 28, 1985, Stephen Eldridge was stabbed to death in a home he shared with Petitioner. There was no dispute at trial that the actual killers were Jimmy Luna,

Petitioner's former coworker and friend, and two brothers Luna hired.

At the time of Eldridge's murder in 1985, Petitioner was 37 years old. She worked as a registered nurse at Los Angeles County-USC Medical Center during the day, and in the evening she provided nursing care to Lee LaPorte at his home. She shared a home with Eldridge, 27 years old, who was a self-employed landscaper. They owned the home as joint tenants. In December 1984, Petitioner and Eldridge had each bought $100,000 in life insurance, designating each other as beneficiary.

In early 1985, Petitioner's relationship with Eldridge deteriorated. Eldridge complained about Petitioner's pets and the unkempt condition of the house. Petitioner was upset about Eldridge's treatment of her pets and his plans to sell his interest in the house. Near the end of February 1985, Petitioner discussed a plan to kill Eldridge with Luna. Petitioner told Luna that she had an insurance policy, and offered Luna $50,000 to kill Eldridge. Luna agreed. Petitioner told Luna that she wanted Eldridge stabbed because a gun would make too much noise, and that she wanted the killing to look like a "homosexual murder" because she thought the police would not investigate the murder of a homosexual as vigorously as other killings. On different occasions, Petitioner suggested that Luna carve the word "gay" on Eldridge's body or cut off his penis.

On three occasions in late February and early March 1985, Petitioner arranged for Luna to be at the house she shared with Eldridge so that Luna could kill Eldridge. However, Luna could not carry out the murder because he became frightened each time. Petitioner then suggested that Luna find someone to assist him, but asked him not to tell anyone of her involvement.

In March 1985, Luna asked his friend Marvin Lee to help him commit the murder, telling him that an "organization" wanted someone killed. He offered Marvin $3,000 to "watch [his] back." Marvin agreed. In later conversations, Luna told Marvin that the victim was a homosexual and Luna was going to castrate him in order to make it appear as a "homosexual murder."

In the evening on March 21, 1985, Luna and Marvin knocked on the door where

Petitioner and Eldridge lived. When Eldridge opened the door, Luna and Marvin forced their way inside. Threatening Eldridge with a knife, Luna ordered him to crawl on his hands and knees into the bedroom and to lie face-down on the bed. Luna then cut Eldridge on the buttocks and yelled homosexual epithets at him. Marvin gave Luna a two-foot long bedpost, with which Luna struck Eldridge on the head. Eldridge then jumped up and ran out of the house, whereupon Luna and Marvin left.

Los Angeles Police Officer David Yates, who was dispatched to investigate the attack, found Eldridge at the house dressed only in his underwear and covered in blood. Eldridge was transported by an ambulance to a hospital for treatment.

The next day, Petitioner spoke with Luna about the failed murder attempt. She told him that "we are going to have to do it again and this time you can't fail." After March 21, 1985, but before April 28, 1985, there were several telephone conversations between Petitioner and Luna. During one of these conversations, Marvin was with Luna and listened in as Petitioner discussed the murder plan and what they would do with the anticipated insurance proceeds. Petitioner objected to Marvin's participation in the planned murder and said that if Marvin told anyone about it, Luna would "have to kill that nigger too." Luna assured her that Marvin was trustworthy and would not say anything. Marvin's brother Dondell overheard part of the conversation when Marvin passed him the telephone.

On April 28, 1985, the day of the murder, Luna met Marvin and his brother Dondell and offered Dondell money to help commit the murder. Luna then made several telephone calls to Petitioner, during which Petitioner told Luna that she would leave a front bedroom window open for entry into the house and that Luna should tie her up and cut or hit her so she would look like a robbery victim.

Luna, Marvin, and Dondell entered the house through the front bedroom window around 8:15 p.m. Luna went down the hall to Petitioner's room, and Petitioner told Luna that Eldridge had not yet returned from a dinner engagement. Petitioner told Luna to cut her on the breast and inner thigh, which he did, to make it appear that Eldridge was killed when he came home while Petitioner was being robbed.

Eldridge arrived home around 10:40 p.m. When he entered the house, Dondell met him with a rifle owned by Petitioner and provided to him by Luna. Marvin then grabbed Eldridge by the neck in a chokehold and took him down the hall, and Luna stabbed him repeatedly until Eldridge slumped to the floor. Luna returned to Petitioner's bedroom where he found Petitioner on the floor with a facial injury. Petitioner asked Luna how the injury looked, as she had self-inflicted her wound. As Luna and the two Lee brothers were about to leave the house, Marvin overheard Petitioner yell from the back bedroom not to forget to cut off Eldridge's penis. Luna did so.

Los Angeles County Deputy Medical Examiner Susan Selser performed the autopsy. She testified that Eldridge had been stabbed 44 times and his penis was severed postmortem. He sustained 44 stab wounds, 28 of which were independently fatal.

On May 23, 1985, Luna was taken into custody for questioning but released within 72 hours. On July 2, 1985, he was arrested for the first degree murder of Eldridge. In August 1985, Petitioner was also arrested and charged with attempted murder, murder, and special circumstance allegations of murder for financial gain and lying in wait. Marvin Lee, who was in custody for an unrelated offense, was granted immunity for the murder of Eldridge in exchange for his confession and testimony. In August 1986, Dondell Lee was granted immunity while in the custody of the California Youth Authority. In July 1989, Luna entered into a plea agreement under which he pleaded guilty to first degree murder and agreed to testify in Petitioner's prosecution.

The defense theory was that the prosecution had not proven its case. Counsel cross-examined Luna for eight days and also presented the testimony of five of Luna's former coworkers from Los Angeles County-USC Medical Center that Luna was a habitual liar.

Defense witness Dr. John Ryan, a pathologist, testified that based on his review of the autopsy report, Eldridge's stab wounds had been inflicted by two different weapons.

At the penalty trial, the prosecution presented evidence that Petitioner had Luna beat up someone so she could obtain that person's job. Specifically, the prosecution's evidence was that, in April 1983, Dewayne Bell, John Phillips and Phillip LaChance worked

alternating shifts at the LaPorte residence as caretakers for the elderly Lee LaPorte. Bell had worked for the LaPortes for five years at that time. While LaChance was in jail for driving under the influence, Petitioner temporarily assumed his caretaker duties. Petitioner told Luna that she wanted permanent employment with the LaPortes, and offered Luna money to injure Bell so that she could take his job. Luna later attacked Bell at his home, and slashed his face, throat, and chest. After Bell returned to his caretaker duties at the La Portes' home, Luna repeatedly telephoned the LaPortes and threatened Bell when Betty LaPorte answered the telephone, per Petitioner's instructions. As a result of these calls, Bell lost his job with the LaPortes and Petitioner took over Bell's duties.

II. Procedural Background

On appeal, the California Supreme Court affirmed Petitioner's conviction and sentence. People v. McDermott, 28 Cal. 4th 946 (2002). Shortly thereafter, the United States Supreme Court denied certiorari. McDermott v. California, 538 U.S. 1014 (2002). The California Supreme Court denied Petitioner's state habeas corpus petition on January 14, 2004.

The instant habeas proceeding was commenced on January 26, 2004, when Petitioner filed her request for counsel. On January 14, 2005, Petitioner filed her first Petition and simultaneously filed another state habeas petition. On February 15, 2005, Respondent filed a motion to dismiss the federal petition and, on March 11, 2005, Petitioner filed a motion to stay the federal proceedings pending resolution of state habeas proceedings. In an April 27, 2005 Order, the Court granted a stay of the federal litigation.

On January 25, 2007, the Court lifted the stay because the state exhaustion litigation had been completed. On March 23, 2007, Petitioner filed a First Amended Petition (FAP). Respondent filed an Answer on May 22, 2007, and Petitioner filed a Traverse on June 21, 2007.

On September 24, 2007, the Court granted the parties' agreed-upon discovery and approved a Stipulation re: Protective Order. On October 18, 2007, the Court issued an order resolving the parties' remaining discovery disputes. On June 18, 2008, Petitioner filed a

motion seeking leave to file a Second Amended Petition, which the Court denied on July 14, 2008, on the grounds that the claims Petitioner sought to add did not relate back to the FAP.

On April 27, 2009, Petitioner filed the Motion for Evidentiary Hearing (MEH); on July 24, 2009, Respondent filed her Opposition; and on September 25, 2009, Petitioner filed her Reply. The MEH briefing was based in part on discovery taken during these federal habeas proceedings. Following the Court's issuance of its June 25, 2010 Order granting an evidentiary hearing as to certain claims, the Supreme Court issued opinion in Cullen v. Pinholster, __ U.S. __, 131 S. Ct. 1388 (2011). The Court then vacated the June 25, 2010 Order and directed the parties to brief any impact that decision might have on Petitioner's entitlement to an evidentiary hearing. Petitioner filed her Supplemental Brief on July 14, 2011; Respondent filed her Supplemental Brief in opposition on September 6, 2011; and Petitioner filed her Reply on September 22, 2011. In a March 29, 2012 Order, the Court rejected Petitioner's arguments that Pinholster had no impact on her entitlement to an evidentiary hearing and, instead, found that an evidentiary hearing should not be granted unless Petitioner satisfies 28 U.S.C. § 2254(d) based solely on the state court record as to the claim on which it had previously granted an evidentiary hearing.

On August 3, 2012, Petitioner filed her Opening Brief; on January 10, 2013, Respondent filed her Opposition; and on May 1, 2013, Petitioner filed her Reply. The Court took this briefing under submission without oral argument, and now addresses the briefing on these claims.

DISCUSSION

I. Standards

The amendments to 28 U.S.C. § 2254 effected by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) govern the FAP, because this case was filed after the effective date of that statute. Woodford v. Garceau, 538 U.S. 202, 210 (2003). Under the AEDPA, a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: "(1) 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 (2) 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." 28 U.S.C. § 2254(d)(1) and (2). Because Petitioner's claims in the FAP were adjudicated on the merits, she must satisfy either § 2254(d)(1) or § 2254(d)(2) in order to obtain relief in this case.

Clearly established law, for purposes of § 2254(d)(1) review, means the Supreme Court holdings in existence at the time of the state court decision in issue. Greene v. Fisher, ___ U.S. ___, 132 S. Ct. 38, 44-45 (2011); Pinholster, 131 S. Ct. at 1399; Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 785 (2011). Under § 2254(d)(1)'s first prong, a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the relevant Supreme Court holdings or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640 (2003). Section 2254(d)(1)'s "unreasonable application" second prong constitutes an objective standard that is not satisfied merely by finding that a state court erred in applying clearly established law. Richter, 131 S. Ct. at 784; Lockyer v. Andrade, 538 U.S. 63, 75 (2003). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); see also Xiong v. Felker, 681 F.3d 1067, 1074 (9th Cir. 2012) (holding that the state court's incorrect or erroneous determination is insufficient, because the § 2254(d)(1) "inquiry is strictly limited to whether the state court's application of clearly established Supreme Court precedent" was objectively unreasonable), cert. denied, ___ U.S. ___, 133 S. Ct. 989 (2013).

In determining whether there has been an "unreasonable determination of the facts" under § 2254(d)(2), the district court must review whether the "fact-finding process itself is defective." Milke v. Ryan, 711 F.3d 998, 1007 (9th Cir. 2013) (citing Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004)). A district court cannot uphold a determination of the facts by the state court where there is a defect that causes the district court to "more than

merely doubt whether the process operated properly." Id. (citing Taylor, 366 F.3d at 1000). In addition, "[w]e have held that, 'where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" Id. (citing and quoting Taylor, 366 F.3d at 1001).

In applying these standards, the Court looks to the last reasoned state court decision on the claim presented. See DeWeaver v. Runnels, 556 F.3d 995, 997 (2009). Here, the last reasoned state court decision for some of the claims that were also raised in Petitioner's direct appeal is California Supreme Court's decision on direct appeal. For those claims where there is only a summary denial, "a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Richter, 131 S. Ct. at 786; Pinholster, 131 S. Ct. at 1403. A federal court has the authority to issue habeas relief only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." Richter, 131 S. Ct. at 786.

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Landrigan, 550 U.S. at 474 (citation omitted). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Id.

In addition, before granting an evidentiary hearing on any claim, the Court shall ascertain the reasonableness of the state supreme court's decision under § 2254(d) based on the record that was before the state court that adjudicated the claim on the merits. See Pinholster, 131 S. Ct. at 1398. The Court makes the § 2254(d) determination prior to eliciting further evidence at an evidentiary hearing, because "evidence introduced in federal

court has no bearing on § 2254(d)(1) review."[1] Id. at 1400. As the Supreme Court further observed in Pinholster, "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." Id. at 1401.

To determine whether the state court violated § 2254(d) based on the record that was before it, the Court must look to the California procedures for handling habeas petitions, which requires the state court to issue an order to show cause when a petitioner makes out a prima facie case for relief on a claim. Id. at 1402 n.2. The California Supreme Court has explained that a petitioner has alleged a prima facie case for relief where the claim is "sufficient on its face," such that, assuming the factual allegations in the petition to be true, the claim "states facts that . . . entitle the petitioner to relief." People v. Duvall, 9 Cal. 4th 464, 474-75 (1995). Nevertheless, "conclusory" allegations do not suffice to state a prima facie case for relief, which includes instances where the petitioner either failed to "provide any explanation of the basis for the allegations" or failed to state "fully and with particularity the facts on which relief is sought." Id. at 474.

In deciding whether the state court applied correct legal principles in an objectively unreasonable way, the district court must analyze the state court's method, as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003) (citations omitted)). In Nunes, the Ninth Circuit determined that the state court's rejection of the petitioner's claim was unreasonable under both § 2254(d)(1) and (2). Id. First, because the petitioner had made a prima facie claim for ineffective assistance, taking the petitioner's allegations at face value (i.e., that his attorney gave him the wrong information and advice about the state's plea offer and, if he had been accurately informed, he would have taken the plea bargain), the state court should have afforded him an evidentiary hearing. Id. at 1054-55. Second, the state court's findings viewed as a factual determination were in error, given that the state

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[1] Although Pinholster specifically addressed the application of § 2254(d)(1), it further noted that, based on the explicit language of § 2254(d)(2), the consideration of federally-developed evidence is also precluded as to a § 2254(d)(2) determination. Id. at 1400 n.7.

court had gone well beyond its task of assessing the allegations for sufficiency and had made improper credibility determinations without providing an evidentiary hearing. Id. at 1055. However, in Nunes, the Ninth Circuit noted that, "there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved." Id. at 1053-54.

In describing the instances when an evidentiary hearing is necessary in federal habeas proceedings, the Ninth Circuit has further explained that "[t]o find the state court's fact finding process defective [under § 2254(d)(2)] in a material way, or, perhaps completely lacking, 'we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.'" Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir. 2014) (citing Taylor, 366 F.3d at 1000). In Hurles, the Ninth Circuit remanded the case for an evidentiary hearing on the issue of the state court judge's failure to recuse herself in view of the state court's rendering of factual findings denying the petitioner's judicial bias claim without an evidentiary hearing or other opportunity to present evidence. Id. at 792. Accordingly, such factual findings of the state court were not entitled to the "cloak" of the "presumption of correctness" under § 2254(e)(1). Id. at 790. The Ninth Circuit further reasoned that an evidentiary hearing was required, where the habeas petitioner had not failed to develop the factual basis of his claim in state court under 28 U.S.C. § 2254(e)(2), and: (1) the petitioner has demonstrated his entitlement to an evidentiary hearing pursuant to Townsend v. Sain, 372 U.S. 293, 313 (1963); and (2), the allegations, if true, would entitle him to relief. Id. at 791 (citation omitted). Under Townsend, a federal court must conduct an evidentiary hearing when: (1) the state court's factual determinations are not fairly supported by the record as a whole; and (2) the fact-finding procedure used by the state court was not adequate to afford a full and fair hearing. Id. (citing Townsend, 372 U.S. at 313). Because the petitioner's allegation of judicial bias would, if proved, entitle him to federal habeas relief, the Ninth Circuit held that

the district court had abused its discretion in denying the claim without conducting an evidentiary hearing. Id. (citing Stanley v. Schriro, 598 F.3d 612, 617 (9th Cir. 2010)).

To the extent that Respondent contends that some of these claims are procedurally barred, the Court notes that it maintains authority to resolve any claim on the merits rather than addressing whether it is procedurally barred. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997) (finding that a court can elect against deciding a procedural bar issue when a claim can be readily resolved on the merits).

II. Ineffective Assistance Claims

In the Court's June 25, 2010 Order, Petitioner was granted an evidentiary hearing on five claims based on the ineffective assistance of counsel. Petitioner's right to the effective assistance of counsel is guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 686 (1984). Ineffective assistance of counsel claims are analyzed pursuant to the standard set forth in Strickland, which constitutes "clearly established Federal law, as determined by the Supreme Court of the United States," for purposes of federal habeas review of an ineffective assistance claim. Bell v. Cone, 535 U.S. 685, 698 (2002); Dows v. Wood, 211 F.3d 480, 484 (9th Cir. 2000).

To prevail on her ineffective assistance of counsel claims, Petitioner must demonstrate that: (1) her counsel's performance was deficient; and (2) the deficient performance prejudiced her defense. Strickland, 466 U.S. at 688-93. See also Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam) (stating that the Sixth Amendment right "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense"). As both prongs of the Strickland test must be satisfied in order to establish a constitutional violation, a failure to satisfy either prong requires that a petitioner's ineffective assistance claim be denied. Strickland, 466 U.S. at 697 (finding no need to address deficiency of performance if lack of prejudice is obvious); Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995) (same); Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998) (finding no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the Strickland test -- deficient performance -- requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The relevant inquiry under Strickland is not what defense counsel could have done, but whether counsel's choices were reasonable. See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998); see also Wiggins v. Smith, 539 U.S. 510, 511 (2003) (stating that the issue is "not whether counsel should have presented a mitigation case," but whether "the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*"; emphasis in original).

Due to the difficulties inherent in making the above-described evaluation, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; see also Bell, 535 U.S. at 702 (holding that a habeas court "must indulge" in this "strong presumption" because "it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight"). Petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (internal quotation marks and citation omitted); see also Bell, 535 U.S. at 698 (finding that, even if an ineffective assistance claim is not subject to § 2254(d)(1) deference, the petitioner still must overcome the presumption that counsel's conduct might be considered sound trial strategy); Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001) ("The defendant bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy.").

The second prong of the Strickland test -- prejudice -- requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id.; see also Woodford v. Visciotti, 537 U.S. 19, 22 (2002).

For a petitioner to succeed on an ineffective assistance of counsel claim in a § 2254 proceeding, the "pivotal question is whether the state court's application of the Strickland

standard was unreasonable[; t]his is different from asking whether defense counsel's performance fell below Strickland's standard." Richter, 131 S. Ct. at 785. Thus, the criteria created by Strickland, when applied in combination with the AEDPA, amount to a standard of double deference. Id. at 788.

A. Claim Three D.3: Whether Trial Counsel Improperly Failed to Consult an Independent Crime Scene Expert

In Claim Three D.3, Petitioner contends that her counsel's failure to consult an independent crime scene expert constituted ineffective assistance.[2] (FAP at 86-87.) Specifically, Petitioner contends that counsel failed to present any evidence to refute the testimony elicited by the prosecution that Petitioner was guilty based on the crime scene evidence. Id. Petitioner therefore contends that, if trial counsel had obtained an independent criminalist, the criminalist could have assisted counsel in preparing for the cross-examination of Detective Arnold and could have testified about aspects of the crime scene critical to the defense. Id. In support of this claim, Petitioner relies upon the Declaration of Richard Fox, a forensic chemist, bacteriologist, and criminalist. (Ex. 56.)

Fox asserts that a qualified expert could have testified about the holes in the crime scene evidence supporting the prosecution's case and provided better grounds for cross-examination, such as questions regarding the lack of objective basis for the opinions offered by Arnold and Music. Based on his review of evidence, Fox states that a qualified criminalist could have assisted the defense in showing that many of Arnold's conclusions about the crime scene were not scientifically sound, contradicted by the actual evidence, and/or not based on any evidence at all, including: Arnold lacked any notes and recollection of details of the crime scene five years prior, such as the "dry" "bathmat or towel" upon which he concluded that Petitioner's story that she had taken a bath was untrue; Arnold's testimony as to "peculiarities" of the crime scene was faulty, as all crime scenes are

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[2] Now, Petitioner is withdrawing a request for an evidentiary hearing on Claim Three (D.3). (Br. at 6.) However, Respondent argues that the claim should be denied as without merit, in view of new Supreme Court authority, as discussed below. (Opp. at 11.)

different; Arnold's conclusion that the number of stab wounds indicated a "deliberate" killing was faulty, because the number of stab wounds indicated a frenzied attack; Arnold's question about the lack of footprints in the blood was meaningless; Music improperly failed to test the temperature of the bath water or test it in any other way aside from conducting "crude" experiments in her own bathtub; and Music improperly failed to test the tape that appeared to have been used to cover Petitioner's mouth for the presence of saliva, not just blood. Id. Petitioner alleged this claim in her state habeas proceedings, and it was summarily denied by the California Supreme Court.

The question at issue in this claim is whether counsel's investigation and presentation of evidence regarding Petitioner's defense was constitutionally inadequate and, if so, whether Petitioner's defense was thereby prejudiced. In describing the standards counsel must undertake in conducting an adequate investigation, the Supreme Court has explained:

> . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments.
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> . . . [W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated entirely. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 690-91. A court must consider the objective reasonableness of the decision in light of all the circumstances under the prevailing norms in assessing counsel's investigative choices. Wiggins, 539 U.S. at 521-23. An attorney has great latitude to make strategic decisions about what investigation strategy to pursue after having gathered sufficient evidence. Jennings v. Woodford, 290 F.3d 1006, 1014 (9th Cir. 2002). Nevertheless, counsel must conduct a "thorough investigation" of the evidence before a

decision can be considered strategic under Strickland. Williams, 529 U.S. at 396.

In granting an evidentiary hearing on this claim in its June 25, 2010 Order, the Court relied upon the Ninth Circuit's decision in Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009), where habeas relief was granted when counsel had failed to adequately investigate physical evidence by retaining an independent expert.[3] (June 25, 2010 Order at 36-37.) In Richter,. Specifically, in Richter, the Ninth Circuit found that the petitioner's defense counsel was ineffective by failing to summon as a witness an expert on forensic evidence who would help support the defense theory that someone else committed the murder. Id. There, the Ninth Circuit specifically noted that, although counsel reviewed crime scene evidence, he did not investigate "available forensic testimony that would have contradicted the prosecution's explanation of the events that transpired and would have strongly supported the defense's theory." Richter, 78 F.3d at 946. In the June 25, 2010 Order, relying upon this language in Richter, the Court found that Petitioner had set forth colorable allegations based on Fox's declaration, as "it was not clear whether counsel improperly failed to investigate readily available forensic expert assistance that could have supported the defense theory that Petitioner was a crime victim and not a participant in Eldridge's murder." (June 25, 2010 Order at 37.) Accordingly, in the June 25, 2010 Order, the Court found that an evidentiary hearing on these allegations was therefore warranted.

However, following the June 25, 2010 Order, the Supreme Court reversed the Ninth Circuit's decision in Richter, and found that the California Supreme Court's denial of the petitioner's claim in that case was reasonable under the AEDPA. Richter, 131 S. Ct. at 784. The Supreme Court explained that the Ninth Circuit erred in finding that counsel's failure to retain a forensic expert to explain serological evidence was deficient and prejudicial under

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[3] The Court also cited Duncan v. Ornoski, 528 F.3d 1222, 1241 (9th Cir. 2008), which is a pre-AEDPA case. Consequently, the allegations in that case were not subject to AEDPA scrutiny. In Duncan, the Ninth Circuit found that counsel rendered ineffective assistance at sentencing based on the failure to investigate and present potentially exculpatory serological evidence with respect to the special circumstance finding that he intended the victim to be killed. Id.

Strickland. First, the Supreme Court held that the Court of Appeals erred in finding that counsel was deficient in consulting blood evidence experts in developing the basic strategy for the petitioner's defense. The Supreme Court reasoned that a state court could reasonably conclude that defense counsel could have properly elected not to use expert blood evidence, even if had been apparent that expert blood testimony could support the petitioner's defense. There, the petitioner's attorney had reason to question the truth of his client's account, and there was a risk that serological analysis or other forensic evidence could have demonstrated that the petitioner's story was an invention. Id. at 789-90. Apart from this risk, there was a possibility that expert testimony could have shifted attention to esoteric matters and distracted the jury from whether the petitioner was telling the truth, or transform the case into a battle of the experts. Id. at 790. In addition, the Supreme Court found that Court of Appeals erred in finding deficiency because counsel had not expected the prosecution to offer expert testimony and therefore was unable to offer his own expert testimony in response. Specifically, the Supreme Court explained:

> Even if counsel should have foreseen that the prosecution would offer expert evidence, Richter would still need to show it was indisputable that Strickland required his attorney to act upon that knowledge. Attempting to establish this, the Court of Appeals held that defense counsel should have offered expert testimony to rebut the evidence from the prosecution. But Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.
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> In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. . . . Here, Richter's attorney represented him with vigor and conducted a skillful cross-examination. As noted, defense counsel elicited concessions from the States's experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators left the crime scene. For all of these reasons, it would have been reasonable to find that Richter had not shown his attorney was deficient under Strickland.

Richter, 131 S. Ct. at 791.

Here, in view of the Supreme Court's decision in Richter, it is has now become clear that Petitioner has not met the standard for showing colorable allegations of deficiency and

prejudice based on her counsel 's failure to consult an independent crime scene expert to rebut the prosecution's crime scene evidence. As the Supreme Court explained in Richter, there was no "Newtonian" rule requiring the defense to present an expert to refute the prosecution's crime scene evidence that tended to implicate Petitioner. Furthermore, Fox's declaration offers only speculation as to what more a criminalist hired by the defense could have done to illuminate various problems with the police investigation of the crime scene.

Moreover, like the defense counsel in Richter, the record shows that defense counsel cross-examined Arnold and effectively challenged his testimony in the closing argument. For instance, counsel noted inconsistencies between Arnold's testimony and the crime scene log, and pointed out Arnold's failure to include information in the crime scene log. (RT at 5101-02, 5170.) In the closing argument, counsel attacked Arnold's testimony regarding Petitioner's involvement in the murder, noting that he initially believed that the perpetrator had entered through the window, but later determined that his assumption was incorrect based on his interview with Marvin Lee. (RT at 11200-01.) Counsel further attacked Arnold's testimony pertaining to the bath mat, noting that the mat had approximately three and one-half hours to dry before it was examined. (RT at 11201-02.) To the extent that Petitioner contends that counsel improperly failed to attack Arnold's credentials, her argument fails. Given Arnold's experience in being a police offer for over 20 years and investigating over 100 crime scenes, further cross-examining him on this point could have served to reinforce his qualifications and made him appear more credible to the jury. See also Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008) (finding that counsel's failure not to cross-examine an expert where such a cross-examination might have backfired was not deficient performance).

Accordingly, because Petitioner cannot show that there is "no possibility fairminded jurists could disagree" that the California Supreme Court unreasonably applied clearly established law or determined the facts in denying these allegations in order to establish a violation under § 2254(d), an evidentiary hearing as to Subclaim D.3 of Claim Three is not warranted.

B. Claim Three D.4: Counsel's Decision to Elicit Testimony from the Prosecutor Regarding His Decision to Seek the Death Penalty in Petitioner's Case

In Claim Three D.4, Petitioner alleges that counsel was ineffective based on the decision to elicit testimony from the prosecutor regarding his decision to seek the death penalty in Petitioner's case. (FAP at 92-93.) At trial, Curt Livesay, the Assistant District Attorney who was responsible for determining the appropriate penalty in Petitioner's case, testified that Deputy District Attorney Mader (the prosecutor in Petitioner's case) recommended giving Luna a plea deal, and Livesay agreed that Mader essentially told him that "if anyone deserved the death penalty," Petitioner did. (RT at 10,441, 10,458.)

In questioning Livesay, counsel elicited testimony that although the case against Luna was originally filed as a death penalty case, Luna later received a plea deal in which Luna would receive a life sentence without the possibility of parole in exchange for testifying against Petitioner at trial. (RT at 10360-95.) Livesay further testified that Mader told him that, because Luna had a prior relationship with Petitioner, Luna could describe Petitioner's "evilness and sophistication," which would be "helpful for the jury in evaluating her character." (RT at 10441.) In arguing over an objection pertaining to this testimony outside the presence of the jury, counsel explained to the trial court that he was seeking this testimony from Livesay to impeach Luna and to determine what factors went into his deal. (RT at 10478.) In response, the trial judge noted that through counsel's questions, it was possible that the prosecutor "is appearing as if she is being small and petulant and for some reason having to do with gender in wanting to be the first kid on the block, so to speak, to get a death penalty imposed for a member of the same sex" and Livesay's testimony "just seemed to explode or widen into an attack on the prosecution." (RT at 10474.) In addition, the trial judge stated that he was "initially scratching [his] head . . . as to why Mr. Livesay was here . . . [b]ut it became apparent that initially we have had to [deal] with Mr. Luna and why Mr. Luna was offered a disposition other than the death penalty." (RT at 10475.)

The California Supreme Court denied this claim on direct review, stating:

> Defense witness Curt Livesay was the assistant district attorney in charge of determining whether the prosecution should seek the death penalty in special circumstance cases. He testified about the terms of accomplice Luna's plea agreement. On cross-examination by the prosecution, Livesay explained that the purpose of the plea bargain was to have Luna tell the jury about [Petitioner's] role in the killing, and that without the plea bargain Luna was certain to have invoked his right against self-incrimination. Livesay did not give his personal opinion on [Petitioner's] guilt, and defense counsel had a legitimate tactical reason for calling Livesay as a witness: to attempt to undermine prosecution witness Luna's testimony by showing that the prosecution had given him a favorable deal in exchange for his testimony against [Petitioner]. In any event, [Petitioner] was not prejudiced. Undoubtedly, the jury was aware that the prosecution, as the charging party, was convinced of [Petitioner's]'s guilt.

McDermott, 28 Cal. 4th at 996. The California Supreme Court thereafter summarily denied the claim on the merits in Petitioner's state habeas proceedings.

In the Court's June 25, 2010 Order, it noted the well-established line of authority that a prosecutor may not express an opinion as to the guilt of a defendant. (June 25, 2010 Order at 43-44 (citing United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993); United States v. Young, 470 U.S. 1, 18-19 (1985); Sechrest v. Ignacio, 549 F.3d 789, 810-11 (9th Cir. 2008).) In view of this line of authority and statements attributed to the prosecutor that Petitioner was "evil" and the "most" deserving of the death penalty (RT at 10, 441, 10, 458), the Court found that Petitioner's allegations of ineffective assistance of counsel based on her counsel's decision to call Livesay as a witness sufficed to warrant an evidentiary hearing under the existing authority at that time. Thus, the Court found that Petitioner was entitled to further explore at an evidentiary hearing whether counsel decision's to call Livesay as a witness was a product of "sound trial strategy." (June 25, 2010 Order at 44); Strickland, 466 U.S. at 689.

However, following the Court's June 25, 2010 Order, the Supreme Court issued its opinions in Pinholster and Richter, which refined the standards for a district court reviewing a state decision in federal habeas proceedings under § 2254(d). In Pinholster, the Supreme Court held that, before new evidence elicited at an evidentiary hearing can be considered in federal habeas proceedings, a district court should first determine whether the state court violated § 2254(d) solely on the basis of the state court record. 131 S. Ct. at 1398.

Furthermore, the Supreme Court in Richter explained that, under § 2254, there is a standard of double deference, by which the petitioner must show that the "the state court's application of the Strickland standard was unreasonable." 131 S. Ct. at 785. Of course, in claims like this one involving counsel's decisions to elicit testimony or cross-examine a witness, it is settled that such decisions are entitled to "great deference." Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008) (quoting Dows, 211 F.3d at 487).

Nevertheless, Petitioner notes that, unlike other claims from the prior evidentiary hearing briefing that relied upon federally developed claims, this claim was based solely on the state record. (Br. at 7-8.) Thus, Petitioner seeks to rely upon language from the Court's June 25, 2010 Order granting an evidentiary hearing in contending that an evidentiary hearing is warranted as to this claim. (Id.) Nevertheless, the Court vacated its June 25, 2010, and it is no longer binding. (See March 29, 2011 Order.) Moreover, as explained above, the Supreme Court made clear in Richter that a petitioner must meet a high threshold before a violation of § 2254(d) can be shown. 131 S. Ct. at 784, 786 (finding that, even as to summarily denied claims, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'") (citations omitted). Until and unless such standards are met to establish a violation of § 2254(d), a petitioner is not entitled to further explore her claim at an evidentiary hearing. See Pinholster, 131 S. Ct. at 1398, 1400.

Here, in view of Richter, Petitioner's allegations that counsel provided ineffective assistance by calling Livesay as a witness do not warrant an evidentiary hearing because Petitioner cannot meet the "doubly deferential" standards in order to demonstrate a violation of § 2254(d). As the California Supreme Court explained in rejecting this claim on direct appeal, defense counsel had a legitimate tactical reason for calling Livesay as a witness: "to attempt to undermine prosecution witness Luna's testimony by showing that the prosecution had given him a favorable deal in exchange for his favorable testimony against [Petitioner]." McDermott, 28 Cal. 4th at 996. Given the record, most fairminded jurists would probably agree with this conclusion. See Richter, 131 S. Ct. at 786. Livesay's testimony helped to

support the defense's argument that Luna's testimony was false by demonstrating Luna's huge incentive to lie and implicate Petitioner when his life was at stake. In addition, it suggested that the more deserving culprit (Luna) had been unfairly been spared the death penalty. Furthermore, the defense attempted to use Livesay's characterization of Petitioner to show that the prosecution was over-zealous in "rushing to judgment," conducting a "sloppy investigation," and focusing on Petitioner to the exclusion of all other suspects. (See, e.g., RT at 11171-99, 11214-215, 11326.) Consequently, although it might have been unorthodox for counsel to pursue the strategy of calling the prosecutor as a witness, counsel's decision to elicit testimony from the prosecutor as to why Petitioner, and not Luna, was ultimately charged with the death penalty had some strategic basis. Thus, because Petitioner cannot demonstrate a violation of § 2254(d) as to these allegations, she is not entitled to an evidentiary hearing as to Claim Three D.4.

C. Claim Three D.8: Whether Counsel's Failure to Reassert a Batson Challenge after the Prosecutor Exercised her Ninth Peremptory Challenge against an African-American Juror Was Deficient Performance

In Claim Three D.8, Petitioner contends that her counsel improperly failed to assert a second Batson motion as to the prosecutor's strike of Juror Isaac Jennings in Subclaim D.8 of Claim Three. (FAP at 106-08.) For the reasons set forth in the discussion pertaining to Petitioner's Batson Claims in Part IV, Petitioner cannot demonstrate a violation of § 2254(d) as to this claim, and an evidentiary hearing is not warranted.

D. Claim Three D.10: Whether Counsel's Failure to Challenge Biased Jurors and Fulfill Responsibilities during Jury Selection Was Deficient Performance

In Claim Three D.10, Petitioner contends that her trial counsel failed to fulfill his responsibilities during jury selection by not adequately questioning and challenging Juror Charlotte Halpin-Shower. (FAP at 110-16.) Juror Halpin-Shower's brother was a police officer who had been killed in the line of duty, and Petitioner maintains that "there was a reasonable probability -- if not a certainty -- that the judge would have promptly excused her

for cause." (Br. at 19.) Petitioner further contends that because this juror sat in judgment as part of the jury, she was prejudiced by her counsel's deficient performance. (Id.)

At trial, when counsel questioned Juror Halpin-Shower regarding her views about the death penalty and whether her husband knew another District Attorney, Juror Halpin-Shower explained that her husband had met the District Attorney while working in the Attorney General's Office. (RT at 2,073, 3,681-89.) She stated that her husband practiced mostly civil but some criminal law, and she did not follow what her husband did "too much." (RT at 3682.) She stated that she was familiar with the court system, and believed the judicial process was "slow" but the "best there is." (RT at 3681-82.) She stated that she believed that the presumption of innocence was "one of the better points of our system," and she agreed that "it should be entirely up to a defendant" to decide to testify and a defendant should not be compelled to testify. (RT at 3684.) Counsel ultimately passed over a request to excuse this juror. (RT at 3689.)

In her juror questionnaire, Juror Halpin-Shower identified her brother as a police officer who was "murdered" and "killed in action." (Ex. 55, pp. 1114-15.[4]) In addition, noted that she was a member of Our Lady of Grace Catholic Church, and considered herself to be a "spiritual" and "religious" person who attended church regularly. (Ex. 55, pp. 1109, 1111.) She confirmed that she would not automatically vote to impose the death penalty, but specifically explained that "the circumstances must be considered." (Ex. 55, p. 1121.)

In a January 3, 2005 Declaration that Petitioner presented in her state habeas proceedings, Juror Halpin-Shower stated that: (1) her brother was a police officer with the San Pablo, California Police Department and was murdered in the line of duty on August 4, 1977; (2) two men were involved in the murder but only one, Ronnie Morse, was caught, tried, and convicted of murder, for which he received a life sentence; and (3) Juror Halpin-

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[4] Although the Ninth Circuit has stated that bias may be implied in some instances where "close relatives of a juror have been personally involved in a situation involving a similar fact pattern," it also has observed that "we have never done so when the juror was honest on voir dire." Fields III, 503 F.3d at 773 (citations and quotations omitted).

Shower and members of her family have traveled to San Quentin to personally object to the parole of Morse numerous times. (Ex. 45, pp. 797-98.) The California Supreme Court summarily denied the allegations of ineffective assistance based on counsel's failure to challenge Juror Halpin-Shower in Petitioner's state habeas proceedings.

The Sixth Amendment guarantees criminal defendants the right to a fair trial by a panel of impartial, indifferent jurors. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984)("One touchstone of a fair trial is an impartial trier of fact -- 'a jury capable and willing to decide the case solely on the evidence before it'") (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)). In order to obtain a new trial based on a juror's untruthful voir dire answers, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough, 464 U.S. at 556.

"In extraordinary cases, courts may presume bias based on the circumstances." Dyer v. Calderon, 151 F.3d 970, 981-83 (9th Cir. 1998) (en banc). Fields v. Brown, 503 F.3d 755, 768 (9th Cir. 2007) (Fields III).[5] Nevertheless, although the Ninth Circuit has found implied bias in certain circumstances, the Supreme Court has left open the question as to whether bias could be implied in the absence of juror dishonesty. (June 25, 2010 Order at 54 (citing Fields III, 503 F.3d at 771-72 (citing McDonough, 464 U.S. at 556-57 (Blackmun, Stevens, and O'Connor, JJ., concurring); id. at 556-59 (Brennan and Marshall, JJ., concurring in the judgment); and United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977)).) There are four general fact situations where bias might be implied: (1) where a juror is apprised of such prejudicial information about the defendant that it is highly unlikely the juror can exercise independent judgment; (2) where there is the existence of certain relationships between the

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[5] Fields v. Woodford, 309 F.3d 1095 (9th Cir. 2002) (Fields I) remanded the case to the district court for an evidentiary hearing on whether the juror was biased. Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005) (Fields II) affirmed the district court's finding following the evidentiary hearing indicating that the juror was not biased. Fields III affirmed in part and reversed in part that decision after rehearing was granted en banc.

juror and the defendant; (3) where a juror or the juror's close relatives have been personally involved in circumstances involving a similar fact pattern; and (4) where it is revealed that the juror is an actual employee of the prosecuting agency, a close relative of one of the participants in the trial, or was a witness or somehow involved in the underlying circumstance that led to the trial. Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1062 (9th Cir. 1997) (citations and quotations omitted); Estrada v. Scribner, 512 F.3d 1227, 1240 (9th Cir. 2008) (quoting rule). Furthermore, in reviewing an ineffective assistance claim based counsel's failure to exercise a peremptory challenge to strike a biased juror, the Ninth Circuit has stated that "[e]stablishing Strickland prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased." Davis v. Woodford, 384 F.3d 628, 643 (9th Cir. 2004) (quoting United States v. Quintero-Barraza, 78 F.3d 1344, 1349 (9th Cir. 1995)).

In the Court's June 25, 2010 Order, the Court found that, because it was uncertain whether Juror Halpin-Shower could have been excused for cause had counsel asked more probing questions during voir dire, an evidentiary hearing was warranted on this claim. (June 25, 2010 Order at 57-58.) The Court noted, and the parties do not dispute, that the record does not indicate that Juror Halpin-Shower was dishonest in her juror questionnaire responses or during voir dire. Nevertheless, the Court relied upon Fields III, where the Ninth Circuit found no bias only after an evidentiary hearing had been conducted in federal habeas proceedings where a juror honestly disclosed that his wife had been a victim of crimes that were similar to the crimes for which the petitioner was charged and the facts bearing on the juror's potential impartiality came to light after he was empaneled. (June 25, 2010 Order at 58.) The Court reasoned that, "while Juror Halpin-Shower was not dishonest on voir dire and questions posed to her could have fleshed out her potential bias based on her brother's murder, additional facts suggesting her potential bias -- the facts surrounding her participation in parole hearings to extend the incarceration of her brother's murderer -- have come to light following her jury service in Petitioner's case." (Id.)

Here, as Pinholster and Richter dictate, the Court must first determine whether Petitioner has shown a violation of § 2254(d) as to these allegations before she is entitled to an evidentiary hearing on them. As an initial matter, in view of the Ninth Circuit's statement in Fields that the Supreme Court has "left open" whether juror bias may be implied, it is not certain that there is any "clearly established" law regarding this claim. Consequently, the California Supreme Court's denial of this claim could not constitute a violation of § 2254(d)(1). Carey v. Musladin, 549 U.S. 70, 77 (2006) (finding that, given the lack of holdings from the Supreme Court on the particular issue the petitioner presented, the state court's determination that the petitioner was not prejudiced was not contrary to clearly established federal law).

In any event, given Juror Halpin-Shower's answers in voir dire and her juror questionnaire suggesting that she would be a fair and impartial juror, Petitioner cannot establish Strickland prejudice under AEDPA review. Specifically, Juror Halpin-Shower confirmed that she would not impose the death penalty unless the circumstances warranted it, and respected Petitioner's presumption of innocence and right to choose not to testify. (Ex. 55, p. 1121; RT at 3684.) In addition, this juror's answers that she regularly attended the Catholic Church suggested that she would be compassionate towards Petitioner. (Ex. 55, p. 1109, 1111.) See also Quintero-Barraza, 78 F.3d at 995-96 (finding no Strickland prejudice based on counsel's failure to strike juror who stated his belief that one is guilty before proven innocent and that it would be "difficult [for him] to be impartial," as counsel appeared to have reasonably concluded that the juror would honestly apply the laws as outlined in the judge's instructions because the juror was honest about his pretrial views).

Furthermore, it is possible that the California Supreme Court rejected Petitioner's claim based on the passage of time and dissimilarity of crimes, given that the murder of Juror Halpin-Shower's brother occurred 12 years prior to Petitioner's case and resulted from a shooting when her brother approached robbers at a store. (Ex. 45 at 797.) Indeed, Juror Halpin-Shower does not state in her declaration that she harbored any bias against Petitioner. Especially when viewed through the AEDPA lens described in Richter by which "all

fairminded jurists must agree" that the California Supreme Court's decision denying these allegations was error, Petitioner's claim here must fail. Accordingly, because Petitioner cannot establish a violation of § 2254(d) as to these allegations, an evidentiary hearing is not warranted as to Claim Three D.10.

E. Claim Three E: Failure to Investigate and Present Mitigating Evidence

In Claim Three.E, Petitioner contends that her counsel was ineffective based on his failure to adequately investigate and present a mitigation defense at the penalty phase. (FAP at 119-54.)

At trial, Petitioner's brother Wayne, testified that Petitioner was "loving" and sent money to her elderly parents, who were in poor health and unable to travel, and he asked the jury to spare his sister's life. (RT at 11,925-31.) In addition, Dr. Philip Merrit, who worked with Petitioner at USC County Medical Center, testified that Petitioner demonstrated compassion in working with the "worst of the worst" patients. (RT at 11,793-94.) Similarly, Carol Kelly, Petitioner's nursing supervisor at USC County Medical Center, testified that Petitioner would go out of her way to care for patients and was well-liked by them. (RT at 11,821-24.) Margaret Stokes, a deputy sheriff at Sybal Brand Institute for Women (Sybal Brand) where Petitioner was housed, described Petitioner as "sensitive" and "caring" and relayed instances where Petitioner prevented an inmate from choking and helped to prevent the suicide of another inmate. (RT at 11,991-992.) Stokes's testimony was corroborated by Victoria Samaniego, another deputy sheriff at Sybil Brand (RT at 11,999-12,003).

In the closing argument of the penalty phase, defense counsel argued that the death penalty was not the appropriate punishment for Petitioner. (RT at 12348 ("[Is] there really a necessity to kill [Petitioner]? Is there really a necessity to protect society by killing her? Is there a necessity to kill her because society wants to punish her?"); RT at 12390 ("But the test in deciding whether [Petitioner] should go to the gas chamber is more than that. Much more than that. You have got to be satisfied within yourself that there is no doubt in your mind that that's the only available punishment that she deserves."). In addition, Defense counsel argued that life without the possibility of parole was a sufficiently severe

punishment. (RT at 12394 ("[T]hat's what Petitioner deserves. I think that your sense of fairness and I think that your sense of applying equal justice sufficiently provides you with the opportunity of returning that terrible, terrible verdict of having her spend 10, 20, or 30 years in level four only to some day when her bodily functions cease to exist exit in a casket from state prison at who knows what date.").) Furthermore, defense counsel portrayed Petitioner as a caring, competent nurse, devoted daughter, and model inmate who posed no threat of future dangerousness. (RT at 12351-55 (arguing that Petitioner was a compassionate nurse in going beyond what was required of her to care for patients and she performed well in the structured prison setting); RT at 12362 (arguing that Petitioner was a devoted daughter who sent money to her parents and was a model inmate).)

The record shows that counsel attempted to contact Petitioner's family members to obtain information about Petitioner's background. In addition, the District Attorney interviewed Petitioner's brother Kenneth, and defense counsel was aware of Kenneth's statement to the District Attorney and did not want the prosecutor to question Wayne about Kenneth, as Kenneth's statement was apparently unhelpful. (RT at 11931-33 (arguing at sidebar by the defense that further questioning by the prosecutor would reveal what Wayne "feels about the other brother's comments to the prosecution" and the trial court's ruling that the prosecutor would not be allowed to present evidence that the other brothers were not "upstanding citizens").). Petitioner's brother Joseph was a drug addict, and was on trial or incarcerated at the time of Petitioner's trial. (RT at 11933; Exs. 102, 104, 105 (correspondence to Joseph at correctional facility dated February 24, 1990, February 28, 1990, and October 18, 1990); Ex. 115 (Joseph's January 30, 1990 arrest report), Ex. 116 (Joseph's March 21, 1990 indictment).) Furthermore, the record shows that counsel undertook significant investigation relating to the penalty phase, including consulting with mental health experts Edward Conolley, Ph.D., Dr. William Vicary, Dr. Michael Maloney, and Cynthia Waldorf, M.A. (CT III Supp. 187, 205, 235-41.)

In state habeas proceedings, Petitioner presented evidence pertaining to her impoverished upbringing and family instability as a child. (Ex. 141, Declaration of Dr.

Clausen, describing the poverty, neglect, family instability, paternal criminal behavior, and residential transiency of Petitioner's childhood due to her father's unemployment and alcoholism.) In addition, Petitioner presented a declaration from her mother indicating that counsel did not question her about Petitioner's childhood. (Ex. 150, Theresa McDermott's Declaration stating: "Mr. Ingber did not ask me any questions about my daughter's childhood, her family background, her upbringing, or her visit to see me just before she was arrested. He only took the pictures, made small talk, and ate some food.").) Declarations from Petitioner's brothers indicate that Petitioner was left alone all day when she was about three or four years old; her father told her that she was "ugly"; she suffered from migraine he aches; and she dropped out of high school in the tenth grade. (FAP, Ex. 1 at 10-11; 2 at 22-23.) The California Supreme Court summarily denied the allegations based on counsel's failure to investigate and present mitigating evidence in Petitioner's state habeas proceedings.

It is well-established that counsel must make a reasonable investigation regarding a mitigation defense at the penalty phase. Wiggins, 539 U.S. at 522-29. In addition, evidence of a troubled childhood is an important factor in mitigation "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (citations and internal quotation marks omitted), abrogated on other grounds, as stated in Atkins v. Virginia, 536 U.S. 304 (2002).

Nevertheless, in deciding whether to present mitigating evidence of a troubled childhood, the Supreme Court has explained that "we address not what is prudent or appropriate, but only what is constitutionally compelled." Burger v. Kemp, 483 U.S. 794 (1987). In this pre-AEDPA case, the Supreme Court found that counsel's decision not to present mitigating evidence did not constitute ineffective assistance, even though it found that the record suggested that counsel "could well have made a more thorough investigation than he did." Id. at 794. The Supreme Court observed that counsel could have presented

evidence that the petitioner "had an exceptionally unhappy and unstable childhood" that was "sometimes even violent," and the petitioner's mental and emotional development were several years below his chronological age. Id. at 779, 790 n.7. Nevertheless, members of the family could have been cross-examined to show the petitioner's prior contacts with law enforcement, and the psychologist retained by the defense would have been subjected to cross-examination that could have disclosed the petitioner's lack of remorse and could have been "literally fatal" to the defense. Id. at 791, 793. Thus, counsel decided not to present such testimony, because it was "at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of [the co-defendant's] strong influence on his will." Id. at 793.

In granting an evidentiary hearing in the June 25, 2010 Order, the Court relied upon the Ninth Circuit's decision in Pinholster, finding that "[l]ike the evidence regarding the petitioner's abusive childhood and deprived upbringing in Pinholster, it is possible that the evidence regarding Petitioner's impoverished upbringing and family alcoholism could have humanized her to the jury." (June 25, 2010 Order at 68.) In Pinholster, after conducting an evidentiary hearing in which the petitioner elicited evidence from two new medical experts who found that the petitioner suffered from partial epilepsy and brain injury, the district court granted habeas relief on the grounds that the petitioner's counsel was deficient in failing to investigate and present mitigating evidence. Id. at 1397. In that case, the petitioner's counsel conceded before the penalty phase began that he was not prepared "to offer anything by way of mitigation." Id. at 1395. In response to the prosecution's evidence at the penalty phase regarding the petitioner's history of threatening and violent behavior, the defense called only one witness, the petitioner's mother, who testified about the petitioner's troubled childhood and adolescent years and described the petitioner as a "perfect gentleman." Id. at 1396. Prior to the penalty phase, the defense retained Dr. John Stalberg, who examined the petitioner and diagnosed him with "antisocial personality disorder," and found that the petitioner "was not under the influence of extreme mental or emotional disturbance" at the time of the murders. Id.

However, following the Court's June 25, 2010 Order, the Supreme Court reversed the Ninth Circuit's decision in Pinholster, and held that the Ninth Circuit erred in finding that the district court could consider federally-developed evidence to determine whether the California Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1). Id. at 131 S. Ct. at 1391. Instead, the Supreme Court found that the petitioner failed to show that the California Supreme Court unreasonably applied federal law in deciding that his trial court's performance was not deficient. Id. at 1403. The Supreme Court reasoned that counsel could have had a strategic reason for presenting the testimony of his mother, based on the "family sympathy" defense in order to invoke sympathy for the petitioner's mother, rather than the petitioner. Id. at 1404-05. The Supreme Court further explained that this decision was reasonable, because counsel was challenged at the penalty phase with an unsympathetic client who seemed to "glorify" his "hundreds of robberies," which limited their feasible mitigation strategies. Id. at 1405. Furthermore, it noted that counsel's strategic decision regarding the presentation of mitigating evidence was entitled to a "heavy measure of deference." Id. at 1408 (quoting 590 F.3d at 692 (Kosinski, C.J., dissenting) ("The current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude the jury simply won't buy it.")). Thus, the judgment of the Ninth Circuit was reversed. Id. at 1411.

Here, in view of the Supreme Court's decision in Pinholster, it is now apparent that Petitioner has not met the standard for obtaining an evidentiary hearing based on counsel's failure to present mitigating evidence pertaining to her upbringing and difficult childhood. In contrast to counsel in Pinholster, who conceded that they had not prepared a mitigation case, Petitioner's trial counsel undertook extensive investigation of mitigating evidence, by speaking with mental health experts, a criminal justice consultant, family members, friends, colleagues, and prison employees who had observed Petitioner in her institutional setting. Given the record, Petitioner cannot show that counsel's decision to challenge the

appropriateness of the death penalty was an unreasonable penalty phase strategy.

It is even possible that presenting evidence of Petitioner's difficult upbringing would have been counter-productive, as the Supreme Court observed about the mitigating evidence regarding the petitioner's difficult childhood in Burger. Given that Petitioner was an educated and professional woman who worked as a registered nurse and owned her own home, the prosecution could have argued that she had surmounted the difficulties of having an impoverished childhood. It was reasonable for counsel to argue that her education and experience as a competent and caring registered nurse would render her a productive member of the prison community, especially by pointing to instances where she assisted her fellow inmates. (RT at 11990, 11999 (Stokes's testimony that Petitioner had saved an inmate's life who was choking); RT at 11991 (Stokes's testimony that Petitioner notified jail authorities that another inmate was suicidal).) In addition, evidence about her troubled family history could have undercut the evidence from Wayne's testimony that Petitioner was a devoted, caring daughter with a loving relationship with her mother. (RT at 11928-29.)

Moreover, in view of the fact that the jury found Petitioner guilty of murder and plainly rejected her argument that she was the victim of an attack at the guilt phase, it was reasonable for counsel to select a defense theory at the penalty phase that did not cast Petitioner as a victim. See Brown, 530 F.3d at 1036 (finding that counsel's decision not to pursue a tactic that might have backfired was not deficient performance). In addition, the evidence Petitioner presents (i.e., being left alone as a small child, being told she was "ugly," and dropping out of high school) pales in comparison to the mitigating evidence in the cases upon which she relies.[6] Cf. Wiggins, 539 U.S. at 517 (finding counsel ineffective based on

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[6] Although Petitioner further argues that counsel was ineffective for failing to present evidence regarding the hardships of her mother and other family siblings (Br. at 37-51), the failure to present such evidence did not constitute deficient performance. Lockett v. Ohio, 438 U.S. 586, 605 n.12 (1978) (finding that a court is not precluded from "exclud[ing], as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); see also People v. Rowland, 4 Cal. 4th 238, 279 (1992) (finding that "the background of the defendant's family is of no consequence in and of itself" at the penalty phase, because the punishment determination turns on the defendant's own

the failure to investigate the petitioner's "bleak" childhood, including being left alone to beg for food and eat paint chips and garbage, and suffering multiple incidents of severe physical abuse by his mother and molestation and rape while in foster care); Porter v. McCollum, 558 U.S. 30, 33-37 nn.4 & 9 (2009) (finding ineffective assistance based on counsel's failure to investigate or present evidence of the petitioner's military service or mental impairment resulting from his post-traumatic stress disorder from serving in combat and being wounded in the Korean War); Sears v. Upton, 561 U.S. 945, 949-51 (2010) (per curiam) (finding counsel was ineffective for failing to investigate and present evidence of physical abuse in the petitioner's family and sexual abuse by his cousin, and frontal lobe abnormalities that resulted in substantial cognitive deficits), Williams v. Taylor, 529 U.S. 362, 395 (2000) (finding counsel was ineffective for failing to investigate and present evidence of the petitioner's "nightmarish" childhood, including his father's severe and repeated beatings and his parents' criminal neglect).

Thus, Petitioner's allegations here fail, as she cannot show that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." Richter, 131 S. Ct. at 786. Accordingly, because Petitioner cannot establish a violation of § 2254(d) as to these allegations, an evidentiary hearing is not warranted as to Claim Three E.

F. The California Supreme Court's "Treatment" of Ineffective Assistance Claims

Finally, Petitioner contends that the California Supreme Court treatment of ineffective assistance claims, like hers, violates § 2254(d)(1) in several respects. (Br. at 23-30.) First, she contends that the California Supreme Court erred in resolving her ineffective assistance claims, because it applied an incorrect constitutional standard for assessing prejudice. (Br. at 20-23.) Second, Petitioner maintains that the state court erred by adding a heavier burden than is prohibited by Strickland and it impliedly misapplied Lockhart v. Fretwell, 506 U.S.

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personal moral culpability) (citations omitted).

364 (1993), in the same manner later found to be unconstitutional in Williams v. Taylor, 529 U.S. 362 (2000). (Br. at 24-27.) Third, Petitioner contends that federal precedent requires state courts to provide habeas petitioners evidentiary hearings to assist in developing their claims. (Br. at 27-30.)

First, in arguing that the California Supreme Court adds impermissible hurdles beyond what Strickland requires, Petitioner relies upon the following statement by the California Supreme Court:

> . . . Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and later to prove them. "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and defendant; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." (People v. Gonzalez, 51 Cal. 3d 1179, 1260 (1990).)

(Br. at 24-25 (citing Duvall, 9 Cal. 4th at 474).) Petitioner further contends that this standard conflicts with the following statement in Strickland: "The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." 466 U.S. at 697. In addition, Petitioner notes the Supreme Court in Strickland explained that because "fundamental fairness is the central concern" of a habeas proceeding, "no special standards ought to apply to ineffectiveness claims made in habeas proceedings." Id. at 697-98. Thus, Petitioner contends, the standards announced by the California Supreme Court in Duvall create a "special standard" in evaluating ineffective assistance claims that is prohibited by Strickland.

However, Petitioner's argument fails, as this statement by the California Supreme Court did not create a new or "special" standard in evaluating ineffective assistance claims. Indeed, it merely restates the rule that courts presume the correctness of a criminal judgment. In re Reno, 55 Cal. 4th 428, 450-51 (2012). If a criminal defendant fails at trial and appeal and decides to mount a collateral attack, "all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them." Id. (citations and quotation marks omitted). Moreover, this

general statement made by the California Supreme Court regarding the presumptive validity of convictions and sentences is consistent with the AEDPA's statutory guidelines and the language of Strickland itself. See 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence"); Strickland, 466 U.S. at 496 (stating that there is a "strong presumption of reliability" of a state court's judgment on ineffective assistance claims in federal habeas proceedings).

Second, to the extent that Petitioner contends that the California Supreme Court misinterpreted the Strickland standard by improperly applying the Fretwell standard to her case (Br. at 26-27), her argument is unpersuasive. In Williams, the Supreme Court reasoned that, although the Strickland test provides adequate guidance for resolving nearly all ineffective assistance claims, "there are some situations in which the overriding focus on fundamental fairness may affect the analysis." 529 U.S. at 391. As the Supreme Court in Williams explained,"we concluded [in Fretwell] that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in Strickland." Williams, 529 U.S. at 392. In Fretwell, the death sentence the state had imposed on the defendant had been based on an aggravating circumstance (i.e., murder for pecuniary gain) that duplicated an element of the underlying felony (i.e., murder in the course of a robbery). Id. Shortly before the trial, the circuit had held that such "double counting was impermissible, but Fretwell's lawyer failed to object to the use of the pecuniary gain aggravator." Id. However, the authority holding that "double counting" was impermissible was overruled after Fretwell's trial. Id. Consequently, even though a trial judge probably would have sustained an objection to the double counting, it had later became apparent that the state had a right to rely on the disputed aggravating evidence. Id. Accordingly, because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural

right, the Supreme Court found that Fretwell could not satisfy the "prejudice" prong of the Strickland test. Id. at 392-93.

Therefore, the Supreme Court in Williams reasoned that the Virginia Supreme Court erred in holding that Fretwell supplanted the rule for determining prejudice set forth in Strickland. 529 U.S. at 391. The Court in Williams explained that, in Fretwell, it was not disputed that the petitioner had a constitutionally-protected right to provide the jury mitigating evidence that his trial counsel deficiently failed to offer or discover. Id. at 393. However, the Virginia Supreme Court erred by requiring a separate inquiry into fundamental fairness, based on its flawed reading of Fretwell, even though the petitioner had been able to show his lawyer was ineffective and his ineffectiveness probably affected the outcome of the proceeding. The Supreme Court explained that the state supreme court unreasonably applied clearly established federal law in its denial of the ineffective assistance claim, because its decision "turned on its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." Id. at 397 (citations omitted). In addition, the state supreme court's prejudice determination unreasonably failed to evaluate the totality of available mitigation evidence. Id. at 397-98.

Thus, under Williams, determining prejudice by looking at the outcome in the absence of counsel's deficiencies is usually consistent with reviewing the fundamental fairness of the trial, except in the few situations where prejudice may be presumed or where, as in Fretwell, counsel's deficiency would operate as a "windfall" to a petitioner. Moreover, a state court's use of a prejudice standard, that includes reviewing whether counsel's deficient performance rendered the proceeding itself unfair and the result of the proceeding "unreliable," is not necessarily an unconstitutional prejudice formulation under Williams. Indeed, this formulation derives from Strickland, where, in finding that "the defendant must show that the deficient performance prejudiced the defense," the Supreme Court further explained that "[t]his requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." 466 U.S. at

687. In addition, the Supreme Court in Strickland explained that, "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." 466 U.S. at 694. See also Williams, 529 U.S. 392 n.17 ("[The prejudice component of the Strickland test] focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.") (citing Strickland, 466 U.S. at 687) .

Here, in view of the fact that the California Supreme Court did not discuss Fretwell in deciding her claims on direct review, her argument is unfounded. Moreover, Petitioner cannot show that the California Supreme Court incorrectly applied the prejudice standard in her case, as contemplated by Williams. Because the California Supreme Court did not find that Petitioner's counsel acted deficiently in any manner, there was no way for the "windfall" exception to apply. In addition, it noted that "prejudice" required a defendant to show that counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" McDermott, 28 Cal. 4th at 991 (citing People v. Kipp, 18 Cal.4th 349, 366 (1998)). This prejudice formulation is consistent with Strickland, as discussed above. Even if the authority which Petitioner cites, In re Avena, 12 Cal. 4th 694, 721-22 & n.5 (1996), were relevant to how the California Supreme Court determined prejudice in her case, it would not compel a different result. In Avena, the California Supreme Court held that considering prejudice under either formulation (i.e., whether the result of the proceeding would have been different but for counsel's errors or whether counsel's errors rendered the proceeding fundamentally unfair), the petitioner's claims failed. Id. Accordingly, Petitioner has not shown that the California Supreme Court incorrectly applied the prejudice standard in her case, and cannot demonstrate a violation of § 2254(d).

Third, Petitioner's argument that the California Supreme Court's summary denial of her ineffective assistance claims and failure to provide her an evidentiary hearing necessitates an evidentiary hearing in these federal habeas proceedings is similarly unpersuasive. (See Br. at 20-23, 27-30.) Without restating the comprehensive prior standard of review set forth prior to the discussion regarding Petitioner's individual claims, the Court notes that generally, under Pinholster and Richter, Petitioner is not entitled to an evidentiary hearing unless she can first demonstrate a violation of § 2254(d) on the basis of the state court record. See also Richter, 131 S. Ct. at 784-85 (finding that even a summary denial without the words "on the merits" is a merits adjudication unless proved otherwise); cf. Williams v. Woodford, 859 F. Supp. 2d 1154 (E.D. Cal. 2012) (Kozinski, C.J., sitting by designation) (finding that the petitioner had demonstrated a violation of § 2254(d), and consequently, granting motion for an evidentiary hearing). Because she has not shown a § 2254(d) violation as to these ineffective assistance claims, no evidentiary hearing is warranted. Pinholster, 131 S. Ct. at 1400 (finding that the 2254(d) determination is made prior to eliciting further evidence at an evidentiary hearing, because "evidence introduced in federal court has no bearing on [§ 2254(d)] review.") Therefore, Petitioner's additional arguments regarding her ineffective assistance claims are unavailing.

III. Batson-related Claims

In Claim Four, Petitioner alleges that the prosecution exercised peremptory challenges based upon racially discriminatory motives against the first eight jurors. (FAP at 106-08.) In addition, in Claim Three D.8, Petitioner maintains that her counsel deficiently failed to challenge the prosecutor's strike of the ninth African-American juror. (FAP at 157-91.) In the Brief, Petitioner maintains that habeas relief is warranted or, in the alternative, an evidentiary hearing is necessary to question the former trial prosecutor, Katherine Mader (now a Los Angeles Superior Court Judge), regarding her peremptory challenges of the first eight African-American jurors. (Br. at 70, Reply at 101-02.) Similarly, she maintains that habeas relief is warranted or, alternatively, an evidentiary hearing is necessary to develop the facts underlying her ineffective assistance claim

pertaining to the prosecutor's peremptory challenge of the ninth African-American juror. (Br. at 10.)

At trial, after the prosecutor struck eight African-American jurors, Petitioner's trial counsel made a Wheeler-Batson motion.[7] (RT at 3814.) The trial court, without finding a prima facie showing of discrimination, asked the prosecutor to state her reasons for striking the eighth African-American juror. (RT at 3815.) The prosecutor explained that this juror initially stated that he favored the death penalty only if a person had a criminal record, and his juror questionnaire suggests that he was in favor of rehabilitation and counseling before imposing the death penalty. (Id.) The trial court then asked to see the questionnaires of Jurors Brown, Kee, Spann, Jessie, and Madden. (RT at 2833.) The prosecutor explained that Juror Madden was only 19 years old, and she did not believe Juror Madden was sufficiently mature to make a penalty decision and thought that Juror Madden's views were not "thought out at all." (Id.) In addition, the prosecutor stated that Juror Theola J. was "very, very stupid," and had stated that she could not see herself ever giving the death penalty. (Id.) The prosecutor further explained that Juror Kee stated that he would consider the death penalty if the crime was particularly brutal, but did not want to impose the death penalty unless the defendant would kill again in prison. (RT at 3823.)

The trial court reviewed the challenged jurors, and found that the defense made a prima facie case of discrimination. (RT at 3825.) The trial court reviewed the questionnaires of the African-American jurors who were excused, as well as counsel's explanations. The trial court then invited the prosecutor to be heard further, to which she responded:

> I would like to say one more thing that in addition to the explanations which I have provided to the court with respect to each one of these jurors which honestly wouldn't have made any difference to me what their race was, given some of their views, I also took into account the fact that I believe that all these jurors weren't necessarily opposed to the death penalty, but that I had a pool of jurors out in the audience who I thought were more in favor of the death penalty than these particular jurors. And that it was no reason to keep

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[7] This refers to People v. Wheeler, 22 Cal.3d 258, 280 (1978), a California analog of Batson.

them.

I didn't feel they would be good prosecution jurors on the issue of the death penalty.

And I would have preferred, frankly, to have a number of black jurors on this case because of the fact that the defendant makes racist remarks which will be coming into evidence. And that I have two black prosecution witnesses Marvin Lee and Dondell Lee. And that I would have like to have some black jurors.

(RT at 3825-26.)

The defense responded that the African-American witnesses for the prosecution may not have assisted the prosecution's case, and a jury with more African-American jurors would not necessarily have helped the prosecution. (RT at 3826.) The defense argued that the unused juror pool was irrelevant because the pertinent issue was whether there had been systematic exclusion. (Id.) In response, the trial court ruled:

I will find that in each case that I have looked at there is a reasonable relationship of the views expressed either in the questionnaire or orally by the prospective juror that has been excused and the issues in this case.

Also, in making that finding I am taking into account the fact that [there] was at least one Black juror, a Mr. Morris, at a point in time that Ms. Mader was prepared to accept the jury as constituted.

(RT at 3826-27.)

After the court denied counsel's Batson motion, the selection of the jury resumed. The defense unsuccessfully challenged African-American Juror Jennings due to his death penalty views. (RT at 2142-43 ("I feel in fairness that this gentleman, using the words of the court, I think that he just doesn't qualify. It is not a question of being wishy washy. I think either of us goes back and forth with him enough times, whoever is that last one is going to get the word out of him. I think he has expressed that he would always impose it.").) Thereafter, the prosecutor twice accepted an alternate panel that included Juror Jennings, and excused two Caucasian alternate jurors before exercising a peremptory challenge against Juror Jennings. (RT at 4364.) However, the prosecutor never exercised a peremptory challenge against Juror Caudle, an African-American juror who was ultimately selected as an alternate juror. At one point, the prosecutor accepted the alternate

panel with both Jurors Caudle and Juror Jennings. (RT at 4360.)

On direct review, the California Supreme Court denied Petitioner's Batson claim based on the prosecution's peremptory challenges against the eight African-American jurors on its direct appeal, and refrained from undertaking a comparative juror analysis. McDermott, 28 Cal. 4th at 980-81. There, the California Supreme Court explained:

> Once the trial court finds that the moving party has made a prima facie case, the burden shifts to the opposing party to provide an explanation for the peremptory challenges that is race or group neutral and related to the particular case being tried. (People v. Silva, supra, 25 Cal.4th at p. 384; People v. Ervin (2000) 22 Cal. 4th 48, 74-75 [91 Cal. Rptr. 2d 623, 990 P.2d 506].)
>
> Here, the prosecutor said she had peremptorily challenged the eight Black prospective jurors because their views on the death penalty were unfavorable to the prosecution. Although the prosecutor also stated that one juror, Keia M., was immature, and that another, Theola J., was "very stupid," the trial court understood that the overriding reason for challenging the eight prospective jurors was the attitude of each toward the death penalty. The Attorney General agrees that the prosecutor challenged each of the eight Black prospective jurors for essentially the same reason, namely, that "the prospective juror's views and attitudes regarding the death penalty were adverse to the prosecution ...."
>
> A prospective juror's views about the death penalty are a permissible race and group-neutral basis for exercising a peremptory challenge in a capital case. (People v. Mayfield (1997) 14 Cal. 4th 668, 724 [60 Cal. Rptr. 2d 1, 928 P.2d 485].) When the trial court has found a prima facie case, and the party exercising the peremptory challenges has stated a race-neutral reason for each challenge, "the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767 [115 S. Ct. 1769, 1770-1771, 131 L. Ed. 2d 834]; see also People v. Silva, supra, 25 Cal.4th at p. 384.) The trial court's ruling on this issue is reviewed for substantial evidence. (People v. Alvarez (1996) 14 Cal.4th 155, 196 [58 Cal. Rptr. 2d 385, 926 P.2d 365].) But we apply this deferential standard of review only when "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (People v. Silva, supra, 25 Cal.4th at p. 386; accord, People v. Fuentes (1991) 54 Cal.3d 707, 720 [286 Cal. Rptr. 792, 818 P.2d 75]; People v. Hall (1983) 35 Cal.3d 161, 167-168 [197 Cal. Rptr. 71, 672 P.2d 854].)

McDermott, 28 Cal. 4th at 970-71. The California Supreme Court then analyzed the peremptory challenges as to each African-American juror. Id. at 971-72. It ultimately determined at step three that the prosecutor's reasons as to each juror were genuine. Id. at 974-78. On state habeas review, the California Supreme Court summarily denied Petitioner's allegations in Claim Three D.8 that counsel deficiently failed to make a Batson

challenge as to the prosecutor's excusal of Juror Jennings.

The Supreme Court has held that the Equal Protection Clause guarantees a defendant that the State will not exclude prospective jurors from the jury venire based on their race or on the false assumption that they are not qualified to serve as jurors because of their race. Batson, 476 U.S. at 85. In Batson, the Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner which violates the Equal Protection Clause. Hernandez v. New York, 500 U.S. 352, 359 (1991); Batson, 476 U.S. at 96-98. First, the moving party must make a prima facie showing that the prosecutor engaged in the discriminatory use of a peremptory challenge. Id. Second, after a prima facie showing is made, the burden then shifts to the prosecutor who must articulate a race-neutral explanation for the challenge. Id. Third, the court must decide whether the moving party has established purposeful discrimination. Id. Under this final step, the court must evaluate the credibility of the prosecutor to determine whether the explanation is genuine. Batson, 476 U.S. at 96-98.

To establish a prima facie case, a defendant must show that: (1) the prosecution exercised a peremptory challenge to remove one or more jurors belonging to a cognizable racial group, and (2) "the facts and other relevant circumstances raise an inference" that the challenge was motivated by group bias. Batson, 476 U.S. at 96. See also Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006) (finding that a defendant can make a prima facie showing of discrimination based solely upon a statistical disparity); Turner v. Marshall, 63 F.3d 807, 812 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 681 (9th Cir. 1999) (en banc) (finding prima facie showing of discrimination where prosecutor struck five out of a possible nine African Americans)).

At Batson's third step, the court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, including a comparative analysis of similarly situated jurors, as required by clearly established Supreme Court law at the time of the trial." See Batson, 493 U.S. at 93 (quotations and citations omitted). The court "must consider the totality of the relevant facts to decide whether counsel's race-

neutral explanation for a peremptory challenge should be believed." Briggs v. Grounds, 682 F.3d 1165, 1169 (9th Cir. 2012) (quotations omitted). "If a prosecutor's proffered reason for striking a black panelist applies just as well to otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Miller-El v. Kretke, 545 U.S. 231, 241 (2005) (Miller-El II). See also Kesser v. Cambra, 465 F.3d 351, 359-60 & n.2 (9th Cir. 2006) (en banc) (finding that comparative juror analysis is clearly established Supreme Court authority for AEDPA purposes, and may be required whether or not it was requested or attempted in the state courts) (citing Miller-El).

Courts must look to the "totality of the relevant facts" in considering a Batson claim. Batson, 476 U.S. at 94. A petitioner need not show a pattern of discriminatory strikes in order to obtain relief, as "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." Id. (citing United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)). Finally, AEDPA "imposes a highly deferential standard" for evaluating state court Batson rulings, and "demands that state-court decisions be given the benefit of the doubt." Felkner v. Jackson, ___ U.S. ___, 131 S. Ct. 1305 (2011) (per curiam)(quotation omitted); see also Briggs, 682 F.3d at 1170 (stating that under the AEDPA, federal habeas court's review of Batson issue "is doubly deferential: unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence, we must uphold it.") (citation omitted).

In the June 25, 2010 Order, the Court noted that the California Supreme Court had applied the incorrect standard in discussing step one of a Batson claim. (June 25, 2010 Order at 75 (citing McDermott, 28 Cal.4th at 969 (applying the "strong likelihood" standard); Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)).) Consequently, no AEDPA deference is due to the California Supreme Court's decision, insofar as it pertained to the prima facie finding of Petitioner's Batson violation. The Court also noted, as the parties conceded, that the California Supreme Court failed to perform a comparative juror

analysis. (Id. at 71, 74.) Therefore, in the June 25, 2010 Order, the Court granted an evidentiary hearing in order to determine whether Petitioner could demonstrate a violation of § 2254(d) warranting habeas relief for these claims. (See id.) As explained above, the Court vacated its June 25, 2010 Order following the Supreme Court's decisions in Pinholster and Richter, and subsequently directed the parties to submit a comparative juror analysis. (March 29, 2012 Order.)

Here, as in Williams, where the prosecutor exercised peremptory challenges against 75 percent of the African-American jurors, the statistical disparity between African-American jurors the prosecutor struck and non-African-American jurors against whom she exercised no peremptory challenges demonstrates an inference of bias. In this case, the prosecutor struck 75 percent of African-American jurors and challenged African Americans at a rate more than twice the percentage of African Americans in the venire (i.e., 37 percent peremptory challenges used against 15 percent of the jury pool). Thus, the California Supreme Court correctly determined that Petitioner satisfied her burden at step one of Batson.

Next, at step two of Batson, the burden shifted to the prosecution to provide race-neutral reasons for the strike. As noted above, the prosecutor gave reasons for striking four of the jurors, and a general reason as to all of the jurors. The trial court then was required to consider those justifications and determine whether Petitioner established "purposeful discrimination" at the third step. See Paulino v. Harrison, 542 F.3d 692, 699 (9th Cir. 2008).

In cases like this one, where the state court declined to perform a comparative juror analysis, the Ninth Circuit has recently clarified the standard and instructed courts in federal habeas proceedings under the AEDPA, as follows:

> [The] standard becomes convoluted, though, when it is paired with the requirement that we conduct, in the first instance, the comparative analysis that the state court declined to perform. Green v. LaMarque, 532 F.3d 1028, 1031 (9th Cir.2008) (holding that where a state court has failed to conduct a comparative juror analysis "[w]e must conduct that analysis de novo, rather than remanding for the state courts to do so"). It is clear in these cases that AEDPA deference still applies, and the state court decision cannot be upset

> unless it was based upon an "unreasonable determination of the facts." See Cook, 593 F.3d at 816 & n. 2; Green, 532 F.3d at 1031. In this class of cases, therefore, we must reconcile our duty to apply AEDPA deference to the state court's factual determinations with the need to review the facts from a perspective not considered by the state courts.
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> Combining these two requirements, we conclude that our evaluation of the state court's disposition of Jamerson's Batson claim should proceed in two steps. To begin, we must perform in the first instance the comparative analysis that the state court declined to pursue. Then, we must reevaluate the ultimate state decision in light of this comparative analysis and any other evidence tending to show purposeful discrimination to decide whether the state was unreasonable in finding the prosecutor's race-neutral justifications to be genuine. In essence, we must assess how any circumstantial evidence of purposeful discrimination uncovered during comparative analysis alters the evidentiary balance and whether, considering the totality of the evidence, the state court's credibility determination withstands our doubly deferential review.

Jamerson v. Runnels, 713 F.3d 1218, 1225-26 (9th Cir. 2013) (citation omitted). The Ninth Circuit in Jamerson further explained that despite the reference in prior opinions to reviewing "de novo" a comparative analysis of the stricken and selected jurors, "this choice of phrase is not meant to denote the applicable standard of review" but was intended to direct courts to "conduct the comparative analysis in the first instance, rather than remanding the case to the state courts to do so." Id. at n.2 (citing Green, 532 F.3d at 1031.)

Thus, under the guidance of Jamerson, Pinholster, and Richter, the Court will reevaluate whether the California Supreme Court's decision was unreasonable in finding the prosecutor's race-neutral justifications for her strikes to be genuine in light of the comparative juror analysis that both parties submitted.

A. Juror Madden

In support of her peremptory challenge of prospective Juror Madden, the prosecutor explained that Juror Madden was only 19 and was not mature enough to make a decision to impose the death penalty, and noted that this juror's views were not "thought out at all." (RT at 3822.) The California Supreme Court examined the challenge of Juror Madden, and explained:

> On the jury questionnaire, in response to a question about her general feelings on the death penalty, Keia M. wrote: "It depends on the case." On voir dire by the trial court, Keia M. said she did not have strong feelings either way about the death penalty and would not automatically vote either for or against

it.

> On voir dire by defense counsel, Keia M. agreed that she was "right down the middle" on the death penalty and that on a scale of zero to 10 her views on the death penalty would be a five.
>
> The prosecutor on voir dire asked Keia M. if she had any thoughts on whether life in prison without possibility of parole or death was "worse as a punishment." Keia M. replied: "I really don't think one is worse than the other. I can't say that life imprisonment, in prison is worse than the death penalty, because I have never been in prison. I mean, I don't know the situation. But I would think that there is no difference. There is really not a difference." Asked which penalty she would choose if she "wanted to punish the person the most severely that [she] could," Keia M. replied: "The death penalty." She explained: "You just go faster. You don't-well, not a lot of people think the way I do. I think the more time you have here on this earth, the better it is, you know, no matter where you are."
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> Substantial evidence supports the trial court's finding that the prosecutor could reasonably view Keia M. as unfavorable on the penalty issue. Although her responses generally indicated neutrality on the death penalty, and although she eventually expressed the view that the death penalty was a harsher punishment than life in prison without possibility of parole, she nonetheless had expressed the view that there was really no difference between the two penalties in terms of severity. Given this expression of opinion on an issue critical to penalty determination, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Keia M. was based on her death penalty views and not on her race.

28 Cal. 4th at 977-78.

Here, the juror questionnaire supports the prosecutor's explanation regarding this juror's lack of life experience and maturity. At the time of trial, Juror Madden had worked at an insurance company for only 14 months, was not married, and did not have children. (Ex. 35 at 333.) Many of her responses to questions pertaining to her views about crime and the death penalty were perfunctory and vague. (Ex. 35 at 334 (responding to question asking what were the most important causes of crime, "lack of something); 347 (responding to question asking her general feelings about the death penalty, "It depends on the case"); 79 (responding to question asking whether the death penalty is used too often or seldomly, "I don't feel it has been used too often nor too seldomly."). When asked to describe an important learning experience in her life, this juror focused on her relationship with her parents. (Ex. 35 at 345 (identifying an important learning experience as "when I found out my parents were people too.").

In addition, on voir dire, Juror Madden stated that she did not have strong feelings toward the death penalty "either way," and whether it should be imposed would "depend[] on the circumstances." (RT at 2330.) However, she had difficulty articulating circumstances when she believed the death penalty should be imposed. (RT at 2331 ("No, there is no particular crime where I can say if somebody -- someone did this, then I would, you know, think they deserved the death penalty."). In addition, she did not think that life imprisonment was worse than the death penalty, but conceded that she "did not know the situation" because she had never been in prison. (RT at 2342.)

Similar to Juror Madden, the prosecution challenged a prospective Caucasian male, Juror Smith, who was 22 years old, single, and without children. (Ex. 175 at 572, 578-79.) Although Juror Smith provided brief answers regarding his views about the death penalty, his answers were more articulate than Juror Madden's responses and his response indicated that he was more supportive of the death penalty than Juror Madden. (Ex. 175 at 583, 586 ("I am neither 'for' nor 'against' [the death penalty]. If I was forced to chose I would learn toward 'for.' I feel it should be an option open if the courts decide it warrants such an action. Though it should not become a solution to the crime problem in this country.") During voir dire, Juror Smith provided short answers in response to his views about the death penalty and noted that although he was "pretty much middle of the road" about the death penalty, the penalty should not be taken away as an option. (RT at 1419-24.) Ngo v. Giurbino, 651 F. 3d 1112, 1117-19 (9th Cir. 2011) (finding that a comparative analysis with other non-African-American jurors who were peremptory challenged for similar reasons supported the prosecutor's race-neutral justifications).

Petitioner contends that Jurors Field, Seeley, Parvin, and Barnes who ultimately served on the jury also expressed the view that life without the possibility of parole might be a harsher punishment. (Br. at 77, citing RT at 1916, 2803, 2597.) However, these jurors had far more life experience and maturity than Juror Madden, and their responses regarding their views about crime and the death penalty were more reasoned and intelligent than Juror Madden's responses. (Ex. 174 at 551 (Juror Seeley was a 72-year-old widow and retired

bookkeeper); 565 (Juror Seeley's lengthy response as to why the death penalty is a "very difficult thing to decide."); Ex. 161 at 278 (Juror Field was a 67-year-old woman who had worked for 16 years at the VA Medical Center in West Los Angeles); 289, 294 (identifying unemployment, gangs and drugs as the most important causes of crime, and explaining that "the punishment should fit the crime"); Ex 170 at 467 (Juror Parvin was 67 years old, married with children, and a retired small business owner); 481 (stating that he understands that "in view of the public threat of crime today, [the death penalty] is necessary."); Ex. 41 at 459 (Juror Barnes was a 63-year-old widow who had worked for 20 years for the U.S. Postal Service); 473 (explaining that the death penalty "has a place in the justice system," and felt that she could agree to it "if guilt were established beyond doubt" and it was "so urged as the proper legal punishment."). See also, e.g., Jamerson, 713 F.3d at 1228 (finding that the comparative analysis supported the prosecutor's justification, because "no seated juror possessed the trait that the prosecutor identified as the reason for the strike.").

B. Juror Welch

The prosecutor explained that she challenged Juror Welch because his initial statements showed that he "favored the death penalty" only when the defendant had a criminal record and his questionnaire reflected a preference for rehabilitation and counseling before the death penalty should be imposed. (RT at 3815.) In examining the prosecutor's strike of this juror on direct appeal, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about his general feelings on the death penalty, Gerald W. wrote: "If someone purposely takes the life of another, I feel that they should be punished severely. If accidental or without thought I feel they should go through some type of rehab & counseling for an extensive period of time." On voir dire by the trial court, Gerald W. said he would not automatically vote either for or against the death penalty.
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> The prosecutor on voir dire asked Gerald W. whether he thought "that as a society we should even have the death penalty." Gerald W. replied: "Yes, I believe that there are some murder cases that require the death penalty. Because there are some people that just are killers. Might have had, to me, a criminal life or scrapes with the law, you know." The prosecutor then asked how he would feel "if the person had not done it before." Gerald W. said: "They would be in a different category." Asked whether his ability "to vote for the death penalty in a lot of ways would be determined by the person's prior

> criminal record," Gerald W. replied: "It would have a lot to do with it." On further questioning, however, Gerald W. added that he could see himself voting for the death penalty when the person did not have a prior criminal record but committed "a very violent premeditated murder." Asked what kinds of things he would look for in making the penalty determination in that situation, Gerald W. said: "The history of what the person was like prior to this murder." The prosecutor then asked this question: "Could you see yourself ever voting for the death penalty in a situation where you have already found the person guilty because they participated in the crime, but they weren't the person who actually pulled the trigger and did the stabbing, whatever?" Gerald W. replied: "I don't think so." He later said, however, that if three people agreed to commit a robbery and decided in advance to kill the robbery victim, he could vote for the death penalty for each of the participants because "one should not get off any lighter as far as sentencing or anything than the other because all three of them-to me, that would like they all shared equally in that crime."
>
> Substantial evidence supports the trial court's finding that the prosecutor could reasonably view Gerald W. as unfavorable on the penalty issue. Although he indicated he was neutral on the death penalty, his answers suggested that in making the penalty determination he would be heavily influenced by the presence or absence of a prior criminal record and that at least initially he was not inclined to impose the death penalty on one who did not personally participate in the killing. In the context of this case, where the defendant lacked a prior criminal record and did not directly participate in the killing, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Gerald W. was based on his death penalty views and not on his race.

McDermott, 28 Cal. 4th at 978-79.

Here, the record supports the prosecutor's explanation for excusing Juror Welch on the basis of his preoccupation with a defendant's prior record or history. (RT at 3029 (noting that he thought it would be important if someone had had a "criminal life with scrapes with the law" and further stating "I'm saying if they premeditated a murder or just straight out committed the murder, I think that person deserves to be killed because of the way they have lived. It's in their history.") When the prosecutor asked Juror Welch specific questions regarding criminal history and whether he would consider imposing capital punishment in a "different category" of cases, he maintained that a prior criminal record "would have a lot to do with" his vote on the death penalty. (RT at 3030.) Finally, when asked whether he could ever impose the death penalty on someone without a prior criminal history but who was a perpetrator in a murder who did not actually do the killing, Juror Welch said "I don't think so." (RT at 3032.) Although he later modified his answer, his initial pre-occupation with whether the defendant was the direct perpetrator, as well as his pre-occupation with the

defendant's criminal history, supports the race-neutral reasons given by the prosecutor for challenging this juror.

Petitioner contends that the prosecutor's reasons for striking this juror were a pretext, because he was an "unequivocal supporter of the death penalty," and compares him to other seated jurors who agreed that they would be interested in considering the defendant's background. (Br. at 81-82 (citing to questions of Jurors Barnes, DeLeon, Durall, and Field).) However, unlike Juror Welch who specifically injected his views regarding the defendant's past criminal record into the discussion, these jurors' statements that they would consider the defendant's background were mainly in agreement to counsel's questions. (RT at 1576 (Juror Barnes); 1793 (Juror DeLeon); 1847 (Juror Durall); 1914 (Juror Field).) Furthermore, while seated Jurors Seeley and Tharp agreed that they would consider the defendant's role in the killing, neither of them stated that they would not impose the death penalty on someone who did not actually "pull the trigger" or do the "stabbing." (RT at 2801 (Juror Seeley agreeing with the prosecutor that the fact that others did the killing could "sway" her decision); 2943 (Juror Tharp agreeing that she would take into consideration the fact that others did the killing).) Indeed, similar to Juror Welch, the prosecutor challenged prospective Juror Sarkdavisarak, a Caucasian female who stated that she could not hold the aider and abettor equally responsible as the direct perpetrator. (RT at 2726-27.)

C. Juror Brown

The prosecutor gave no specific reason for challenging Juror Brown, and only generally stated that this juror was among those jurors who she did not believe would be "good prosecutor jurors on the issue of the death penalty." (RT at 3825.) In examining the prosecutor's strike of this juror on direct appeal, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about her general feelings on the death penalty, Brenda B. wrote: "In some cases I believe in the death penalty. However, only when there can be no rehabilitation at all." She repeated this view on voir dire, stating: "I believe that a person-if a person can be rehabilitated and if they're truly sorry for what they did .... I believe in giving them a chance to prove it." At one point she said she would automatically vote for life without parole, rather than death, if she was convinced the defendant could be rehabilitated. Although she later retreated from this position

> somewhat, she continued to view the potential for rehabilitation as the most important consideration in determining penalty in a capital case. Because defendant had no prior criminal record, the prosecutor might reasonably conclude that Brenda B.'s focus on rehabilitation made her an unfavorable jury for the prosecution on the penalty issue. Substantial evidence supports the trial court's finding that Brenda B.'s views on the death penalty, rather than her race, were the basis for the prosecution's peremptory challenge.

McDermott, 28 Cal. 4th at 976.

Here, the record shows that Juror Brown would impose the death penalty only if there was no chance of rehabilitation. In her juror questionnaire, Juror Brown stated: "In some cases I believe in the death penalty. However only when there can be no rehabilitation at all." (Ex. 33 at 305.) During voir dire, Juror Brown continued to stress her belief that the death penalty should be imposed only in those instances where a defendant could not be rehabilitated. (RT at 1882 (stating that if a person just went crazy but was "truly are sorry and they could be rehabilitated, I believe in giving them a chance to prove it" and agreeing that she would automatically vote for life without the possibility of parole if she found the defendant could be rehabilitated).)

After the trial court inquired whether there would ever be other factors that she would consider, Juror Brown stated that she would consider "everything." (Id.) However, then the prosecutor questioned her about the importance of rehabilitation, she again stated that although not everyone can be rehabilitated, "when they can, I believe it giving it a try" and that it "really comes down" to the "question of rehabilitation." (RT at 1893.) She stated that she would vote for the death penalty in certain situations, such as a drive-by shooting, a serial killer, a person "who would murder babies for no reason," or "just cold blooded and heartless murder." (RT at 1894.) However, she immediately thereafter stated, "[b]ut then again, there is times when I believe that a person murders – can murder and can change. Can be Rehabilitated. I don't believe that all people that kill cannot be rehabilitated." (Id.) When the prosecutor asked Juror Brown whether she could vote for the death penalty in a case where the defendant was not a serial murderer or killed babies, she responded that she could vote for the death penalty but would have to "seriously think about it." (RT at 1897.)

Petitioner attempts to show that the prosecutor's reasons were a pretext by comparing Juror Brown with Juror Parisen, who indicated that she would "definitely" impose the death penalty when someone killed "without caring" and "there is no chance for redemption." (Br. at 86-76 (citing RT at 2567).) However, Juror Brown's core question as to whether to impose the death penalty, as she specifically testified, was the "question of rehabilitation" and she was fixated on the issue during her questioning. By contrast and despite her brief reference to a "chance for redemption," Juror Parisen agreed that, even if a defendant could be rehabilitated, she could impose the death penalty if the crime was "horrible." (RT at 2577.) In such a case, Juror Parisen agreed that the possibility of rehabilitation "wouldn't make any difference." (Id.)

D. Juror Kee

The prosecutor specifically stated that she excused Juror Kee because he would not vote for the death penalty unless the defendant would kill again in prison. (RT at 3823.) In examining the challenge of this juror, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about his general feelings on the death penalty, Gilbert K. wrote: "Necessary in some cases to protect the population, and society." Gilbert K. thought the state had the right to impose capital punishment for both intentional and unintentional killings.
>
> On voir dire, in response to a question whether he had strong feelings about the death penalty either way, Gilbert K. replied: "No, I wouldn't, especially I would say that I feel every case has its own merits, and depending on what the case is about and what is happening, I would decide from that point." The prosecutor asked Gilbert K. to rate his death penalty views on a scale of one to 10, "10 being somebody who would always impose it in a case of premeditated murder, an eye for an eye; you kill somebody, you get the death penalty; one let's say being somebody who would never do so." Gilbert K. answered that he "would probably be somewhere around a four or five, depending on the case itself and a person is found guilty and circumstances involved in it." The prosecutor asked whether this meant Gilbert K. was "somebody who kind of leans away from the death penalty." Gilbert K. replied, "I find myself straddling the line basically at five until I hear the difference to persuade me either way or the other."
>
> The prosecutor asked whether Gilbert K. could "think about any type of case just in the abstract that ... in your mind would call for the death penalty." He replied: "Possibly a case where a person who could be found guilty or would be found guilty I would say was a person that could possibly want to commit murder again. [¶] That would make me think more about the death

> penalty. [¶] A person that could possibly go back out and kill somebody else again or couldn't be controlled to keep somebody from hurting again." The prosecutor reminded Gilbert K. that the alternative penalty was life imprisonment without parole, meaning that "the person would never come out of prison alive." Gilbert K. replied: "But that person would be in prison with other people, and people are, even though they may be in prison, can be hurt in prison."
>
> The prosecutor then asked Gilbert K. if he could see himself ever voting for the death penalty if he "did not feel that there was a chance that the person would kill again." Gilbert K. replied: "If I did not feel the person would kill again, that's very doubtful. It is very doubtful." Asked to explain further, he added: "Because of the fact that the person is to me is under total control or being controlled for the rest of their life. [¶] I don't see the necessity to kill somebody for that.... What I am just basically saying is depending on the circumstances and the circumstances of the case itself, if a person was found guilty of the crime, and I felt that they could not do anybody any other harm or that they were the type of person warranted any other harm, life in prison I think would fit. [¶] If a person was a person who I felt was dangerous to society or to themselves, or a type of person who without any thought or malice could hurt somebody at any time, I say that is the person who maybe would be a good candidate for the death penalty."
>
> Under further questioning by the prosecutor, Gilbert K. modified his views. He said he could see himself voting to impose the death penalty on a defendant who would not likely kill again if the defendant was guilty of a premeditated murder by lying in wait or for financial gain and the crime was particularly brutal or cold-blooded or had been planned over a long period of time.
>
> Having reviewed the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Gilbert K. as unfavorable on the penalty issue. Because defendant apparently had no history of violence and did not personally commit the capital murder, the prosecutor had little basis to argue that defendant would kill again if sentenced to prison for life without parole. Although Gilbert K. eventually said he could see himself voting to impose the death penalty on a defendant who was not likely to commit future violent acts, his earlier responses, questioning the need to execute someone who posed little or no threat of violence in prison, could be a matter of legitimate concern to the prosecutor in this case. We see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Gilbert K. was based on his death penalty views and not on his race.

McDermott, 28 Cal. 4th at 973-74.

In voir dire in response to the prosecutor's question as to what sort of case warranted the death penalty, Juror Kee responded it could be necessary if the person "could possibly go back out and kill someone again" or "couldn't be controlled" from hurting another person again. (RT at 2232.) The prosecutor further questioned whether Juror Kee could

vote for the death penalty in a situation where a person was found guilty of first degree murder with special circumstances if he did not think that person would kill again. (RT at 2233.) Juror Kee responded: "If I didn't think that person would kill again, it's very doubtful. That's very doubtful." (Id.) When the prosecutor asked Juror Kee to explain his answer, Juror Kee stated:

> What I am basically saying is depending on the circumstances and the circumstances of the case itself, if a person was found guilty of the crime, and I felt that they could not do anybody any other harm or that they were the type of person warranted any other harm, life in prison I think would fit.
>
> If a person was a person who I felt was dangerous to society or to themselves, or a type of person who without any thought or malice could hurt somebody at any time, I say that is the person who maybe would be a candidate for the death penalty.

(RT at 2233-34.)

Petitioner argues that the prosecutor's reasons for challenging this juror were a pretext by comparing this juror to Juror Parvin. (Br. at 88.) In explaining his feelings about the death penalty, Juror Parvin stated that "[d]eterrence and protection of the public would carry a little more weight than trying to select the worst possible punishment." (RT at 2588.) However, deterrence encompasses other future murders done by others, not just Petitioner. Moreover, unlike Juror Kee, Juror Parvin's responses when viewed as a whole indicate that he did not feel that a person's proclivity to kill again should be a dispositive factor in deciding to impose the death penalty. As Juror Parvin explained in response to the prosecutor's further questions, he would want to hear the all of the evidence in deciding which punishment to impose and would not decide "on the basis of which is the worse punishment." (RT at 2600.) In addition, Respondent accurately points out a response similar to Juror Kee's made by Juror Kosh, a Caucasian male excused by the prosecutor, who stated in his juror questionnaire: "In some cases . . . the death penalty is justified and even called for, to be certain that the killer does not kill again." (Ex. 165 at 376.)

E. Juror McGensie

The prosecutor did not provide a specific reason for challenging this juror, and only relied upon her general justification that this juror was among those jurors who she did not believe would be "good prosecutor jurors on the issue of the death penalty." (RT at 3825.) In examining the challenge of this juror, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about her general feelings on the death penalty, Patricia M. wrote: "If evidence is presented of one taking a life without justifiable cause-for example, molesting children or child abuse-I really have no problem with a guilty verdict-or where proof is shown where someone took anyone [sic] life just for thrills." She wrote that she had voted to reinstate the death penalty when it was on the ballot in 1978, and she stated that "the State should have the right to execute, depending on the circumstance, an individual who-unlawfully kills another human being, whether intentionally or not."
>
> On voir dire, defense counsel asked what Patricia M.'s views would be on the appropriate penalty if she were to find defendant guilty of first degree murder with the special circumstance of lying in wait or financial gain. She answered: "I would probably be more apt to say life without the possibility of parole." Asked to explain, she said: "Because to me it is death anyway. You're going to be confined and it said without any parole. You're going to die there anyway. It is a slow death."
>
> Under questioning by the prosecutor, Patricia M. said that death was a more severe punishment than life imprisonment without parole. Asked whether she would be more inclined to vote for life imprisonment without parole if the victim was not a child, she replied: "Depending on the situation with her as to why-if in fact she killed the person. It would be the involvement. I'd have to hear the circumstances surrounding it. But I don't feel that I would be swayed one way or the other as to more for the death or more for imprisonment."
>
> Asked whether a premeditated murder for financial gain was "the type of murder [she] would consider the death penalty for," she replied, "Possibly." Asked whether she felt the death penalty "really serves any purpose," she replied, "Not really."
>
> Having reviewed the record-especially Patricia M.'s view that the death penalty did not serve any purpose and her stated inclination to impose life imprisonment rather than death for a premeditated murder carried out for financial gain-we conclude that substantial evidence supports the trial court's findings that the prosecutor could reasonably view Patricia M. as unfavorable on the penalty issue and that the prosecutor's peremptory challenge against her was based on her death penalty views and not on her race.

McDermott, 28 Cal. 4th at 971-72.

Here, the record supports the race-neutral reasons for challenging this juror provided by the prosecutor. During voir dire, Juror McGensie stated that she would be inclined to

impose life without the possibility of parole for murder committed by lying in wait or for financial gain because it would be a "slow death." (RT at 23844-85.) In fact, when asked whether she thought that the death penalty served any purpose, she responded "not really. (RT at 2391-92.) However, Petitioner contends that Juror McGensie's juror questionnaire reflected pro-capital punishment attitude. In response to a question about imposing the death penalty, Juror McGensie stated that she would have "no problem with a guilty verdict" for cases involving child abuse or a murder committed "just for thrills." (Ex. 44 at 665.) Nevertheless, her answer indicated that it pertained to delivering a guilty verdict and she further explained on voir dire that she "really [wasn't] talking about the death penalty" in this answer. (Id. and RT at 2378-79.) Furthermore, because Juror McGensie was not responding to her views about the death penalty in this question, Petitioner's cannot properly compare her response to the response to this question by seated Juror Clow who cited child abuse cases as instances where capital punishment was appropriate.

Petitioner maintains that the prosecutor's reasons for excusing this juror were a pretext, in view of the responses by seated Jurors Seeley, Field, and Barnes, who grappled with whether capital punishment was a more severe penalty than life imprisonment. (Br. at 90-91.) However, Juror Field's juror questionnaire responses suggested that she was highly pro-capital punishment. (Ex. 161 at 292 ("Those who take another's life should receive the death penalty.").) Although Juror Field stated that she herself would rather get the death penalty than spend the rest of her life in prison, she specifically acknowledged that the death penalty was the worst punishment that she could impose. (RT at 1916-17.) While Juror Seeley noted that life without possibility of parole "may be" more of a punishment than death, she also stated during voir dire that she had "strong feelings" on the death penalty and "if a person has deliberately murdered another person, it should be done likewise to him." (RT at 2795.) She further testified that she believed that the death penalty had been carried out too seldom. (RT at 2803.) In her questionnaire, Juror Seeley stated that the supported the reinstatement of the death penalty in 1978 and voted to recall Justice Rose Bird because of her stance on the death penalty. (Ex. 174 at 568.) Similarly,

Juror Barnes's overall responses indicated that the death penalty was the worse penalty, even though she noted that life without the possibility of parole "might be" just as bad as the death penalty. (See RT at 1564; RT at 1565 (responding to defense counsel's question, "If your feelings are that maybe prison is worse than death," Juror Barnes interrupted by stating "Oh, No" and agreeing that she would not hesitate to vote for the death penalty if she thought it was appropriate); RT at 1574-76 (identifying the Manson and Ramirez cases as being appropriate for the death penalty and agreeing that, if a murder is particularly cold-blooded, she could vote for the death penalty even if there was only one victim).) Certainly, none of the jurors with whom Petitioner seeks to compare Juror McGensie indicated such strong doubts about the effectiveness of the death penalty and the preference for life imprisonment based on the fact pattern of this case.

F. Juror Spann

The prosecutor did not provide a specific reason for challenging Juror Spann, and only relied upon her general justification that this juror was among those jurors who she did not believe would be "good prosecutor jurors on the issue of the death penalty." (RT at 3825.) In examining the challenge of this juror, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about her general feelings on the death penalty, Kathryn S. wrote: "I really don't know for sure. I have never really given it thought." On voir dire, the trial court asked if she had since given thought to the death penalty. Kathryn S. said she had, adding: "I don't have any feelings one way or the other." Asked whether she believed there should be a law allowing for the death penalty, she said: "I don't know. I really can't say if there should be a law or there shouldn't."
>
> On voir dire by defense counsel, Kathryn S. said she would want to hear from defendant in making the penalty determination, but that she would not necessarily vote for death if defendant did not testify. She said that on a scale of zero to 10, with zero being never voting to impose the death penalty and 10 being always voting to impose the death penalty, she would consider herself a five.
>
> The prosecutor asked Kathryn S. whether she thought the death penalty was "worse" than life without possibility of parole. At first, Kathryn S. replied: "I really can't say. I don't know. They are both bad." The prosecutor asked which of these punishments Kathryn S. would impose if she "wanted to punish somebody the worst that you possibly could." Kathryn S. said: "Maybe I would say life in prison.... So they could have a chance to think about what

> they did." Asked again which punishment she would choose to punish someone "in the most harsh manner that you could," Kathryn S. said: "Life without possibility of parole." Asked why she would ever "give the death penalty," Kathryn S. replied: "I don't know that I would. I mean I can't say. Why would I-I don't know why I would ever give it or if I would."
>
> After reviewing the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Kathryn S. as unfavorable on the penalty issue. Although her responses generally indicated neutrality on the death penalty, she expressed considerable doubt that the death penalty was a harsher punishment than life in prison without possibility of parole and she could not explain why she would ever choose the death penalty over life without parole. In view of these responses, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Kathryn S. was based on her death penalty views and not on her race.

McDermott, 28 Cal. 4th at 976-77.

Here, the record support's the prosecutor's race-neutral reasons for excusing this juror. When asked during voir dire whether the death penalty was worse than life without the possibility of parole, Juror Spann responded "I really can't say. I don't know. They are both bad." (RT at 2868.) When the prosecutor asked Juror Spann which punishment she would impose to "punish someone the worst that you possibly could," Juror Spann responded "[m]aybe I would say life in prison." (RT at 2869.) When the prosecutor asked her why, she responded "[s]o they could have a chance to think about what they did." (Id.) At a side bar conference, the prosecutor stated: "I think this lady as far as I am concerned is just totally vacant upstairs. She is a total wild card for both sides. I would be more than happy to just excuse her. She has said stuff that is not good for the prosecution and stuff that is not good for the defense." (RT at 2871.)

Later, during further questioning, Juror Spann explicitly stated her view that "life without the possibility of parole" was the worse penalty. (RT at 2876.) When she enumerated a few horrible crimes, she explained that she was not saying that she would impose the death penalty for those offenses but only that "those were bad." (Id.) When asked point blank as to the death penalty, Juror Spann stated "I don't know why I would ever give it or if I would." (Id.) Thus, given Juror Spann's responses, it was reasonable for the prosecutor to view this juror as less likely to vote for the death penalty, and at best,

selecting her would have been like gambling on a "wild card."

Petitioner argues that the prosecutor's reasons for challenging this juror were a pretext by comparing her to seated Jurors Parisen and Barnes, who both expressed hesitation about imposing the death penalty. (Br. at 93-94.) However, Juror Parisen stated that although she would "tend not to want to use the death penalty," she agreed that she could bring herself to impose the death penalty in an appropriate case and would keep an open mind. (RT at 2566.) In addition, despite Juror Barnes's statement that life without the possibility of parole "might be" just as bad as the death penalty, her overall responses indicated that the death penalty was the worse penalty. (See RT at 1564, 1565, 1574-76.) Similar to Juror Parisen, Juror Barnes agreed that she would not hesitate to choose the death penalty if she felt it was the appropriate punishment. (RT at 1565.) Thus, unlike Juror Spann, neither Juror Parisen nor Juror Barnes ever categorically stated that life imprisonment without the possibility of parole was a harsher punishment than the death penalty. In addition, Respondent aptly points to the prosecutor's challenge of Juror Hope, a Caucasian female who struggled in distinguishing which punishment was more severe. (Ex. 163 at 334 (responding as to her general feelings about the death penalty that she was not a "strong advocate" of the penalty and "I feel that life imprisonment without possibility of parole is probably fully as much 'cruel and unusual' punishment as the death sentence."); RT at 2083 (responding that the death penalty was worse only because "ethically we are taught that.").

G. Juror Talbert

The prosecutor did not provide a specific reason for challenging this juror, and only relied upon her general justification that this juror was among those jurors who she did not believe would be "good prosecutor jurors on the issue of the death penalty." (RT at 3825.) In examining the challenge of this juror, the California Supreme Court explained:

> On the jury questionnaire, in response to a question about his general feelings on the death penalty, James T. wrote: "I have mixed feeling because my religious beliefs condem [sic] killing, yet I feel punishment should fit the crime." On voir dire by the trial court, James T. said there was no conflict

> between his religious beliefs and state law allowing a jury to impose the death penalty and that he would not automatically vote either for or against it.
>
> On voir dire by the prosecutor, James T. said that the biblical command "Thou shalt not kill" applied to "everybody in society" but not to the state. He affirmed again that voting as a juror to impose the death penalty would not conflict with his religious views. He said that a murder deliberately planned for financial gain was the type of murder that could get his vote for the death penalty. Asked whether he thought our society should have a death penalty, James T. replied: "I think that society needs to be in a situation where they should not have a death penalty. And that's what I am just saying. No one should kill another person, you know, to bring the situation up." The prosecutor then asked whether James T. would vote for the death penalty if it was on the ballot. James T. answered: "I would probably vote no.... Because simply killing is wrong."
>
> Substantial evidence supports the trial court's finding that the prosecutor could reasonably view James T. as unfavorable on the penalty issue. Although he consistently denied any conflict between his religious views and state law on the death penalty, James T. said he would vote against it if it appeared on the ballot because of his strongly held view that killing is wrong. Given this expression of doubt about the moral legitimacy of the death penalty, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against James T. was based on his death penalty views and not on his race.

McDermott, 28 Cal. 4th at 978.

Here, the record supports the race-neutral reasons provided by the prosecutor for challenging this juror. As the California Supreme Court noted, when the prosecutor questioned Juror Talbert as to whether he would vote for the death penalty if it were a ballot measure, he responded "I probably would vote no . . . . because *simply killing is wrong.*" (RT at 2918; emphasis added.) Thus, despite Juror Talbert's statement that voting for the death penalty in a specific case would not conflict with his religious views and his statements indicating that he could vote for it, the prosecutor was reasonable in thinking that others would be better penalty phase jurors in view of this juror's philosophical opposition to the death penalty.

H. Juror Jessie

In specifically explaining why she challenged this juror, the prosecutor stated that this juror was "stupid" and "as bad as you can get," to which the trial court responded, "I remember her. She's the one I remember. Of all of those, she is the one I remember." (RT at 3823.) In examining the challenge of this juror, the California Supreme Court explained:

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Theola J. wrote: "Mixed." Asked during voir dire to explain what she had meant, she said: "Well, I feel that I don't think-just like if I have a chance to decide on that, I don't think I would." Asked whether she meant she would have difficulty voting for the death penalty, she said: "No, I wouldn't have-after I see, you know, what everything that I listened to, you know." She said she would not automatically vote either for or against the death penalty, but instead would listen to any evidence presented on the issue of penalty. She said: "I would have to hear. I would have to make up my mind after I hear what's presented before me. I just couldn't say right now, you know. I couldn't say one way or the other because like I said, mixed. I don't know really, you know."

Asked by defense counsel whether she would be "somewhere in the middle" on a scale of one to 10, Theola J. answered in the affirmative. Asked by the prosecutor whether she thought the State of California should have the right to execute somebody for a particular kind of murder, Theola J. said: "Well, I think they should have that right. I say under certain circumstances, I think." Asked to explain what circumstances would warrant the death penalty, she said: "It would really have to be horrible.... Some of the things that I might, you know, that a person what I believe just didn't have a heart, you know, that would do something to somebody. That's the way I feel."

The prosecutor asked Theola J. whether she felt "that the state should have the right to execute somebody if they are found guilty of a first degree premeditated deliberate murder." Theola J. replied: "No, I don't think so." Asked to explain, she said: "Well, I would think that it could be another punishment, you know, maybe life or something." On further probing of her views by the prosecutor, Theola J. said: "Well, like I said, maybe the state should have the right under certain circumstances, but some of them that I don't think that I would think it was that-that they should have that right." Asked to explain what circumstances would warrant the death penalty, she said: "Like I said before, it would have to be worse than death.... It would have to be, like I said, a more-even though that's violent, it would have to be a little more violent or something, I think."

At this point the trial court intervened and explained to Theola J. that under this state's laws not every first degree murder qualifies for the death penalty, that a first degree murder with the special circumstances of financial gain or lying in wait did qualify for the death penalty, and that the jury would determine penalty only if it found defendant guilty beyond a reasonable doubt of first degree murder with one or both of these special circumstances. Theola J. indicated that she understood the court's explanation, that it seemed different than what the prosecutor had asked her, and that she did not have any problem with the law as the court had explained it. The court asked Theola J. whether she was "one of those persons who would never vote for the death penalty under those circumstance, under those conditions." She answered: "No, I don't think I would be one that would never vote for it. I think I would vote for it. But, like I said, I would have to hear. They would have to convince me. See, I would have to be convinced, you know, because I could say, well, I would decide, you know, I wouldn't want this to happen or want this to happen, but my mind could change after hearing what I have to hear. That's the only way I could be convinced."

> The prosecutor then asked whether Theola J. felt "that the state should have the right to execute somebody who has committed a premeditated, deliberate murder by lying in wait." Theola J. replied: "Yes, I think so." Asked whether such a crime would be "horrible enough" to make the death penalty appropriate, Theola J. said: "Yeah, I think so after I hear. Like I said, it is really hard for me because I could say one thing and then after I hear it I could say maybe I shouldn't have said that. After I hear. After you hear things and it's been explained to you from A to Z, it is a lot better than just trying to say it now. You know, I think the more I would hear about what happened then my decision could be, you know, I could decide for myself, you know, which way I would really feel."
>
> Having reviewed the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Theola J. as unfavorable on the penalty issue. Although her responses were confused and inconsistent, and her final statements indicated neutrality on the death penalty, two of her answers could cause the prosecutor legitimate concern. Most obviously, she said she did not think the state should have the right to impose the death penalty for a first degree premeditated deliberate murder, and she thought there could be another punishment, such as life imprisonment. Although she modified or explained this view, she then said that to impose the death penalty "they"-by inference the prosecution-would have to convince her, suggesting that she might enter the penalty phase with something like a presumption in favor of the alternate penalty of life without parole. In view of these responses, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Theola J. was based on her death penalty views and not on her race.

McDermott, 28 Cal. 4th at 974-75.

Here, the record supports the prosecutor's race-neutral reasons for challenging this juror. In her juror questionnaire, Juror Jessie failed to provide any meaningful responses to many of her questions. Many of the questions were left blank, and in response to what her "general" feelings were about the death penalty, Juror Jessie simply wrote "mixed." (Ex. 36 at 369-73 (all questions left entirely blank); 369 (responding "mixed" to question asking her general views about the death penalty); 364-65 (responding with only "?" to six questions).) During voir dire, defense counsel and the trial court questioned Juror Jessie why she wrote "mixed" to the question regarding her views about the death penalty:

> Juror Jessie: Well, I feel that I don't think – just like if I have a chance to decide on that, I don't think I would.
>
> Trial Court: You don't think you could do what?
>
> Juror Jessie: Decide on the death penalty.

> Trial Court: Are you saying to me that you would have difficulty being able to vote for the death penalty?
>
> Juror Jessie: No. I wouldn't have – after I see, you know, what everything that I listened to, you know.

(RT at 2167.)

Given these nonsensical responses, the prosecutor had a reasonable basis to believe that Juror Jessie did not have the intellectual capacity to understand and apply the law. Although Juror Jessie eventually stated that she could see herself imposing the death penalty for a murder committed while lying in wait, these responses came at the end of a series of inconsistent responses. (See RT at 2183-84.) In addition, Juror Jessie stated that she would only vote for the death penalty under these circumstances if the prosecutor could "convince her" so that her "mind could change." (RT at 2182.) Petitioner accurately points out that Juror Parisen similarly stated that she would need to be "convinced" to vote for capital punishment. (RT at 2570.) However, Juror Parisen's juror questionnaire responses were, by comparison, far more articulate than Juror Jessie's responses. Significantly, Juror Parisen indicated in her juror questionnaire that she generally believed that the death penalty was appropriate "when the crime is the taking of another's life and there 's no remorse, no hope," and agreed that the "State had the right to execute, depending on the circumstances, an individual who [u]nlawfully kills another human being, whether intentionally or not." (Ex. 169 at 460.) By contrast, Juror Jessie initially agreed on voir dire that the State did not have the right to execute someone for premeditated deliberate murder, and stated that she "would think that it could be another punishment . . . maybe life or something." (RT at 2178.) Consequently, although the prosecutor's reasons for challenging characterization of this juror were unflattering and harsh, they were not unfounded and not racially-motivated.

In sum, the record and the comparative juror analysis demonstrate that the prosecutor provided sufficiently "clear and reasonably specific" race-neutral reasons for challenging

these African-American jurors under Batson. Batson, 476 U.S. at 98 n.20.[8] The California Supreme Court therefore did not unreasonably find that the prosecutor's justifications were genuine and not pretextual. See Jamerson, 713 F.3d at 1236 (noting that even though some of the prosecutor's justifications looked thin at first glance, a closer review of the record failed to show that the state court unreasonably found the justifications to be pretextual and not genuine). Consequently, under the "doubly deferential" review required for reviewing this claim, habeas relief is not warranted.

To the extent that Petitioner contends that an evidentiary hearing is warranted in view Johnson v. Finn, 665 F.3d 1063 (9th Cir. 2011) (Reply at 101-02), her argument is misplaced. In Johnson, the Ninth Circuit found that the district court was required to conduct an evidentiary hearing when the state court used the wrong standard at step one and failed to find a prima facie case of discrimination. Id. at 1072 (finding that because the state court used the wrong standard at step one in determining that the petitioners had not made a prima facie showing of discrimination, de novo review was warranted and an evidentiary hearing was required "to replicate on habeas review the inquiry that the state trial court should have conducted in the fist place -- requiring the prosecutor to assert race-neutral reasons for the strike (at Batson step two) and determining (at Batson step three) whether the asserted reasons were in fact genuine rather than pretextual."). Unlike in Johnson, the state court in this case used the wrong standard but reached the correct finding that Petitioner had established a prima facie case of discrimination at step one, and then proceeded to solicit the prosecutor's reasons for the strikes at step two and render a credibility determination at to those reasons at step three. Furthermore, in view of the case law following the Court's June 25, 2010 Order that has further clarified the standards by which district courts must review

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[8] Respondent's point is well-taken that there is no Supreme Court precedent requiring a prosecutor to state specific race-neutral reasons as to each individual juror where, as here, the record shows that a general explanation applies to several. Carey v. Musladin, 549 U.S. 70, 77 (2006) (finding that, given the lack of holdings from the Supreme Court on the particular issue the petitioner presented, the state court's determination that the petitioner was not prejudiced was not contrary to clearly established federal law).

state court findings generally and Batson claims specifically, the trial court's credibility findings should be upheld because they were reasonable in view of the record and the comparative juror analysis. See Pinholster, 131 S. Ct at 1398, 1400; Jamerson, 713 F.3d at1235 (citing Briggs, 682 F.2d at 1170).

I. Juror Jennings

Finally, to the extent that Petitioner contends that her counsel ineffectively failed to make an additional Batson motion based on the prosecutor's challenge of Juror Jennings, her claim fails. In view of counsel's earlier attempt to challenge this juror for cause (RT at 2142-43), Petitioner cannot show that counsel lacked a strategic reason for not seeking to challenge the prosecutor's excusal of this juror. Strickland, 466 U.S. at 689 (finding that, in order to show deficient performance, a petitioner must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."). Furthermore, counsel may have determined that any such motion would have been futile, given that the prosecutor had twice accepted Juror Jennings as part of the panel and had at all times accepted Juror Caudle, who ultimately remained on the alternate panel. (RT at 4373.) See also, e.g., James v. Borg, 24 F.3d 20, 26-28 (9th Cir. 1994) (finding that trial counsel was not incompetent for failing to make a motion to suppress evidence obtained from a car search that would have been denied because the petitioner lacked standing to challenge the search); Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (finding no ineffective assistance for failing to file a suppression motion where counsel determined that the motion would not be successful based on his research and knowledge of the denial of similar motions in other cases).

In addition, in response to the defense counsel's previous Batson challenge, the prosecutor explained that she had challenged various jurors not because they were necessarily opposed to the death penalty, but because there were others in the remaining pool who she thought were "more in favor of the death penalty." (RT at 3825.) Because the other remaining jurors were more in favor of the death penalty than Juror Jennings, it was reasonable for counsel to think that the same explanation would apply to the prosecutor's

challenge of Juror Jennings. For instance, Juror Kolbein, who was placed on the panel after Juror Jennings was excused, indicated that she was more favorable to the death penalty than Juror Jennings. (Ex. 177 at 628-29 (responding that she thought someone who took a life "should have to pay with theirs" and thought "too many criminals rely on not having the death penalty as a right to continue in the crime"); RT at 4080-82 (stating during voir dire that someone who committed premeditated murder should always receive the death penalty).) Similarly, Juror Ishay, the last alternate juror who was seated, provided more pro-death penalty answers in her juror questionnaire to questions that Juror Jennings had either left blank or responded in a more neutral. (See Ex. 164 at 356 (indicating that the death sentence was carried out too seldom and specifically stating that it should be carried out after all appeals are exhausted).) Thus, fairminded jurists could conclude that, even if counsel had made a Batson challenge, the challenge would not have survived all three steps in order to succeed. Because Petitioner cannot overcome the "double deferential" standard to show ineffective assistance on these grounds, she cannot demonstrate a violation of § 2254(d) by the California Supreme Court for this claim and no evidentiary hearing is warranted. Richter, 131 S. Ct. at 786; Pinholster, 131 S. Ct. at 1403.

CONCLUSION

For all of the reasons set forth above, Petitioner has not demonstrated a violation of § 2254(d) as to any of her claims in the Brief. Accordingly, Claims Three.D.3, Three.D.4, Three.D.8, Three.D.10, Three.E, and Four are DENIED, and no evidentiary hearing is warranted.

Petitioner shall submit her Opening Brief regarding the final merits of the remaining phase claims within 60 days of the entry of this Order; Respondent shall file his Opposition 45 days within the filing of Petitioner's Opening Brief; and Petitioner's Reply, if any, shall be filed within 30 days following the filing of Respondent's Opposition.

IT IS SO ORDERED.

Dated: January 5, 2015

DAVID O. CARTER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAUREEN MCDERMOTT, **Petitioner,** **v.** **DEBORAH K. JOHNSON, Warden, Central California Women's Facility,** **Respondent.**	**Case No. CV 04-0457 DOC** **DEATH PENALTY CASE** **ORDER DENYING RELIEF ON REMAINING CLAIMS**

The Court has reviewed Petitioner's Opening Brief on the Merits of Unadjudicated Claims (Opening Brief), Respondent's Opposition, and Petitioner's Reply, which was taken under submission on February 16, 2016. Now, the Court issues the following Order.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

The facts, as set forth in the Court's June 25, 2010 and January 5, 2015 Orders and by the California Supreme Court on direct review, People v. McDermott, 28 Cal. 4th 946, 962-66 (2002), are summarized, as follows:

On April 28, 1985, Stephen Eldridge was stabbed to death in a home he shared with Petitioner. There was no dispute at trial that the actual killers were Jimmy Luna, Petitioner's former coworker and friend, and two brothers Luna hired, Marvin and Dondell

Lee.

At the time of Eldridge's murder in 1985, Petitioner was 37 years old. She worked as a registered nurse at Los Angeles County-USC Medical Center during the day, and in the evening she provided nursing care to Lee LaPorte at his home. She shared a home with Eldridge, 27 years old, who was a self-employed landscaper. They owned the home as joint tenants. In December 1984, Petitioner and Eldridge each bought $100,000 in life insurance, designating each other as beneficiary.

In early 1985, Petitioner's relationship with Eldridge deteriorated. Eldridge complained about Petitioner's pets and the unkempt condition of the house. Petitioner was upset about Eldridge's treatment of her pets and his plans to sell his interest in the house. Near the end of February 1985, Petitioner discussed a plan to kill Eldridge with Luna. Petitioner told Luna that she had an insurance policy, and offered Luna $50,000 to kill Eldridge. Luna agreed. Petitioner told Luna that she wanted Eldridge stabbed because a gun would make too much noise, and that she wanted the killing to look like a "homosexual murder" because she thought the police would not investigate the murder of a homosexual as vigorously as other killings. On different occasions, Petitioner suggested that Luna carve the word "gay" on Eldridge's body or cut off his penis.

On three occasions in late February and early March 1985, Petitioner arranged for Luna to be at the house she shared with Eldridge so that Luna could kill Eldridge. However, Luna could not carry out the murder because he became frightened each time. Petitioner then suggested that Luna find someone to assist him, but asked him not to tell anyone of her involvement.

In March 1985, Luna asked his friend Marvin Lee to help him commit the murder, telling him that an "organization" wanted someone killed. He offered Marvin $3,000 to "watch [his] back." Marvin agreed. In later conversations, Luna told Marvin that the victim was a homosexual and Luna was going to castrate him in order to make it appear as a "homosexual murder."

In the evening on March 21, 1985, Luna and Marvin knocked on the door where

Petitioner and Eldridge lived. When Eldridge opened the door, Luna and Marvin forced their way inside. Threatening Eldridge with a knife, Luna ordered him to crawl on his hands and knees into the bedroom and to lie face-down on the bed. Luna then cut Eldridge on the buttocks and yelled homosexual epithets at him. Marvin gave Luna a two-foot long bedpost, with which Luna struck Eldridge on the head. Eldridge then jumped up and ran out of the house, whereupon Luna and Marvin left.

Los Angeles Police Officer David Yates, who was dispatched to investigate the attack, found Eldridge at the house dressed only in his underwear and covered in blood. Eldridge was transported by an ambulance to a hospital for treatment.

The next day, Petitioner spoke with Luna about the failed murder attempt. She told him that "we are going to have to do it again and this time you can't fail." After March 21, 1985, but before April 28, 1985, there were several telephone conversations between Petitioner and Luna. During one of these conversations, Marvin was with Luna and listened in as Petitioner discussed the murder plan and what they would do with the anticipated insurance proceeds. Petitioner objected to Marvin's participation in the planned murder and said that if Marvin told anyone about it, Luna would "have to kill that nigger too." Luna assured her that Marvin was trustworthy and would not say anything. Marvin's brother Dondell overheard part of the conversation when Marvin passed him the telephone.

On April 28, 1985, the day of the murder, Luna met Marvin and his brother Dondell and offered Dondell money to help commit the murder. Luna then made several telephone calls to Petitioner, during which Petitioner told Luna that she would leave a front bedroom window open for entry into the house and that Luna should tie her up and cut or hit her so she would look like a robbery victim.

Luna, Marvin, and Dondell entered the house through the front bedroom window around 8:15 p.m. Luna went down the hall to Petitioner's room, and Petitioner told Luna that Eldridge had not yet returned from a dinner engagement. Petitioner told Luna to cut her on the breast and inner thigh, which he did, to make it appear that Eldridge was killed when he came home while Petitioner was being robbed.

Around 10:40 p.m., Eldridge arrived home. When he entered the house, Dondell met him with a rifle owned by Petitioner and provided to him by Luna. Marvin then grabbed Eldridge by the neck in a chokehold and took him down the hall, and Luna stabbed him repeatedly until Eldridge slumped to the floor. Luna returned to Petitioner's bedroom where he found Petitioner on the floor with a facial injury. Petitioner asked Luna how the injury looked, as she had self-inflicted her wound. As Luna and the two Lee brothers were about to leave the house, Marvin overheard Petitioner yell from the back bedroom not to forget to cut off Eldridge's penis. Luna did so.

Los Angeles County Deputy Medical Examiner Susan Selser performed the autopsy. She testified that Eldridge had been stabbed 44 times and his penis was severed postmortem. He sustained 44 stab wounds, 28 of which were independently fatal.

On May 23, 1985, Luna was taken into custody for questioning but released within 72 hours. On July 2, 1985, he was arrested for the first degree murder of Eldridge. In August 1985, Petitioner was also arrested and charged with attempted murder, murder, and special circumstance allegations of murder for financial gain and lying in wait. Marvin Lee, who was in custody for an unrelated offense, was granted immunity for the murder of Eldridge in exchange for his confession and testimony. In August 1986, Dondell Lee was granted immunity while in the custody of the California Youth Authority. In July 1989, Luna entered into a plea agreement under which he pleaded guilty to first degree murder, with a sentence of life without parole, and agreed to testify in Petitioner's prosecution.

The defense theory was that the prosecution had not proven its case. Counsel cross-examined Luna for eight days and also presented the testimony of five of Luna's former coworkers from Los Angeles County-USC Medical Center that Luna was a habitual liar.

Defense witness Dr. John Ryan, a pathologist, testified that based on his review of the autopsy report, Eldridge's stab wounds had been inflicted by two different weapons.

At the penalty trial, the prosecution presented evidence that Petitioner had Luna beat up someone so she could obtain that person's job. Specifically, the prosecution's evidence was that, in April 1983, Dewayne Bell, John Phillips and Phillip LaChance worked

alternating shifts at the LaPorte residence as caretakers for the elderly Lee LaPorte. Bell had worked for the LaPortes for five years at that time. While LaChance was in jail for driving under the influence, Petitioner temporarily assumed his caretaker duties. Petitioner told Luna that she wanted permanent employment with the LaPortes, and offered Luna money to injure Bell so that she could take his job. Luna later attacked Bell at his home, and slashed his face, throat, and chest. After Bell returned to his caretaker duties at the La Portes' home, Luna repeatedly telephoned the LaPortes and threatened Bell when Betty LaPorte answered the telephone, per Petitioner's instructions. As a result of these calls, Bell lost his job with the LaPortes and Petitioner took over Bell's duties.

II. Procedural Background

On August 12, 2002, the California Supreme Court affirmed Petitioner's conviction and sentence. People v. McDermott, 28 Cal. 4th 946 (2002). Shortly thereafter, the United States Supreme Court denied certiorari. McDermott v. California, 538 U.S. 1014 (2002). The California Supreme Court denied Petitioner's state habeas corpus petition on January 14, 2004.

The instant habeas proceeding was commenced on January 26, 2004, when Petitioner filed her request for counsel. On January 14, 2005, Petitioner filed her first Petition and simultaneously filed another state habeas petition. On February 15, 2005, Respondent filed a motion to dismiss the federal petition and, on March 11, 2005, Petitioner filed a motion to stay the federal proceedings pending resolution of state habeas proceedings. In an April 27, 2005 Order, the Court granted a stay of the federal litigation.

On January 25, 2007, the Court lifted the stay because the state exhaustion litigation had been completed. On March 23, 2007, Petitioner filed a First Amended Petition (FAP). Respondent filed an Answer on May 22, 2007, and Petitioner filed a Traverse on June 21, 2007.

On September 24, 2007, the Court granted the parties' agreed-upon discovery and approved a Stipulation re: Protective Order. On October 18, 2007, the Court issued an order resolving the parties' remaining discovery disputes. On June 18, 2008, Petitioner filed a

motion seeking leave to file a Second Amended Petition, which the Court denied on July 14, 2008, on the grounds that the claims Petitioner sought to add did not relate back to the FAP.

On April 27, 2009, Petitioner filed a Motion for Evidentiary Hearing (MEH); on July 24, 2009, Respondent filed her Opposition; and on September 25, 2009, Petitioner filed her Reply. The MEH briefing was based in part on discovery taken during these federal habeas proceedings. Following the Court's issuance of its June 25, 2010 Order granting an evidentiary hearing as to certain claims, the Supreme Court issued opinion in Cullen v. Pinholster, 563 U.S. 170 (2011). The Court then vacated the June 25, 2010 Order and directed the parties to brief any impact that Pinholster might have on Petitioner's entitlement to an evidentiary hearing. The parties' briefing closed on September 22, 2011. In a March 29, 2012 Order, the Court rejected Petitioner's arguments that Pinholster had no impact on her entitlement to an evidentiary hearing and, instead, found that an evidentiary hearing should not be granted unless Petitioner satisfied 28 U.S.C. § 2254(d) based solely on the state court record as to the claims on which it had previously granted an evidentiary hearing. Thereafter, in a January 5, 2015 Order, the Court denied the claims upon which it had previously granted an evidentiary hearing in view of the impact of new Supreme Court authority, and directed the parties to submit briefing addressing the merits of the remaining unadjudicated claims.

On June 4, 2015, Petitioner filed her Opening Brief; on December 15, 2015, Respondent filed her Opposition; and on February 16, 2016, Petitioner filed her Reply. The Court took this briefing under submission without oral argument, and now addresses the briefing on these claims.

DISCUSSION

I. Standards

The amendments to 28 U.S.C. § 2254 effected by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this case, because it was filed after the effective date of that statute. Woodford v. Garceau, 538 U.S. 202, 210 (2003). Under the

AEDPA, a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: "(1) 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 (2) 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." 28 U.S.C. § 2254(d)(1) and (2). Because Petitioner's claims were adjudicated on the merits, she must satisfy either § 2254(d)(1) or § 2254(d)(2) in order to obtain relief in this case.

Clearly established law, for purposes of § 2254(d)(1) review, means the Supreme Court holdings in existence at the time of the state court decision at issue. Greene v. Fisher, 565 U.S. 34, 38 (2011); Cullen v. Pinholster, 563 U.S. 170, 182 (2011); Harrington v. Richter, 562 U.S. 86, 98 (2011). Under § 2254(d)(1)'s first prong, a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the relevant Supreme Court holdings or reaches a different conclusion than that reached by the high court on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640 (2003). Section 2254(d)(1)'s "unreasonable application" second prong constitutes an objective standard that is not satisfied merely by finding that a state court erred in applying clearly established law. Richter, 131 S. Ct. at 102; Lockyer v. Andrade, 538 U.S. 63, 75 (2003). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); see also Xiong v. Felker, 681 F.3d 1067, 1074 (9th Cir. 2012) (holding that simply finding that the state court was incorrect or erroneous is insufficient, because the § 2254(d)(1) "inquiry is strictly limited to whether the state court's application of clearly established Supreme Court precedent" was objectively unreasonable).

Under § 2254(d)(2), in determining whether there has been an "unreasonable determination of the facts" the district court must review whether the "fact-finding process itself is defective." Milke v. Ryan, 711 F.3d 998, 1007 (9th Cir. 2013) (citing Taylor v.

Maddox, 366 F.3d 992, 1000 (9th Cir. 2004)). A district court cannot uphold a determination of the facts by the state court where there is a defect that causes the district court to "more than merely doubt whether the process operated properly." Id. (citing Taylor, 366 F.3d at 1000). In addition, the Ninth Circuit has held that, "'where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" Id. (citing and quoting Taylor, 366 F.3d at 1001).

In applying these standards, the Court looks to the last reasoned state court decision on the claim presented. See DeWeaver v. Runnels, 556 F.3d 995, 997 (9th Cir. 2009). For those claims where there is only a summary denial, "a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Richter, 562 U.S. at 102; Pinholster, 563 U.S. at 188. A federal court has the authority to issue habeas relief only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." Richter, 562 U.S. at 102.

In addition, in assessing a violation of § 2254(d), the Court shall ascertain the reasonableness of the state supreme court's decision based on the record that was before the state court that adjudicated the claim on the merits. See Pinholster, 563 U.S. at 181. The Court makes the § 2254(d) determination prior to eliciting further evidence at an evidentiary hearing, because "evidence introduced in federal court has no bearing on § 2254(d)(1) review." Id. at 185. As the Supreme Court further observed in Pinholster, "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." Id. at 186.

To determine whether the state court violated § 2254(d), the Court must look to the California procedures for handling habeas petitions, which require the state court to issue an order to show cause when a petitioner makes out a prima facie case for relief on a claim.

See Pinholster, 563 U.S. at 188 n. 12 (citing In re Clark, 5 Cal. 4th 750, 770 (1993); People v. Duvall, 9 Cal. 4th 464, 474 (1995)). The California Supreme Court has explained that a petitioner has alleged a prima facie case for relief where the claim is "sufficient on its face," such that, assuming the factual allegations in the petition to be true, the claim "states facts that . . . entitle the petitioner to relief." Duvall, 9 Cal. 4th at 474-75. Nevertheless, "conclusory" allegations do not suffice to state a prima facie case for relief, which includes instances where the petitioner either failed to "provide any explanation of the basis for the allegations" or failed to state "fully and with particularity the facts on which relief is sought." Id. at 474.

Finally, in deciding whether the state court applied correct legal principles in an objectively unreasonable way, the district court must analyze the state court's method, as well as its result. Williams v. Taylor, 529 U.S. 362, 404-06 (2000); Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). In Nunes, the Ninth Circuit determined that the state court's rejection of the petitioner's claim was unreasonable under both § 2254(d)(1) and (2). Id. First, because the petitioner had made a prima facie claim for ineffective assistance, taking the petitioner's allegations at face value (i.e., that his attorney gave him the wrong information and advice about the state's plea offer and, if he had been accurately informed, he would have taken the plea bargain), the state court should have afforded him an evidentiary hearing. Id. at 1054-55. Second, the state court's findings viewed as a factual determination were in error, given that the state court had gone well beyond its task of assessing the allegations for sufficiency and had made improper credibility determinations without providing an evidentiary hearing. Id. at 1055. However, in Nunes, the Ninth Circuit noted that, "there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved." Id. at 1053-54.

To the extent that Respondent contends that some of these claims are procedurally barred, the Court notes that it maintains authority to resolve any claim on the merits before addressing whether it is procedurally barred. Lambrix v. Singletary, 520 U.S. 518, 524-25

(1997) (finding that a court can elect against deciding a procedural bar issue when a claim can be readily resolved on the merits).

II. Claim 5: The Trial Court Improperly Denied Two Challenges for Cause against Biased Jurors

In Claim 5, Petitioner alleges that the trial court improperly denied the defense's challenges for cause against three biased jurors, Harold O., Hilyard B., and Mary F. (FAP at 183-88.)

The California Supreme Court denied this claim on direct review, stating:

> 1. Juror Harold O.
>
> The trial court properly denied the defense challenge for cause to Prospective Juror Harold O. On voir dire, Harold O. expressed strong feelings in favor of the death penalty, but he also said he would not automatically "go one way or the other" and would follow the law as instructed. Although Harold O. at one point said he would automatically vote for death at the penalty phase unless evidence was introduced to convince him otherwise, the record shows that Harold O. mistakenly thought he was being asked for his views on the appropriate penalty if no evidence was introduced at the penalty phase. When the trial court clarified the question, Harold O. assured the court that he would consider the evidence and mitigating factors. The trial court impliedly resolved any conflicts or ambiguities in Harold O.'s responses by finding that his views on the death penalty would not prevent or substantially impair the performance of his duties as a juror. We will not disturb that finding, which is fairly supported by the record.
>
> 2. Mary F.

The trial court properly denied the defense challenge for cause to Prospective Juror Mary F. Although Mary F. said she favored the death penalty, she also said she would keep an open mind and would consider life without possibility of parole at the penalty phase. The trial court impliedly resolved any conflicts or ambiguities in Mary F.'s responses by finding that her views on the death penalty would not prevent or substantially impair the performance of her duties as a juror. We will not disturb that finding, which is fairly supported by the record.

3. Hilyard B.

Prospective Juror Hilyard B. said he felt strongly that the death penalty should be imposed under certain circumstances, but he also said that he could set aside his personal feelings and follow the law as instructed, and that the appropriate sentence to be imposed would depend on the particular situation. Hilyard B. stated that although he would give greater weight to the circumstances of the crime and recent mitigating factors, he would consider other factors in aggravation and mitigation as well. These responses do not show that the trial court erred in denying the defense challenge for cause.

Hilyard B. did not answer questions in the juror questionnaire about how he had voted in elections; he explained that he considered that information personal and confidential. We reject defendant's argument that the trial court was required to excuse Hilyard B. because of his failure to answer these particular questions, or that defendant was denied a right to adequate voir dire. Hilyard B. freely answered questions on voir dire about his death penalty views and his ability to obey the court's instructions regarding penalty determination in a capital case. Thus, the defense had adequate opportunity to voir dire

> Hilyard B. in support of a challenge for cause. (See People v. Holt (1997) 15 Cal.4th 619, 661 [63 Cal.Rptr.2d 782, 937 P.2d 213] [stating that reversal of judgment is required only when voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair"].)

McDermott, 28 Cal. 4th at 982-83.

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." Ross v. Oklahoma, 487 U.S. 81, 85 (1988). Both the defendant and the State have the right to exclude from a capital sentencing jury those people whose views on the death penalty would prevent them from being able to impartially consider the evidence of aggravating and mitigating circumstances in a particular case in accordance with the instructions of the trial judge. Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." Id. at 728. Conversely, "[a] juror who will automatically vote for the death penalty in every case" cannot meet the impartiality requirement and must be excluded for cause. Id. at 729.

Nevertheless, jurors may not be excluded for cause simply because they have views for or against the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 519-21 (1968). A State "infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." Wainwright v. Witt, 469 U.S. 412, 416 (1985). "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The question is whether a juror can, regardless of that juror's views on the death penalty, consider in good faith "the evidence of aggravating and mitigating

circumstances as the instructions require him to do." Morgan, 504 U.S. at 729.

Trial courts have discretion to control voir dire in order to determine whether prospective jurors are qualified to serve in a capital case. Morgan, 504 U.S. at 729. "The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." Id. at 729. The trial court must give both the prosecutor and the defendant an adequate opportunity to identify any unqualified jurors, by questioning (or allowing the parties to question) the prospective jurors on their views of the death penalty. See id. at 731-34.

Here, the California Supreme Court did not unreasonably reject Petitioner's allegations in this claim. First, with respect to Harold O., the record supports the California Supreme Court's conclusion that, although Harold O. supported the death penalty, he consistently confirmed that he would follow the law as instructed by the trial court and would not automatically vote one way or the other. (RT at 1396-00.) During voir dire, Harold O. stated that he would keep an open mind and listen to the evidence presented before deciding which penalty to impose. (RT at 1390-92.) It is true that, initially, Harold O. indicated that he would require the defense to affirmatively present evidence at the penalty phase in order for him to consider voting for LWOP. Nevertheless, as the trial court observed, this juror was construing "no evidence" to mean "no factors in mitigation" at the penalty phase. (RT at 1403.) Thus, after the trial court clarified the question, Harold O. provided responses indicating that he would not require the defense to present evidence at the penalty phase before he would consider voting for LWOP. For instance, Harold O. agreed that, if he were provided a list of aggravating and mitigating factors, he would consider all of the factors in deciding the appropriate sentence. (RT at 1395.) In addition, when asked a hypothetical question as to whether he would demand additional evidence at the penalty phase in order to persuade him to vote for LWOP if evidence of Petitioner's age and background were presented at the guilt phase, he answered "no." (RT at 1415.) Finally, the trial court again asked him, "If I inform the jury during the penalty phase, if there is one, that there are factors in mitigation that the jury may consider in deciding the

appropriate penalty, and there is evidence as to those factors, will you take that into account in deciding what the appropriate penalty is?," to which Harold O. responded, "yes." (RT at 1417.) Therefore, a "reasonable jurist" could agree with the California Supreme Court's conclusion that Harold O.'s responses demonstrated that any views he had about the death penalty would not prevent or impair his performance as a juror in accordance with the trial court's instructions and his juror's oath.

Second, with respect to Juror Hilyard B., the record supports the California Supreme Court's conclusion that, although Juror Hilyard B. felt strongly about the death penalty, he would apply the law as instructed by the trial court and vote for the appropriate sentence based upon the particular situation. (RT at 3163-82.) As the California Supreme Court indicated, Juror Hilyard O. did not answer the questions in his juror questionnaire asking how he voted in the elections for reinstating the death penalty and the retention of Chief Justice Rose Bird because he viewed these responses as "personal and confidential," but he indicated that whether the State should execute a person who unlawfully and intentionally kills another person would "depend[] on the circumstances." (FAP, Ex. 42 at 496-97.) In addition, during voir dire, the trial court asked Juror Hilyard B.: "Are your feelings about the death penalty such that you would always vote for the death penalty?," to which Juror Hilyard B. responded, "[o]h, absolutely not." (RT at 3166.) In addition, he added that his decision would "[d]epend[] on the judge's instructions and the other information that would be submitted." (RT at 3166.) Thus, a "reasonable jurist" could find that the trial court appropriately rejected the challenge for cause, because Juror Hilyard B.'s responses during voir dire to the questions by the trial court and parties indicated that he would be able to obey the court's instructions regarding penalty determination.

Third, with respect to Juror Mary F., the record supports the California Supreme Court's conclusion that her responses indicated that she would keep an open mind and

follow the law in deciding the appropriate penalty.[1] (RT at 1903-04.) Although she stated that she was "in favor of the death penalty," she stated that would not vote for the death penalty automatically. (RT at 1903-04.) In response to defense counsel's questions, Juror Mary F. indicated that she would want to know about the circumstances of the crime, the relationship between the defendant and the victim, and the defendant's personal history and background in deciding the appropriate penalty. (RT at 1914-15.) In addition, she stated that she could see herself voting for either the death penalty or LWOP and, on a scale of one to ten as to how frequently the death penalty should be imposed (i.e., "never" or "always"), she placed herself "right in the middle." (RT at 1915-16.) Furthermore, she stated that, although she herself would prefer the death penalty than spending the rest of her life in prison, the "worst" punishment for a defendant was death, not LWOP. (RT at 1916-17.) In her juror questionnaire, Juror Mary F. stated that she believed in "an eye for an eye" when it came to the death penalty. (FAP, Ex. 161.) However, she also stated in her juror questionnaire that she would set aside her personal views on the death penalty and follow the law as instructed by the trial court. (Id. at 294.) Thus, a "reasonable jurist" could agree with the California Supreme Court's conclusion that Mary F.'s views about the death penalty would not prevent or impair her performance as a juror.

Accordingly, because Petitioner cannot show that the California Supreme Court unreasonably applied the law or determined the facts in denying these allegations under § 2254(d), no habeas relief is warranted as to this claim.

II. Claim 6: The Trial Court Erroneously Granted the Prosecution's Witt Motion Against Two Qualified Jurors

In Claim 6, Petitioner alleges that the trial court violated her constitutional rights by

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[1] Respondent contends that Petitioner failed to preserve this claim for review in these federal habeas proceedings, because Petitioner did not allege it in her state habeas petition. (Opp. at 10.) Regardless, the Court need not resolve this argument because, for the reasons explained below, the claim is not meritorious. See, e.g., Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (holding that a federal court may deny an unexhausted claim when it clearly lacks merit)

erroneously granting the prosecution's Witt motions[2] against two qualified prospective jurors, Scott M. and Beverly S. (FAP at 188-92.)

The California Supreme Court denied this claim on direct review, stating:

> The trial court did not err in granting the prosecution's challenges for cause to Prospective Jurors Scott M. and Beverly S. As defendant recognizes, they made statements in their juror questionnaires that would disqualify them from serving as jurors in this case. Although their later statements during voir dire may not have been disqualifying, the resolution of these conflicts and contradictions was the task of the trial court. By granting the prosecution's challenges for cause, the trial court impliedly found that these prospective jurors' views would prevent or substantially impair the performance of their duties as jurors, and we will not disturb those findings, which are fairly supported by the record.

McDermott, 28 Cal. 4th at 984.

The same standards stated above in connection with Claim 5 apply to the trial court's excusal for cause of Jurors Scott M. and Beverly S. Again, a trial court may excuse a prospective juror for cause because of his or her views on capital punishment where the juror's views would "prevent or substantially impair the performance" of that person's duties as a juror according to the trial court's instructions and the juror oath." Witt, 469 U.S. at 424 (quotation marks and citation omitted). In addition, trial courts maintain discretion in determining whether prospective jurors are qualified to serve in a capital case. Morgan, 504 U.S. at 729. See also Uttecht v. Brown, 551 U.S. 1, 7-8 (2007) ("Even when '[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty,' the need to defer to the trial court remains because so much may turn on a potential juror's demeanor.")

Here, the California Supreme Court did not unreasonably reject Petitioner's allegations in this claim. First, with respect to Juror Scott M., the answers he provided in his juror questionnaire indicated that he was biased against the death penalty. For instance,

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[2] This refers to a motion made pursuant to Wainright v. Witt, 469 U.S. 412 (1985).

in response to Question 79.D, asking whether he believed the State should automatically have the right to execute anyone in certain circumstances, Juror Scott M wrote: "I don't believe the State should have the right at all." (Ex. 178 at p. 18.) In addition, in response to a question asking what his general feelings were about the death penalty, Juror Scott M. wrote: "I don't believe that we have the right to take someone's life, but the possibility of a 'life sentence,' without parole should be considered for the most gruesome crimes, or serial killers, or people who assassinate political figures." (Ex. 178 at p. 16.)

During voir dire, Scott M. contradicted his juror questionnaire statements, stating that the State had the right to take someone's life but "maybe" in only the "worst cases," such as gruesome crimes or those involving serial killers or political assassinations. (RT at 2384-95, 2412.) However, in other cases, he stated that the defendant "should just be maybe locked up or rehabilitated." (RT at 2395.) In addition, he stated that his religion taught him "that we don't really have the right to take someone else's . . . life " (RT at 2401.) Furthermore, although he stated that he could set aside his personal views and maybe vote for the death penalty, in a case with a single victim (like this case), he stated that he "would have a hard time voting, casting the final vote for the death penalty because that is something very absolute." (RT at 2415.) The trial court, in rejecting the defense's argument that Juror Scott M. had "rehabilitated" himself during voir dire, stated:

> First of all, I don't have to just take the answers of any prospective juror and accept it. Otherwise, we could have a machine here that just registers whether the answer meets a certain criteria.
>
> I am here to assess the credibility. I have some doubt whether [Scott M.] is being truthful. I suspect he has a hidden agenda based on his demeanor, the way he responded to questions and the complete turnabout.
>
> And it is not just one response on his part in his questionnaire. It is replete with views that he is certainly entitled to, but just don't allow him to qualify to serve on a death penalty jury.

(RT at 2424.) Thus, in view of the totality of Juror Scott M.'s responses during voir dire as well as his juror questionnaire responses, a "reasonable jurist" could find that the trial court appropriately excused him for cause.

Second, with respect to Juror Beverly S., the answers he provided in his juror questionnaire indicated that he was biased against the death penalty. For instance, Juror Beverly S. agreed with the trial court that he was against the death penalty had had very strong feelings against it. (RT at 2813.) In addition, he stated that he was "not really sure" whether he would always vote for the death penalty and agreed would not like to vote for it. (RT at 2813-14.) At one point he answered "I think so" in response to whether he could keep an open mind about imposing the death penalty, but then answered that "I am not sure one way or the other to be perfectly frank" in response to whether he could ever impose the death penalty. (RT at 2314.)

Furthermore, Juror Beverly S. explained that, although he "honestly believe[d] [he] could make the decision" to impose the death penalty, he "really didn't know" whether he could make that decision and it would "give him difficulty" to do so. (RT at 2827.) In response to the prosecutor's questions as to whether he could impose the death penalty on a person who did not actually kill the victim, he stated that he would "give her time rather than death." (RT at 2833.) When questioned as to how in favor of imposing the death penalty he was on a scale of 1 to 10, he stated that he saw himself as "either a 3 or 4." (RT at 2833.) However, he stated that he thought the State should not have a death penalty, and explained that life in prison was "pretty rough in itself" and he "just [didn't] believe in [killing anyone]." (RT at 2837.) Finally, in deciding that Juror Beverly S. should be excused for cause, the trial court explained that this juror had been "very candid" in explaining the strength of his views against the death penalty and, "based on those views I just don't think he could be fair to both sides." (RT at 2842.) Thus, given the record, a "reasonable jurist" could agree with the conclusions by California Supreme Court and trial court that Juror Beverly S.'s views about the death penalty would prevent or impair his performance as a juror.

Accordingly, no habeas relief is warranted as to Claim 6, as Petitioner cannot show that the California Supreme Court unreasonably applied the law or determined the facts in denying these allegations under § 2254(d).

C. Claim 9: Juror Fred L., the Prosecutor, and Defense Counsel Impermissibly Commented on Petitioner's Failure to Testify

In Claim 9, Petitioner alleges that Juror Fred L., the prosecutor, and defense counsel impermissibly commented on Petitioner's failure to testify in violation of Griffin v. California, 380 U.S. 609, 615 (1965). (FAP at 207-11.)

Petitioner points to statements made by Juror Fred L. that he had read an article about the trial court that "would cause me to want [Petitioner] to testify on her own behalf even though she constitutionally doesn't have to, and that would lead me to be prejudiced against her." (FAP at 207; RT at 3796.) Then, the trial court called Juror Fred L. and counsel to a sidebar conference to question him further about the article. (RT at 3799-3802.) After trial court excused Juror Fred L. from jury service, the trial court addressed the remaining jurors, stating:

> As you can see or perhaps sense, I have excused [Juror Fred L.]. He felt that because of things that, items, conclusions he drew from what he read that he could not be fair. Is there anyone else on this jury that would share what I have portrayed [Juror Fred L.'s] feelings about media coverage or to be more specific have any of you read anything very recently or sometime ago that would cause you to believe that you couldn't be fair to both sides?

(RT at 3811-12.) After hearing nothing in response, the trial court stated, "Okay. I take it there is no response" and concluded that "the record will show there is no response." (RT at 3812.)

In addition, Petitioner points to the following statements made by the prosecutor during closing rebuttal argument:

> . . . I would ask you to ask yourself what was the defense in this case? In fact, I would like to ask you if you would silently to yourself try to complete the following sentence: Maureen McDermott did not hire Jimmy Luna because . [. . .]
>
> I wonder if you are like me. It is a blank, because they never really answered that question.
>
> I kept waiting all day yesterday when [defense counsel] was talking thinking that he might tell us what the defense was in this case, and the only thing close that I heard was him say if you throw out the attempted murder, it all disappears like a house of cars.

> Well, why in the world are we going to throw out the attempted murder[?]
>
> He didn't give us any reason to throw out the attempted murder.
>
> But that's really as close as he ever came to letting us know in his mind what the defense was.

(FAP at 209 (citing RT at 11370.).)

On direct review, the California Supreme Court rejected this claim, stating:

> We also reject defendant's argument that the statements by Juror Fred L. and those the trial court made in the presence of the full jury constituted improper comments on defendant's failure to testify. Fred L. stated that based on the article he read, he would want defendant to testify "even though [defendant] constitutionally doesn't have to," and that would lead him "to be prejudiced against her." Defendant did not preserve the issue for appeal because she did not make a timely objection in the trial court. (See People v. Hines (1997) 15 Cal. 4th 997, 1035 [64 Cal. Rptr. 2d 594, 938 P. 2d 388].) In any event, the specific contents of the article were not discussed in front of the other jurors but only in a sidebar conference with counsel, Juror Fred L.'s comment expressly recognized defendant's constitutional right not to testify, and the trial court instructed the jury not to draw any inferences from a defendant's failure to testify. Accordingly, the statements in question were not constitutionally improper comments on defendant's failure to testify.

McDermott, 28 Cal. 4th at 984.

It is well-settled that, under the Fifth Amendment, criminal defendants have the right not to be compelled to testify. See, e.g., Griffin, 380 U.S. at 615. A trial judge must, if requested by the defendant, instruct or admonish the jury not to draw an adverse inference from the defendant's failure to take the stand. See, e.g., James v. Kentucky, 466 U.S. 341, 350 (1984); Carter v. Kentucky, 450 U.S. 288, 300 (1981).

At trial, the trial court specifically instructed the jury regarding Petitioner's constitutional right not to testify, pursuant to California Jury Instruction, Criminal ("CALJIC"), No. 2.60, as follows:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(CT at 1352.)

In addition to this express instruction, the trial court provided several other instructions further explaining the extent of Petitioner's constitutional right not to testify. (See, e.g., CT at 1353 ("In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charges against her. No lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against her on any such essential element."); CT at 1,390 ("The nontestimonial conduct of the defendant is not relevant evidence which may be considered in determining guilt or innocence. You are to disregard the defendant's conduct in the courtroom as it has no tendency in logic or reason to prove or disprove a material issue at trial.")).

The trial court also instructed the jury with a special instruction provided by the defense, which stated:

> The defendant, Maureen McDermott, acting on the advice of counsel, elected not to testify in any phase of this trial.
>
> It is the constitutional right of a defendant not to testify in either phase of this trial.
>
> You are instructed not to consider the fact that the defendant elected not to testify in the penalty phase or the guilt phase. That is a matter which you must not in any way affect your verdict as to penalty.

(CT at 1480.)

First, with respect to Juror Fred L., Petitioner's allegations fail to rise to the level of a constitutional violation. As the Court noted in its June 25, 2010 Order, in rejecting the juror misconduct allegations in Claim 8, "the trial court's questions to the remaining jurors sufficiently provided the jurors an opportunity to indicate any bias, confusion, or concerned based on anything said by Juror [Fred L.]." (June 25, 2010 Order at 80.) In addition, as the Court further noted in this order, the trial court's instructions to the jury, including CALJIC No. 2.60, "minimized any negative impact associated with Juror [Fred L.'s] comment." (Id.) Thus, even if Griffin errors extended to jurors as Petitioner contends, the California

Supreme Court's rejection of these allegations was not unreasonable in view of the trial court's instructions to the jury regarding Petitioner's right not to testify.

Second, Petitioner's allegations based on the prosecutor's comments similarly are unavailing and fail to demonstrate a Griffin error. The Court previously addressed the propriety of these comments in the June 25, 2010 Order, stating:

> . . . [These comments by the prosecutor] are largely innocuous and within the range of permissible argument attacking Petitioner's defense, and they do not address or comment on Petitioner's failure to testify. Darden v. Wainwright, 477 U.S. 168, 181 (1986)(quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))(holding that habeas relief based on improper comments made by the prosecution is warranted when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"); Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996)("courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."); Molina, 934 F.2d at 1445 ("freedom to argue reasonable inferences based on the evidence" is inherent in the prosecution's latitude to fashion closing arguments).

(Order at 81 n.29.) Thus, the California Supreme Court's rejection of these allegations was neither contrary to clearly established federal law nor an unreasonable determination of facts.

Third, with respect to the "bizarre analogy about coaching the San Francisco 49ers in the Super Bowl" by defense counsel, Petitioner's allegations once again do not set forth a constitutional violation.[3] As noted in the Court's June 25, 2010 Order, the Court rejected

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[3] These comments were made during counsel's closing argument, as follows:

> [It] was kind of like Dan Reeves in the Super Bowl the end of the fourth quarter. Some of you that are people that are familiar with football this year there was a Super Bowl between the 49er's and the Denver Broncos, and the decision of what to do is like a football player, football coach and an attorney. That is the state of the case right now.
>
> . . .
>
> If you are the coach of the 49er's and on the first running play of the game Joe Montana gets injured and he is out of the game, then about the first end of the first quarter Roger Craig, your main running back is out of the game, you get down to the fourth quarter and the game is tied, and your defensive back Ronny Lott in trying to stop a pass is called for interference, which puts the ball at the one yard line of the opponent's team. He argues

Petitioner's ineffective assistance allegations based on the same comments by defense counsel contained in Claim 3.D.12 and found that counsel was merely explaining that Petitioner's decision not to testify was a tactical one based on the "state of the evidence." (June 25, 2010 Order at 62-63.) Thus, although counsel's football analogy may have been somewhat confusing to the jurors and perhaps not the most useful tactic in persuading them of Petitioner's innocence, the comments did not constitute an improper comment on the defendant's failure to testify or a concession of guilt. Thus, the California Supreme Court reasonably rejected Petitioner's allegations here.

Accordingly, because Petitioner cannot demonstrate an unreasonable application of the law or determination of facts under 28 U.S.C. § 2254(d), no habeas relief is warranted as to Claim 9.

D. Claim 10: The Trial Court Improperly Admitted Prior Bad Act Evidence through the Testimony of Philip La Chance

In Claim 10, Petitioner alleges that the admission of evidence through the testimony of Philip La Chance, which pertained to prior bad acts that occurred in the Fall of 1994 and related to her illegal efforts to obtain money, violated her due process rights. (FAP at 211-17.) Specifically, Petitioner points to two pieces of evidence: (1) Petitioner stole Mrs. La Porte's diamond ring from her residence with the intent to sell it; and (2) Petitioner urged La Chance, who handled some financial matters for the La Portes, to steal money from their

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> the call and he is thrown out of the game.
>
> . . .
>
> In this case the decision about her to testify or not testify was based upon the state of the evidence at the time. And you folks saw what transpired in this courtroom for several months, and based upon what I am sure that you saw the decision for her not to testify was a meaningful, intelligent decision.

(RT at 11,353-56.)

checking account. (Id. (citing RT at 8229-33.))

At trial, the prosecution elicited testimony that Petitioner worked as a registered nurse at a hospital during the day and provided home health care in the evening to a private patient, Lee La Porte. Petitioner had told her coworker, Philip La Chance, who assisted Mr. La Porte's wife, Betty, that she needed "a lot of money." (RT at 8220.) She asked to borrow money from La Chance, who said "no" because he did not have "the kind of money she needed to borrow." (RT at 8257.) In order to obtain money, Petitioner suggested to La Chance a scheme to pawn Betty La Porte's diamond ring. (RT at 8224.) According to the scheme, Petitioner took the ring from the La Porte's home and, together with La Chance, had it appraised in downtown Los Angeles. (RT at 8225-26.) Because its value was assessed only at $250, Petitioner returned the ring to Betty's dresser. (RT at 8226.)

In addition, La Chance testified that Petitioner, who knew that La Chance had assisted Betty with some banking matters, suggested that La Chance obtain a power of attorney over the La Portes' finances while Betty was in the hospital and "clear out the checking account." (RT at 8229-33.) La Chance refused, and told her that he "just couldn't do that, not to Lee."

The California Supreme Court denied these allegations on direct review, stating:

> [E]vidence of a defendant's poverty or indebtedness is inadmissible to establish a motive to commit robbery or theft, "because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice." (People v. Wilson (1992) 3 Cal.4th 926, 939 [13 Cal. Rptr. 2d 259, 838 P.2d 1212].) Evidence that a defendant committed other crimes may be admitted when relevant to establish a motive for the commission of the charged offense or a common plan or design (Evid. Code, § 1101, subd. (b); People v. Ewoldt (1994) 7 Cal. 4th 380, 393-394 [27 Cal. Rptr. 2d 646, 867 P.2d 757]), but only if the offenses share common features (People v. Ewoldt, supra, at pp. 402-403). We do not need to decide here, however, whether the trial court erred in admitting the evidence because its admission did not prejudice defendant. The testimony was relatively brief and the trial court limited its prejudicial impact by instructing the jury that the evidence was not admissible to prove bad character or predisposition to commit crimes. (See People v. Lewis (2001) 25 Cal. 4th 610, 637 [106 Cal. Rptr. 2d 629, 22 P.3d 392].)

McDermott, 28 Cal. 4th at 998-99.

Generally, state evidentiary rulings are not cognizable in a federal habeas proceeding

unless the admission of the evidence violated the petitioner's due process right. See Estelle v. McGuire, 502 U.S. 62, 70 (1991); Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). "It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." Spivey v. Rocha, 194 F.3d 971, 977-78 (9th Cir. 1999); Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993).

In addition, the Ninth Circuit has directly rejected the argument at issue here: whether propensity evidence introduced against a defendant violates her due process rights. Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006). In Alberni, as the Ninth Circuit explained:

> In Garceau v. Woodford, 275 F.3d 769 (9th Cir. 2001), rev'd on other grounds, 538 U.S. 202, 123 S. Ct. 1398, 155 L. 3d. 2d 363 (2003), we acknowledged that the "Supreme Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith." Id. at 774. In fact, the Supreme Court reserved determination of this question in Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Id. at 863. There, the petitioner relied upon Ninth Circuit cases decided prior to AEDPA to support his argument. Id. However, as the Ninth Circuit rejected the petitioner's argument, explaining that the petitioner could not rely on circuit authority to vindicate his rights when the Supreme Court has expressly reserved consideration on this issue. Id. at 864. Thus, it affirmed the district court's denial of the petitioner's claim. Id. at 867.

Here, Petitioner essentially seeks review of the state court's application of its evidentiary rules, which does not warrant federal habeas relief, as explained by the Supreme Court in McGuire. Similarly, Petitioner's argument that the evidence was unduly prejudicial is unavailing because, as the California Supreme Court explained, such evidence was minimal and the trial court gave a curative instruction that such evidence was not admissible for proving a predisposition to commit crimes. McDermott, 28 Cal. 4th at 299. Moreover, even if the admission of this evidence were error, its admission did not rise to the level of a

constitutional due process violation because it directly related to Petitioner's motive and intent -- i.e., she was struggling financially and arranged to have Eldridge murdered to obtain insurance proceeds. Finally, even if this evidence was improper propensity evidence and its admission had been the clearly erroneous, Petitioner's claim necessarily fails for the same reasons explained in Alberni -- there is no Supreme Court authority supporting the proposition that such error would violate her due process rights.

Accordingly, no habeas relief is warranted as to Claim 10, as Petitioner cannot show that the California Supreme Court unreasonably applied the law or determined the facts in denying these allegations under § 2254(d).

E. Claim 11: The Trial Court Improperly Admitted Hearsay Evidence through the Testimony of Officer Yates

In Claim 11, Petitioner alleges that the admission of Eldridge's hearsay statements to Officer Yates after the first attack violated her right to confrontation under the Sixth Amendment. (FAP at 217-20.)

At the preliminary hearing, Officer Yates testified that he arrived at the home of Petitioner and Eldridge around 10:20 p.m., about five minutes after receiving the dispatch call. (CT at 8-9.) Eldridge stood in the living room covered in fresh flood, wearing only a pair of white shorts. (CT at 9, 12.) When the prosecutor questioned Yates as to what Eldridge said after that, defense counsel objected on hearsay grounds. (CT at 12-13.) The prosecutor responded that Eldridge's statements to Yates were spontaneous declarations, exceptions to the hearsay rule under California Evidence Code § 1240. (CT at 12-15.) The trial court then overruled the objection. (CT at 15.)

According to Yates, Eldridge stated that, when he was getting ready for bed, someone knocked on the door. (RT at 15.) When he opened the door, a male Hispanic with a knife and male Black forced their way into the house. (RT at 15-16.) The black male was around six feet tall and weighed 170 pounds. (CT at 16.) The Hispanic male was around five feet 11 inches tall and weighed 165 to 170 pounds. (CT at 16.) He believed both men were 26 to 27 years old. (CT at 16.) Eldridge further stated that he did not know either man, and was

"very upset." (CT at 19-20.) Shortly thereafter, paramedics arrived. (CT at 24-25.) Yates clarified on cross-examination that the "full story of what happened was obtained at the hospital." (CT at 24.) At the residence, Eldridge told Yates briefly what had happened, that: "[T]wo people barged in the door. One had a knife. He was cut, hit on the head, ordered to the bedroom." (CT at 26.) One man was Hispanic and the other one was Black. (CT at 31.) Yates observed that Eldridge was "very upset" and "scared." (CT at 27.)

Thereafter, Yates was excused and defense counsel renewed their objections. (CT at 39-40.) The trial court ruled that Eldridge's initial statement to Yates was admissible as a spontaneous declaration, but excluded the second statement at the hospital due to its "doubt with respect to the spontaneity" of the statement given the passage of time. (CT at 53.) To the extent that it was ambiguous as to what statements were made at the scene and the hospital, the trial court found that it would only consider the first statement that a male Black and male Hispanic entered the residence and struck the balance of Yates's testimony. (CT at 54.)

At trial, the prosecution again sought to introduce Eldridge's statements to Yates and have them admitted into evidence as spontaneous declarations. (RT at 4217-18, 4241-46.) At a hearing outside the presence of the jury, the trial court conducted a hearing to determine the admissibility of Eldridge's statements to Yates. Yates testified that approximately three to five minutes passed between the time that he received the radio broadcast and when he arrived at the residence. (RT at 4399-4400.) When Yates arrived, he saw that Eldridge was covered from head to toe in fresh blood, was very upset, and told Yates that two men had forced their way into the house. (RT at 4380, 4382, 4385.) He described one of his attackers as an Hispanic man, five feet 10 or 11, weighing 165 to 170 pounds, who cut Eldridge with a knife. (RT at 4381.) The other man was Black, six feet tall, and weighed 170 to 180 pounds. (RT at 4381-82.) The men forced Eldridge into the bedroom but he broke away and fled to the backyard. (RT at 4380-84.)

Paramedics arrived to treat Eldridge and transport him to the hospital, and Yates continued to speak with Eldridge while the paramedics assisted him. (RT at 4380-85.)

Eldridge told Yates that he did not know the men who attacked him. (RT at 4384-85.) Eldridge spoke rapidly and not all of his statements were responsive to Yates's questions. (RT at 4382.) Yates was trying to obtain a description of the suspects, who had just fled the scene, in order to broadcast it to other police units. (RT at 4381, 4396.) Yates spoke to Eldridge at the house for approximately five minutes before the paramedics transported him to the hospital. (RT at 4385.)

About ten or fifteen minutes later, Yates arrived at the hospital and spoke to Eldridge in the emergency room. At this time, nurses were cleaning Eldridge's wounds and a doctor was examining him. When Yates questioned Eldridge about how the assault began, Eldridge stated that he heard a knock at the front door and saw two men outside. The men told Eldridge that someone was "fooling" with his truck and, when Eldridge unlocked the door, the two men barged in. (RT at 4388.) Eldridge was "somewhat excited" as he spoke to the officer, but was able to answer the questions. (RT at 4389.)

Yates had another conversation with Eldridge about ten to fifteen minutes later after Eldridge returned after being x-rayed. (RT at 4389-90, 4397-98.) At this point, approximately 30 to 45 minutes had passed after Yates had first seen Eldridge at his residence. (RT at 4392-93, 4397.) Eldridge was in a neck brace and a portion of his hair had been shaved. There were cuts on Eldridge's back and a cut on the back of his head. (RT at 4393.) Yates began to fill out a police report. (RT at 4393.) Eldridge was still upset and continued to speak rapidly, but was slightly calmer than when he was at the residence. He appeared nervous, almost cried at one point in this conversation, and said that his head hurt. (RT at 4399.)

Eldridge described that, when the men entered the house, he was wearing only his underwear because he was getting ready for bed. (RT at 4390.) One of the men ordered him to remove his underwear, and the men then ordered Eldridge to crawl on the floor to the bedroom. (RT at 4390.) As he crawled, the Hispanic suspect cut him on the back with a knife. (RT at 4391.) The Hispanic male then made Eldridge lay face down on the bed. When Eldridge asked what they wanted, he was told to "shut up." (RT at 4391.) Eldridge picked

up his wallet from the bedside stand and tried to give it to one of the men. (RT at 4391.) The Black man, who was carrying a club, told the Hispanic man, "[w]e should fuck him in the ass with this." (RT at 4392.) As Eldridge told Yates, "I knew they were going to kill me," so Eldridge jumped off the bed, pushed past the men, and ran out the kitchen door into the backyard. (RT at 4392.) The men followed Eldridge to the door, but were frightened by the dogs in the backyard and fled through the front door. (RT at 4392.) Eldridge stated that he had never seen the men before, and estimated that they entered the residence around 10:20 p.m. (RT at 4400-01.) At that point, Yates finished his interview with Eldridge and returned to the police station. (RT at 4398.)

As the trial court explained, it needed to determine whether Eldridge's statements were "spontaneous" under California Evidence Code § 1240. (RT at 4440.) Furthermore, the trial court noted that it had read the California Supreme Court decisions in People v. Poggi, 45 Cal. 3d 306 (1988), and People v. Farmer, 47 Cal. 3d 888 (1980), overruled on other grounds, People v. Waidla, 22 Cal. 4th 690, 724 n.6 (2000), which addressed the spontaneous statement exception to the hearsay rule. (RT at 4439-41.)) The trial court correctly explained that, under Poggi, a statement is admissible as a spontaneous declaration if: (1) there is an occurrence sufficiently startling to render the declaration spontaneous and without deliberation; (2) the declaration must have been made before there has been an opportunity to misrepresent or contrive; and (3) the declaration must relate to the circumstance of the occurrence preceding it. (RT at 4440); see also Poggi, 45 Cal. 3d at 318 (citations omitted).

In deciding the admissibility of Yates's testimony about Eldridge's statements, the trial court separately considered the three instances in which Eldridge made statements to Yates -- once at the Killion Street address and twice at the hospital. (RT at 4439.) In admitting each of the three sets of statements, the trial court found that the statements were all made in a reliable matter, and "appear[ed] to be truly spontaneous." (RT at 4441.) In addition, the trial court observed that, "[c]onsidering what occurred, the extent of the injuries, I'm satisfied that the statements were not reflective and are qualified as spontaneous statements. So I am going to admit the statements." (RT at 4442.)

Petitioner raised this claim her second state habeas petition, which the California Supreme Court summarily rejected on the merits.

The Supreme Court has previously held that, in order to not run afoul of the Confrontation Clause, an unavailable witness's out-of-court statement may be admitted into evidence if the statement falls within a "firmly rooted hearsay exception" or otherwise bears "particularized guarantees of trustworthiness" such that adversarial testimony would not to the statement's reliability. Ohio v. Roberts, 448 U.S. 56, 65-66 (1981). At the time of Petitioner's conviction, Roberts was the governing standard, such that Supreme Court authority decided subsequent to Roberts does not apply retroactively to this claim.[4] In addition, the Supreme Court has found that "spontaneous declarations" are constitutionally admissible if they are "given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation," and "the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." Idaho v. Wright, 497 US. 805, 820 (1990). The Supreme Court has further described "spontaneous declarations" as statements that are "offered in a moment of excitement -- without the opportunity to reflect on the consequences of one's exclamation." White v. Illinois, 502 U.S. 346 (1992).

Here, as the trial court explained, the statements by Eldridge to Yates were spoken all within 45 minutes after Eldridge was attacked with a knife by two strangers who Eldridge reasonably believed were trying to kill him. (RT at 4389-91.) Even when Eldridge gave the second set of statements at the hospital, he was still upset and almost in tears. (RT at 4389-

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[4] To the extent that Roberts was abrogated by Crawford v. Washington, 541 U.S. 36 (2004), Crawford does not control here as it was not the clearly established law at the time her conviction became final. Whorton v. Bockting, 549 U.S. 406, 421 (2007) (holding that Crawford does not apply retroactively on collateral review); See also Meras v. Sisto, 676 F.3d 1184, 1188-89 (9th Cir. 2012) (holding that the state court's decision that forensic lab report was properly admitted as a business record exception to hearsay rule was not an unreasonable application of clearly established law based on pre-Crawford authority at the time of the state court's decision). Although Petitioner sets forth an argument based on Crawford, she concedes that it was decided after her case and there is authority indicating that it should not be applied retroactively. (Pet.'s Br. at 52.)

90, 4395, 4397-98.) At the point, Eldridge's head wound had not yet been stitched and he was complaining that his head hurt. (RT at 4393-95, 4397-99.) As such, the trial court's conclusion that Eldridge's statements to Yates qualified as excited utterances under California law was more than appropriate. Thus, to the extent that Petitioner contends that the trial court's admission of this evidence was an "erroneous application of the 'spontaneous declaration' exception" (Pet.'s Br. at 46), her argument fails. See McGuire, 502 U.S. at 70 (holding that state evidentiary rulings are not cognizable in a federal habeas proceeding unless the admission of the evidence violated the petitioner's due process right); see also Johnson, 63 F.3d at 931 (holding that the claims pertaining to the admissibility and foundation of certain evidence were state law questions which did not raise a federal habeas issue).

Furthermore, the fact that the judge at the preliminary hearing excluded the statements made by Yates at the hospital does not render the ruling by the trial court error. Indeed, unlike the judge at the preliminary hearing, the trial court explained how it had researched the issue and cited the California precedent upon which it was relying finding that Eldridge's statements to Yates were spontaneous declarations. (RT at 4439-41.) In addition, there was very little testimony at the preliminary hearing elicited from Yates describing either Eldridge's physical condition, appearance, or state of mind. (See RT at 15-54.) If anything, the different rulings are nothing more than the disagreement between "fair-minded jurists" that this Court cannot disturb on habeas review. Richter, 562 U.S. at 102.

Moreover, under Roberts, Petitioner's Confrontation Clause challenge fails, as Eldridge's statements fell within a firmly-rooted exception to the hearsay rule, which was exempted from Confrontation Clause violations under the clearly established law at the time

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of Petitioner's conviction.[5] The California Supreme Court's denial of these allegations was therefore not contrary to clearly established federal law at the time of Petitioner's trial nor an unreasonable determination of facts. Accordingly, because Petitioner cannot show that the California Supreme Court unreasonably rejected it, habeas relief is not warranted on Claim 11.

E. Claim 12: The Prosecutor Committed Misconduct during Closing Arguments

In Claim 12, Petitioner contends that the prosecutor committed misconduct during the penalty phase closing argument by: (1) the use of epithets to dehumanize Petitioner; (2) quotes from the Bible to establish divine authority to impose the death penalty; (3) an argument that Petitioner was more deserving of the death penalty because she was a woman; (4) bad faith arguments that Petitioner would be dangerous in prison; (5) attacks on defense counsel; and (6) a plea to impose the death penalty based on gut instinct. (FAP at 220-30.) On direct review, the California Supreme Court found that Petitioner failed to object to the last five of these alleged instances of misconduct and was precluded from raising those claims. McDermott, 28 Cal. 4th at 1001. In state habeas proceedings, the California Supreme Court summarily denied all allegations in this claim on the merits.

The allegations here, which are based on prosecutorial misconduct, warrant habeas relief only when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v DeChristoforo, 416 U.S. 637, 643 (1974)). "To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in the

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[5] Furthermore, Petitioner's assertion that Respondent "conceded" in state habeas proceedings that the trial court erred in admitting the statements made by Eldridge to Yates at the hospital is inaccurate. (See Opening Br. at 50.) As Respondent explains, at the time the Informal Response was filed, the Supreme Court had not yet determined whether Crawford could be retroactively applied. (Opp. at 42 n.17.) Consequently, the Informal Response assumed arguendo that, even if Crawford applied to Petitioner's case, the information related by Eldridge at that time was not prejudicial because it was mostly duplicative of his earlier statements. (Id.)

denial of the defendant's right to a fair trial.'" Greer v. Miller, 483 U.S. 756, 765 (1987)(citation omitted).

Nevertheless, the prosecutor is entitled to argue reasonable inferences from the evidence. See Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) ("Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."); United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) ("freedom to argue reasonable inferences based on the evidence" is inherent in the prosecution's latitude to fashion closing arguments).

When analyzing the misconduct, it is important that the court view the challenged remarks "in the context of the entire trial." Donnelly, 416 U.S. at 639; United States v. Young, 470 U.S. 1, 12 (1985) (citing and applying standard); Miller, 483 U.S. at 65-66 (same). "If prosecutorial misconduct is established, and it was constitutional error," the reviewing court then applies the Brecht harmless error test to determine whether federal habeas relief is merited. Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir.), as amended by 315 F.3d 1062 (9th Cir. 2002).

1. The Prosecutor's Use of "Epithets"

In support of her allegations in Claim 12(B), Petitioner points to certain comments made by the prosecutor during her closing argument at the penalty phase that Petitioner argues constituted misconduct. (FAP at 222-23.) First, at the beginning of the penalty phase closing argument, the prosecutor made the following statements about being less than "human":

> The time has now arrived for us [to] look exactly at what one human being did to another.
>
> And I use the term human being in a literal sense because I'm not so sure that Maureen McDermott really should be categorized as a human being.
>
> Because human beings have a heart and human soul. And nobody with a heart and nobody with a soul could have done what Maureen McDermott has done in this case.

(FAP at 222 (citing RT at 12256).) The defense objected and, at a side bar, argued that it was improper for the prosecutor to suggest that Petitioner was something less than human. (Id. (citing RT at 12256-57).) The trial court overruled the objection, stating that "I think it is proper for a prosecutor to argue what someone did was inhumane or inhuman." (RT at 12257.) The trial court noted that, "if I heard the term animal I wouldn't have had to have you object, okay?" (RT at 12257.) In addition, the trial court noted that it would overrule the defense objections, so long as the prosecutor's arguments were not "inflammatory" and did not use the word animal or refer to Petitioner as an animal. (RT at 12257-58.)

Petitioner also argues that the following portions of the prosecutor's similar arguments constituted misconduct:

> As I was saying, human beings have a heart. Human beings have a soul. And nobody with a heart or soul could possibly have done what Maureen McDermott did in this case.
>
> She may be a mutation of a human being, but she is not a human being in the manner that we know human beings.

(FAP at 222 (citing RT at 12259).)

> [Bell] . . . [a]nd Eldridge thought that she was a warm, nice person. And that's precisely the reason why . . . Maureen McDermott should not be kept alive.
>
> Because I would suggest to you that Maureen McDermott is much more dangerous than the ordinary murderer. Because with an ordinary murderer, if there really is such a thing, what you see if what you get. She's a true wolf in sheep's clothing. And that makes her an extremely treacherous person to keep alive.
>
> Society has a right to protect itself against forms of human beings such as Maureen McDermott. Society cannot survive with a traitor like Maureen McDermott in its midst.

(FAP at 222 (citing RT at 12305-06).)

In addition, Petitioner points to the prosecutor's comments, after noting that

Petitioner had no regrets between the time she orchestrated the attack on Bell and the "campaign of terror against Stephen Eldridge" (RT at 12307), when the prosecutor stated:

> Is [understanding Petitioner's compassion as a nurse] really any different than trying to understand how a Nazi could enjoy listening to Mozart?
>
> The same brutal people who would work in the crematoriums or gas chambers during the day, kiss their wife and children good bye when they left for work in the morning and went to a concert at night and listening to beautiful music.
>
> But does that make the people any less evil? Does it make Maureen McDermott any less evil that she could show compassion to a person in the hospital that she cares for?

(FAP at 222-23 (citing RT at 12308).)

The prosecutor also noted that Petitioner "had in effect, resigned from the human race." (FAP at 223 (citing RT at 12335).) Furthermore, the prosecutor argued that Petitioner "stalked [Eldridge and Bell] like animals, particularly as Jimmy Luna told us the story." (Id.) When defense counsel objected to the use of the word "animal," the trial court responded, in front of the jury, "it's not a good choice of words" and "it really ought to be avoided." (RT at 12336.) With that, the prosecutor went on with her argument that Petitioner stalked her victims. (RT at 12336; FAP at 223.)

Finally, Petitioner points to the prosecutor's arguments to the jury regarding the "right" of "society" to "kill its enemies" and additional references to Petitioner as various sorts of animals:

> Every society in the world from our tribal beginnings has a right to kill our enemies so that we can survive. We have a right to kill germs. We have a right to kill mad dogs. We have a right to kill snakes. We have killed hundreds if not thousands of people to survive as a nation.
>
> Society has a right of self-defense and it belongs to every one of us. Every one of us has a right to live. And it's a very important right. And it transcends the right of any individual rights.
>
> We all have a right to go to bed at night and know that we are going to wake up in the morning.

We all have a right to use our key to enter the front door of our house and know there is not going to be somebody who is lurking behind that door.

And we have that right whether we are on the outside or whether we are in the inside in the prison population in having to deal with somebody like Maureen McDermott.

Those people that threaten our rights, those people who kill while we are asleep, those people who hide behind doors, those people who buy death while we innocently go about our lives, those people are our enemies.

And our right to survive is paramount to their right to survive. And it's that simple. And no matter how hard or how uncharitable it is to conclude perhaps that there are some people that don't belong among us, there are some people that we don't have a right to take a chance on.

We don't have a right to take a chance on Maureen McDermott and the prison population doesn't have to take a chance on Maureen McDermott.

(RT at 12337-38; FAP at 223.)

On direct review, the California Supreme Court rejected Petitioner's claim, stating:

The trial court overruled defense counsel's objection that it was improper for the prosecutor to argue that defendant was not a human being. The court explained that the prosecutor did not use the word "animal," adding that "it's proper for a prosecutor to argue what someone did was inhumane or inhuman."

As we have said, we do not condone the use of opprobrious terms in argument, but such epithets are not necessarily misconduct when they are reasonably warranted by the evidence. (People v. Hawkins (1995) 10 Cal.4th 920, 961 [42 Cal.Rptr.2d 636, 897 P.2d 574]; People v. Sandoval (1992) 4 Cal.4th 155, 180 [14 Cal.Rptr.2d 342, 841 P.2d 862].) Here, the prosecutor's remarks, which the trial court understood as referring to conduct by defendant that was inhumane, did not exceed the permissible scope of closing argument in view of the evidence presented of, among other things, defendant's deliberate and cold-blooded planning of the killing of Stephen Eldridge. (See, e.g., People v. Hawkins, supra, at p. 961 [finding no prosecutorial misconduct in describing the defendant as "coiled like a snake" and in comparing the act of sentencing defendant to life in prison as akin to "putting a rabid dog in the pound"]; People v. Sully (1991) 53 Cal.3d 1195, 1249 [283 Cal.Rptr. 144, 812 P.2d 163] [reference to the defendant as a "human monster" and a "mutation"].)

Defendant also cites as improper the prosecutor's comments in closing argument describing defendant as "a mutation of a human being," a "wolf in sheep's clothing," a "traitor," a person who "stalked people like animals," and someone who had "resigned from the human race." Because defendant did not object to these remarks or request an admonition at trial, she may not now challenge these statements. (People v. Hill, supra, 17 Cal.4th at p. 820.) Moreover, when considered in the context of the planning and execution of Eldridge's murder, these references are within the permissible bounds of argument, and in any event would not have had such an impact "as to make it

> likely the jury's decision was rooted in passion rather than evidence." (People v. Thomas (1992) 2 Cal.4th 489, 537 [7 Cal.Rptr.2d 199, 828 P.2d 101].)
>
> Defendant asserts that the prosecutor committed misconduct by comparing her to a Nazi working in the crematorium by day and listening to Mozart by night. We find no misconduct in these remarks. The prosecutor was not comparing defendant's conduct in arranging Eldridge's murder with the genocidal actions of the Nazi regime. Rather, the prosecutor was arguing that human beings sometimes lead double lives, showing a refined sensitivity in some activities while demonstrating barbaric cruelty in others. In the context of this case, where the evidence showed defendant to be both a caring and competent nurse and a person capable of plotting a brutal murder, the argument was appropriate.
>
> Finally, defendant claims the prosecutor committed misconduct by comparing defendant to a germ, a mad dog, and a snake. These remarks were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others. (People v. Hawkins, supra, 10 Cal.4th at p. 961; People v. Thomas, supra, 2 Cal.4th at p. 537; People v. Sully, supra, 53 Cal.3d at p. 1249.)

McDermott, 28 Cal. 4th at 1002-03.

Generally, in making arguments to a jury, a prosecutor should avoid making statements that are specifically designed to inflame the emotions of the jurors. Gardner v. Florida, 430 U.S. 349, 358 (1977) (holding that a death sentence must not be based upon "caprice or emotion."); Drayden v. White, 232 F.3d 705, 713 (9th Cir. 2000) (holding that a prosecutor's inflammatory arguments are improper); see also United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005) (holding that a prosecutor must not make arguments "designed to appeal to the passions, fears, and vulnerabilities of the jury.").

In addition, "[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." Weatherspoon, 410 F.3d at 1149 (internal quotation marks and citations omitted).[6] See also Chandler v. Florida, 449 U.S. 560, 574 (1981) (holding that trial courts must be "especially vigilant to guard against any impairment of the defendant's right to a verdict that is based solely upon the evidence and the relevant law."); (finding that the prosecutor's suggestion

[6] As the defendant in Weatherspoon was convicted in the District of Nevada, that case was not decided pursuant to the AEDPA.

that the jury should "make a statement to society" in its verdict was improper).

Here, the California Supreme Court's denial of the allegations in this claim was not unreasonable. A fairminded jurist could conclude that the prosecutor's argument that Petitioner's actions were "inhuman" and "inhumane" was warranted by the evidence, as the trial court observed. Similarly, the same conclusion could be reached as to the prosecutor's argument comparing Petitioner's behavior to a Nazi who listened to classical music in the evening in explaining the how Petitioner was a compassionate nurse in her job at the hospital while, at the same time, orchestrating the brutal murder of her roommate. These are the sorts of "hard blows" that the prosecutor may make in a closing argument, when they are reasonably based on the evidence presented. Ceja, 97 F.3d at 1253-54.

Furthermore, the prosecutor's use of the word "animal" and arguments regarding the rights of society to kill "germs, mad dog[s], and snake[s]" did not rise to the level of a constitutional violation within the context of this case. See Parker v. Matthews, 567 U.S. 37, 47 (2012) (finding that that "even if the[prosecutor's] comment [was] understood as directing the jury's attention to inappropriate considerations," the state court's rejection of the claim was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."). In addition to specifically noting the impropriety of the word "animal" immediately after it was used, the trial court thoroughly instructed the jury not to consider counsel's arguments as evidence. (CT at 1333 ("Statements made by the attorneys during the trial are not evidence, although if the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved as to the party or parties making the stipulation."); CT at 1331 ("If anything concerning the law said by the attorneys in their arguments or at any other time during trial conflicts with my instructions on the law, you must follow my instructions.")); see also, e.g., Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996) (finding that the prosecutor's improper comment did not warrant habeas relief, reasoning in part that the trial court instructed the jury to follow its instructions, especially where they conflicted with argument by the attorneys, and to decide the case based on the evidence). And, even if

these arguments had been improper, they did not constitute the essence of the prosecutor's argument to the jury. Ortiz-Sandoval, 81 F.3d at 989 (finding that the prosecutor's improper statement did not warrant habeas relief, reasoning that it was "made once" and "not the theme of the prosecutor's closing argument."). Indeed, these were but several comments in a lengthy closing argument spanning more than 95 record transcript pages following an over six-month trial that commenced on October 23, 1989, and ended on April 3, 1990. (RT at 12254-339; CT at 1221, 1320; CT at 1447-48; CT at 1494-95.) See also, e.g., Trilio v. Biter, 769 F.3d 995, 1002 (9th Cir. 2014) (finding that the prosecutor's improper comment did not play a "prominent role" in the trial, and was but a "single statement during a closing argument that took twenty pages of transcript after a long criminal trial."). Moreover, the prosecutor herself stressed to the jury that the jury could only return a verdict of death if it found the aggravating factors substantially outweighed the mitigating factors. (RT at 12266.)

Accordingly, no habeas relief is warranted as to Claim 12(B), as Petitioner cannot show that the California Supreme Court unreasonably applied the law or determined the facts in denying these allegations under § 2254(d).[7]

2. The Prosecutor's Use of Biblical Arguments

In support of her allegations in Claim 12(C), Petitioner maintains that the prosecutor's invocation of the Bible to support a death verdict constituted misconduct. (FAP at 223-24.) Specifically, Petitioner points to the following statements by the prosecutor during the penalty phase closing argument:

> Now, I'm [not] a biblical scholar. I don't know much about the Bible.

[7] Respondent notes that the allegations in Claim 12 are barred by the contemporaneous bar objection. (Opp. at 51 n.51 (citing McDermott, 28 Cal. 4th at 1003).) Regardless, for the reasons explained above, the Court need not address that issue, as the allegations in Claim 12(B) fail on their merits. Lambrix, 520 U.S. at 524-25 (finding that, where a claim can be readily denied on the merits, a court can elect to decide a claim on those grounds rather than address whether it is procedurally barred).

> But most biblical scholars, as I understand it, interpret the commandment "Thou shalt not kill" as actually meaning "thou shall not commit murder."
>
> And there are in fact several references to the death penalty in the Bible. In Exodus 21, verse 12, the Bible says, "Whoever striketh a man a mortal blow must be put to death."
>
> And in verse 14, which I would suggest to you is incredibly apropos for this situation, "When a man kills another man after maliciously scheming to do so, you must take him from my altar and put him to death."

(FAP at 223-25 (citing RT at 12332-33).) These allegations were rejected by the California Supreme Court on direct review for the failure to make a contemporaneous objection (McDermott, 28 Cal. 4th at 1001), and denied summarily in state habeas proceedings, as well as on procedural grounds.

It is settled that, in a death penalty case, a prosecutor cannot make arguments at the penalty phase for the jury to render a verdict that is based on factors aside from those specifically included in the state sentencing statute, such as arguments based on a "higher law" or extra-judicial authority. Caldwell v. Mississippi, 472 U.S. 320, 336 (1980) (finding the prosecutor's argument improper in a death penalty case because it was neither "accurate or relevant to a valid state penological interest" as it was "not linked to any arguably valid sentencing consideration."); see also Chandler, 449 U.S. at 574 (holding that verdicts must be "based solely upon the evidence and the relevant law."). In Caldwell, the Supreme Court further found that the prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by a higher court was unconstitutional, because the argument led the jury to "believe that the responsibility for determining the appropriateness of the defendant's death sentence rest elsewhere." Id. at 329. Furthermore, in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), the Supreme Court explained that the Eighth and Fourteenth Amendments are violated where a death sentence is rendered by a process that fails to "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance." (Citations omitted). Consequently, in view of this line of clearly established law and the many cases following it, the Ninth Circuit has observed that

"religious arguments [made by a prosecutor] have been condemned by virtually every federal and state court to consider their challenge." Sandoval v. Calderon, 241 F.3d 765, 778-80 (9th Cir. 2000). To the extent that Respondent contends that the only applicable authority for resolving this issue is merely "on the periphery" (Opp. at 57), she is wrong.

Here, as an initial matter, it must be pointed out that this claim is procedurally barred based on counsel's failure to make a contemporaneous objection. See Bonin v. Calderon, 59 F.3d 815, 842-43 (9th Cir. 1995) (finding that the failure to make a contemporaneous objection constitutes a valid procedural bar). A procedurally barred claim, such as this one, is precluded from being a basis for relief unless Petitioner can show "cause and prejudice," or a "fundamental miscarriage of justice." Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Sawyer v. Whitley, 505 U.S. 446, 451 (2000). Where counsel's failure to object is itself ineffective assistance, counsel's ineffective failure to make a contemporaneous objection may overcome the cause and prejudice standard. Edwards. v. Carpenter, 529 U.S. 446, 451 (2000) ("Although we have not identified with precision exactly what constitutes 'cause' to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice.") (citations omitted). However, for that exception in Carpenter to apply to these allegations, this ineffective assistance should be alleged as a separate claim that has been exhausted. Id. at 451-52 ("and we held in Carrier that the principles of comity and federalism that underlie our longstanding exhaustion doctrine – then as now codified in the federal habeas statue, see U.S.C. 2254(b), (c) -- require that constitutional claim, like others, to be first raised in state court.") (emphasis in original). In this case, unfortunately, Petitioner has not alleged such an ineffective assistance claim. Cf., Roybal v. Davis, 148 F. Supp. 3d 958, 1046 (S.D. Cal. 2015) (finding that the petitioner's claim of ineffective assistance satisfied cause and prejudice for excusing counsel's failure to object to the prosecutor's arguments to the jury for imposing the death penalty based on the Bible). Furthermore, because Petitioner would still be death eligible notwithstanding the prosecutor's errors, the "fundamental miscarriage of justice" exception to the cause and

prejudice rule does not apply here. Sawyer, 505 U.S. at 438 ("[W]e must determine if petitioner has shown by clear and convincing evidence that but for the constitutional error, no reasonable juror would find him eligible for the death penalty under [state law].").

Nevertheless, if this claim were not procedurally barred, the allegations in Claim 12(C)would have been meritorious.[8] The prosecutor's arguments based on the Bible, citing two different passages of Scripture, plainly contravened the above-cited authority mandating that appeals to religion by a prosecutor in a death penalty case are improper, as they are based neither on the "clear and objective" sentencing factors in the California death penalty statute nor the evidence in the case. Caldwell, 472 U.S. at 336; Chandler, 449 U.S. at 574; Sandoval, 241 F.3d at 776. In addition, the prosecutor's argument improperly diminished the jury's overall responsibility for its verdict by suggesting that the ultimate responsibility for its decision should rest with a "higher" authority. Caldwell, 472 U.S. at 328-29; Sandoval, 241 F.3d at 777("Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty."). Despite Respondent's contention that "at no time" did the prosecutor suggest that religious authority justified imposing the death penalty on Petitioner, no other conclusion can be drawn from her argument.

To the extent that Respondent contends that the prosecutor was "merely explain[ing] *in anticipation of* a potential defense plea for leniency based on Christian values of forgiveness, that the Bible did not contravene California's death penalty" (Opp. at 58; emphasis added), her argument is both unreasonable and incorrect. Instead, in the defense's closing argument that followed, counsel only mentioned the Bible in response to the prosecutor's comments and argued instead that the penalty determination should be based on state law rather than scripture. (RT at 12384-85.) Caldwell, 472 U.S. at 336 ("assuming without accepting . . . the position that the defense counsel's argument invited error, it did

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[8] To the extent that the Court finds that the other allegations in Claim 12 were not misconduct, both individually and cumulatively, it is excluding the impact of the allegations in Claim 12(C) in connection with those other claims.

not invite *this* error.") (citations omitted and emphasis added); Sandoval, 241 F.3d at 777 (rejecting the argument that the prosecutor's argument was "merely fair response to comments in defense counsel's closing argument," as the defense never invoked religious authority in advocating against imposing the death penalty).

In other cases involving similar error, courts have found the error to be prejudicial. For instance, in Sandoval, the Ninth Circuit found that a prosecutor's argument that "God sanctioned the death penalty" for the petitioner and paraphrased the Bible, without directing quoting or citing it, warranted reversal. 241 F.3d at 776, 779. There, the Ninth Circuit noted that no curative instruction was given after the argument was made and the jury deliberated for over three days prior to reaching a penalty verdict. Id. at 779. In finding the error prejudicial, the Ninth Circuit in Sandoval stated, "[w]e do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death." Id. See also Roybal, 148 F. Supp. 3d at 1046, 1051 (finding that a prosecutor's argument to impose the death penalty based on quotes from the Bible warranted habeas relief where the jury deliberated six days and made several requests to read back certain testimony during its deliberations).

In this case, the prosecutor did not merely paraphrase the Bible, as in Sandoval; she directly cited and quoted it, not once, but twice. Respondent's argument that this case is distinguishable from Sandoval because the prosecutor here made only "passing, rather incidental, references" (Opp. at 59) does not accurately characterize the prosecutor's argument in this case and is therefore unpersuasive. Hardly "admittedly ambiguous" (Donnelly, 416 U.S. at 645), the prosecutor's improper remarks about the Bible's sanction of the death penalty in this case were "quite focused, unambiguous, and strong" (Caldwell, 472 U.S. at 340). Thus, as in Sandoval, the prosecutor, in making these arguments, "meant to have an effect on the jury" and likely did. 241 F.3d at 780.

Moreover, in view of the fact that these arguments comprised nearly all of the last seven pages of the prosecutor's closing penalty argument (RT at 12332-39), they served as

a "grand finale" substantially overshadowing the earlier arguments. See Roybal, 148 F. Supp. 3d at 1052 ("The misconduct was deliberate, substantial, and perfectly timed with crescendo effect at the close of argument."). Also, as in Sandoval, no curative instruction was given. Furthermore, the jury deliberated for three days before reaching its decision, and submitted a question regarding the consideration of aggravating evidence that required further clarification from the trial court. (CT at 1446-48, 1495.) See also, e.g., Sandoval, 241 F.3d at 797 (finding prejudice where the jury deliberated for over three days); Roybal, 148 F. Supp. at 1050 (finding prejudice based on the prosecutor's improper biblical argument at the penalty phase where the jury's deliberations spanned several court days and the jurors requested certain evidence, as well as a read back of testimony from the penalty phase).

However, notwithstanding these grievous allegations, this Court is bound by the inescapable procedural bar.

3. The Prosecutor's Argument That Petitioner's Gender Should Be Grounds for Imposing the Death Penalty

In Claim 12(D), Petitioner contends that the prosecutor's argument suggesting that she was more deserving of the death penalty because she was a woman was constitutional error. Specifically, Petitioner points to the following statements:

> Certainly her conduct in this case is every bit as evil as a man could ever think of committing. But I would suggest to you that as a female she had a unique advantage in committing this crime. Because she is a female she could suck Steve into believing that she was really caring for him and keep him at the house during the period of time that she was actually plotting his murder.
>
> Because she was a nurse and because she was a female, perhaps he believed a little bit more readily that she was actually nurturing and nursing him.
>
> Would a man have been able to do so effectively? I think not.
>
> And so I would just suggest to you that someone who has used her sex to destroy another human being, how could we use that same factor of her sex to give her mercy?

(FAP at 225-26 (citing RT at 12333-34).) These allegations were summarily denied by the California Supreme Court in Petitioner's state habeas proceedings.

Here, in addition to being procedurally barred based on counsel's failure to object to these arguments by the prosecutor, the California Supreme Court's denial of these allegations was not unreasonable. Although Petitioner relies upon Zant, which noted that it was impermissible to refer to factors related to the race, religion, or political affiliation of the defendant," that case does not support her allegations here, nor does any other clearly established law. Carey v. Musladin, 549 U.S. 70, 77 (2006) (finding that, given the lack of holdings from the Supreme Court on the particular issue the petitioner presented, the state court's determination that the petitioner was not prejudiced was not contrary to clearly established federal law). Furthermore, given the context of the trial, a fairminded jurist could view these arguments as an appeal to the jury not to show mercy to Petitioner because a woman. (RT at 12333 (prosecutor's argument that the jury should not place any special significance on Petitioner's gender and they should "treat her just like everybody else.").) Accordingly, no habeas relief is warranted on these allegations. **4 .**

The Prosecutor's Arguments that Petitioner Would Be Dangerous in Prison

In Claim 12(E), Petitioner contends that the prosecutor's arguments that she would be dangerous in prison constituted misconduct. Specifically, Petitioner points to the following statements made by the prosecutor in her closing penalty phase argument:

> We don't have a right to take a chance on Maureen McDermott and the prison population doesn't have to take a chance on Maureen McDermott.

(FAP at 227 (citing RT at 12338).)

In addition, Petitioner cites the prosecutor's argument that Petitioner was more dangerous than a "compulsive serial killer," where she argued:

> Maureen McDermott is not like a compulsive robber, burglar, or compulsive serial killer. We don't know what's going to catch her fancy next. Who will she turn on next?

> What if Maureen McDermott wants a job in the institution that she can't get? What means would Maureen McDermott resort to in the institution?

(FAP at 227-028 (citing RT at 12313-14).)

Here, these allegations fail, as they are procedurally barred based on counsel's failure to make a contemporaneous objection and were reasonably denied on their merits by the California Supreme Court. The prosecutor's argument that Petitioner might "turn" on someone if she wanted something was reasonably based on the evidence elicited by the prosecution that she paid Luna to murder Eldridge in order to obtain life insurance proceeds and to attack Bell in order to obtain his job working at the La Porte residence. See McDermott, 28 Cal. 4th at 965-66. Accordingly, the allegations in this claim do not warrant habeas relief.

5. The Prosecutor's Attacks on Defense Counsel

In Claim 12(F), Petitioner contends that the prosecutor's preemptive attacks on defense counsel were misconduct. Specifically, Petitioner cites the prosecutor's argument that defense counsel had a duty to "create" sympathy for Petitioner: "It's the job of the defense attorneys in this case to create sympathy during this phase for Maureen McDermott just like in the guilt phase it's their job to argue that she is not involved in these crimes." (RT at 12309.) At that point, trial counsel objected on the grounds that the argument was improper. The trial court overruled the objection, and the prosecutor repeated herself: "It's the job of the defense attorneys to create sympathy for their client in this part of the case." (FAP at 228 (citing RT at 12312).)

Here, in addition to their procedural bar, these allegations fail on their merits. Of course, a prosecutor cannot suggest that defense counsel distorted the law or misstated evidence to assist a client. United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980) ("A prosecutor should not misstate the law in closing argument.") (citations omitted); cf. United States v. Artus, 591 F.2d 526, 528 (9th Cir. 1979) (holding that the prosecutor's misstatements of the law and fact were plain error warranting reversal). However, the prosecutor was not making such improper arguments in this instance; instead, she was

commenting on the defense's presentation of evidence at the penalty phase case tending to cultivate sympathy for Petitioner. See United States v. Ruiz, 710 F.3d 1077, 1086 (9th Cir. 2013) ("The prosecutor's comments were directed to the strength of the defense on the merits, and did not amount to an *ad hominem* attack on defense counsel.") (citations and quotation marks omitted); United States v. Nobari, 574 F.3d 1065, 1079 (9th Cir. 2009) (finding no misconduct results from a prosecutor's argument attacking the defense on the merits, as opposed to the integrity of the defense counsel). Thus, these allegations do not set forth a constitutional violation.

6. The Prosecutor Made a Plea to Impose the Death Penalty Based on Gut Instinct

In Claim 12(G), Petitioner contends that the prosecutor improperly asked the jury to disregard the trial court's instructions to weight the factors in aggravation and mitigation and, instead, to rely upon "gut instinct." In support of this claim, she cites the following portion of the prosecutor's argument:

> A United States Supreme Court Justice by the name of Potter Stewart who is now retired wrote a very famous opinion about obscenity. And . . . in that opinion he states, "What is a dirty book, a dirty magazine, a dirty film? I cannot define what is obscene, but I know it when I see it."
>
> I might not have been able to describe to you necessarily with my words or pictures during the trial – what is a crime or what is a criminal who has earned the penalty of death. But I would suggest to you that you know it when you see it.

(FAP at 229 (citing RT at 12338).)

Here, these allegations were reasonably rejected by the California Supreme Court. It is possible that a reasonable jurist could have concluded that, in this argument, the prosecutor was merely trying to convey that there was no exact formula to determine whether someone should receive the death penalty and she herself might not have been able to fully put into words why Petitioner deserved it in this case.

Finally, considering the improper comments made by the prosecutor "within the

context of the entire trial," no habeas relief is warranted as to the allegations in Claim 12.[9] Donnelly, 416 U.S. at 639, 643 (finding the prosecutor's improper remarks did not warrant habeas relief where the comments were vague and were corrected through the trial judge's curative instruction); cf. Caldwell, 472 U.S. at 339-40 (finding the prosecutor's "quite focused, unambiguous, and strong" improper statements warranted habeas relief when they were not only uncorrected but agreed with by the trial judge). As noted above, the prosecutor stressed that the jury could only reach a death verdict if it found that the aggravating factors "substantially outweighed" the mitigating factors: "[T]he bottom line is that in order for you to return a verdict of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that death is warranted." (RT at 12266.) Also, given the strength of the aggravating evidence and the ample evidence demonstrating Petitioner's lead role in arranging Eldridge's murder, it is doubtful that these few comments had any impact on the jury's decision. See Darden, 477 U.S. at 182 (reasoning that the prosecutor's comments were not error given the heavy weight of the evidence against the petitioner, making it unlikely that the jury's decision was influenced by the comments). Consequently, for these reasons, no violation of § 2254(d) has been shown, as Petitioner fails to show that the California Supreme Court unreasonably determined the facts or applied the law in connection with these allegations.

X. Claim 13: The Trial Court Unfairly Refused to Allow Jurors to Consider the Lenient Treatment of the Accomplices in Their Penalty Determination

In Claim 13, Petitioner alleges that the trial court's refusal to allow jurors to consider the lenient treatment of the accomplices in the penalty determination resulted in constitutional error. (FAP at 231-39.)

At trial during the guilt phase, the prosecutor stated that Luna agreed to a plea bargain

[9] As explained above, this determination does not include the procedurally barred allegations in Claim 12(C).

whereby, in exchange for his truthful testimony at Petitioner's trial, he received a sentence of life in prison without the possibility of parole for his role in Eldridge's murder. (RT at 375-78.) In addition, the prosecutor informed the jury that accomplices Marvin and Dondell Lee received immunity from prosecution for their role in the murder. (RT at 11088.)

At the penalty phase, the trial court provided the following jury instruction requested by the prosecution, over the defense's objection:

> You may not consider either the punishment or absence of punishment for the following accomplices: James Luna, Marvin Lee and Dondell Lee in determining the appropriate penalty for the defendant Maureen McDermott in this case.

(RT at 12253.) In addition, the trial court informed counsel at the penalty phase that, although defense counsel was precluded from directly arguing to the jury that the punishment or the absence of punishment for the accomplices could justify leniency for Petitioner by not sentencing her to death, defense counsel could still mention the sentence or absence of sentence for any of the accomplices. (RT at 11859-60.)

On direct appeal, the California Supreme Court rejected this claim, stating:

> We have consistently held that evidence of an accomplice's sentence is irrelevant at the penalty phase because "it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (People v. Cain (1995) 10 Cal.4th 1, 63 [40 Cal.Rptr.2d 481, 892 P.2d 1224]; see also People v. Hamilton (1989) 48 Cal.3d 1142, 1183, fn. 26 [259 Cal.Rptr. 701, 774 P.2d 730].) Nothing in the challenged instruction precluded the jury from considering sympathy for [Petitioner] in deciding the appropriate punishment for her crimes. Nor did the instruction nullify the standard instruction the court gave on sympathy, which provides that the jury may "consider sympathy or pity" for a defendant as a mitigating factor.
>
> Citing the high court's decision in Parker v. Dugger (1991) 498 U.S. 308 [111 S.Ct. 731, 112 L.Ed.2d 812], [Petitioner] argues "evidence of disparity of sentencing is indeed mitigating evidence and closing argument which emphasizes the disparity is appropriate." We rejected a similar contention in People v. Cain, supra, 10 Cal.4th at page 63: "...Parker did not hold evidence of an accomplice's sentence must be introduced in mitigation at the penalty phase, or that a comparison between sentences given codefendants is required. [Citation.] The Parker court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. Parker does not state or imply the Florida rule is

> constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition."

McDermott, 28 Cal. 4th at 1004-05 (citations omitted).

It is well-established that, in death penalty cases, the jury may not be precluded from considering as mitigating evidence "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604-05 (9th Cir. 1978). Nevertheless, the Supreme Court also explained in Lockett that "[n]othing in this opinion limits the traditional authority of a court to exclude as irrelevant, evidence not bearing on the defendant's character, prior record, or circumstances of his offense." Id. at 604 n.12.

Here, Petitioner cannot show that the California Supreme Court unreasonably denied this claim. In addressing the question at issue here, whether a sentencing court must consider a co-defendant's lesser sentence as mitigating evidence, the Ninth Circuit expressly stated that "neither the Ninth Circuit nor the Supreme Court has ever held that a sentencing court must consider mitigating evidence of the type [the petitioner] presented." Smith v. Mahoney, 611 F.3d 978, 996 (9th Cir. 2010). There, the Ninth Circuit cited its earlier decision similarly rejecting that argument and stating that "[a]lthough a trial court is not necessarily precluded from allowing consideration of codefendant sentences, a trial court does not commit constitutional error under Lockett by refusing to allow such evidence." Id. (citing and quoting Beardslee v. Woodford, 358 F.3d 560, 579 (9th Cir. 2004)). Thus, for the reasons set forth in Smith and Beardslee, Petitioner's allegations do not give rise to a constitutional violation.

Thus, because the California Supreme Court's decision regarding this claim was not contrary to clearly established federal law nor an unreasonable determination of facts, no habeas relief is warranted as to Claim 13.

XI. Claim 14: The Trial Court's Failure to Instruct the Jury regarding Petitioner's Ineligibility for Parole Was Constitutional Error

In Claim 14, Petitioner alleges that her due process and fair trial rights were violated by the prosecutor's assertion that she could obtain parole and the trial court's failure to give an instruction advising the jurors that Petitioner was ineligible for parole. (FAP at 240-42.)

At the penalty phase, the trial court instructed the jury:

> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without the possibility of parole.
>
> And let me just digress for a moment.
>
> I have told you at the outset of this case that both of those punishments mean exactly what is said, and that is the operative assumption that if you elect life without the possibility of parole is the appropriate penalty, except that is what the punishment will be.
>
> And if you should decide the appropriate penalty is that of death, expect that that is the punishment that will take place.

(RT at 12239.) The California Supreme Court summarily rejected this claim in Petitioner's state habeas proceedings.

Here, Petitioner cannot show that the California Supreme Court's denial of her claim was objectively unreasonable. In support of her claim, Petitioner relies upon Kelly v. South Carolina, 534 U.S. 246 (2002); Shafer v. South Carolina, 532 U.S. 36 (2001); and Simmons v. South Carolina, 512 U.S. 154, 170 (1994). In these capital cases reviewing South Carolina law, the Supreme Court found that the jury instructions were constitutionally inadequate because the defendants' future dangerousness was at issue and the instructions left open the question as to whether the defendants would be eligible for parole. For instance, in Shafer, the trial court instructed the jury that "life imprisonment means until the death of the offender," but also instructed the jury that "[p]arole eligibility or ineligibility is not for your consideration." 532 U.S. at 45. Similarly, in Simmons, the jury was instructed "not to consider parole" which "actually suggested that parole was available but the jury for some unstated reasons, should be blind to this fact." 512 U.S. at 170-71. The Supreme Court therefore found, for those reasons, that the instruction was confusing and did not accurately advise the jury of the defendant's parole ineligibility. Id. Finally, in

Kelly, where the trial court provided the jury similar instructions leaving opening the question of parole eligibility, the Supreme Court reversed the conviction based on its rejection of the State's argument that a parole ineligibility instruction was unnecessary because, unlike the juries in Simmons and Shafer, the jury did not request further instruction from the judge. 534 U.S. at 256-57.

However, unlike the juries in these South Carolina cases, Petitioner's jury was specifically instructed at the penalty phase that the only choice for Petitioner's punishment for it to decide was between "death" and "life imprisonment without the possibility of parole" (LWOP) according to their plainly understood meanings and, more importantly, was never provided any other instruction suggesting that parole eligibility remained an open question. Consequently, these South Carolina cases do not bear on the issue presented here, and Petitioner points to no Supreme Court authority which does. Carey v. Musladin, 549 U.S. 70, 77 (2006) (finding that, given the lack of holdings from the Supreme Court on the particular issue the petitioner presented, the state court's determination that the petitioner was not prejudiced was not contrary to clearly established federal law).

Moreover, the Ninth Circuit rejected these same allegations in Bonin v. Calderon, 59 F.3d 815, 849 (9th Cir. 1995). Like Petitioner, the petitioner in Bonin contended that the trial court's failure to provide an additional instruction on the meaning of the term "life without possibility of parole" may have caused the jurors to believe that he might have actually been paroled. The Ninth Circuit rejected this argument as "pure speculation," noting that the petitioner "offere[]ed] no evidence that any of the jurors in his trials believed the 'life without possibility of parole' means anything other than what it says." Id. To the extent that Petitioner relies upon the prosecutor's statement during the guilt phase argument -- that it was "hypocritical" for the defense to suggest that Luna might possibly ask a judge to strike the special circumstances against him in the future because Petitioner could similarly do so (Pet.'s Br. at 82 (citing RT at 11070)), her argument fails to show that the jury either disbelieved or was confused about the instructions regarding the sentencing choice between death and LWOP at the penalty phase.

In addition, Petitioner's argument based on comments made by prospective jurors during voir dire (Pet.'s Br. at 85 (citing RT at 1357-58, 1754-55, 2923-24, 3011-12, 3196-98, 4062, 4092)), prior to their being sworn as jurors and instructed by the trial court at both phases, is unavailing. These comments fail to demonstrate that, after the jurors were instructed that life imprisonment without parole meant only that without any further instruction suggesting that parole might be possible, they somehow disbelieved or were confused as to Petitioner's parole ineligibility during the penalty phase deliberations. Instead, similar to the petitioner's arguments in Bonin, Petitioner's arguments based on the comments by the prosecutor and the prospective juror comments are, at most, speculation. In sum, there is nothing in the record sufficient to rebut the well-established presumption that jurors follow their instructions. Penry v. Johnson, 532 U.S. 782, 799 (2001) (stating that a reviewing court must "generally presume that jurors follow their instructions"); Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."); Richardson v. March, 481 U.S. 200, 206, 211 (1987) (stating the "invariable assumption" that jurors follow instructions).

Accordingly, no habeas relief is warranted as to Claim 14, because the California Supreme Court did not unreasonably determine the facts or apply the law in rejecting these allegations.

XII. Claim 15: California's Death Penalty Statute Fails to Narrow the Class of Offenders Eligible for the Death Penalty

In Claim 15, Petitioner alleges that the California capital sentencing scheme fails to narrow the class of persons eligible for the death penalty. (FAP at 242–64.) The California Supreme Court summarily rejected this claim in Petitioner's state habeas proceedings.

In order to pass constitutional muster**,** a death penalty statute must provide a "meaningful basis for distinguishing between the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring); see also McCleskey, 481 U.S. at 303 (finding that a valid death penalty statute must narrow the class of murderers subject to a death sentence); Zant

v. Stephens, 462 U.S. 862, 877 (1982); Lewis v. Jeffers, 497 U.S. 764, 775 (1990); Lowenfield v. Phelps, 484 U.S. 231, 243-45 (1988). To be eligible for the death penalty, a defendant must be convicted of a crime for which the death penalty is a proportionate punishment. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (citing Coker v. Georgia, 433 U.S. 584 (1977)). This occurs in instances where the trier of fact convicts the defendant of murder and finds one "aggravating circumstance" (or "special circumstance") at either the guilt or penalty phase, which may be contained in the definition of the crime, a separate sentencing, or both. Id. (citations omitted).

The Supreme Court addressed the California death penalty statue in Pulley v. Harris, 465 U.S. 37, 51 (1984), finding that it was not unconstitutional for lack of proportionality.[10] There, the Supreme Court explained that the California death penalty statute, which requires that the jury find at least one special circumstance beyond a reasonable doubt, thereby "limits the death sentence to a small sub-class of capital eligible cases." Id. at 53. Because the statutory list of relevant factors applied to defendants within that sub-class provided sufficient jury guidance and lessened the chance of arbitrary application of the death penalty, it was not void under Furman and its progeny. Id. (citations omitted). Subsequently, in Tuilaepa, the Supreme Court held that the California death penalty statute's list of special circumstances, which requires the sentencer to consider the circumstances of which defendant was convicted and the existence of any special circumstances, is not unconstitutionally vague.[11] Tuilaepa, 512 U.S. at 976. There, the Supreme Court reasoned that the sentencer should consider the circumstances in deciding whether to impose the death penalty, and the California death penalty statute correctly instructs the jury to consider relevant subject matter and does so in "understandable terms."

---

[10] There, the Supreme Court noted that it was analyzing the 1977 death penalty statute, but further noted that the 1978 statute was "substantially similar" and that "what is said [in this decision] applies equally to the [1978] statute." Id. at 40 n.1.

[11] In Tuilaepa, the Supreme Court was addressing the 1988 and 1994 statutes. Id. at 969.

Id.

Here, under Pulley and Tuilaepa, the California death penalty statute's scheme of special circumstances appropriately narrows the class of defendants convicted of murder to a sub-class, and is neither void for a lack of proportionality nor vague. The special circumstances here (murder for financial gain and lying in wait) distinguish Petitioner's case from the generic case of first degree murder. Thus, the first prong of the Tuilaepa test, which requires that the special circumstance "must apply only to a subclass of defendants convicted of murder," is satisfied. Nor can Petitioner satisfy the second prong of Tuilaepa by showing that the special circumstance can be construed as "vague," because the words of the statute instructed the jury to consider these special circumstances in understandable terms.

Accordingly, Petitioner cannot show that the California Supreme Court unreasonably rejected this claim.

XIII. Lethal Injection Constitutes Cruel and Unusual Punishment

In Claim 16, Petitioner contends that her execution by lethal injection violates the Eighth Amendment ban on cruel and unusual punishment. (FAP at 265-80.) Because this claim is not yet ripe, it will be dismissed as premature.

CONCLUSION

For the foregoing reasons, the remaining claims in the FAP are denied with prejudice, with the exception of Claim 16, which is denied as premature.

IT IS SO ORDERED.

Dated: August 15, 2017

David O. Carter
DAVID O. CARTER
United States District Judge

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAUREEN MCDERMOTT, **Petitioner,** **v.** **DEBORAH K. JOHNSON, Warden, Central California Women's Facility,** **Respondent.**	**Case No. CV 04-0457 DOC** **DEATH PENALTY CASE** **JUDGMENT**

Pursuant to the Order re: Petitioner's Brief re: Application of 28 U.S.C. § 2254(d) and the Order Denying Relief on Remaining Claims,

IT IS HEREBY ORDERED AND ADJUDGED that the First Amended Petition is denied with prejudice and judgment is entered in favor of Respondent and against Petitioner.

The Clerk is ordered to enter this judgment.

IT IS SO ORDERED.

Dated: August 15, 2017

David O. Carter
DAVID O. CARTER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 04-0457-DOC Date: May 14, 2018

Title: MCDERMOTT V JOHNSON **(DEATH PENALTY CASE)**

PRESENT: The Honorable DAVID O. CARTER, U.S. District Judge

Deborah Lewman	None
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS):

On August 15, 2017, the Court entered an Order and Judgment affirming the conviction and sentence in this case, but granted a Certificate of Appealability as to Claim 12(C). As the the Court explained in its Order, the allegations in this claim would have been grounds for relief had the claim not been procedurally barred based on counsel's failure to make a contemporaneous objection. (*See* August 15, 2017 Order Denying Relief on Remaining Claims at 39-44.) Thereafter, on September 13, 2017, Petitioner filed a Motion pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) seeking relief as to the Court's denial of Claim 12(C). In its12-page reasoned Order issued on April 2, 2018, the Court denied this post-judgment motion, explaining that Petitioner had failed to demonstrate clear error as to the Court's denial of Claim 12(C).

On May 2, 2018, Petitioner filed a Motion to Expand the Certificate of Appealability, in which she now asks to include the denial of her post-judgment motion. As noted above, at this Court's request, the Ninth Circuit will review the merits of the Court's denial of Claim 12(C), as the Court found that there was a "substantial showing of the denial of a constitutional right." (August 15, 2017 Order Granting Certificate of Appealability at 2 (citing 28 U.S.C. § 2253(c)(2).) However, because no such showing has been made as to the denial of Petitioner's post-judgment motion, it is DENIED. *See also* Ninth Cir. R. 22-1(e) (explaining how to advance uncertified arguments on appeal).

IT IS SO ORDERED.

cc Parties of Record

Initials of Clerk djl : 00

#22

SUPREME COURT
FILED

JAN 14 2004

Frederick K. Ohlrich Clerk

DEPUTY

S092813

IN THE SUPREME COURT OF CALIFORNIA

DOCKETED
LOS ANGELES
JAN 22 2004
BY J. APOLINAR
NO. 00 CV 00457

En Banc

In re MAUREEN McDERMOTT on Habeas Corpus

The petition for writ of habeas corpus filed November 8, 2000, is denied.

Each claim and subclaim is denied on the merits.

To the extent that it asserts a violation of speedy-trial rights under the Sixth Amendment to the United States Constitution and/or section 15 of article I of the California Constitution, Claim C is procedurally barred, separately and independently, on the ground it was raised and rejected on appeal. (See *In re Harris* (1993) 5 Cal.4th 813, 824-829; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Brown, J., would deny the petition solely on the merits.

LODGED
FEB 15 2005
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CAL.
SOUTHERN DIVISION AT SANTA ANA
BY DEPUTY

GEORGE
Chief Justice

Petition for Writ of Habeas Corpus
Filed Jan. 14, 2005
Cal. Supreme Court Case No. S130708

SER 344-363

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MAUREEN McDERMOTT, Petitioner, On Habeas Corpus.	**CASE NO. _____** Related to Cases: Court of Appeal No. S016081 California Supreme Court No. S092813

PETITION FOR WRIT OF HABEAS CORPUS

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551. The declarations and other exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

552. The violations of Petitioner's constitutional rights warrant the granting of this Petition without any determination of whether the violation substantially affected or influenced the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Further, these violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Petitioner's rights had a substantial and injurious effect or influence on Petitioner's conviction and sentence, rendering them fundamentally unfair and resulting in a miscarriage of justice.

CLAIM TWELVE - PETITIONER'S FIFTH AND EIGHTH AMENDMENT RIGHTS WERE VIOLATED BASED UPON EGREGIOUS PROSECUTORIAL MISCONDUCT DURING THE PENALTY CLOSING ARGUMENT

553. Petitioner's conviction, confinement and sentence of death are illegal and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution due to prosecutorial misconduct.

554. It is well established that misconduct by a prosecuting attorney during closing argument may be grounds for reversal. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). A defendant's due process rights are violated if prosecutorial misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright,* 477 U.S. 168, 183, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Courts in federal habeas cases review claims of prosecutorial misconduct "to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974). In capital cases, the Eighth Amendment is also violated where the prosecutors urges the jury to reach the sentence determination based upon factors other than those it is instructed to consider. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *Sandoval v. Calderon,* 241 F.3d 765 (9th Cir. 2000).

555. While there are countless ways in which the prosecution argument may transcend acceptable norms, there are certain categories *per se* improper. First, a prosecutor may not misstate the law in closing argument. *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979); *United States v. Berry*, 627 F.2d 193, 200 (9th Cir. 1980). Second, the prosecutor may not hurl gratuitous insults at the defendant. *Byrd v. Collins*, 209 F.3d 486, 536 (6th Cir. 2000); *Darden*, 477 U.S. at 180 & n. 11 (deeming improper the prosecutor's characterization of the defendant as an "animal"). Third, the prosecutor may not appeal to prejudices or biases of the jurors, including those based upon race, ethnic origin, and religion. *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987) (noting that "the Constitution prohibits racially biased prosecutorial arguments"); *Bains v. Cambra*, 204 F.3d 964, 974 & n.5 (9th Cir. 2000) ("religion-based prosecutorial arguments also are prohibited under clearly established federal law"). Presumably, this would also encompass arguments based upon the sex of the defendant. *See J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128-46, 114 S.Ct. 1419, 142130, 128 L.Ed. 2d 89 (1994) (extending *Batson* to prohibit gender-based discrimination in the exercise of peremptory challenge).

556. Finally, the prosecutor may not invoke "higher law" or religious authority as a basis for imposing the death sentence. *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Bennett v.*

Angelone, 92 F.3d 1336, 1346 (4th Cir. 1996); *Cunningham*, 928 F.2d at 1019-20; *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987).

557. Amazingly, the prosecutor's sentencing argument is rife with improper argument, touching on virtually every possible proscribed category. Jointly and severally, these comments deprived Petitioner of a fair hearing.

1. The Prosecutor Used Numerous Epithets to Dehumanize Petitioner

558. The prosecutor began her closing argument by injecting her personal belief that Petitioner that was not a human being:

> The time has now arrived for us ... to look exactly at what a human being did to another. And I use that term 'human being' in a literal sense because I'm not so sure that Maureen McDermott really should not be categorized as a human being. Because human beings have a heart and human beings have a soul.

97 RT 12256.

559. The defense objected, but it was immediately overruled because the prosecutor did not use the word, "animal." 97 RT 12257-58. The prosecutor then described Petitioner as possibly "a mutation of a human being, but she is not a human being in the manner that we know human beings." 97 RT 12259.

560. Throughout her closing argument, the prosecutor used derogatory epithets to describe Petitioner to the jury. The prosecutor said Petitioner was a "wolf in sheep's clothing," a "treacherous person to keep alive," a "traitor," 97 RT 12306, an "evil" "Nazi" working in the "crematorium" by day and "listening to Mozart" by night, 97 RT 12308; someone who "stalked people like animals" (97 RT 12336) and who had "resigned from the human race." 97 RT 12335. The prosecutor also compared Petitioner to "our enemies," to "germs," "mad dogs," and "snakes." 97 RT

12337. ("We have a "right to kill our enemies ... We have a right to kill germs. We have a right to kill mad dogs. We have a right to kill snakes.").

561. Far from an isolated statement, the prosecutor repeatedly and flagrantly used derogatory nomenclature to describe Petitioner. This went beyond hyperbole. Because these epithets had no other purpose than to inflame the passions of the jury, it was wholly improper for the prosecutor to use these terms.

562. The circumstances of this case are distinguishable for *Darden* in two key respects. First, the prosecutor used numerous derogatory terms to the refer to Petitioner. The prosecutor continued to do so, notwithstanding the court's admonition that she not employ the word "animal." Second, the prosecutor's argument arose in the context of the sentencing proceeding. While the impact of such comments on the jury may eventually dissipate if made during closing argument, the danger is much greater when made during the penalty phase.

563. By employing this dehumanizing language, the prosecutor hoped to lighten the import of the jury's weighty decision to issue a death verdict.

2. The Prosecutor Quoted Several Passages from the Bible to Establish Divine Authority and Directive for Imposing the Death Penalty

564. The prosecutor also invoked the Bible to support her argument for death:

> Now, I'm [not] a biblical scholar. I don't know much about the Bible. But most biblical scholars, as I understand it, interpret the commandment '[T]hou shalt not kill' as actually meaning '[T]hou shall not commit murder.'
>
> And there are in fact several references to the death penalty in the Bible. In Exodus 21, ver 12, the Bible says, "whoever striketh a man a mortal blow must be put to death."
>
> And in verse 14, which I would suggest to you is incredibly apropos for this situation, ["]when a man kills another man

> after maliciously scheming to do so, you must take him from my altar and put him to death.["] 97 RT 12332-33.

565. Scriptural references, similar to the ones here, have been universally condemned. *Sandoval*, 241 F.3d at 777. The danger with invoking Biblical concepts of vengeance is two-fold. First, the introduction of religious references subverts the constitutional mandate of sentencing schemes to "channel the sentencer's discretion by clear and objective standards." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Second, the insinuation that the death penalty is divinely compelled transfers the ultimate duty to impose a sentence to a higher authority, thereby undercutting the jury's sense of responsibility in the sentencing process. *Sandoval*, *supra*, at 777; *see Caldwell*, 472 U.S. at 330-34 (holding that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court unconstitutionally encouraged the jury to delegate its feeling of responsibility for the defendant's sentence to the appellate court).

566. In the instant case, each of the citations to the Old Testament were improper. The prosecutor began by absolving the state of any moral blame for the death penalty, noting that biblical scholars construe the Ten Commandments as prohibiting only murder rather than all killing. *Bennett*, 92 F.3d at 1346 (argument that Biblical commandment that 'Thou Shall Not Kill" applied only to the citizen, not the state, was improper). Then, the prosecutor demonstrated how the Bible actually condoned state-sanctioned capital punishment. *Coe*, 161 F.3d at 351 (finding inappropriate prosecutor's explanation of the foundation for capital punishment in the Bible and in the scriptures themselves). The prosecutor ended her Biblical lesson by outlining the jury's divine mandate to impose the death penalty in this case. *Sandoval*, 241 F.3d at 779.

567. This final appeal was the most damaging. Rather than grapple with the difficult and often imprecise determination of life or death, the jury could rest assured that a death verdict was not only permitted but commanded by a higher authority. And because the prosecutor quoted chapter and verse from the Bible rather than merely articulate her own religious convictions, her argument was not subject to debate. Finally, the prosecutor's assertion was perhaps worse than the oft-quoted phrase of an "eye for eye, tooth for tooth." *Tison v. Arizona*, 481 U.S. 137, 180-81, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (Brennan, J., dissenting) (noting the "crude proportionality of 'an eye for an eye' "); *Coker v. Georgia*, 433 U.S. 584, 620, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (Burger, C.J., dissenting) ("As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.' "). While both carried a strong visceral appeal, clear guidance regarding capital punishment based upon express Judeo-Christian teachings would have been that much more powerful.

568. Therefore, because there is strong likelihood that at least one of the jurors felt obligated to impose the death penalty based upon the prosecutor's sermon, Petitioner was clearly prejudiced.

3. The Prosecutor Argued that the Gender of Petitioner Should be Grounds for Imposing Death.

569. The Prosecutor, Ms. Mader, argued to the jury that Petitioner was more deserving of death because she was a woman:

> Certainly her conduct in this case is every bit as evil as a man could ever think of committing. But I would suggest to you that as a female she had a unique advantage in committing this crime. Because as a female she could suck Steve into believing that she was really caring for him and keep him at the house during the period of time that she was actually plotting his murder.

refrain from "unfounded and inflammatory attacks on the opposing advocate"); see also ABA Standards for Criminal Justice 4-7.8 at 4.99 ("A personal attack by the prosecutor on defense counsel is improper.").

579. Here, the prosecutor's preemptive strike on defense counsel's anticipory argument was inappropriate. The clear import of the prosecutor's statement was that it was incumbent on defense counsel to fabricate something so that Petitioner would appear sympathetic. This amounted to misconduct on multiple levels. First, the prosecutor erected a nonexistent obligation for the defense to engender sympathy for Petitioner in order to avoid the death penalty. Second, the prosecutor's argument gave the impression that information presented by the defense counsel's argument would be spurious and should be immediately discounted. Once again, the prosecutor violated her primary responsibility not to strike "foul" blows. *Berger*, 295 U.S. at 88.

6. The Prosecutor Made a Dubious Plea To Impose The Death Penalty Based Upon Gut Instinct

580. Ms. Mader trivialized and usurped the authority of the court by asking the jury to disregard the court's instructions to weigh the factors in aggravation and mitigation in determining which sentence to impose. Instead she told the jury to rely on gut instinct:

> A United States Supreme Court Justice by the name of Potter Stewart who is now retired wrote a very famous opinion about obscenity. And . . . in that opinion he states, 'What is a dirty book, a dirty magazine, a dirty film? I cannot define what is obscene, but I know it when I see it.'
>
> I might not have been able to describe to you necessarily with my words or pictures during the trial - what is a crime or what is a criminal who has earned the penalty of death. But I would suggest to you that you know it when you see it.

97 RT 12338.

581. The analogy drawn by the prosecutor was not only improper but excessively virulent in that she likened the grave decision to put someone to death to a "dirty book, a dirty magazine, a dirty film." The prosecutor trivialized and truncated the process by encouraging the jury to reject the "clear and objective standards" set forth in the statutory sentencing scheme, *Godfrey*, 446 U.S. at 428, and replace them with an "arbitrary and capricious" method in determining whether the defendant should live or die. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

582. In sum, the numbing hyperbole invoked by Ms. Mader throughout her argument was individually as well as collectively violative of due process. The prosecutor repeatedly crossed the line of permissible argument to purposefully inflame the passions of the jury, thus rendering the trial wholly unfair. *Donnelly*, *supra*, 416 U.S. 637. The trial court's acquiescence to the prosecutor's considerable misconduct violated Petitioner's rights to due process and to equal protection under the Sixth and Fourteenth Amendments. In sum, these constitutional errors produced a death judgment that is not reliable under the Eighth Amendment requiring that Petitioner's sentence be set aside. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

583. After Petitioner has been provided discovery, the use of this Court's subpoena power, and the funds and opportunity to fully investigate her claims, Petitioner requests an opportunity to supplement or amend this Petition.

584. The declarations and other exhibits accompanying this Petition, as well as the allegations set forth elsewhere in this Petition, are hereby incorporated by reference into this claim as though set forth in full.

585. The violations of Petitioner's constitutional rights warrant the granting of this Petition without any determination of whether the violation substantially

affected or influenced the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Further, these violations so infected the integrity of the proceedings that the error cannot be deemed harmless. In any event, these violations of Petitioner's rights had a substantial and injurious effect or influence on Petitioner's conviction and sentence, rendering them fundamentally unfair and resulting in a miscarriage of justice.

CLAIM THIRTEEN - THE COURT'S INSTRUCTION THAT THE JURY COULD NOT CONSIDER THE PUNISHMENT AND/OR NON-PUNISHMENT OF THE ALLEGED ACCOMPLICES DURING THE PENALTY PHASE WAS FUNDAMENTALLY UNFAIR AND RENDERED THE DEATH ~~JUDGMENT~~ UNRELIABLE

586. Petitioner's conviction, confinement and sentence of death are illegal and unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution due to the exclusion of relevant mitigating evidence.

A. Facts in Support

587. The police promised Marvin Lee immunity if he would divulge what he knew about the murder of Stephen Eldridge. Marvin Lee then told the police that Mr. Luna offered him money to help kill Mr. Eldridge. Mr. Luna told Mr. Lee that Petitioner wanted Mr. Eldridge dead in order to collect on an insurance policy. 57 RT 7088-94.

588. Marvin Lee admitted that he went with Mr. Luna on the night of April 28, 1985, and held Mr. Eldridge down while Mr. Luna stabbed him to death. Mr. Lee neglected to tell the police that his brother, Dondell Lee, also went with them and also helped to kill Mr. Eldridge. 57 RT 7148-53, 7080-84.

SUPREME COURT
FILED
JAN 3 - 2007
Frederick K. Ohlrich Clerk
DEPUTY

S130708

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MAUREEN MCDERMOTT on Habeas Corpus

The petition for writ of habeas corpus filed January 14, 2004, is denied.

Each claim and subclaim except claim sixteen is denied on the merits.

Claims One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Twelve, Thirteen, and Fourteen are procedurally barred, separately and independently, on the ground that they are untimely. (See *In re Robbins* (1998) 18 Cal.4th 770, 780, 815, fn. 35; *In re Clark* (1993) 5 Cal.4th 750, 765.)

Claims One, Two, Three (except to the extent it is based on the failure to consult an independent criminalist), Four, Five, Six, Seven, Eight, Nine, Ten, Twelve, Thirteen, and Fourteen are procedurally barred, separately and independently, on the ground that they are successive. (See *In re Clark, supra,* 5 Cal.4th at pp. 767-768.)

Claims Four, Five, Six, Eight, Nine (to the extent it is based on the comments of Juror L.), Ten, Twelve, and Thirteen are procedurally barred, separately and independently, on the ground they were raised and rejected on appeal. (See *In re Harris* (1993) 5 Cal.4th 813, 824-829; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Claims Seven, Nine (to the extent it is based on statements made by the prosecutor and defense counsel), and Fourteen are procedurally barred, separately and independently, on the ground that they could have been but were not raised on appeal. (See *In re Harris, supra,* 5 Cal.4th at p. 825; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claims One (to the extent it is based on a conflict of interest as to witness Howard) and Three (to the extent it is based on the failure to consult an independent criminalist) are procedurally barred, separately and independently, on the ground they are repetitive. (See *In re Clark, supra,* 5 Cal.4th at pp. 767-768.)

Claim Sixteen is denied as premature and without prejudice to petitioner's filing of a renewed petition after an execution date is set.

Corrigan, J., was absent and did not participate.

GEORGE
Chief Justice

PROOF OF SERVICE

I declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and at whose direction I served a copy of the attached **NOTICE OF DECISION BY CALIFORNIA SUPREME COURT** on the following individual(s), addressed as follows,

[ ] Placing same in a sealed envelope for collection and interoffice delivery addressed as follows:	[ ] Placing same in an envelope for hand-delivery addressed as follows:	[x] Placing same in a sealed envelope for collection and mailing via the United States Post Office, addressed as follows:	[ ] Faxing same via facsimile machine addressed as follows:

G. TRACY LETTEAU
Deputy Attorney General
Department of Justice
300 S. Spring Street, Suite 500
Los Angeles, CA 90013

Ms. Maureen McDermott
CDC # W-36601
Central California Women's Facility
504-148L
P.O. Box 1508
Chowchilla, California 93610-1508

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on January 8, 2007.

Patricia Jacobson

SUPREME COURT
FILED
MAY 21 2008
Frederick K. Ohlrich Clerk
Deputy

S155331

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MAUREEN MCDERMOTT on Habeas Corpus

The requests of petitioner and respondent that we judicially notice the records in her appeal (*People v. McDermott* (2002) 28 Cal.4th 946, case number S016081), and in her two previous petitions for writs of habeas corpus (case numbers S092813 and S130708) are granted.

The petition for writ of habeas corpus filed on August 10, 2007, is denied. Each claim is denied on its merits.

GEORGE
Chief Justice

LODGED
FEB 15 2005
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
BY DEPUTY

#17

COPY

SUPREME COURT
FILED
AUG 12 2002
Frederick K. Ohlrich Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

DOCKETED
LOS ANGELES
AUG 15 2002
BY J. APOLINAR

THE PEOPLE,

Plaintiff and Respondent,

v.

MAUREEN MCDERMOTT,

Defendant and Appellant.

NO. S016081

90 XS0004

Los Angeles County
Super. Ct. No. A810541

A jury convicted defendant Maureen McDermott of one count of murder (Pen. Code, § 187, subd. (a))[1] and one count of attempted murder (§§ 664, 187, subd. (a)). The jury found true special circumstance allegations that the murder was carried out for financial gain (§ 190.2, subd. (a)(1)) and by means of lying in wait (§ 190.2, subd. (a)(15)). Defendant was sentenced to death. This appeal is automatic. (Cal. Const., art. VI, § 11; Pen. Code, § 1239.)

I. FACTS AND PROCEEDINGS

A. Guilt Phase

On April 28, 1985, Stephen Eldridge was brutally stabbed to death in the home he shared with defendant, Maureen McDermott. It was undisputed at trial that the actual killers were Jimmy Luna (a former coworker and personal friend of defendant's) and two brothers whom Luna had hired for the murder, Marvin and Dondell Lee. The prosecution's theory at defendant's trial was that defendant had

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

hired Luna to kill Eldridge so she could obtain sole ownership of a house she co-owned with Eldridge and collect $100,000 under an insurance policy she had on Eldridge's life. Luna (who had pled guilty to first degree murder) and both Marvin and Dondell Lee (who had received complete immunity and were never charged with the murder) testified against defendant. Defendant denied complicity in Eldridge's murder.

1. Prosecution evidence

At the time of Stephen Eldridge's murder in 1985, defendant was 37 years old. During the day, she worked as a registered nurse at a hospital (Los Angeles County-USC Medical Center), and in the evening she provided nursing care to Lee La Porte at his home. Defendant shared a house in Van Nuys with Eldridge, a 27-year-old, self-employed landscaper. They owned the property as joint tenants. In December 1984, defendant and Eldridge had each bought $100,000 in life insurance, designating each other as beneficiary.

In early 1985, defendant's relationship with Eldridge deteriorated. Eldridge complained about the unkempt condition of the house and about defendant's pets. Defendant was upset about Eldridge's treatment of her pets and his plans to sell his interest in the house. Near the end of February 1985, defendant discussed with Jimmy Luna, a hospital coworker and personal friend, a plan to kill Eldridge. Defendant told Luna that she had an insurance policy on Eldridge's life and that she wanted him dead. She offered Luna $50,000 to kill Eldridge, and he agreed. Defendant told Luna that she wanted Eldridge stabbed because a gun would make too much noise, and that she wanted the killing to look like a "homosexual murder" because she thought the police would not investigate the murder of a homosexual as vigorously as other killings. To make the murder look like a

homosexual killing, defendant on different occasions suggested that Luna carve out the word "gay" on the body with a knife or cut off the victim's penis.

On three occasions in late February and early March of 1985, defendant arranged for Luna to be at the house she shared with Eldridge so Luna could kill Eldridge. Each time, however, Luna became frightened and could not carry out the murder. Defendant then suggested to Luna that he find someone to help him kill Eldridge, but she told him she did not want anyone but Luna to know of her involvement.

In March 1985, Luna asked his friend Marvin Lee to help him commit the murder. He told Marvin that an "organization" wanted someone killed, and he offered Marvin $3,000 to "watch [his] back." Marvin agreed. In later conversations, Luna told Marvin that the intended victim was a homosexual and that Luna would castrate the victim to make it look like a "homosexual murder."

In the evening of March 21, 1985, Luna and Marvin knocked on the door of the house where defendant and Eldridge lived. As Eldridge opened the door, Luna and Marvin forced their way inside. Threatening Eldridge with a knife, Luna ordered him to crawl on his hands and knees into the bedroom and to lie facedown on the bed. Luna then cut Eldridge on the buttocks with the knife and yelled homosexual epithets at him. From another room, Marvin retrieved a two-foot-long bedpost, with which Luna struck Eldridge on the head. Eldridge jumped up and ran out of the house. Luna and Marvin left.

Los Angeles Police Officer David Yates, who was dispatched to investigate the attack on Eldridge, found him at the house dressed only in his underwear and covered in blood. An ambulance took Eldridge to a hospital for treatment.

The next day, defendant spoke on the telephone with Luna about the failed murder attempt, telling him, "we are going to have to do it again, and this time you can't fail." After March 21 but before April 28, 1985, there were several

telephone conversations between defendant and Luna. During one of these conversations, Marvin was with Luna, and he listened in as defendant discussed the murder plan and what they would do with the anticipated insurance proceeds. Defendant objected to Marvin's participation in the planned murder; she said that if Marvin told anyone about it, that Luna would "have to kill that nigger too." Luna assured her that Marvin was trustworthy and would not say anything. Marvin's brother Dondell overheard part of this conversation when Marvin passed him the telephone.

On the day of the murder, April 28, 1985, Luna met Marvin and Dondell Lee, and Luna offered Dondell money to help commit the murder. Luna then made several telephone calls to defendant, during which defendant told Luna that she would leave a front bedroom window open for entry into the house and that Luna should tie her up and cut or hit her so she would look like a robbery victim.

Around 8:15 p.m., Luna, Marvin, and Dondell entered the house through the front bedroom window. Luna went down the hall to defendant's bedroom, where defendant told him that Eldridge had not yet returned from a dinner engagement. Defendant told Luna to cut her on the breast and inner thigh, which he did, to make it appear that Eldridge was killed when he came home while defendant was being robbed.

Around 10:40 p.m., Eldridge came home. When he entered the house, Dondell Lee met him with a rifle owned by defendant, but provided to him by Luna. Marvin Lee then grabbed Eldridge by the neck in a chokehold and took him down the hall, where Luna repeatedly stabbed him until he slumped to the floor. Luna then returned to defendant's bedroom, where he found defendant lying on the floor with a facial injury. Defendant asked Luna how the injury looked, saying she had banged her head on a table in the bedroom. As Luna and the two Lee

brothers were about to leave the house, Marvin Lee overheard defendant yell from the back bedroom not to forget to cut off Eldridge's penis. Luna did so.

Los Angeles County Deputy Medical Examiner Susan Selser performed the autopsy. She testified that Eldridge had been stabbed 44 times and that his penis was cut off postmortem. Of the 44 stab wounds, 28 were independently fatal.

On May 23, 1985, Luna was taken into custody for questioning, but he was released within 72 hours. On July 2, 1985, he was arrested for the first degree murder of Eldridge. In August 1985, defendant was also arrested. She was charged with attempted murder, and murder and special circumstance allegations of murder for financial gain and lying in wait. Marvin Lee, who was in custody for an unrelated offense, was granted immunity for the murder of Eldridge in exchange for his confession and truthful testimony. In August 1986, Dondell Lee was granted immunity while in the custody of the California Youth Authority. In July 1989, Luna entered into a plea agreement under which he pled guilty to first degree murder and agreed to testify truthfully in the prosecution of defendant.

2. Defense evidence

The main theory of the defense at trial was that the prosecution had not proven its case against defendant. Defense counsel cross-examined prosecution witness Luna for eight days, thoroughly challenging his veracity. The defense also presented the testimony of five of Luna's former coworkers from Los Angeles County-USC Medical Center that Luna was a habitual liar.

Defense witness Dr. John Ryan, a pathologist, testified that—based on his review of the autopsy report—Eldridge's stab wounds had been inflicted by two different weapons.

B. Penalty Phase

1. Prosecution evidence

At the penalty phase, the prosecution presented evidence that defendant had Luna beat up someone so she could obtain that person's job.

In April 1983, Dewayne Bell, John Phillips, and Philip La Chance worked alternating shifts at the La Porte residence as caretakers for the elderly Lee La Porte. At that time, Bell had worked for the La Portes for five years. While La Chance was in jail for driving under the influence, defendant temporarily assumed his caretaker duties. Defendant told Luna that she wanted permanent employment with the La Portes, and she offered Luna money to injure Bell so she could take his job. Luna later attacked Bell at his home, slashing Bell's face, throat, and chest. When Bell returned to his caretaker duties at the La Portes' home, defendant had Luna repeatedly telephone the La Portes and make threats against Bell when Betty La Porte answered the phone. As a result of these calls, Bell lost his job with the La Portes, and defendant took over Bell's duties.

2. Defense evidence

At the penalty phase, the defense presented testimony of defendant's coworkers, her brother, prison guards, and a criminal justice expert.

Dr. Philip Merritt, who had worked with defendant at the county hospital, described defendant as a compassionate and caring nurse.

According to Carol Kelly, a nurse and defendant's colleague at the hospital, defendant was a hard worker who was dependable and well liked by the patients and student nurses.

Wayne McDermott, defendant's brother, testified that defendant was very loving towards their mother, to whom she regularly sent money. He expressed the hope that defendant not be given the death penalty.

Margaret Stokes, a deputy sheriff who worked at the Sybil Brand Institute for Women in Los Angeles, described defendant as a cooperative, sensitive, and caring person who had saved an inmate from choking. In her view, defendant had adjusted well to incarceration. Another deputy, Victoria Samaniego, mentioned that because of defendant's reliability she had been made a jail trusty, and that she had never caused problems.

Jerry Enomoto, a college professor, criminal justice consultant, and former director of the Department of Corrections, stated his opinion that defendant would adjust well in prison if sentenced to life without the possibility of parole.

II. JURY SELECTION ISSUES

A. Prosecutor's Exercise of Peremptory Challenges

Defendant contends she was denied both her state constitutional right to trial by a jury drawn from a representative cross-section of the community (Cal. Const., art. I, § 16) and her federal constitutional right to equal protection (U.S. Const., 14th Amend.) because the prosecution impermissibly used its peremptory challenges to remove prospective jurors on the basis of race (see *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277). We disagree.

1. Facts

During the initial jury selection process, the defense excused 20, and the prosecution 18, prospective jurors on peremptory challenges. The prosecution exercised six of its 18 peremptory challenges against Black prospective jurors, while the defense removed one Black prospective juror by peremptory challenge. The jury that was sworn included no Blacks.

Immediately after the jury was sworn, the trial court recalled that one of the jurors had told the bailiff he had read a newspaper article about the case. After

inquiring into the matter, the trial court discharged this juror. To select a replacement for the discharged juror, the court granted the defense one peremptory challenge and the prosecution two peremptory challenges.

The first prospective juror called, James T., was Black. After both sides passed for cause, the prosecutor exercised a peremptory challenge against him. The next prospective juror called, Gerald W., was also Black. When the defense did not challenge him for cause, the prosecution immediately exercised its remaining peremptory challenge against Gerald W. At that point, the defense accused the prosecution of exercising its peremptory challenges for the constitutionally impermissible purpose of eliminating prospective jurors because of their race.

The trial court asked the prosecutor to give her reason for excluding Prospective Juror Gerald W., but the court stated it was not making a finding that the defense had established a prima facie case of racial motivation. The prosecutor replied that Gerald W. had initially "said that he favored the death penalty only in situations if a person had a criminal record," although the prosecutor acknowledged that Gerald W. had "changed his mind later." The prosecutor also asserted that on his questionnaire Gerald W. had said he was in favor "basically of rehabilitation and counseling before punishment such as the death penalty."

Defense counsel observed that the prosecutor had exercised eight of 20 peremptory challenges against Black prospective jurors and that the jury as constituted did not include any Blacks. Asserting that the prosecutor had used peremptory challenges to excuse Blacks who "were fundamentally pro prosecution on the death penalty issue," defense counsel argued that exclusion based on race was the only explanation for the prosecutor's use of peremptory challenges against Blacks.

The trial court commented that although the jury as sworn included no Blacks, the prosecutor had earlier *twice* accepted a jury that included a Black juror whom the defense later peremptorily challenged. The court then asked to see defense counsel's copies of the questionnaires of the Black prospective jurors whom the prosecutor had excused by peremptory challenge, noting that counsel's copies were more organized than the court's. As defense counsel handed the questionnaires to the court, the prosecutor made comments as to some of the excused Black prospective jurors. Noting that Keia M. was only 19 years old, the prosecutor said she "didn't feel she [Keia] was mature enough" to sit as a juror in this death penalty case because "her views were not thought out at all." As to Theola J., the prosecutor described her as "very, very stupid," adding that "she couldn't see herself ever giving the death penalty." Of Gilbert K. the prosecutor noted that he "stated that he would consider the death penalty if the crime was particularly brutal" but "he doesn't want the death penalty unless the defendant would kill again in prison," and the prosecutor "didn't feel that was a realistic prospect for the defendant in this case."

The trial court said it might "be prepared to find a prima facie case" and would have to "go through each explanation to see if there is any reasonable basis for the exercise of the challenge." After a recess, the court stated: "I think I have all the information I need." The court found that the defense had established a prima facie case, and said it was "looking at all the questionnaires of Black jurors who have been excused and listening to [the prosecutor's] explanations and trying to see if there is a reasonable relationship between the reason for the excusal and the viewpoints of the jurors."

Asked by the trial court if she wanted to be heard any further, the prosecutor replied: "I would like to say one more thing that in addition to the explanations which I have provided to the court with respect to each one of these

jurors which honestly wouldn't have made any difference to me what their race was, given some of their views, I also took into account the fact that I believe that all these jurors weren't necessarily opposed to the death penalty, but that I had a pool of jurors out in the audience who I thought were more in favor of the death penalty than these particular jurors. And that it was no reason to keep them. [¶] I didn't feel they would be good prosecution jurors on the issue of the death penalty. [¶] And I would have preferred, frankly, to have a number of Black jurors on this case because of the fact that the defendant makes racist remarks which will be coming into evidence. And that I have two Black prosecution witnesses Marvin Lee and Dondell Lee. And that I would have liked to have some Black jurors."

The trial court remarked that at issue were the "death penalty views" of the prospective jurors, and it found a "reasonable relationship" between those views expressed either in the juror questionnaires "or orally by the prospective juror" and the prosecutor's challenge to each of those jurors. The court noted that in making this finding it had also taken into account that the prosecutor had *twice* earlier accepted the jury when it included one Black juror. The court denied the defense motion.

The jury selection process continued, and a twelfth juror, Harold O., was selected and sworn. Thereafter, six alternate jurors were selected and sworn. One of the alternates was Margaret C., a Black woman, who eventually served on the jury, replacing a juror excused during the trial.

2. Analysis

"The exercise of peremptory challenges to eliminate prospective jurors because of their race violates the federal Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79, 89) and the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277)." (*People v. Williams* (1997) 16 Cal.4th 636, 663.) A party

claiming an opponent improperly discriminated in the exercise of peremptory challenges must make a timely objection and demonstrate a strong likelihood that prospective jurors were excluded because of their race or other group association. (*Id.* at pp. 663-664; *People v. Arias* (1996) 13 Cal.4th 92, 134-135.)

This court has stated that a motion alleging discriminatory use of peremptory challenges is untimely if "first asserted after the jury has been sworn." (*People v. Thompson* (1990) 50 Cal.3d 134, 179.) We made that statement, however, in the context of a motion brought after all jury impanelment procedures had been concluded. (*Id.* at pp. 178-179; see also *People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.) As other courts have recognized, discriminatory motive may become sufficiently apparent to establish a prima facie case only during the selection of alternate jurors, and a motion promptly made before the alternates are sworn, and before any remaining unselected prospective jurors are dismissed, is timely not only as to the prospective jurors challenged during the selection of the alternate jurors but also as to those dismissed during selection of the 12 jurors already sworn. (*People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023; *People v. Gore* (1993) 18 Cal.App.4th 692, 701-706; see also *Morning v. Zapata Protein (USA), Inc.* (4th Cir. 1997) 128 F.3d 213, 215 [stating that a *Batson* challenge must "be raised, at the latest, before the venire is excused"]; *Dias v. Sky Chefs, Inc.* (9th Cir. 1991) 948 F.2d 532, 534 [stating that *Batson* challenge must "occur as soon as possible, preferably before the jury is sworn."].) Thus, it is more accurate to say that the motion is timely if made before jury impanelment is completed because "the impanelment of the jury is not deemed complete until the alternates are selected and sworn." (*In re Mendes* (1979) 23 Cal.3d 847, 853.) Here, the defense motion was timely because it was made before the alternate jurors were selected and sworn.

The party, here defendant, who claims the opposing party has engaged in discriminatory use of peremptory challenges bears the initial burden to establish a prima facie case—that is, to raise a reasonable inference that the opposing party has challenged the jurors because of their race or other group association. (*People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7.) Here, the trial court found that the defense had established a prima facie case, and we assume that finding is supported by substantial evidence. (*People v. Silva* (2001) 25 Cal.4th 345, 384.)

Once the trial court finds that the moving party has made a prima facie case, the burden shifts to the opposing party to provide an explanation for the peremptory challenges that is race or group neutral and related to the particular case being tried. (*People v. Silva, supra,* 25 Cal.4th at p. 384; *People v. Ervin* (2000) 22 Cal.4th 48, 74-75.)

Here, the prosecutor said she had peremptorily challenged the eight Black prospective jurors because their views on the death penalty were unfavorable to the prosecution. Although the prosecutor also stated that one juror, Keia M., was immature, and that another, Theola J., was "very stupid," the trial court understood that the overriding reason for challenging the eight prospective jurors was the attitude of each toward the death penalty. The Attorney General agrees that the prosecutor challenged each of the eight Black prospective jurors for essentially the same reason, namely, that "the prospective juror's views and attitudes regarding the death penalty were adverse to the prosecution . . . ."

A prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case. (*People v. Mayfield* (1997) 14 Cal.4th 668, 724.) When the trial court has found a prima facie case, and the party exercising the peremptory challenges has stated a race-neutral reason for each challenge, "the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination."

(*Purkett v. Elem* (1995) 514 U.S. 765, 767; see also *People v. Silva, supra*, 25 Cal.4th at p. 384.) The trial court's ruling on this issue is reviewed for substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196.) But we apply this deferential standard of review only when "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva, supra*, 25 Cal.4th at p. 386; accord, *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

We consider each of the eight challenged jurors, taking them in the order in which the prosecutor challenged them.

a. Patricia M.

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Patricia M. wrote: "If evidence is presented of one taking a life without justifiable cause—for example, molesting children or child abuse—I really have no problem with a guilty verdict—or where proof is shown where someone took anyone [*sic*] life just for thrills." She wrote that she had voted to reinstate the death penalty when it was on the ballot in 1978, and she stated that "the State should have the right to execute, depending on the circumstance, an individual who—unlawfully kills another human being, whether intentionally or not."

On voir dire, defense counsel asked what Patricia M.'s views would be on the appropriate penalty if she were to find defendant guilty of first degree murder with the special circumstance of lying in wait or financial gain. She answered: "I would probably be more apt to say life without the possibility of parole." Asked to explain, she said: "Because to me it is death anyway. You're going to be confined and it said without any parole. You're going to die there anyway. It is a slow death."

Under questioning by the prosecutor, Patricia M. said that death was a more severe punishment than life imprisonment without parole. Asked whether she would be more inclined to vote for life imprisonment without parole if the victim was not a child, she replied: "Depending on the situation with her as to why—if in fact she killed the person. It would be the involvement. I'd have to hear the circumstances surrounding it. But I don't feel that I would be swayed one way or the other as to more for the death or more for imprisonment."

Asked whether a premeditated murder for financial gain was "the type of murder [she] would consider the death penalty for," she replied, "Possibly." Asked whether she felt the death penalty "really serves any purpose," she replied, "Not really."

Having reviewed the record—especially Patricia M.'s view that the death penalty did not serve any purpose and her stated inclination to impose life imprisonment rather than death for a premeditated murder carried out for financial gain—we conclude that substantial evidence supports the trial court's findings that the prosecutor could reasonably view Brenda B. as unfavorable on the penalty issue and that the prosecutor's peremptory challenge against her was based on her death penalty views and not on her race.

b. Gilbert K.

On the jury questionnaire, in response to a question about his general feelings on the death penalty, Gilbert K. wrote: "Necessary in some cases to protect the population, and society." Gilbert K. thought the state had the right to impose capital punishment for both intentional and unintentional killings.

On voir dire, in response to a question whether he had strong feelings about the death penalty either way, Gilbert K. replied: "No, I wouldn't, especially I would say that I feel every case has its own merits, and depending on what the case is about and what is happening, I would decide from that point." The

prosecutor asked Gilbert K. to rate his death penalty views on a scale of one to 10, "10 being somebody who would always impose it in a case of premeditated murder, an eye for an eye; you kill somebody, you get the death penalty; one let's say being somebody who would never do so." Gilbert K. answered that he "would probably be somewhere around a four or five, depending on the case itself and a person is found guilty and circumstances involved in it." The prosecutor asked whether this meant Gilbert K. was "somebody who kind of leans away from the death penalty." Gilbert K. replied, "I find myself straddling the line basically at five until I hear the difference to persuade me either way or the other."

The prosecutor asked whether Gilbert K. could "think about any type of case just in the abstract that . . . in your mind would call for the death penalty." He replied: "Possibly a case where a person who could be found guilty or would be found guilty I would say was a person that could possibly want to commit murder again. [¶] That would make me think more about the death penalty. [¶] A person that could possibly go back out and kill somebody else again or couldn't be controlled to keep somebody from hurting again." The prosecutor reminded Gilbert K. that the alternative penalty was life imprisonment without parole, meaning that "the person would never come out of prison alive." Gilbert K. replied: "But that person would be in prison with other people, and people are, even though they may be in prison, can be hurt in prison."

The prosecutor then asked Gilbert K. if he could see himself ever voting for the death penalty if he "did not feel that there was a chance that the person would kill again." Gilbert K. replied: "If I did not feel the person would kill again, that's very doubtful. It is very doubtful." Asked to explain further, he added: "Because of the fact that the person is to me is under total control or being controlled for the rest of their life. [¶] I don't see the necessity to kill somebody for that. . . . What I am just basically saying is depending on the circumstances and the circumstances

of the case itself, if a person was found guilty of the crime, and I felt that they could not do anybody any other harm or that they were the type of person warranted any other harm, life in prison I think would fit. [¶] If a person was a person who I felt was dangerous to society or to themselves, or a type of person who without any thought or malice could hurt somebody at any time, I say that is the person who maybe would be a good candidate for the death penalty."

Under further questioning by the prosecutor, Gilbert K. modified his views. He said he could see himself voting to impose the death penalty on a defendant who would not likely kill again if the defendant was guilty of a premeditated murder by lying in wait or for financial gain and the crime was particularly brutal or cold-blooded or had been planned over a long period of time.

Having reviewed the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Gilbert K. as unfavorable on the penalty issue. Because defendant apparently had no history of violence and did not personally commit the capital murder, the prosecutor had little basis to argue that defendant would kill again if sentenced to prison for life without parole. Although Gilbert K. eventually said he could see himself voting to impose the death penalty on a defendant who was not likely to commit future violent acts, his earlier responses, questioning the need to execute someone who posed little or no threat of violence in prison, could be a matter of legitimate concern to the prosecutor in this case. We see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Gilbert K. was based on his death penalty views and not on his race.

c. Theola J.

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Theola J. wrote: "Mixed." Asked during voir dire to explain what she had meant, she said: "Well, I feel that I don't think—just like

if I have a chance to decide on that, I don't think I would." Asked whether she meant she would have difficulty voting for the death penalty, she said: "No, I wouldn't have—after I see, you know, what everything that I listened to, you know." She said she would not automatically vote either for or against the death penalty, but instead would listen to any evidence presented on the issue of penalty. She said: "I would have to hear. I would have to make up my mind after I hear what's presented before me. I just couldn't say right now, you know. I couldn't say one way or the other because like I said, mixed. I don't know really, you know. "

Asked by defense counsel whether she would be "somewhere in the middle" on a scale of one to 10, Theola J. answered in the affirmative. Asked by the prosecutor whether she thought the State of California should have the right to execute somebody for a particular kind of murder, Theola J. said: "Well, I think they should have that right. I say under certain circumstances, I think." Asked to explain what circumstances would warrant the death penalty, she said: "It would really have to be horrible. . . . Some of the things that I might, you know, that a person what I believe just didn't have a heart, you know, that would do something to somebody. That's the way I feel."

The prosecutor asked Theola J. whether she felt "that the state should have the right to execute somebody if they are found guilty of a first degree premeditated deliberate murder." Theola J. replied: "No, I don't think so." Asked to explain, she said: "Well, I would think that it could be another punishment, you know, maybe life or something." On further probing of her views by the prosecutor, Theola J. said: "Well, like I said, maybe the state should have the right under certain circumstances, but some of them that I don't think that I would think it was that—that they should have that right." Asked to explain what circumstances would warrant the death penalty, she said: "Like I said

before, it would have to be worse than death. . . . It would have to be, like I said, a more—even though that's violent, it would have to be a little more violent or something, I think."

At this point the trial court intervened and explained to Theola J. that under this state's laws not every first degree murder qualifies for the death penalty, that a first degree murder with the special circumstances of financial gain or lying in wait did qualify for the death penalty, and that the jury would determine penalty only if it found defendant guilty beyond a reasonable doubt of first degree murder with one or both of these special circumstances. Theola J. indicated that she understood the court's explanation, that it seemed different than what the prosecutor had asked her, and that she did not have any problem with the law as the court had explained it. The court asked Theola J. whether she was "one of those persons who would never vote for the death penalty under those circumstance, under those conditions." She answered: "No, I don't think I would be one that would never vote for it. I think I would vote for it. But, like I said, I would have to hear. They would have to convince me. See, I would have to be convinced, you know, because I could say, well, I would decide, you know, I wouldn't want this to happen or want this to happen, but my mind could change after hearing what I have to hear. That's the only way I could be convinced."

The prosecutor then asked whether Theola J. felt "that the state should have the right to execute somebody who has committed a premeditated, deliberate murder by lying in wait." Theola J. replied: "Yes, I think so." Asked whether such a crime would be "horrible enough" to make the death penalty appropriate, Theola J. said: "Yeah, I think so after I hear. Like I said, it is really hard for me because I could say one thing and then after I hear it I could say maybe I shouldn't have said that. After I hear. After you hear things and it's been explained to you from A to Z, it is a lot better than just trying to say it now. You know, I think the

more I would hear about what happened then my decision could be, you know, I could decide for myself, you know, which way I would really feel."

Having reviewed the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Theola J. as unfavorable on the penalty issue. Although her responses were confused and inconsistent, and her final statements indicated neutrality on the death penalty, two of her answers could cause the prosecutor legitimate concern. Most obviously, she said she did not think the state should have the right to impose the death penalty for a first degree premeditated deliberate murder, and she thought there could be another punishment, such as life imprisonment. Although she modified or explained this view, she then said that to impose the death penalty "they"—by inference the prosecution—would have to convince her, suggesting that she might enter the penalty phase with something like a presumption in favor of the alternate penalty of life without parole. In view of these responses, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Theola J. was based on her death penalty views and not on her race.

d. Brenda B.

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Brenda B. wrote: "In some cases I believe in the death penalty. However, only when there can be no rehabilitation at all." She repeated this view on voir dire, stating: "I believe that a person—if a person can be rehabilitated and if they're truly sorry for what they did . . . . I believe in giving them a chance to prove it." At one point she said she would automatically vote for life without parole, rather than death, if she was convinced the defendant could be rehabilitated. Although she later retreated from this position somewhat, she continued to view the potential for rehabilitation as the most important consideration in determining penalty in a capital case. Because defendant had no

prior criminal record, the prosecutor might reasonably conclude that Brenda B.'s focus on rehabilitation made her an unfavorable jury for the prosecution on the penalty issue. Substantial evidence supports the trial court's finding that Brenda B.'s views on the death penalty, rather than her race, were the basis for the prosecution's peremptory challenge.

e. Kathryn S.

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Kathryn S. wrote: "I really don't know for sure. I have never really given it thought." On voir dire, the trial court asked if she had since given thought to the death penalty. Kathryn S. said she had, adding: "I don't have any feelings one way or the other." Asked whether she believed there should be a law allowing for the death penalty, she said: "I don't know. I really can't say if there should be a law or there shouldn't."

On voir dire by defense counsel, Kathryn S. said she would want to hear from defendant in making the penalty determination, but that she would not necessarily vote for death if defendant did not testify. She said that on a scale of zero to 10, with zero being never voting to impose the death penalty and 10 being always voting to impose the death penalty, she would consider herself a five.

The prosecutor asked Kathryn S. whether she thought the death penalty was "worse" than life without possibility of parole. At first, Kathryn S. replied: "I really can't say. I don't know. They are both bad." The prosecutor asked which of these punishments Kathryn S. would impose if she "wanted to punish somebody the worst that you possibly could." Kathryn S. said: "Maybe I would say life in prison. . . . So they could have a chance to think about what they did." Asked again which punishment she would choose to punish someone "in the most harsh manner that you could," Kathryn S. said: "Life without possibility of parole." Asked why she would ever "give the death penalty," Kathryn S. replied:

"I don't know that I would. I mean I can't say. Why would I—I don't know why I would ever give it or if I would."

After reviewing the record, we conclude that substantial evidence supports the trial court's finding that the prosecutor could reasonably view Kathryn S. as unfavorable on the penalty issue. Although her responses generally indicated neutrality on the death penalty, she expressed considerable doubt that the death penalty was a harsher punishment than life in prison without possibility of parole and she could not explain why she would ever choose the death penalty over life without parole. In view of these responses, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Kathryn S. was based on her death penalty views and not on her race.

f. Keia M.

On the jury questionnaire, in response to a question about her general feelings on the death penalty, Keia M. wrote: "It depends on the case." On voir dire by the trial court, Keia M. said she did not have strong feelings either way about the death penalty and would not automatically vote either for or against it.

On voir dire by defense counsel, Keia M. agreed that she was "right down the middle" on the death penalty and that on a scale of zero to 10 her views on the death penalty would be a five.

The prosecutor on voir dire asked Keia M. if she had any thoughts on whether life in prison without possibility or death was "worse as a punishment." Keia M. replied: "I really don't think one is worse than the other. I can't say that life imprisonment, in prison is worse than the death penalty, because I have never been in prison. I mean, I don't know the situation. But I would think that there is no difference. There is really not a difference." Asked which penalty she would choose if she "wanted to punish the person the most severely that [she] could," Keia M. replied: "The death penalty." She explained: "You just go faster. You

don't—well, not a lot of people think the way I do. I think the more time you have here on this earth, the better it is, you know, no matter where you are."

Substantial evidence supports the trial court's finding that the prosecutor could reasonably view Keia M. as unfavorable on the penalty issue. Although her responses generally indicated neutrality on the death penalty, and although she eventually expressed the view that the death penalty was a harsher punishment than life in prison without possibility of parole, she nonetheless had expressed the view that there was really no difference between the two penalties in terms of severity. Given this expression of opinion on an issue critical to penalty determination, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Keia M. was based on her death penalty views and not on her race.

g. James T.

On the jury questionnaire, in response to a question about his general feelings on the death penalty, James T. wrote: "I have mixed feeling because my religious beliefs condem [*sic*] killing, yet I feel punishment should fit the crime." On voir dire by the trial court, James T. said there was no conflict between his religious beliefs and state law allowing a jury to impose the death penalty and that he would not automatically vote either for or against it.

On voir dire by the prosecutor, James T. said that the biblical command "Thou shalt not kill" applied to "everybody in society" but not to the state. He affirmed again that voting as a juror to impose the death penalty would not conflict with his religious views. He said that a murder deliberately planned for financial gain was the type of murder that could get his vote for the death penalty. Asked whether he thought our society should have a death penalty, James T. replied: "I think that society needs to be in a situation where they should not have a death penalty. And that's what I am just saying. No one should kill another person, you

know, to bring the situation up." The prosecutor then asked whether James T. would vote for the death penalty if it was on the ballot. James T. answered: "I would probably vote no. . . . Because simply killing is wrong."

Substantial evidence supports the trial court's finding that the prosecutor could reasonably view James T. as unfavorable on the penalty issue. Although he consistently denied any conflict between his religious views and state law on the death penalty, James T. said he would vote against it if it appeared on the ballot because of his strongly held view that killing is wrong. Given this expression of doubt about the moral legitimacy of the death penalty, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against James T. was based on his death penalty views and not on his race.

h. Gerald W.

On the jury questionnaire, in response to a question about his general feelings on the death penalty, Gerald W. wrote: "If someone purposely takes the life of another, I feel that they should be punished severely. If accidental or without thought I feel they should go through some type of rehab & counseling for an extensive period of time." On voir dire by the trial court, Gerald W. said he would not automatically vote either for or against the death penalty.

The prosecutor on voir dire asked Gerald W. whether he thought "that as a society we should even have the death penalty." Gerald W. replied: "Yes, I believe that there are some murder cases that require the death penalty. Because there are some people that just are killers. Might have had, to me, a criminal life or scrapes with the law, you know." The prosecutor then asked how he would feel "if the person had not done it before." Gerald W. said: "They would be in a different category." Asked whether his ability "to vote for the death penalty in a lot of ways would be determined by the person's prior criminal record," Gerald W. replied: "It would have a lot to do with it." On further questioning, however,

Gerald W. added that he could see himself voting for the death penalty when the person did not have a prior criminal record but committed "a very violent premeditated murder." Asked what kinds of things he would look for in making the penalty determination in that situation, Gerald W. said: "The history of what the person was like prior to this murder." The prosecutor then asked this question: "Could you see yourself ever voting for the death penalty in a situation where you have already found the person guilty because they participated in the crime, but they weren't the person who actually pulled the trigger and did the stabbing, whatever?" Gerald W. replied: "I don't think so." He later said, however, that if three people agreed to commit a robbery and decided in advance to kill the robbery victim, he could vote for the death penalty for each of the participants because "one should not get off any lighter as far as sentencing or anything than the other because all three of them—to me, that would like they all shared equally in that crime."

Substantial evidence supports the trial court's finding that the prosecutor could reasonably view Gerald W. as unfavorable on the penalty issue. Although he indicated he was neutral on the death penalty, his answers suggested that in making the penalty determination he would be heavily influenced by the presence or absence of a prior criminal record and that at least initially he was not inclined to impose the death penalty on one who did not personally participate in the killing. In the context of this case, where the defendant lacked a prior criminal record and did not directly participate in the killing, we see no basis to disturb the trial court's finding that the prosecutor's peremptory challenge against Gerald W. was based on his death penalty views and not on his race.

3. Defendant's arguments

Defendant argues that the trial court's findings are not entitled to deference because the trial court did not make " 'a sincere and reasoned attempt to evaluate the prosecutor's explanation.' " (*People v. Fuentes, supra,* 54 Cal.3d at p. 718.) More particularly, defendant asserts the trial court reviewed jury questionnaires as to only seven of the eight Black prospective jurors that the prosecutor had excused by peremptory challenge. We find the record on this point to be inconclusive. The trial court asked defense counsel for his copies of the questionnaires because, as the court said, they were better organized than the court's, and the court mentioned seven of the eight prospective jurors by name, omitting the name of Patricia M. But the trial court may have had its own copy of Patricia M.'s questionnaire already in hand, or defense counsel may have supplied the court with all eight questionnaires. We note that the court later announced it had "look[ed] at all the questionnaires of Black jurors who have been excused." Defense counsel did not challenge this statement. On this record, we find no basis to conclude that the trial court failed to review the questionnaires and the voir dire responses of each of the eight prospective jurors.

Defendant also argues that the trial court should have granted the defense motion because the prosecutor failed to give separate reasons for challenging each of the eight Black prospective jurors and because the trial court failed to make separate findings as to each challenged juror. Although we agree that it is generally preferable to have individual reasons and individual findings for each challenged juror, we have never required them. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva, supra,* 25 Cal.4th at p. 386; see also *People v. Arias, supra,* 13 Cal.4th at p. 137, fn. 17.)

Defendant next asserts that the prosecutor's stated reasons for the challenges invited a comparison with the pool of remaining unselected prospective jurors. The prosecutor said: "I also took into account the fact that I believe that all these jurors weren't necessarily opposed to the death penalty, but that I had a pool of jurors out in the audience who I thought were more in favor of the death penalty than these particular jurors." Defendant argues that in view of this statement it became necessary to undertake the comparison that the prosecutor invited.

We note that at trial the defense did not suggest undertaking such a comparison, and indeed defendant's trial attorney stated that at issue were the death penalty views of the challenged Black prospective jurors, not the views of prospective jurors who had not yet been called into the jury box. The trial court indicated its agreement with this statement. The defense did not protest when the trial court said it had reviewed the questionnaires and voir dire of the challenged jurors, without referring to the unselected jurors remaining in the jury pool. Because the trial court's review of the questionnaires and voir dire of the challenged jurors showed that each had expressed views that the prosecutor could reasonably regard as unfavorable on the penalty issue, the trial court apparently concluded, with defense acquiescence, that there was no need to compare their expressed views with those of the remaining prospective jurors in the jury pool.

Moreover, the comparison that defendant invites hardly seems feasible. Under the jury selection system that the trial court was using, the parties did not know the order in which prospective jurors in the jury pool would be called into the jury box. The number of prospective jurors in the pool, and their identities, changed with the exercise of each peremptory challenge and the summoning of each prospective juror from the pool into the jury box. Defendant has attempted to undertake a comparative analysis in his appellate brief, but it is inconclusive.

Defendant does not dispute that at the time of each prosecution peremptory challenge against a Black prospective juror, there remained in the jury pool at least one prospective juror (and usually several) whom the prospector could reasonably regard as more favorable on the penalty issue, and that, during most of the time in question, the prosecutor had more remaining peremptory challenges than the defense. Although the prosecutor could never be entirely certain that the challenged Black prospective juror would be replaced by a juror with more favorable penalty views, the prosecutor could reasonably have thought it more likely than not that this would occur.

We conclude, therefore, that defendant has failed to demonstrate error in the trial court's denial of his motion under *Batson v. Kentucky, supra,* 476 U.S. 79, and *People v. Wheeler, supra,* 22 Cal.3d 258.

B. Challenges to Prospective Jurors for Cause

Defendant contends that during jury selection the trial court erred in overruling her "for cause" challenges to six prospective jurors and in granting the prosecution's challenges to two prospective jurors.

The same legal standard governs the inclusion or exclusion of a prospective juror. (*People v. Mincey* (1992) 2 Cal.4th 408, 456.) A trial court should sustain a challenge for cause when a juror's views would "prevent or substantially impair" the performance of the juror's duties in accordance with the court's instructions and the juror's oath. (*People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Mayfield, supra,* 14 Cal.4th at p. 727.) On appeal, we will uphold a trial court's ruling on a challenge for cause by either party "if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Mayfield, supra,* 14 Cal.4th at p. 727; see

also *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey, supra,* 2 Cal.4th at pp. 456–457.)

1. Harold O.

The trial court properly denied the defense challenge for cause to Prospective Juror Harold O. On voir dire, Harold O. expressed strong feelings in favor of the death penalty, but he also said he would not automatically "go one way or the other" and would follow the law as instructed. Although Harold O. at one point said he would automatically vote for death at the penalty phase unless evidence was introduced to convince him otherwise, the record shows that Harold O. mistakenly thought he was being asked for his views on the appropriate penalty if no evidence was introduced at the penalty phase. When the trial court clarified the question, Harold O. assured the court that he would consider the evidence and mitigating factors. The trial court impliedly resolved any conflicts or ambiguities in Harold O.'s responses by finding that his views on the death penalty would not prevent or substantially impair the performance of his duties as a juror. We will not disturb that finding, which is fairly supported by the record.

2. Mary F.

The trial court properly denied the defense challenge for cause to Prospective Juror Mary F. Although Mary F. said she favored the death penalty, she also said she would keep an open mind and would consider life without possibility of parole at the penalty phase. The trial court impliedly resolved any conflicts or ambiguities in Mary F.'s responses by finding that her views on the death penalty would not prevent or substantially impair the performance of her duties as a juror. We will not disturb that finding, which is fairly supported by the record.

3. Hilyard B.

Prospective Juror Hilyard B. said he felt strongly that the death penalty should be imposed under certain circumstances, but he also said that he could set aside his personal feelings and follow the law as instructed, and that the appropriate sentence to be imposed would depend on the particular situation. Hilyard B. stated that although he would give greater weight to the circumstances of the crime and recent mitigating factors, he would consider other factors in aggravation and mitigation as well. These responses do not show that the trial court erred in denying the defense challenge for cause.

Hilyard B. did not answer questions in the juror questionnaire about how he had voted in elections; he explained that he considered that information personal and confidential. We reject defendant's argument that the trial court was required to excuse Hilyard B. because of his failure to answer these particular questions, or that defendant was denied a right to adequate voir dire. Hilyard B. freely answered questions on voir dire about his death penalty views and his ability to obey the court's instructions regarding penalty determination in a capital case. Thus, the defense had adequate opportunity to voir dire Hilyard B. in support of a challenge for cause. (See *People v. Holt* (1997) 15 Cal.4th 619, 661 [stating that reversal of judgment is required only when voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair"].)

4. Katherine K. and Barbara M.

As defendant concedes, Prospective Jurors Katherine K. and Barbara M. gave contradictory answers on voir dire. When denying the defense challenges for cause, the trial court impliedly resolved those contradictions by finding that their views would not prevent or substantially impair the performance of their duties as jurors, and we will not disturb those findings, which are fairly supported by the record. Although Barbara M. did not disclose in her juror questionnaire that her

mother-in-law had been a murder victim 20 years earlier, she disclosed the information on voir dire, and the trial court considered it in denying the defense challenge for cause.

5. Richard R.

The trial court properly denied the defense challenge for cause to Prospective Juror Richard R. Although during voir dire Richard R. said he thought defense counsel was trying to influence the prospective jurors, he said he would not hold this against the defense and it would not affect his performance as a juror. By denying the defense challenge for cause, the trial court impliedly found that Richard R.'s views would not prevent or substantially impair the performance of his duties as a juror, and we will not disturb that finding, which is fairly supported by the record.

6. Scott M. and Beverly S.

The trial court did not err in granting the prosecution's challenges for cause to Prospective Jurors Scott M. and Beverly S. As defendant recognizes, they made statements in their juror questionnaires that would disqualify them from serving as jurors in this case. Although their later statements during voir dire may not have been disqualifying, the resolution of these conflicts and contradictions was the task of the trial court. By granting the prosecution's challenges for cause, the trial court impliedly found that these prospective jurors' views would prevent or substantially impair the performance of their duties as jurors, and we will not disturb those findings, which are fairly supported by the record.

C. Double Jeopardy and Comment on Failure to Testify

Immediately after the jury was sworn, the trial court recalled that one of the jurors, Fred L., had earlier told the bailiff about reading a newspaper article regarding the case. The court, in the presence of the other jurors, inquired into the

matter. When the court asked whether the article had affected his ability to be fair to either side, Juror Fred L. responded: "It would cause me to want the defendant to testify on her own behalf even though she constitutionally doesn't have to, and that would lead me to be prejudiced against her." The court then asked, "In other words, you would expect if the defendant doesn't take the stand and testify in her own behalf, you would hold it against her?" Juror Fred L. replied, "Yes." After a sidebar discussion with the attorneys for both sides, the trial court discharged Fred L. When the court then asked the remaining 11 jurors if any of them had read anything that would cause them to believe that they could not be fair, no one responded.

Defendant contends that jeopardy attached when the 12 jurors were sworn, and that therefore the trial court proceedings after the discharge of Juror Fred L. violated her constitutional right under the Fifth Amendment to the federal Constitution to not be placed in jeopardy twice for the same offense. We have held that generally "where a court has indicated that a trial will be conducted with alternate jurors the impanelment of the jury is not deemed complete until the alternates are selected and sworn." (*In re Mendes, supra,* 23 Cal.3d at p. 853.) The trial court here indicated that there would be alternate jurors. Defendant urges us to overrule *Mendes* because, according to defendant, it conflicts with the United States Supreme Court's decision in *Crist v. Bretz* (1978) 437 U.S. 28, holding that jeopardy attaches when jurors are impaneled and sworn. As the Attorney General notes, however, we were aware of and considered the high court's decision in *Crist* when we decided *In re Mendes,* and we there concluded that our decision was not in conflict with *Crist.* (*In re Mendes, supra,* 23 Cal.3d at pp. 853-854.) We adhere to that view.

We also reject defendant's argument that the statements by Juror Fred L. and those the trial court made in the presence of the full jury constituted improper

comments on defendant's failure to testify. Fred L. stated that based on the article he read, he would want defendant to testify "even though [defendant] constitutionally doesn't have to," and that would lead him "to be prejudiced against her." Defendant did not preserve the issue for appeal because she did not make a timely objection in the trial court. (See *People v. Hines* (1997) 15 Cal.4th 997, 1035.) In any event, the specific contents of the article were not discussed in front of the other jurors but only in a sidebar conference with counsel, Juror Fred L.'s comment expressly recognized defendant's constitutional right not to testify, and the trial court instructed the jury not to draw any inferences from a defendant's failure to testify. Accordingly, the statements in question were not constitutionally improper comments on defendant's failure to testify.

III. GUILT PHASE ISSUES

A. Accomplice Corroboration

Defendant contends she is entitled to a judgment of acquittal because the only evidence linking her to the crimes came from the uncorroborated testimony of accomplices James Luna and brothers Marvin and Dondell Lee. As recited earlier, that testimony was as follows: Defendant agreed to pay Luna $50,000 from the proceeds of an insurance policy to kill victim Eldridge. Defendant made arrangements for Luna and brothers Marvin and Dondell Lee to enter the house to kill Eldridge, for Luna to help her inflict some injuries on herself so it would appear that the killing occurred during a robbery, to kill Eldridge, and to cut off his penis to make the crime look like a "homosexual murder."

A conviction can be based on an accomplice's testimony only if other evidence tending to connect the defendant with the commission of the offense corroborates that testimony. (§ 1111.) The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element

of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

Here, to corroborate the accomplice testimony, the prosecution presented independent evidence that defendant had a motive to kill Eldridge to obtain possession of the house they owned in joint tenancy and to obtain the proceeds of an insurance policy on Eldridge's life. The prosecution also presented independent evidence that defendant was present in the house when Eldridge was killed and that, although Eldridge was stabbed 44 times, defendant received only superficial wounds, casting doubt on the defense claim that she, like Eldridge, was a victim of a residential robbery. The investigating detective concluded, based on the evidence at the crime scene, that there was a murder, not a robbery that led to a murder. And the prosecution presented independent evidence that accomplice James Luna, who admitted stabbing Eldridge to death, was defendant's coworker and personal friend. Considered together, this evidence adequately corroborated the accomplice testimony.

In addition, the prosecution introduced evidence that on the day before and the day of the murder there were 11 telephone calls between defendant and accomplice Luna collectively lasting more than 100 minutes, and that on the day after the murder there were six calls between them collectively lasting more than 40 minutes. Because evidence of the telephone communications was not the only corroborating evidence, we do not address defendant's contention that the records

of the telephone calls between defendant and accomplice Luna, considered in isolation, are insufficient corroboration of the accomplice testimony. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1208, fn. 9.) Meritless, too, is defendant's assertion that the prosecutor stated in closing argument that the telephone records are the best corroborating evidence. The prosecutor stated that the telephone records were the best evidence of a connection between defendant and accomplice Luna, while also noting that the records would require the testimony of a participant witness to give the telephone calls content.

B. Right to Speedy Trial

In August 1985, defendant was arrested in Pennsylvania for the murder of Stephen Eldridge in California. She was arraigned in Los Angeles, California, on January 10, 1986. The preliminary hearing began on January 2, 1987, and ended on January 9, 1987. On September 2, 1987, the prosecution filed an amended information charging defendant with attempted murder, solicitation of murder, and murder. The amended information also alleged the special circumstances of murder for financial gain and murder by lying in wait. Defendant was rearraigned, entered a plea of not guilty, and denied the special circumstance allegations. Later, the trial court dismissed the charge of solicitation of murder.

Between defendant's initial arraignment on January 10, 1986, and the commencement of jury selection on August 14, 1989, Defense Counsel Joe Ingber requested and was granted 25 motions for continuances; each time defendant waived her right to a speedy trial. The continuances were based on Ingber's trial commitments in other criminal cases, including capital cases, and the need to prepare for defendant's trial. The prosecutor, as early as December 1987, and on several occasions thereafter, expressed to the court her concern about the trial delay.

Defendant contends she is entitled to a dismissal with prejudice because the delay of three years and eight months between her arraignment and the beginning of jury selection violated her constitutional right to a speedy trial. In support, she cites the speedy trial provisions of the federal and state Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) Her argument, however, addresses only the speedy trial provision of the federal Constitution.

The Sixth Amendment to the United States Constitution guarantees that in "all criminal prosecutions, the accused shall enjoy the right to a speedy trial . . . ." In *Barker v. Wingo* (1972) 407 U.S. 514, the high court announced a balancing test in determining whether a defendant's right to a speedy trial under the Sixth Amendment had been violated. It identified four criteria to be considered: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. (*Id.* at p. 530.)

Here, defendant's speedy trial claim fails under the third factor because she not only did not assert her speedy trial right in the trial court, but she repeatedly requested and obtained continuances and waived time for each continuance. (*People v. Seaton* (2001) 26 Cal.4th 598, 633-634.) Anticipating this conclusion, defendant argues that trial counsel Ingber provided ineffective assistance by requesting and agreeing to the continuances of the trial date.

A defendant seeking to establish the incompetence of trial counsel must show both that counsel's performance was deficient and that this deficient performance prejudiced the defendant's case. (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.) In assessing the adequacy of counsel's performance, a court must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citations.]" (*Strickland v. Washington* (1984)

466 U.S. 668, 689.) If " 'the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' " (*People v. Kipp* (1998) 18 Cal.4th 349, 367.)

Here, defendant fails to establish that trial counsel Ingber's performance was deficient. The record shows that Ingber needed continuances to prepare for the preliminary hearing as well as the trial, to seek or review discovery, and to await completion of accomplice Luna's preliminary hearing. The record belies defendant's assertion that the only grounds for the continuances were Ingber's commitments in other cases. Although defendant asserts that Ingber intentionally delayed the trial to obtain a higher fee, the record does not support this assertion. Because defendant has not shown that trial counsel's performance was deficient when measured against the standard of a reasonably competent attorney, we reject her claim that counsel's requests for continuances denied her the right to effective assistance of counsel.

C. Conflict of Interest

Defendant contends she was denied her Sixth Amendment right under the federal Constitution to be represented by counsel free of a conflict of interest. We disagree.

1. Relevant facts

On October 24, 1989, at the end of the first day of the prosecution's case-in-chief, Defense Counsel Ingber told the trial court that during a prosecution interview with accomplice James Luna four days earlier, Luna had mentioned having a "relationship" with Ingber. Ingber expressed concern that the prosecution might call him as a witness in this case. Ingber explained that in

another case he had represented Randy Howard, who was Luna's cellmate and sexual partner, but he had never represented Luna. When the prosecutor agreed not to bring up the subject of Luna's claimed relationship with Ingber during Luna's direct examination, the trial proceedings continued.

The prosecution's direct examination of accomplice Luna began on November 1, 1989. The next day, on cross-examination by defense cocounsel Burkow, Luna testified that he had a sexual relationship with cellmate Randy Howard from August 1985 until February 1988, and that he had told Howard of the March 1985 attempted murder and the April 1985 actual murder of Eldridge.

On November 8, 1989, during a break in the cross-examination of Luna, and outside the jury's presence, the prosecutor expressed her concern to the trial court about Defense Counsel Ingber's prior representation of Randy Howard. The prosecutor asserted that if Ingber had obtained confidential information from Howard that could be useful in the cross-examination of prosecution witness Luna, Ingber's prior attorney-client relationship with Howard might preclude disclosing such information to his cocounsel, Burkow. The prosecutor suggested that defendant waive any potential conflict of interest.

Ingber then told the trial court that he had not told Cocounsel Burkow anything discussed with Howard. Ingber added: "I spoke with Mr. Luna myself prior to the time I represented Miss McDermott, discussing nothing about the case whatsoever, as a solicitous, gratuitous, favor on behalf of Mr. Howard to speak to Mr. Luna. [¶] That's all of my relationship with Mr. Luna." In Ingber's view, failing to disclose to cocounsel Burkow any information about Luna's character received from Howard could not be detrimental to defendant. The trial court disagreed, finding a potential conflict of interest. The court then appointed Bruce Hill, an experienced criminal defense attorney, as independent counsel to consult with defendant.

On November 20, 1989, in defendant's presence, Attorney Hill told the trial court he had met with defendant for an hour and a half, 50 minutes of which were spent discussing the subject of the potential conflict of interest presented by Defense Counsel Ingber's prior representation of Randy Howard in a different case. When the court asked defendant whether she still wanted Ingber to represent her, she responded "Yes, I do, your honor." The court then asked defendant if she understood that because of the potential conflict she ran "the risk of a greater chance of conviction." Defendant replied, "Yes." Defendant also said she understood that in waiving her right to conflict-free counsel she was giving up her right to appeal on the ground of ineffective assistance of counsel relating to a claim of counsel's potential conflict of interest. The following colloquy then occurred:

"THE COURT: All right.

"Having been advised of the right to be represented by an attorney free from conflict of interest, and having understood the dangers and disadvantages in being represented by an attorney with a conflict, do you specifically give up the right to be represented by an attorney who has no conflict of interest.

"THE DEFENDANT: Yes, I do."

When the defense called Randy Howard as a witness, he testified that he had not told Counsel Ingber anything Luna had told him about the case. Howard also said Luna had told him that defendant had hired Luna to kill someone to collect on an insurance policy.

2. Waiver of counsel's conflict of interest

The federal and state constitutional rights to the assistance of trial counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to representation by counsel without any conflict of interest (*People v. Jones* (1991)

53 Cal.3d 1115, 1133-1134). When a trial court knows or should know of a possible conflict of interest between a defendant and defense counsel, the court must inquire into the circumstances and take appropriate action. (*People v. Frye* (1998) 18 Cal.4th 894, 999.) Such action may include ascertaining whether the defendant wishes to waive the right to be represented by conflict-free counsel. Although a trial court may refuse to accept such a waiver (*Wheat v. United States* (1988) 486 U.S. 153, 162), it is not required to do so (*People v. Carpenter* (1997) 15 Cal.4th 312, 375-376; *People v. Bonin* (1989) 47 Cal.3d 808, 837). The defendant's waiver must be a knowing, intelligent act done with awareness of the circumstances and likely consequences, and it must be unambiguous. (*People v. Mroczko* (1983) 35 Cal.3d 86, 110.)

Here, the record shows that the trial court fully informed defendant of the potential conflict of interest on the part of Defense Counsel Ingber and that defendant knowingly, intelligently, and voluntarily gave up her right to be represented by conflict-free counsel. As discussed in detail above, the trial court appointed independent counsel to discuss with defendant the potential conflict of interest, advised defendant of her right to the appointment of different counsel at no expense to her, told defendant that her chances of being convicted were possibly greater if Ingber remained as her counsel, offered to address any questions or concerns defendant might have, and obtained an express statement from defendant waiving her right to conflict-free counsel. We have in the past rejected the contention that the right to conflict-free counsel cannot be waived in capital cases. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 375-376.)

D. Effectiveness of Trial Counsel

Citing to both the state and federal Constitutions, defendant contends she was denied her right to effective assistance of counsel at trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) More specifically, she claims that her trial

counsel failed to adequately investigate and prepare her case; failed to move at the close of the prosecution's case for a judgment of acquittal and to object to the prosecution's closing argument on the ground the accomplice testimony was not corroborated; did not present a coherent theory of the case; lacked basic trial skills; presented incomprehensible defenses; bolstered the prosecution's theory of murder for financial gain; bolstered the testimony of accomplice Luna; used vulgar language; expressed personal opinions about defendant's guilt; and conceded defendant's guilt in closing argument.

As we have explained, a defendant claiming ineffective assistance of trial counsel must show both that counsel's performance was deficient and that this deficient performance prejudiced defendant's case. (*People v. Mendoza, supra,* 24 Cal.4th 130, 158.) If counsel's deficiencies were so severe as to result in a complete breakdown of the adversary process, prejudice is presumed. (*United States v. Cronic* (1989) 466 U.S. 648, 656-657.) Otherwise, the defendant must show prejudice " 'in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*People v. Kipp, supra,* 18 Cal.4th at p. 366.)

We reject at the threshold defendant's contention that she is entitled to a presumption of prejudice because her trial counsel's deficiencies resulted in a complete breakdown of the adversarial process. The record shows that defense counsel vigorously represented defendant and subjected the prosecution's case to adversarial testing. As just one example, defense counsel's cross-examination of prosecution witness James Luna lasted eight days.

1. Claim that defense counsel failed to adequately investigate and prepare case

In support of her claim that Defense Counsel Ingber failed to investigate and prepare the case, defendant points to Ingber's involvement in trying other cases

while representing her, his citation of a disapproved case in a motion, and his failure to timely review discovery by the prosecution. Defendant also asserts that Ingber did not hire an investigator until May 1989 and did not conduct his first field investigation until June 1989, shortly before trial started in August 1989, that Ingber did not interview defense witnesses until the morning of their testimony, that some defense witnesses never spoke to Ingber or his cocounsel, Burkow, before testifying, and that Ingber did not ask for a continuance when accomplice James Luna agreed to testify against defendant one month before trial.

As the Attorney General observes, the appellate record does not support many of these assertions. To show when trial counsel Ingber hired an investigator and began the field investigation, defendant mistakenly relies on trial counsel's funding requests. But these requests only cover the period after the trial court appointed Ingber as defendant's trial counsel. The appellate record does not show what actions Ingber did or did not take during the long period before his appointment when Ingber represented defendant as retained counsel.

Assuming trial counsel Ingber did not interview many defense witness until the day of their testimony, we are not persuaded this establishes deficient performance. Experienced counsel may, for example, choose to rely on an investigator's report or other form of written statements describing the witnesses' anticipated testimony. Because defendant has not shown that trial counsel Ingber failed to adequately investigate or prepare, defendant also has not shown show that counsel should have requested additional continuances.

2. Claim that defense counsel should have moved for judgment of acquittal or objected to prosecution's closing argument

Defendant faults trial counsel for not seeking a judgment of acquittal when the prosecution rested its case and for not objecting to the prosecutor's closing argument on the ground that the accomplice testimony of James Luna, Marvin

Lee, and Dondell Lee was not corroborated. As discussed earlier, there was sufficient corroboration of the accomplice testimony. Because a motion or objection on the ground now asserted by defendant would have been futile, trial counsel's failure to move for acquittal or to object to the prosecutor's argument was not deficient performance. (*People v. Diaz* (1992) 3 Cal.4th 495, 562.)

3. Claim that defense counsel did not have a coherent defense theory

Defendant accuses her trial counsel of lacking a coherent defense theory, as shown, according to defendant, by counsel's failure to establish that accomplice James Luna might have had a motive for the killing of Eldridge separate and apart from defendant's. Defendant is wrong. The defense did present a coherent theory of the case, namely, that the prosecution could not prove beyond a reasonable doubt that defendant had anything to do with the murder.

4. Claim that defense counsel lacked basic trial skills

Defendant asserts that her trial counsel lacked basic trial skills. In support, she points to a question by the prosecutor that she claims her counsel should have objected to as leading and as assuming facts not in evidence. She then lists 29 questions defense counsel asked accomplice Luna on cross-examination, claiming that these questions show that counsel was acting as "another prosecutor." Such matters as whether objections should be made and the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) Here, as we pointed out earlier, defense counsel cross-examined accomplice Luna for eight days and vigorously attacked his credibility in closing argument. The record belies defendant's assertion that her trial counsel lacked basic trial skills.

5. Claim that defense counsel presented "incomprehensible defenses"

In arguing that defendant's trial counsel presented "incomprehensible defenses," defendant points to (1) counsel's attempt to establish that murder victim Eldridge received only superficial injuries in the earlier nonfatal attack on March 21, 1985, and (2) counsel's examination of Luna's aunt, Alice Gonzales, eliciting her testimony that Luna was at home on April 28, 1985, when Eldridge was killed. As the Attorney General points out, evidence that Eldridge received only superficial injuries during the March 21 attack supported the defense argument that the attack was not an attempted murder, as the prosecution had argued, but instead was part of an attempted robbery. In turn, this supported the defense argument that the later murder of Eldridge occurred during a residential robbery rather than, as the prosecution had argued, to obtain financial benefits for defendant. The testimony of accomplice Luna's aunt was offered not to exculpate Luna from the murder but to impeach Luna by showing that he had manipulated his aunt to induce her to lie on his behalf. This was consistent with the defense strategy to portray Luna as an individual whose testimony completely lacked credibility.

6. Claim that defense counsel "bolstered" prosecution's case

Defendant accuses her trial counsel of bolstering the prosecution's theory that defendant's motive for Eldridge's murder was financial gain, namely, obtaining the proceeds of the life insurance on Eldridge's life and full title to the house they jointly owned. In support, she cites trial counsel's decision to call as witnesses Robin Tratner, Linda Gunderson, and Antoinette Garcia.

Defense witness Robin Tratner was the custodian of records for the bank where defendant maintained an account. Through direct examination of Tratner, defense counsel established that defendant did not have a negative bank balance during the first half of 1985, when Eldridge was killed. Although Tatner testified

on cross-examination that defendant had bounced over 100 checks in 1984, the defense succeeded in establishing that defendant's financial situation had improved in 1985.

Defense witness Linda Gunderson, a probate lawyer representing the family of murder victim Eldridge, testified that Eldridge's heirs had filed a claim for the insurance proceeds under the policy that Eldridge had bought naming defendant as a beneficiary. Defendant argues that her counsel's decision to have Gunderson testify was a tactical blunder because it allowed the prosecution, during its rebuttal, to call as a witness defendant's former attorney, Mitchell Egers, who testified that he had written a letter to the insurance company claiming that defendant was entitled to the proceeds of Eldridge's life insurance as the beneficiary designated on the policy. We do not agree that defendant was significantly harmed by Egers's testimony, or that the testimony was inconsistent with defendant's claim of innocence. If, as defendant claimed, she was not involved in Eldridge's murder, she would be entitled to claim the proceeds of his life insurance.

Defense witness Antoinette Garcia was the sister of Phillip La Chance, who worked with defendant at the La Porte residence. The defense called her as a witness to impeach La Chance's testimony that defendant had asked him to steal Betty La Porte's ring. Garcia testified that La Chance was not working at the La Porte residence when, according to La Chance, defendant had asked him to steal the ring. On cross-examination by the prosecution, Garcia said that La Chance told her that defendant and La Chance had taken Betty La Porte's ring and had tried to sell it. Whether Garcia's testimony was detrimental to the defense is fairly debatable. Although the prosecution's cross-examination of Garcia produced further evidence that defendant had participated in the theft of the ring, that evidence was an out-of-court statement by La Chance, and Defense Counsel

Ingber's direct examination of Garcia successfully undermined La Chance's credibility. Because reasonable minds could differ on the value of Garcia's testimony for the defense, we do not find that Defense Counsel Ingber performed deficiently by calling her as witness. (See *People v. Hines, supra,* 15 Cal.4th at p. 1065.)

Defendant also faults trial counsel for calling as witnesses Randy Howard, Betty Jones, and Dondell Lee who, according to defendant, each gave testimony against her. We reject defendant's claim because she has not shown that there could be no satisfactory explanation for defense counsel's actions. (*People v. Kipp, supra,* 18 Cal.4th at p. 367.) Howard testified that accomplice Luna told him defendant had hired Luna to kill someone for insurance money. As the Attorney General notes, Howard's testimony was consistent with Luna's and was used by the defense in closing argument to show that because the source of the evidence was Luna himself, Luna's testimony could not be independently corroborated. As to Jones, her testimony that Luna told her defendant sometimes would pick Luna up in her car and go out for cocktails was not adverse to defendant, given that Luna and defendant were friends and coworkers. Dondell Lee's testimony that defendant describes as "the 'lady' told Luna to do this or that" might have been offered by defense counsel to show that accomplice Dondell and his brother Marvin, also an accomplice, had concocted a version of events that was not credible.

7. Claim that defense counsel used vulgar language and sexual innuendo

Defendant accuses trial counsel of using vulgar language and sexual innuendo during the examination of Marvin Lee and Gary Venturini, thus rendering ineffective assistance. We disagree.

The defense played the tape of the July 12, 1985, police interview of accomplice Marvin Lee. The tape apparently contained explicit sexual language, and the questions by defense counsel that defendant now claims were improper all related to that interview. Having reviewed the record, we do not find that Defense Counsel Ingber performed deficiently by referring to and repeating some of the vulgar and offensive language used during the taped interview.

Defendant next asserts trial counsel improperly asked Gary Venturini, who was murder victim Eldridge's former lover, if Venturini's relationship with another former lover was physical, and improperly elicited testimony that the other former lover had died of AIDS. After the prosecution objected, defense counsel rephrased the question to delete any reference to the relationship being physical. Defense counsel could not have anticipated the testimony defendant now claims was offensive, that Venturini's former lover had died of AIDS, because that statement was not responsive to defense counsel's question, which made no reference to the death of the former lover.

In neither of these incidents has defendant shown incompetent representation at trial. In addition, defendant does not even attempt to show prejudice from the purportedly deficient performance.

8. Claim that defense counsel allowed witnesses to express personal opinions of defendant's guilt

Defendant faults her trial counsel for allowing three defense witnesses (Linda Gunderson, Curt Livesay, and Agnes Gordon) and two prosecution witnesses (Twyla Hacker and Carol Bond) to testify as to their opinion of her guilt. The record does not support defendant's claim.

As mentioned previously, defense witness Linda Gunderson was the attorney for the family of murder victim Eldridge. On cross-examination, the prosecution asked whether defendant, the beneficiary of the insurance policy taken out on

Eldridge's life, was disqualified from receiving the insurance proceeds because "she had, in your mind, murdered your client . . . ." Gunderson never answered the question, however, because the trial court sustained defense counsel's prompt objection, and the prosecutor ended her questioning. Thus, contrary to defendant's assertion, Gunderson expressed no opinion on defendant's guilt.

Defense witness Curt Livesay was the assistant district attorney in charge of determining whether the prosecution should seek the death penalty in special circumstance cases. He testified about the terms of accomplice Luna's plea agreement. On cross-examination by the prosecution, Livesay explained that the purpose of the plea bargain was to have Luna tell the jury about defendant's role in the killing, and that without the plea bargain Luna was certain to have invoked his right against self-incrimination. Livesay did not give his personal opinion on defendant's guilt, and defense counsel had a legitimate tactical reason for calling Livesay as a witness: to attempt to undermine prosecution witness Luna's testimony by showing that the prosecution had given him a favorable deal in exchange for his testimony against defendant. In any event, defendant was not prejudiced. Undoubtedly, the jury was aware that the prosecution, as the charging party, was convinced of defendant's guilt.

Defense witness Agnes Gordon was a police officer who spoke to defendant shortly after Eldridge's murder, and she testified that defendant was not as upset after that murder as Gordon would have expected. Contrary to defendant's claim, she expressed no personal opinion on defendant's guilt.

Twyla Hacker, a friend of defendant's, testified as a prosecution witness that police officers told her they thought defendant was guilty; contrary to defendant's assertion, she expressed no opinion about defendant's guilt.

Prosecution witness Carol Stanford Bond, a friend of murder victim Eldridge, testified that she was not on friendly terms with defendant before the murder and

or near the body. In the portion of the tape showing the victim's mutilated groin, no blood is apparent. Although unpleasant, the image is not shocking. The trial court did not abuse its discretion in admitting the videotape. (See *People v. Scheid* (1997) 16 Cal.4th 1, 20.)

We see no reason to criticize the trial court for not watching the videotape again with the jury. With respect to defendant's claim that police officers could be heard laughing in the background, the sound of laughter can only be heard briefly, and it is not clear that the person laughing is a police officer. Thus, the audio part of the videotape in which laughter may be heard would not have prejudiced the jury.

F. Admission of Prior Bad Acts Evidence

Phillip La Chance, who had worked with defendant in caring for the disabled Lee La Porte, testified over defense objections to two prior instances of misconduct by defendant. In the fall of 1984, probably during the months of September and October, defendant told La Chance she needed money to pay bills and discussed with him a plan to steal a ring from Betty La Porte so they could sell it. Around the same time, defendant asked La Chance, who sometimes handled Betty La Porte's banking matters, to get Lee La Porte to sign a check so they "could clear out the checking account." The prosecutor argued that the evidence was relevant to show not only defendant's tendency to employ others to commit crimes for her but also her desperate need for money, which also led her in this case to arrange for Eldridge's murder so she could collect on the insurance policy on his life. The trial court instructed the jury that the evidence was admitted only for the purpose of establishing a possible motive for the murder of Eldridge, and not to prove that defendant had a bad character or a predisposition to commit crimes.

Defendant contends the trial court violated her right to due process by admitting La Chance's testimony because the evidence that she suggested to La Chance that they steal Betty La Porte's ring and embezzle funds from the La Portes' bank account had no logical tendency to show that defendant had Eldridge killed to get insurance proceeds and the house she held in joint tenancy with him.

Generally, evidence of a defendant's poverty or indebtedness is inadmissible to establish a motive to commit robbery or theft, "because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice." (*People v. Wilson* (1992) 3 Cal.4th 926, 939.) Evidence that a defendant committed other crimes may be admitted when relevant to establish a motive for the commission of the charged offense or a common plan or design (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394), but only if the offenses share common features (*People v. Ewoldt, supra,* at pp. 402-403). We do not need to decide here, however, whether the trial court erred in admitting the evidence because its admission did not prejudice defendant. The testimony was relatively brief and the trial court limited its prejudicial impact by instructing the jury that the evidence was not admissible to prove bad character or predisposition to commit crimes. (See *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Defendant also argues that the trial court should have excluded La Chance's testimony because he was an accomplice to the acts of misconduct about which he testified, and his testimony was not corroborated. We disagree. For purposes of the corroboration requirement, an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) Because La Chance had nothing to do with the earlier attempted murder and the later murder of Stephen Eldridge, the only crimes charged here, he could not be prosecuted for

those crimes, and thus he was not an accomplice whose testimony required corroboration.

Finally, defendant contends that La Chance's testimony was inadmissible because his testimony about defendant's plan to steal money from the La Portes' bank account constituted the crime of solicitation to commit grand theft, an offense that must be proven either by the testimony of two witnesses, or by one witness whose testimony is corroborated. (§ 653f, subd. (f).) But the proof requirements of section 653f are inapplicable here. For the prosecution offered La Chance's testimony not to prove a violation of section 653f, but to show defendant's tendency to have others commit crimes for her and to show her desperate need for money, evidence the prosecution argued was relevant in this case.

G. Cumulative Effect of Alleged Errors

Defendant argues that her convictions for attempted murder and murder should be reversed because of the cumulative effect of the errors at the guilt phase. We disagree. Whether considered separately or in combination, the few errors that occurred during the guilt phase of defendant's trial, all of which we discussed earlier, did not prejudice defendant and therefore do not require reversal.

IV. Penalty Phase Issues

A. Corroboration of Aggravating Evidence

Accomplice James Luna testified as a prosecution witness at the penalty phase. He said that defendant had asked him to beat up Dewayne Bell so she could replace Bell as a caretaker for Lee La Porte, an invalid. Luna took two men with him to Bell's apartment where they beat Bell and cut his face. They fled when Bell started screaming. Defendant contends the trial court should not have admitted Luna's testimony because it was not corroborated.

When, as here, the prosecution calls a witness to testify at the penalty phase about the defendant's prior violent conduct, there must be corroboration of that testimony. (*People v. Mincey, supra,* 2 Cal.4th at p. 461.) The jury was so instructed here. As we have observed, corroborating evidence may be slight and entirely circumstantial. (*People v. Szeto, supra,* 29 Cal.3d at p. 27.) It must tend to implicate the defendant by relating to some act or fact that is an element of the crime, but it need not be sufficient in itself to establish every element of the crime. It is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility. The finding of the trier of fact on the issue of corroboration is binding on a reviewing court unless the evidence should not have been admitted or it does not reasonably tend to connect the defendant with the commission of the crime. (*Ibid.*)

Here, Luna's penalty phase testimony was adequately corroborated by the testimony of Dewayne Bell, who testified as a prosecution witness at the penalty phase. Bell described the three individuals who attacked him as a Hispanic man and two Black men. Bell recalled that defendant had previously introduced him to one of the Black men who had attacked him. When Bell saw Luna in the courtroom, Bell recognized him as another person that defendant had introduced him to and he said that Luna "look[ed] similar" to the Hispanic individual who had attacked him. Additional corroboration was provided by evidence of the plan's success in having Bell replaced by defendant as caretaker of the invalid Lee La Porte: After the attack on Bell, the La Portes discharged him and hired defendant.

B. Prosecutorial Misconduct

Defendant contends the prosecutor engaged in prosecutorial misconduct during her closing argument at the penalty phase by: (1) using inflammatory epithets, (2) arguing the absence of mitigation evidence was aggravating, (3) implying defense counsel fabricated evidence, (4) making references to the Bible,

(5) misstating the law, (6) misstating the evidence, (7) arguing defendant's character as aggravating, (8) engaging in bad faith by arguing defendant would be dangerous in prison, (9) making a plea to impose the death penalty based upon gut instinct, and (10) asserting that defendant was more deserving of the death penalty because she is a woman. At trial, defendant objected only to the first three of these claimed instances of prosecutorial misconduct.

Generally, " 'a defendant may not complain on appeal of prosecutorial misconduct 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. Hill* (1998) 17 Cal.4th 800, 820.) This general rule, however, does not apply if a defendant's objection or request for admonition would have been futile or would not have cured the harm caused by the misconduct; nor does it apply when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition. (*Ibid.*) Defendant here fails to show that any of these exceptions applies to any of the seven instances of alleged prosecutorial misconduct to which she did not object at trial. Thus, she may not now raise these claims.

Arguing that we should excuse her trial counsel from the legal obligation to object to prosecutorial misconduct, defendant cites our decision in *People v. Hill, supra,* 17 Cal.4th 800. Defendant's reliance on *Hill* is misplaced, however. There the prosecutor subjected the defense "to a constant barrage of . . . unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods," and the trial court consistently failed to curb the prosecutor's excesses. (*Id.* at p. 821.) Such egregious conduct did not occur here.

We also reject defendant's claim that her trial counsel was ineffective for not objecting to the alleged prosecutorial misconduct. Because the record does not

show the reasons for counsel's actions, defendant's claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

1. Epithets

At the penalty phase, the prosecutor began her closing argument to the jury with these comments: "The time has now arrived for us to . . . look exactly at what one human being did to another. [¶] And I use the term human being in a literal sense because I'm not so sure that Maureen McDermott really should be categorized as a human being. [¶] Because human beings have a heart and human beings have a soul. And nobody with a heart and nobody with a soul could have done what Maureen McDermott has done in this case."

The trial court overruled defense counsel's objection that it was improper for the prosecutor to argue that defendant was not a human being. The court explained that the prosecutor did not use the word "animal," adding that "it's proper for a prosecutor to argue what someone did was inhumane or inhuman."

As we have said, we do not condone the use of opprobrious terms in argument, but such epithets are not necessarily misconduct when they are reasonably warranted by the evidence. (*People v. Hawkins* (1995) 10 Cal.4th 920, 961; *People v. Sandoval* (1992) 4 Cal.4th 155, 180.) Here, the prosecutor's remarks, which the trial court understood as referring to conduct by defendant that was inhumane, did not exceed the permissible scope of closing argument in view of the evidence presented of, among other things, defendant's deliberate and cold-blooded planning of the killing of Stephen Eldridge. (See, e.g., *People v. Hawkins, supra,* at p. 961 [finding no prosecutorial misconduct in describing the defendant as "coiled like a snake" and in comparing the act of sentencing defendant to life in prison as akin to "putting a rabid dog in the pound"]; *People v.*

Sully (1991) 53 Cal.3d 1195, 1249 [reference to the defendant as a "human monster" and a "mutation"].)

Defendant also cites as improper the prosecutor's comments in closing argument describing defendant as "a mutation of a human being," a "wolf in sheep's clothing," a "traitor," a person who "stalked people like animals," and someone who had "resigned from the human race." Because defendant did not object to these remarks or request an admonition at trial, she may not now challenge these statements. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Moreover, when considered in the context of the planning and execution of Eldridge's murder, these references are within the permissible bounds of argument, and in any event would not have had such an impact "as to make it likely the jury's decision was rooted in passion rather than evidence." (*People v. Thomas* (1992) 2 Cal.4th 489, 537.)

Defendant asserts that the prosecutor committed misconduct by comparing her to a Nazi working in the crematorium by day and listening to Mozart by night. We find no misconduct in these remarks. The prosecutor was not comparing defendant's conduct in arranging Eldridge's murder with the genocidal actions of the Nazi regime. Rather, the prosecutor was arguing that human beings sometimes lead double lives, showing a refined sensitivity in some activities while demonstrating barbaric cruelty in others. In the context of this case, where the evidence showed defendant to be both a caring and competent nurse and a person capable of plotting a brutal murder, the argument was appropriate.

Finally, defendant claims the prosecutor committed misconduct by comparing defendant to a germ, a mad dog, and a snake. These remarks were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others. (*People v.*

Hawkins, supra, 10 Cal.4th at p. 961; *People v. Thomas, supra,* 2 Cal.4th at p. 537; *People v. Sully, supra,* 53 Cal.3d at p. 1249.)

2. Alleged Davenport error

Defendant contends the prosecutor improperly argued that the absence of statutory mitigating factors made the crime more aggravated. (See *People v. Davenport* (1985) 41 Cal.3d 247, 288-290.) Not so. When the prosecutor discussed the statutory mitigating factors, she merely noted their absence in this case. She did not argue that this absence transformed the mitigating factors into aggravating factors. This argument was proper. (*People v. Millwee* (1998) 18 Cal.4th 96, 152; *People v. Hines, supra,* 15 Cal.4th at p. 1064.)

3. Claim that prosecutor implied fabrication of evidence by defense counsel

Defendant complains about a comment the prosecutor made in closing argument when, after urging the jury not to extend sympathy to defendant, the prosecutor said: "It is the job of the defense attorneys in this case to *create* sympathy during this phase for Maureen McDermott just like in the guilt phase it's their job to argue that she is not involved in these crimes." (Italics added.) The trial court overruled defense counsel's objection that the prosecutor's use of the word "create" implied that defense counsel would present arguments without any evidentiary basis. The court found nothing in the prosecutor's comment suggesting fabrication of evidence by defense counsel for the purpose of portraying defendant as a person deserving of the jury's sympathy. We agree that, viewed in context, the prosecutor's comment did not impugn the integrity of the defense.

C. Instruction on Accomplice Punishment

At the guilt phase of the trial, the prosecutor told the jury that accomplices Marvin and Dondell Lee had received immunity from prosecution for the murder

of Stephen Eldridge, and that accomplice James Luna agreed to a plea bargain under which, in return for his truthful testimony at defendant's trial, he was to receive a sentence of life in prison without possibility of parole for his role in Eldridge's murder.

At the penalty phase of the trial, over defense objection, the trial court granted the prosecution's request to instruct the jury in this language: "You may not consider either the punishment or absence of punishment for the following accomplices: James Luna, Marvin Lee and Dondell Lee in determining the appropriate penalty for the defendant Maureen McDermott in this case." In discussing the matter with counsel for both parties, the trial court stressed that the instruction did not preclude defense counsel from mentioning the sentence or absence of sentence for any of the accomplices, but the court barred defense counsel from arguing to the jury that the punishment or the absence of punishment for the accomplices would justify leniency for defendant by not rendering a verdict of death against her.

Defendant contends that this instruction was improper because: (1) the instruction nullified the trial court's instruction on sympathy as sympathy for defendant would "naturally" be aroused by the disparate punishment given the accomplices; (2) this court has never held that the defense may not ask a jury to show mercy to a defendant in light of the punishment given the accomplices; (3) the instruction was fundamentally unfair because the prosecutor at the guilt phase was allowed to argue the life sentence given to Luna and the complete immunity granted to both of the Lee brothers were morally justified; and (4) the instruction made the judgment of death arbitrary and capricious as well as unreliable in violation of the Eighth Amendment to the federal Constitution. We disagree.

We have consistently held that evidence of an accomplice's sentence is irrelevant at the penalty phase because "it does not shed any light on the

circumstances of the offense or the defendant's character, background, history or mental condition." (*People v. Cain* (1995) 10 Cal.4th 1, 63; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1183, fn. 26.) Nothing in the challenged instruction precluded the jury from considering sympathy for defendant in deciding the appropriate punishment for her crimes. Nor did the instruction nullify the standard instruction the court gave on sympathy, which provides that the jury may "consider sympathy or pity" for a defendant as a mitigating factor.

Citing the high court's decision in *Parker v. Dugger* (1991) 498 U.S. 308, defendant argues "evidence of disparity of sentencing is indeed mitigating evidence and closing argument which emphasizes the disparity is appropriate." We rejected a similar contention in *People v. Cain, supra,* 10 Cal.4th at page 63: ". . . *Parker* did not hold evidence of an accomplice's sentence must be introduced in mitigation at the penalty phase, or that a comparison between sentences given codefendants is required. [Citation.] The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. [Citation.] *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition. [Citations.]"

D. Claim of Cumulative Error

We reject defendant's contention that the cumulative effect of errors at the penalty phase requires reversal of the death judgment. As we have shown, there was no error.

E. Automatic Motion to Modify the Verdict

"Under section 190.4, subdivision (e), a capital defendant is deemed to have automatically applied for a sentence modification. In ruling on the application, the trial judge must independently reweigh the evidence of aggravating and mitigating circumstances and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict." (*People v. Mincey, supra,* 2 Cal.4th at p. 477.)

Defendant contends the trial court erred in considering the circumstances of the crimes and the assault on Dewayne Bell in ruling on the automatic motion to modify the verdict of death. Defendant asserts that the trial court "did not appreciate the well-settled law regarding the accomplice corroboration rule." Not so. Defendant's argument assumes that her earlier contentions at both the guilt and penalty phases regarding accomplice corroboration were correct, and that the prosecution failed to present adequate corroborating evidence. We have rejected those arguments. The trial court's statement on the record when it denied the motion shows that it independently reweighed the evidence and determined that the weight of the evidence supported the jury's verdict. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1196.) No more was required.

DISPOSITION

The judgment is affirmed.

KENNARD, J.

WE CONCUR:

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

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. McDermott

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S016081
Date Filed: August 12, 2002

Court: Superior
County: Los Angeles
Judge: Alan B. Haber

Attorneys for Appellant:

Steffan Imhoff and Verna Wefald, under appointments by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent:

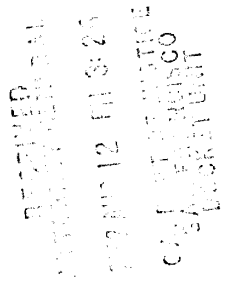
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SUPREME COURT
FILED

OCT 30 2002

Frederick K. Ohlrich Clerk

DEPUTY

COPY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MAUREEN MCDERMOTT,

Defendant and Appellant.

S016081

Los Angeles County
Super. Ct. No. A810541

LODGED
FEB 5 2005
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA
BY DEPUTY

THE COURT:

The opinion herein, filed August 12, 2002, appearing at 28 Cal.4th 946, is modified as follows:

1. Insert the following footnote at the end of the final paragraph on page 984: "Defendant further contends the trial court violated her statutory rights (see Code Civ. Proc., § 231, subd. (a); Pen. Code, § 1089) and her right to due process in allowing the prosecution two peremptory challenges and the defense only one during the selection of a replacement for Juror Fred L. At the time the court dismissed Fred L., defendant had exhausted her peremptory challenges and the prosecution had two remaining. The record thus establishes she received more than her statutory allotment and accordingly suffered no violation of rights. (Cf. *People v. Armendariz* (1984) 37 Cal.3d 573, 579-584 [reversible error in

failing to reopen jury selection and permit exercise of unused peremptory challenges].)"

This modification does not affect the judgment.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAUREEN MCDERMOTT, **Petitioner,** **v.** **DEBORAH K. JOHNSON, Warden, Central California Women's Facility,** **Respondent.**	**Case No. CV 04-0457 DOC** **DEATH PENALTY CASE** **CERTIFICATE OF APPEALABILITY**

Under Rule 11 of the Rules Governing Section 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, the Court finds that a certificate of appealability is appropriate in connection with the denial of relief on Claim 12(C) of the First Amended Petition.

IT IS SO ORDERED.

Dated: August 15, 2017

David O. Carter
DAVID O. CARTER
United States District Judge

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Federal Public Defender
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MAUREEN McDERMOTT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MAUREEN McDERMOTT,

Petitioner,

v.

DEBORAH K. JOHNSON, Warden, Central California Women's Facility,

Respondent.

Case No. 04-cv-00457-DOC

DEATH PENALTY CASE

PETITIONER'S NOTICE OF APPEAL

Notice is hereby given that petitioner Maureen McDermott hereby appeals to the United States Court of Appeals for the Ninth Circuit from: (1) this Court's order denying an evidentiary hearing on certain claims (dkt. 88), entered on June 25, 2010; (2) this Court's order denying claims Three.D.3, Three. D.4, Three.D.8, Three.D.10, Three.E and Four and denying an evidentiary hearing as to those claims (dkt. 160), entered on January 5, 2015; (3) this Court's order denying relief on remaining claims (dkt. 179), entered on August 16, 2017; (4) this Court's judgment (dkt. 180), entered on August 17, 2017; and (5) all other rulings and orders leading up to and relating to the judgment that were contrary to McDermott's requests, motions, and/or claims,

including this Court's denial of discovery (dkt. 55), entered on October 19, 2007; denial of McDermott's motion for reconsideration (dkt. 60), entered on January 18, 2008; this Court's denial of leave to file a second amended petition (dkt. 67), entered on July 15, 2008; and this Court's order vacating the evidentiary hearing set for August 2, 2011 (dkt. 123), entered on March 30, 2012.

On August 16, 2017, the district court denied a certificate of appealability as to all claims except Claim 12(C) of the First Amended Petition. (Dkt. 181.) McDermott reserves the right to request that the Court of Appeals expand the Certificate of Appealability to include other meritorious issues.

No filing of a docket fee is required because McDermott is in forma pauperis and this Court appointed the Office of the Federal Public Defender to represent her in these proceedings. (Dkts. 1, 2, 5.)

Petitioner's notice of appeal is timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). Petitioner notes, however, that her motion to alter or amend the judgment, pursuant to Federal Rules of Civil Procedure 59 and 60(b), is pending before the Court. (Dkt. No. 183.) Petitioner files this notice of appeal in an abundance of caution in the unlikely event that the Court later finds Petitioner's motion to alter or amend the judgment is not timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A). Petitioner's notice of appeal will become effective if the Court denies Petitioner's motion to alter or amend the judgment. FRAP 4(a)(4)(B)(i).

The parties to the judgment are:

Petitioner:

Maureen McDermott
CDC# W-36601, 504-148L
Central California Women's Facility
P.O. Box 1508
Chowchilla, CA 93610

Petitioner's counsel:

Lauren Collins
Michael Weinstein
Deputy Federal Public Defenders
321 E. 2nd Street
Los Angeles, CA 90012

Respondent:

Deborah K. Johnson, Warden
Central California Women's Facility
23370 Rd 22
Chowchilla, CA 93610

Respondent's counsel:

A. Scott Hayward
Xiomara Costello
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300 S. Spring St., Ste 1702
Los Angeles, CA 90013

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: September 13, 2017

By */s/ Lauren Collins*

LAUREN COLLINS
MICHAEL D. WEINSTEIN
Deputy Federal Public Defenders

Attorneys for Petitioner
MAUREEN McDERMOTT

Appeal Documents

2:04-cv-00457-DOC Maureen McDermott v. Gwendolyn Mitchell
CASE CLOSED on 08/15/2017

CLOSED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Collins, Lauren on 9/13/2017 at 4:49 PM PDT and filed on 9/13/2017

Case Name: Maureen McDermott v. Gwendolyn Mitchell
Case Number: 2:04-cv-00457-DOC
Filer: Maureen McDermott
WARNING: CASE CLOSED on 08/15/2017
Document Number: 184

Docket Text:
NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner Maureen McDermott. Appeal of Order, [160], Judgment, [180], Order on Motion for Hearing,,, [88], Order, [179], Minutes of In Chambers Order/Directive - no proceeding held,, [123], Order on Petition for Certificate of Appealability[181], Order[67], Order, [60], Order,, [55]. (Appeal Fee - In forma pauperis status granted on 02/04/2004). (Collins, Lauren)

2:04-cv-00457-DOC Notice has been electronically mailed to:

A Scott Hayward scott.hayward@doj.ca.gov, docketinglaawt@doj.ca.gov, jennie.villegas@doj.ca.gov

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2:04-cv-00457-DOC Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\fakepath\Ntc of Appeal v2.pdf
Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=9/13/2017] [FileNumber=24205449-0
] [3ee3853e790352b931d6965d4896feaeb2610d66110315bc358ece8d0e490968cb1
444b464779828d431efc7c4fbf85b99df635d9f0b4b8a2d36a22b7a2fd598]]

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Attorneys for Petitioner
MAUREEN McDERMOTT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MAUREEN McDERMOTT, Petitioner, v. DEBORAH K. JOHNSON, Warden, Central California Women's Facility, Respondent.	Case No. 04-cv-00457-DOC **DEATH PENALTY CASE** **PETITIONER'S AMENDED NOTICE OF APPEAL**

On September 13, 2017, Petitioner Maureen McDermott filed a notice of appeal with this Court. (Dkt. 184.) That same day she moved to alter or amend the judgment under Federal Rules of Civil Procedure 59 and 60(b). (Dkt. 183.) On April 2, 2018, this Court denied McDermott's motion to alter or amend the judgment under Federal Rules of Civil Procedure 59 and 60(b). (Dkt. 198.) Because McDermott intends on appealing the denial of that motion, she files this Amended Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(4)(B)(ii).

//

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Accordingly, McDermott hereby appeals to the United States Court of Appeals for the Ninth Circuit from: (1) this Court's order denying an evidentiary hearing on certain claims (dkt. 88), entered on June 25, 2010; (2) this Court's order denying claims Three.D.3, Three. D.4, Three.D.8, Three.D.10, Three.E and Four and denying an evidentiary hearing as to those claims (dkt. 160), entered on January 5, 2015; (3) this Court's order denying relief on remaining claims (dkt. 179), entered on August 16, 2017; (4) this Court's judgment (dkt. 180), entered on August 17, 2017; (5) this Court's denial of McDermott's motion to alter or amend the judgment pursuant to Federal Rules of Civil Procedure 59 and 60(b) (dkt. 198), entered on April 2, 2018, and (6) all other rulings and orders leading up to and relating to the judgment that were contrary to McDermott's requests, motions, and/or claims, including this Court's denial of discovery (dkt. 55), entered on October 19, 2007; denial of McDermott's motion for reconsideration (dkt. 60), entered on January 18, 2008; this Court's denial of leave to file a second amended petition (dkt. 67), entered on July 15, 2008; this Court's order vacating the evidentiary hearing set for August 2, 2011 (dkt. 123), entered on March 30, 2012.

Furthermore, on August 16, 2017, the district court denied a certificate of appealability as to all claims except Claim 12(C) of the First Amended Petition. (Dkt. 181.) McDermott intends to move this Court to expand the Certificate of Appealability to include the issue of the denial of her motion to alter or amend the judgment pursuant to Federal Rules of Civil Procedure 59 and 60(b).

McDermott reserves the right to request that the Court of Appeals expand the Certificate of Appealability to include other meritorious issues.

No filing of a docket fee is required because McDermott is in forma pauperis and this Court appointed the Office of the Federal Public Defender to represent her in these proceedings. (Dkts. 1, 2, 5.)

Petitioner's amended notice of appeal is timely filed pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) and 4(a)(4)(B)(ii).

The parties to the judgment are:

Petitioner:	Maureen McDermott CDC# W-36601, 504-148L Central California Women's Facility P.O. Box 1508 Chowchilla, CA 93610
Petitioner's counsel:	Lauren Collins Michael Weinstein Deputy Federal Public Defenders 321 E. 2nd Street Los Angeles, CA 90012
Respondent:	Deborah K. Johnson, Warden Central California Women's Facility 23370 Rd 22 Chowchilla, CA 93610
Respondent's counsel:	A. Scott Hayward Xiomara Costello Douglas L. Wilson John Yang CAAG- Office of Attorney General of California 300 S. Spring Street, Suite 1702 Los Angeles, CA 90013

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 2, 2018

By */s/ Lauren Collins*
LAUREN COLLINS
MICHAEL D. WEINSTEIN
Deputy Federal Public Defenders

Attorneys for Petitioner
MAUREEN McDERMOTT

Death Penalty

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 04-0457 DOC (Death Penalty)	Date	March 29, 2012
Title	MAUREEN MCDERMOTT -V- JOHNSON		

Present: The Honorable	David O. Carter, United States District Judge	
Julie Barrera	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **Supplemental Briefing Addressing Cullen v. Pinholster**

In an April 25, 2011 Order, the Court vacated the evidentiary hearing that had been set for August 2, 2011, and directed the parties to submit supplemental briefing regarding Petitioner's entitlement to an evidentiary hearing in view of Cullen v. Pinholster, 131 S. Ct. 1388 (2011).

The Court has now reviewed the parties' supplemental briefing, and finds that Petitioner's arguments in the supplemental briefing that Pinholster does not apply to her case nor impact her entitlement to an evidentiary hearing are unpersuasive. Under Pinholster, a district court should not grant an evidentiary hearing in a federal habeas proceeding unless a petitioner satisfies 28 U.S.C. § 2254(d) by showing, based only on the record that was before the California Supreme Court, that the California Supreme Court violated clearly established law or unreasonably determined the facts in support of any claim on which she seeks an evidentiary hearing.

Petitioner further contends that she satisfies § 2254(d) based on the arguments set forth in the supplemental briefing and her Motion for Evidentiary Hearing (MEH). On June 25, 2010, roughly 10 months before Pinholster was decided, the Court had granted an evidentiary hearing as to certain claims. However, because the evidence upon which Petitioner relied in the MEH included evidence obtained through discovery in this federal habeas proceeding, it cannot be determined as to any of the previously-granted claims whether Petitioner has shown a violation of § 2254(d) based solely on the state court record. In addition, that determination cannot be made based on this general supplemental briefing regarding the impact of Pinholster.

Thus, the parties shall brief the merits of Petitioner's remaining claims (i.e., those claims that were not previously denied in the June 25, 2010 Order) under 28 U.S.C. § 2254(d) based solely upon the state court record. In connection with Claim 4, the parties shall submit a comparative juror analysis.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-0457 DOC (Death Penalty) Date March 29, 2012

Title MAUREEN MCDERMOTT -V- JOHNSON

On or before May 1, 2012, Petitioner shall file an Opening Brief. On or before June 15, 2012, Respondent shall file an Opposition. On or before July 15, 2012, Petitioner shall file a Reply.

IT IS SO ORDERED.

cc: All parties of record

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUN 25 2010
SDM
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MAUREEN MCDERMOTT, Petitioner, v. MARY LATTIMORE, Warden, Central California Women's Facility at Chowchilla, Respondent.	Case No. CV 04-00457 DOC DEATH PENALTY ORDER RE: PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

Having read and considered the parties' arguments over whether to hold an evidentiary hearing, the Court has dispensed with oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, and rules as follows.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prior Proceedings

After a jury trial on guilt, Petitioner was convicted of one count of murder and one count of attempted murder. The jury also found true the special circumstance allegations that the murder was carried out for financial gain and by means of lying in wait. The jury returned the penalty of death on April 3, 1990, and the trial court imposed judgment

Petitioner's allegations demonstrate the inference of discriminatory bias based on a statistical disparity between African-American jurors the prosecutor struck and non-African-American jurors against whom she exercised no peremptory challenges. The prosecutor struck 75 percent of African-American jurors and challenged African Americans at a rate more than twice the percentage of African Americans in the venire (i.e., 37 percent peremptory challenges used against 15 percent of the jury pool). Aside from providing specific reasons for excusing four of the African-American jurors, the prosecutor provided only a single, general reason for her peremptory challenges in response to counsel's Batson motion and provided no reason at all for excusing Juror Jennings. RT at 3,815, 3,819-25. Like the inadequate record in Williams which required an evidentiary hearing, the record here is similarly inadequate in order to refute the inference of bias.

Thus, Petitioner alleges colorable claims of a Batson violation and related ineffective assistance of counsel at voir dire. Resolving these claims requires assessing the reasons for the prosecutor's challenges of all the African-American jurors and, following that, may require a comparative juror analysis. Petitioner presented her Batson challenge in her direct appeal, which the California Supreme Court denied in its written decision, and she presented her allegations based on Juror Jennings in her state habeas proceedings, which were summarily denied. Williams, 529 U.S. at 429-30. With respect to her Batson claim, Claim Four, the parties agree that, because no comparative juror analysis was undertaken by the state courts, the California Supreme Court's findings on this claim are not entitled to any AEDPA deference. Green v. LaMarque, 532 F.3d 1028, 1031 (9th Cir. 2008). Furthermore, no

D. Where did you work before and what did you do?

(1) [illegible]

(2) [illegible]

(3) Church Secretary

6. Spouse's or roommate's occupation, or their past occupations if you are divorced or widowed? COOK - THEN DENDIX + ROCKETDYNE

7. Father's occupation and where does he or did he work, if known? FARMER

8. Mother's occupation and where does she or did she work, if known? APPLE PACKING PLANT.

9. If you have, or had, brother or sisters, please answer the following:

Age	Sex	Education	Occupation or Profession
52	M	HIGH SCHOOL	Retired Air Force
50	M.	HIGH SCHOOL	Fresh Fruit + Vegetables Purchaser for Limited Foods
66	F	HIGH SCHOOL	Retired

10. Did you have a step-parent(s), and if yes, what was his/her or their occupation? Apple Packer

11. Have you ever been in business for yourself? Yes ___ No ✓

If yes, what type of business ___

12. What supervisory experience have you had? Sales Room Forum Cafeteria - 40 Some years ago.

ORGANIZATIONS

22. What organizations or groups of any kind do you belong to now or in the past? (For example, bowling leagues, church groups, AA, Sierra Club, MECLA, NRA, ACLU, YWCA, YMCA, PTA, NAACP, or any animal rights group.

A. Now None

B. Past Church

23. Have you served as an officer in any organization? Yes ___ No ✓

24. Do you belong to, or associate with, or donate money to any groups that have as a goal the prevention of crime or enforcement of the law or any other specific cause? (For example, neighborhood watch, Mothers Against Drunk Drivers, Crime Victim Law and Order Committee) Yes ___ No ✓

A. If yes which groups? ___

25. Would you describe yourself as a leader or a follower? ___
FOLLOWER
Please explain why: I'm not an authoritative personality.

26. Does your car now have, or has it recently had, a bumper sticker or personalized license plate frame? Yes ___ No ✓
If yes, what does it say? ___

35. (a) Do you own a pet? Yes If so, how many and what kind
2 Dogs (Spayed Female) / Cat (Neutered)

36. What are your other leisure interests and activities?
Work + Grandchildren

37. Have you ever written a Letter to the Editor? Yes_____ No ✓

38. Do you presently have a religious preference or affiliation?
Yes ✓ No___ If yes, what? Christian

39. Do you attend church, temple or other religious or spiritual services regularly? Yes___ No ✓

40. Do you consider yourself a religious person? Yes ✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No___

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? DEMOCRATIC

B. Are you currently registered to vote? Yes ✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) DEM.

C. Did you vote in the last election? Yes___ No ✓

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

ORGANIZATIONS

22. What organizations or groups of any kind do you belong to now or in the past? (For example, bowling leagues, church groups, AA, Sierra Club, MECLA, NRA, ACLU, YWCA, YMCA, PTA, NAACP, or any animal rights group.

A. Now ROTARY CLUB OF LOS ANGELES; SERVICE CORPS OF RETIRED EXECUTIVES - S.B.A.; MASONIC ORDER THROUGH SHRINE (NOT ACTIVE)

B. Past YOUNG PRESIDENTS ORGANIZATION; BOARD MEMBER DOWNTOWN YMCA; BOARD MEMBER GOOD WILL INDUSTRIES; PTA; EPISCOPAL CHURCH; ROTARY BOWLING; BOY SCOUTS; DEN LEADER CUB SCOUTS

23. Have you served as an officer in any organization? Yes ✓

No ___

24. Do you belong to, or associate with, or donate money to any groups that have as a goal the prevention of crime or enforcement of the law or any other specific cause? (For example, neighborhood watch, Mothers Against Drunk Drivers, Crime Victim Law and Order Committee) Yes ✓ No ___

A. If yes which groups? NEIGHBORHOOD WATCH; CAHIC SHERIFF'S ASSOC; SO. POV. CTR (EIGHT KKK); DARE.

25. Would you describe yourself as a leader or a follower? ___

Please explain why: FROM AGE 17 AS AN OWNER MANAGER AND LATER PRESIDENT - HAD NO CHOICE. HAVE ENDED UP AS CHAIRMAN OF ORGANIZATIONS NEVER SEEKING BUT MIGRATING TO TO

26. Does your car now have, or has it recently had, a bumper sticker or personalized license plate frame? Yes ___ No ✓

If yes, ~~what~~ How does it ~~say~~ read? YES EMBOSSED WITH INITIALS

35.(a) Do you own a pet? NO If so, how many and what kind N/A

36. What are your other leisure interests and activities? 10 MILE BICYCLE RIDE ON WEEK DAYS (4-5X WKLY) ROLLER SKATING 1X WEEKLY; MENTORING BUSINESS PERSONS; ACTIVE IN ROTARY COMMUNITY WORKING WITH PERSONS BETWEEN JOBS; WORKING ON CLASSIC CARS; 1-1½ HOURS AT END OF DAY LISTENING TO MUSIC, PREPARATION OF VEGETABLES FOR CONVERSION INTO JUICE — AND PARTAKING OF SAME — KEEPING UP [illegible] HOUSE — [illegible] NEW PAINT — KEEPS ACCOUNT [illegible]

37. Have you ever written a Letter to the Editor? Yes ✓ No

38. Do you presently have a religious preference or affiliation? Yes ✓ No If yes, what? INTEREST IN CHURCH OF RELIGIOUS SCIENCE

39. Do you attend church, temple or other religious or spiritual services regularly? Yes No ✓

40. Do you consider yourself a religious person? Yes ✓✓ No

41. Have you had any special post or duties in your place of worship? Yes ✓ No EPISCOPAL CHURCH - ALTOR BOY - CHOIR

42. Do you have a political affiliation? Yes ✓ No

A. What party are you affiliated with? REPUBLICAN

B. Are you currently registered to vote? Yes ✓ No

If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)

C. Did you vote in the last election? Yes ✓ No GENERAL ELECTION

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? yes If so, how many and what kind
1 cat

36. What are your other leisure interests and activities?
walking yard work

37. Have you ever written a Letter to the Editor? Yes_____ No✓

38. Do you presently have a religious preference or affiliation?
Yes___ No✓ If yes, what?_____

39. Do you attend church, temple or other religious or spiritual services regularly? Yes___ No✓

40. Do you consider yourself a religious person? Yes✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No✓

42. Do you have a political affiliation? Yes___ No✓

A. What party are you affiliated with? none

B. Are you currently registered to vote? Yes✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____
NO party

C. Did you vote in the last election? Yes✓ No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? YES If so, how many and what kind 1 DOG - PEKINGESE

36. What are your other leisure interests and activities? PLAYING GOLF, BEING WITH FAMILY.

37. Have you ever written a Letter to the Editor? Yes____ No X

38. Do you presently have a religious preference or affiliation? Yes X No___ If yes, what? CATHOLIC

39. Do you attend church, temple or other religious or spiritual services regularly? Yes X No____

40. Do you consider yourself a religious person? Yes X No_____

41. Have you had any special post or duties in your place of worship? Yes___ No X

42. Do you have a political affiliation? Yes X No

A. What party are you affiliated with? DEMOCRAT

B. Are you currently registered to vote? Yes X No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____

C. Did you vote in the last election? Yes X No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? No If so, how many and what kind___

36. What are your other leisure interests and activities?_____
Cooking, sewing + gardening

37. Have you ever written a Letter to the Editor? Yes_____ No ✓

38. Do you presently have a religious preference or affiliation?
Yes___ No ✓ If yes, what?_____

39. Do you attend church, temple or other religious or spiritual services regularly? Yes___ No ✓

40. Do you consider yourself a religious person? Yes ✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No ✓

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? [redacted]

B. Are you currently registered to vote? Yes___ No ✓
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____

C. Did you vote in the last election? Yes___ No ✓

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

79. What are your feelings on the following specific questions:

A. Do you feel that the death penalty is used too often? Too seldomly? Please explain: not often enough - I believe in a eye for a eye

B. Do you belong to any group that advocate the increased use or the abolition of the death penalty? Yes____ No ✓

1. What group(s)?_____

2. Do you share the views of this group(s)?

3. How stongly do you hold these views?

C. Do you believe the State should have the right to execute, depending on the circumstances, an individual who

1. Unlawfully kills another human being, whether intentionally or not? Yes_____ No ✓

2. Unlawfully and intentionally kills another human being ? Yes ✓ No___

3. Please Explain: Since it was ententional, the individual should be executed or sent to prison for life without a chance to be paroled.

35. (a) Do you own a pet? Yes If so, how many and what kind? 2 dogs, 5 cats, 3 geese

36. What are your other leisure interests and activities? Gardening, painting.

37. Have you ever written a Letter to the Editor? Yes ____ No ✓

38. Do you presently have a religious preference or affiliation? Yes ✓ No ___ If yes, what? Catholic

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ✓ No ___

40. Do you consider yourself a religious person? Yes ✓ No ____

41. Have you had any special post or duties in your place of worship? Yes ___ No ___

42. Do you have a political affiliation? Yes ✓ No ___

A. What party are you affiliated with? Democrat

B. Are you currently registered to vote? Yes ✓ No ___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) Dem

C. Did you vote in the last election? Yes ✓ No ____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

44. Please explain any thoughts or feelings you have about judging the conduct or behavior of another person. I DO NOT JUDGE THE CONDUCT OR BEHAVIOR OF ANOTHER — UNCONSCIOUSLY THE CONDUCT OR BEHAVIOR OF ANOTHER PERSON PLAYS THE MAJOR PART AS TO MY POTENTIAL ASSOCIATION WITH THAT PERSON. "LET HE WHO IS WITHOUT SIN CAST THE FIRST STONE"

WEAPONS

45. Do you or anyone else in your home own a gun? Yes ✓

No___ If yes,

A. Who? ME

B. What kind and how many? ———

C. Reason for owning a gun. CARRY OVER FROM TRAP SHOOTING AS A YOUNG MAN.

46. Do you have any extraordinary security precautions at your home? (for example, security bars, alarms, lights) Yes ✓

No___

A. If yes, what are they. VERY SOPHISTICATED ALARM — ELEC FALRS

47. Are you now, or have you ever been, a member of the National Rifle Association? Yes___ No ✓

35.(a) Do you own a pet? YES If so, how many and what kind? 2 DOGS (RETRIEVER, VIZLA)

36. What are your other leisure interests and activities? MOVIES, GARDENING, LOUNGE, BASEBALL

37. Have you ever written a Letter to the Editor? Yes X No ___

38. Do you presently have a religious preference or affiliation? Yes X No ___ If yes, what? JEWISH

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ___ No X

40. Do you consider yourself a religious person? Yes X No ___

41. Have you had any special post or duties in your place of worship? Yes ___ No X

42. Do you have a political affiliation? Yes X No ___

A. What party are you affiliated with? REPUBLICAN

B. Are you currently registered to vote? Yes X No ___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) REPUBLICAN

C. Did you vote in the last election? Yes X No ___

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate) NO

ORGANIZATIONS

22. What organizations or groups of any kind do you belong to now or in the past? (For example, bowling leagues, church groups, AA, Sierra Club, MECLA, NRA, ACLU, YWCA, YMCA, PTA, NAACP, or any animal rights group.

A. Now ' _____

B. Past Church group YMCA

23. Have you served as an officer in any organization? Yes ___ No ✗

24. Do you belong to, or associate with, or donate money to any groups that have as a goal the prevention of crime or enforcement of the law or any other specific cause? (For example, neighborhood watch, Mothers Against Drunk Drivers, Crime Victim Law and Order Committee) Yes ___ No ✗

A. If yes which groups? _____

25. Would you describe yourself as a leader or a follower? ___

Follower

Please explain why: Because I Am Not A Leader

26. Does your car now have, or has it recently had, a bumper sticker or personalized license plate frame? Yes ___ No ✗

If yes, what does it say? _____

35.(a) Do you own a pet? Yes If so, how many and what kind 3 CATS

36. What are your other leisure interests and activities? Fishing, Gardening & working on The Home

37. Have you ever written a Letter to the Editor? Yes_____ No ✓

38. Do you presently have a religious preference or affiliation? Yes ✓ No___ If yes, what? Lutheran

39. Do you attend church, temple or other religious or spiritual services regularly? Yes___ No ✓

40. Do you consider yourself a religious person? Yes ✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No ✓

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? Democrat

B. Are you currently registered to vote? Yes ✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) Democrat

C. Did you vote in the last election? Yes ✓ No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? No If so, how many and what kind___

36. What are your other leisure interests and activities?_____
my kids –

37. Have you ever written a Letter to the Editor? Yes_____ No ✓

38. Do you presently have a religious preference or affiliation?
Yes ✓ No___ If yes, what? Trinity Lutheran Church

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ✓ No____

40. Do you consider yourself a religious person? Yes ✓ No_____

41. Have you had any special post or duties in your place of worship? Yes ✓ No___

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? Republican

B. Are you currently registered to vote? Yes ✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____
Repub

C. Did you vote in the last election? Yes___ No ✓

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

ORGANIZATIONS

22. What organizations or groups of any kind do you belong to now or in the past? (For example, bowling leagues, church groups, AA, Sierra Club, MECLA, NRA, ACLU, YWCA, YMCA, PTA, NAACP, or any animal rights group.

A. Now Evening Lutheran Church

B. Past _____

23. Have you served as an officer in any organization? Yes ___ No ✓

24. Do you belong to, or associate with, or donate money to any groups that have as a goal the prevention of crime or enforcement of the law or any other specific cause? (For example, neighborhood watch, Mothers Against Drunk Drivers, Crime Victim Law and Order Committee) Yes ___ No ✓

A. If yes which groups? _____

25. Would you describe yourself as a leader or a follower? ___

Please explain why: I like to help out but not take charge

26. Does your car now have, or has it recently had, a bumper sticker or personalized license plate frame? Yes ___ No ✓

If yes, what does it say? _____

35.(a) Do you own a pet? yes If so, how many and what kind
2 cats male (N.)

36. What are your other leisure interests and activities?
Gardening + - Craft work

37. Have you ever written a Letter to the Editor? Yes_____ No ✓

38. Do you presently have a religious preference or affiliation?
Yes ✓ No___ If yes, what? Lutheran

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ✓ No____

40. Do you consider yourself a religious person? Yes ✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No ✓

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? Dem

B. Are you currently registered to vote? Yes ✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____

C. Did you vote in the last election? Yes ✓ No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

44. Please explain any thoughts or feelings you have about judging the conduct or behavior of another person. We must be most Careful - for there but for the Grace of God go I.

WEAPONS

45. Do you or anyone else in your home own a gun? Yes___
No ✓ If yes,

A. Who? _____

B. What kind and how many? _____

_____

C. Reason for owning a gun. _____

46. Do you have any extraordinary security precautions at your home? (for example, security bars, alarms, lights) Yes_____
No____

A. If yes, what are they. _____

_____

_____

47. Are you now, or have you ever been, a member of the National Rifle Association? Yes___ No ✓

35.(a) Do you own a pet? yes If so, how many and what kind 1 dog

36. What are your other leisure interests and activities? I like to walk around the beach Shopping, Long rides around town, Looking at property

37. Have you ever written a Letter to the Editor? Yes____ No X

38. Do you presently have a religious preference or affiliation? Yes X No___ If yes, what? Christian

39. Do you attend church, temple or other religious or spiritual services regularly? Yes X No___

40. Do you consider yourself a religious person? Yes X No____

41. Have you had any special post or duties in your place of worship? Yes X No___

42. Do you have a political affiliation? Yes X No___

A. What party are you affiliated with? Democrat

B. Are you currently registered to vote? Yes X No___

If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) Dem.

C. Did you vote in the last election? Yes X No____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? NO If so, how many and what kind___

36. What are your other leisure interests and activities? PLAY GUITAR, COLLECT BASEBALL CARDS

37. Have you ever written a Letter to the Editor? Yes_____ No X

38. Do you presently have a religious preference or affiliation? Yes X No___ If yes, what? MORMON

39. Do you attend church, temple or other religious or spiritual services regularly? Yes X No____

40. Do you consider yourself a religious person? Yes X No_____

41. Have you had any special post or duties in your place of worship? Yes X No___

42. Do you have a political affiliation? Yes X No___

A. What party are you affiliated with? DEMOCRAT

B. Are you currently registered to vote? Yes X No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) DEM

C. Did you vote in the last election? Yes X No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? NO If so, how many and what kind___

36. What are your other leisure interests and activities?_____
FISHING, GARDENING, DINING OUT, CAMPING

37. Have you ever written a Letter to the Editor? Yes_____ No✓

38. Do you presently have a religious preference or affiliation?
Yes✓ No___ If yes, what? HEBREW

39. Do you attend church, temple or other religious or spiritual services regularly? Yes X (U.C.) No✓

40. Do you consider yourself a religious person? Yes✓ No_____

41. Have you had any special post or duties in your place of worship? Yes___ No✓

42. Do you have a political affiliation? Yes✓ No___

A. What party are you affiliated with? DEMOCRATIC

B. Are you currently registered to vote? Yes✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.)_____
DEMOCRATIC

C. Did you vote in the last election? Yes✓ No_____

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35. (a) Do you own a pet? NO If so, how many and what kind ___

36. What are your other leisure interests and activities? OVERSEEING THE MANAGEMENT OF OUR CONDO ORGANIZATION

37. Have you ever written a Letter to the Editor? Yes ___ No ✓

38. Do you presently have a religious preference or affiliation? Yes ✓ No ___ If yes, what? JEWISH

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ✓ No ___

40. Do you consider yourself a religious person? Yes ___ No ✓

41. Have you had any special post or duties in your place of worship? Yes ___ No ✓

42. Do you have a political affiliation? Yes ✓ No ___

A. What party are you affiliated with? DEM.

B. Are you currently registered to vote? Yes ✓ No ___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) DEM

C. Did you vote in the last election? Yes ✓ No ___

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

35.(a) Do you own a pet? NO If so, how many and what kind___

36. What are your other leisure interests and activities? videotaping family history, biography; family genealogy

37. Have you ever written a Letter to the Editor? Yes ✓ No___

38. Do you presently have a religious preference or affiliation? Yes ✓ No___ If yes, what? evangelical Presbyterian

39. Do you attend church, temple or other religious or spiritual services regularly? Yes ✓ No___

40. Do you consider yourself a religious person? Yes ✓ No___

41. Have you had any special post or duties in your place of worship? Yes ✓ No___

42. Do you have a political affiliation? Yes ✓ No___

A. What party are you affiliated with? Republican

B. Are you currently registered to vote? Yes ✓ No___
If yes, how (Repub/Dem/Lib/AI/PF/Ind, etc.) Republican

C. Did you vote in the last election? Yes ✓ No___

PREVIOUS JURY EXPERIENCE

43. Have you ever served on any of the following types of juries in state or federal court? (either as a regular juror or alternate)

1447

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. NW M

Date:	MARCH 30, 1990			
HONORABLE:	ALAN B. HABER	JUDGE	D. FIELDS	Deputy Clerk
	R. CONDIFF	Deputy Sheriff	J. KOTELES/ G. GORKOS	Reporter

A 810541
PEOPLE OF THE STATE OF CALIFORNIA
VS
01 MC DERMOTT, MAUREEN
187 01 CT
664/187 01 CT

(Parties and counsel checked if present)

Counsel for People:
DEPUTY DISTRICT ATTY: K. MADER

Counsel for Defendant: J. INGBER, 987.2
C. BURKOW, 987.2

NATURE OF PROCEEDINGS

JURY TRIAL (PENALTY PHASE) REM 1-29-87

Trial resumes from March 29, 1990 with defendant, counsel and all jurors presnt as heretofore.

Argument resumes and is concluded.

Concluding instructions are read to the jury.

The bailiff is sworn to take charge of the jury and the alternate jurors.

At 11:34 a.m. the jury retires to commence deliberations.

The jury is excused for the noon recess at 11:40 a.m. and returns at 1:34 p.m. to resume deliberations.

At 3:05 p.m. the jury leaves for a break, leaving a written request for clarification for the Court. Counsel are notified by the clerk as to the nature of the request, and both sides waive presence and indicate that the Court may answer the request.

The jury returns at 3:20 p.m. and at 3:25 p.m. enters the courtroom, where the Court answers the request as reflected in the notes of the court reporter.

At 3:30 p.m. the jury retires to resume deliberations.

At 4:00 p.m. the jury is excused for the day and directed to return April 2, 1990 at 9 a.m. to resume deliberations.

REMANDED

MINUTES ENTERED
3-30-90
COUNTY CLERK

78M 413L C-120 4-88

MINUTE ORDER

1448

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. NW M

Date: APRIL 2, 1990
HONORABLE: ALAN B. HABER — JUDGE — D. FIELDS — Deputy Clerk
R. CONDIFF — Deputy Sheriff — NONE — Reporter

A 810541 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS
01 MC DERMOTT, MAUREEN N/P
187 01 CT
664/187 01 CT

Counsel for People:
DEPUTY DISTRICT ATTY: K. MADER N/P

Counsel for Defendant: J. INGBER, 987.2 N/P
C. BURKOW, 987.2 N/P

NATURE OF PROCEEDINGS

JURY TRIAL (PENALTY PHASE) REM 1-29-87
(Jury deliberating)

The jury returns and resumes deliberations at 1:30 p.m.

At 2:45 p.m. the jury leaves for a break and returns to resume deliberations at 3:05 P.M.

At 4:00 p.m. the jury is excused for the day and directed to return April 3, 1990 at 1:30 p.m. to resume deliberations.

REMANDED

MINUTES ENTERED
4-2-90
COUNTY CLERK

76M 413L C-120 4-88

MINUTE ORDER

1495

DEPT. NW M

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date:	APRIL 3, 1990			
HONORABLE:	ALAN B. HABER	JUDGE	D. FIELDS	Deputy Clerk
	R. CONDIFF	Deputy Sheriff	J. KOTELES	Reporter

A 810541 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS
01 MC DERMOTT, MAUREEN
187 01 CT
664/187 01 CT

Counsel for People:
DEPUTY DISTRICT ATTY: K. MADER

Counsel for Defendant: J. INGBER, 987.2
C. BURKOW, 987.2

NATURE OF PROCEEDINGS

JURY TRIAL (PENALTY PHASE) REM 1-29-87

The jury returns at 1:33 p.m. and retires to resume deliberations.

At 2:20 p.m the jury buzzes indicating that they have reached a verdict.

The jury is excused from the jury room at 2:37 p.m. to allow for the attorneys and alternate jurors to be notified. The sealed verdict remains in the custody of foreman C.H. BARR.

At 3:33 p.m. the jury returns into the courtroom with the following verdict:

"TITLE OF COURT AND CAUSE - We, the jury in the above-entitled action, having found the defendant, MAUREEN MC DERMOTT guilty of FIRST DEGREE MURDER as charged in Count 1 of the information and having found the special circumstances therein to be true, find the appropriate penalty to be DEATH.

This 3rd day of April 1990 H. Barr FOREMAN "

The jury is polled and all jurors answer in the affirmative.

The Clerk is directed to record the verdict as read.

Defendant is referred to the Probation Department. Probation and sentence hearing and further proceedings are continued to June 8, 1990 at 1:30 p.m. in Department NW Z. Defendant is ordered to return.

The Court addresses the jury and instructs the jury per Penal Code Section 1046.5. The jury is discharged.

Jury instructions given and refused and the verdict form are filed.

REMANDED

MINUTES ENTERED
4-3-90
COUNTY CLERK

76M 413L C-120 4-88

MINUTE ORDER

MR. INGBER: WHEN YOU SAID THAT YOU THOUGHT YOU COULD CONSIDER VOTING FOR THE DEATH PENALTY ON THAT PAGE THERE, YOU WERE BEING QUITE FORTHRIGHT ABOUT SAYING IT IS NOT SOMETHING YOU'RE VOLUNTEERING FOR AND WANTING TO DO?

PROSPECTIVE JUROR BARNES: THAT'S NOT SOMETHING I WOULD ENJOY.

MR. INGBER: RIGHT. BUT IT IS A JOB. IF YOUR FUNCTION AS A JUROR IS A RESPONSIBILITY WHERE AS A JUROR THIS IS ONE OF THE JOBS YOU HAVE TO FACE, YOU CAN FACE IT, CORRECT?

PROSPECTIVE JUROR BARNES: I THINK SO, YES.

MR. INGBER: NOW, IT IS ONE THING, I GUESS, TO THINK ABOUT THE DEATH PENALTY AS BEING APPROPRIATE IN JUST A GENERAL SENSE, AND IT IS ANOTHER THING TO COME RIGHT DOWN TO IT SITTING AS A JUROR WHERE SOMEBODY SAYS TO YOU, "MISS BARNES, WILL YOU VOTE FOR DEATH OR LIFE IN PRISON WITHOUT EVER GETTING OUT?"

YOU CAN SEE THERE'S A LITTLE BIT OF A DIFFERENCE WHEN YOU HAVE TO MAKE AN ANSWER YES OR NO, ISN'T IT?

PROSPECTIVE JUROR BARNES: WELL, AS I SAID IN HERE SOMEWHERE, I THINK THE DEATH PENALTY MIGHT BE JUST AS GOOD AS LIFE IN PRISON.

MR. INGBER: SURE. NOW, YOU WOULDN'T THEN TURN AROUND, IF YOU THOUGHT THE DEATH PENALTY WAS APPROPRIATE BUT NOT NEARLY AS PUNISHMENT ENOUGH, VOTE FOR A LIFE IN PRISON, WOULD YOU?

PROSPECTIVE JUROR BARNES: OH, HEAVEN'S, NO.

MR. INGBER: AND IF YOU TELL US, "I DON'T KNOW HOW I WILL FEEL," THAT'S A PERFECTLY HONEST AND A GOOD ANSWER.

ON THE OTHER HAND, IF YOU TELL US BASED ON YOUR QUESTIONNAIRE THAT YOU DON'T THINK THE DEATH PENALTY IS USED OFTEN ENOUGH, THAT TELLS US SOMETHING ABOUT HOW YOU FEEL ABOUT THE DEATH PENALTY.

WOULDN'T YOU AGREE?

PROSPECTIVE JUROR FIELD: UH-HUM. I DO.

MR. INGBER: WHAT IS IT YOU DO MEAN ABOUT NOT OFTEN ENOUGH? IT IS NOT USED OFTEN ENOUGH. HOW OFTEN WOULD BE ENOUGH? COULD YOU TELL US?

PROSPECTIVE JUROR FIELD: WELL, I JUST THINK AS I SAID, SO OFTEN THEY ARE PAROLED AND THEY ARE LETTING SOME OF THESE SO CALLED KILLERS OUT IN THE STREETS AGAIN AND SOME DO GO AND KILL AGAIN.

MR. INGBER: OKAY.

PROSPECTIVE JUROR FIELD: BUT I THINK A HARSHER PUNISHMENT WOULD BE YOU HAVE TO SPEND THE REST OF YOUR LIFE IN PRISON.

MR. INGBER: THAT'S ONE OF THE QUESTIONS I DON'T ASK YOU.

PROSPECTIVE JUROR FIELD: I WOULD LIKE TO THINK MAYBE RIGHT IN THE MIDDLE.

MR. INGBER: THAT'S BETTER.

YOU HAVE NEVER DONE THIS BEFORE, HAVE YOU?

PROSPECTIVE JUROR FIELD: NO.

MR. INGBER: THAT'S WHEN YOU SAY YOU LIKE TO THINK THAT, WE APPRECIATE IT, AND THAT'S WHERE YOU WOULD BE IN THIS CASE.

PROSPECTIVE JUROR FIELD: I HOPE SO.

MR. INGBER: THANKS VERY MUCH.

PASS FOR CAUSE.

THE COURT: MISS MADER, YOU MAY INQUIRE.

MS. MADER: THANK YOU.

HELLO.

PROSPECTIVE JUROR FIELD: HELLO.

MS. MADER: I AM KATHERINE MADER.

I AM THE PROSECUTOR IN THE CASE.

I JUST HAVE A QUESTION REGARDING A SMALL AREA THAT WE TALKED ABOUT OR THAT YOU TALKED ABOUT WITH DEFENSE COUNSEL, AND THAT WAS WHEN YOU SAID YOU THOUGHT LIFE WITHOUT POSSIBILITY OF PAROLE WAS POSSIBLY A WORSE PUNISHMENT THAN THE DEATH PENALTY.

PROSPECTIVE JUROR FIELD: YES.

MS. MADER: IS THAT REALLY WHAT YOU THINK?

PROSPECTIVE JUROR FIELD: YES, IT IS.

I WOULD RATHER GET THE DEATH SENTENCE THAN SPEND THE REST OF MY LIFE IN A CELL.

I REALLY WOULD.

MS. MADER: FORGET ABOUT THIS CASE. OF COURSE, YOU DON'T KNOW ANYTHING ABOUT THIS CASE AND WE CAN'T ASK YOU TO MAKE A JUDGMENT ABOUT THIS CASE, BUT LET'S JUST TALK ABOUT FIRST DEGREE MURDER WHICH IS PREMEDIATED, DELIBERATED CONDUCT THAT CAUSES --

PROSPECTIVE JUROR JESSIE: NOT THIS ONE, BUT MAYBE ANOTHER ONE?

MS. MADER: YES. DO YOU FEEL THAT THE STATE SHOULD HAVE THE RIGHT TO GIVE SOMEBODY THE DEATH PENALTY IF THEY ARE FOUND GUILTY OF A FIRST DEGREE PREMEDIATED, DELIBERATE MURDER?

MR. INGBER: WELL, YOUR HONOR, I OBJECT TO THAT BECAUSE IT IS INCOMPLETE WITHOUT THE SPECIAL CIRCUMSTANCES. WE HAVE THE STANDARD.

THE COURT: NO, I UNDERSTAND THAT. I DON'T THINK THAT THE QUESTION WAS INTENDED TO MISLEAD.

MR. INGBER: I DIDN'T MEAN INTENDED, BUT IT IS INCOMPLETE.

MS. MADER: NO, IT IS NOT.

THE COURT: BUT I THINK THE QUESTION IS PROPER BECAUSE THE RESPONSE TO IT IS HELPFUL.

I REALIZE YOUR OBJECTION, BUT I DON'T THINK IT IS BECOMES IMPORTANT CONSIDERING THE PREVIOUS ANSWERS, SO I WILL OVERRULE THE OBJECTION.

WHY DON'T YOU ASK IT AGAIN. OR DO YOU UNDERSTAND THE QUESTION, MISS JESSIE?

PROSPECTIVE JUROR JESSIE: ASK IT AGAIN.

MS. MADER: DO YOU FEEL THAT THE STATE SHOULD HAVE

THE RIGHT TO EXECUTE SOMEBODY IF THEY ARE FOUND GUILTY OF A FIRST DEGREE PREMEDIATED DELIBERATE MURDER?

PROSPECTIVE JUROR JESSIE: NO, I DON'T THINK SO.

MS. MADER: WHY WOULD THAT BE?

PROSPECTIVE JUROR JESSIE: WELL, I WOULD THINK THAT IT COULD BE ANOTHER PUNISHMENT, YOU KNOW, MAYBE LIFE OR SOMETHING.

YOU MEAN KILL THE PERSON?

MS. MADER: RIGHT. WHO KILLED SOMEBODY ELSE DELIBERATELY.

PROSPECTIVE JUROR JESSIE: NO.

MS. MADER: DO YOU INSIDE OF YOURSELF HAVE A PROBLEM BECAUSE SOME PEOPLE JUST SAY THEY COULDN'T DO IT.

DO YOU YOURSELF HAVE THAT KIND OF DIFFICULTY WITH THE IDEA THAT YOU COULD BE SENTENCING SOMEBODY TO DIE?

PROSPECTIVE JUROR JESSIE: NO.

MS. MADER: YOU COULD DO IT?

PROSPECTIVE JUROR JESSIE: I COULD DO IT.

MS. MADER: NOW, WHY DO YOU SAY THAT IN A PREMEDIATED, DELIBERATE MURDER THAT THE STATE SHOULDN'T EXECUTE PEOPLE?

PROSPECTIVE JUROR JESSIE: WELL, THAT'S JUST THE WAY I FEEL.

MS. MADER: COULD YOU TELL US A LITTLE BIT MORE ABOUT THE WAY YOU FEEL?

PROSPECTIVE JUROR JESSIE: WELL, LIKE I SAID, MAYBE THE STATE SHOULD HAVE THE RIGHT UNDER CERTAIN CIRCUMSTANCES, BUT SOME OF THEM THAT I DON'T THINK THAT I WOULD THINK IT

WAS THAT -- THAT THEY SHOULD HAVE THAT RIGHT.

MS. MADER: WHAT KIND OF CIRCUMSTANCES DO YOU THINK THE STATE SHOULD HAVE THE RIGHT TO DO THAT?

PROSPECTIVE JUROR JESSIE: LIKE I SAID BEFORE, IT WOULD HAVE TO BE WORSE THAN DEATH.

THE COURT: I'M SORRY?

PROSPECTIVE JUROR JESSIE: IT WOULD HAVE TO BE, LIKE I SAID, A MORE -- EVEN THOUGH THAT'S VIOLENT, IT WOULD HAVE TO BE A LITTLE MORE VIOLENT OR SOMETHING, I THINK.

QUESTION WOULD BE WOULD YOU BE OF THAT MIND AS SOME PEOPLE HAVE INDICATED THAT AFTER SITTING AS A JUROR, FINDING SOMEBODY GUILTY BEYOND A REASONABLE DOUBT, FIRST DEGREE MURDER AND SPECIAL CIRCUMSTANCES THAT THEY WOULD BE IN A POSITION THEN HAVING WEIGHED ALL THOSE FACTORS, SAW THAT IT WAS PLANNED AND EVERYTHING, THAT THE DEATH PENALTY WOULD BE THE ONLY CONSIDERATION THAT THEY WOULD HAVE AT THAT TIME.

SOME PEOPLE HAVE SAID THAT.

ARE YOU OF THAT MIND?

PROSPECTIVE JUROR PARISEN: NO.

I WOULD NEED CONVINCING THAT THE DEATH PENALTY WOULD BE THE CHOICE TO TAKE BETWEEN THOSE TWO, BETWEEN LIFE IMPRISONMENT AND DEATH PENALTY.

MR. BURKOW: SO YOU WOULD WANT TO HEAR ALL THE EVIDENCE?

YOU WOULD WANT TO GO AND YOU WOULD WANT TO HEAR THE PENALTY PHASE; IS THAT RIGHT?

PROSPECTIVE JUROR PARISEN: RIGHT, RIGHT.

MR. BURKOW: OKAY.

THANK YOU.

PROSPECTIVE JUROR PARISEN: OKAY.

MR. BURKOW: THAT IS BECAUSE THAT'S MORE -- I WANTED TO UNDERSTAND THAT.

WOULD YOU REQUIRE THOUGH IN YOUR OWN MIND MENTALLY THAT THE DEFENDANT IN THE PENALTY PHASE TAKE THE STAND TO CONVINCE YOU THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE, YOU KNOW, SHOULD BE A PART OF YOUR CONSIDERATION?

MS. MADER: I AM KATHERINE MADER.

I AM THE PROSECUTOR IN THIS CASE, AND I WOULD BE THE PERSON, IF WE GOT TO THE SECOND PHASE, WHO WOULD BE ASKING FOR YOU TO VOTE FOR THE DEATH PENALTY IN THIS CASE.

AND YOU SAID SOMETHING THAT I NEED TO QUESTION YOU A LITTLE MORE ABOUT WHICH IS YOU WOULD TEND NOT TO WANT TO USE THE DEATH PENALTY.

TELL ME A LITTLE BIT MORE ABOUT HOW YOU FEEL ABOUT THAT STATEMENT.

PROSPECTIVE JUROR PARISEN: I GUESS I WOULD NEED CONVINCING THE OTHER WAY.

YOU WOULD HAVE TO CONVINCE ME TO USE IT.

MY INITIAL THOUGHT WOULD BE LIFE IMPRISONMENT. THAT'S PERHAPS AN EASIER THING FOR ME TO SAY.

AND I WOULD NEED TO REALLY FEEL THAT THE DEATH PENALTY WOULD BE NECESSARY -- NOT NECESSARY -- WOULD BE --

MS. MADER: APPROPRIATE.

PROSPECTIVE JUROR PARISEN: THAT'S THE RIGHT WORD.

APPROPRIATE.

MS. MADER: WHAT KINDS OF THINGS WOULD YOU WANT TO KNOW?

PROSPECTIVE JUROR PARISEN: DIFFICULT. I DON'T KNOW. I DON'T KNOW HOW TO ANSWER THAT.

MS. MADER: CAN YOU ENVISION A SITUATION WHERE A PREMEDITATED, INTENTIONAL, PLANNED, MURDER FOR FINANCIAL GAIN MAY BE SO COLD, EVIL, CALLOUS IN ITS EXECUTION THAT YOU MAY THINK THAT THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT WITHOUT THINKING THAT LIFE WITHOUT THE

MR. BURKOW: I GET THE IMPRESSION THEN THAT WHATEVER DECISION YOU MADE AT WHATEVER PHASE, YOU KNOW, GUILT OR PENALTY, YOU WOULD WANT TO BE ABLE TO LISTEN TO ALL THE FACTORS BEFORE A DECISION WAS MADE?

PROSPECTIVE JUROR SEELEY: I WOULD.

MR. BURKOW: AS YOU SIT THERE NOW, DO YOU FEEL THE DEATH PENALTY OR LET ME PUT IT A DIFFERENT WAY.

WHICH OF THE TWO PUNISHMENTS, THAT IS THE DEATH PENALTY, LIFE WITHOUT THE POSSIBILITY OF PAROLE IS MORE SEVERE TO YOU?

PROSPECTIVE JUROR SEELEY: WELL, I THINK THAT LIFE WITHOUT POSSIBILITY OF PAROLE IS A HORRIBLE LIFE. AND IT MAY BE MORE OF A PUNISHMENT THAN DEATH.

MR. BURKOW: OKAY. SO IT IS OBVIOUS THAT YOU HAVE GIVEN THIS REGULAR CONSIDERATION.

OKAY. YOU HAVE INDICATED, OF COURSE, THAT THE DEATH PENALTY HAS BEEN TOO SELDOMLY CARRIED OUT; IS THAT CORRECT?

PROSPECTIVE JUROR SEELEY: THAT'S RIGHT.

MR. BURKOW: IS THAT EFFECTED A LOT BY THE NEWSPAPER ACCOUNTS THAT YOU READ?

PROSPECTIVE JUROR SEELEY: MOSTLY IN THE ACCOUNTS THAT I READ OF MURDERERS WHO HAVE BEEN SET LOOSE AND MURDERED AGAIN.

MR. BURKOW: YOU DO UNDERSTAND THAT FOR OUR PURPOSES THAT THE LAW HAS CHANGED SINCE THAT ADVENT IN TERMS OF LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR SEELEY: IT REALLY MEANS WHAT IT IS

CONSIDER IT.

THE COURT: I WILL. BUT I WANT TO HEAR FROM MS. MADER FIRST.

MS. MADER: MR. WELCH SAID THAT HE FAVORED THE DEATH PENALTY ONLY IN SITUATIONS IF A PERSON HAD A CRIMINAL RECORD. THAT WAS HIS INITIAL STATEMENT.

AND THEN HE CHANGED HIS MIND LATER. HE IS IN FAVOR, IF YOU LOOK AT HIS STATEMENT IN THE QUESTIONNAIRE, BASICALLY OF REHABILITATION AND COUNSELING BEFORE PUNISHMENT SUCH AS THE DEATH PENALTY.

MR. INGBER: I DON'T KNOW WHERE COUNSEL GETS THAT.

THE COURT: DO YOU HAVE YOUR QUESTIONNAIRE?

MR. INGBER: SURE.

THE COURT: OKAY. YOUR ARGUMENT?

THE COURT: START WITH BROWN. LET ME SEE THE BROWN QUESTIONNAIRE.

WILL YOU ALSO GET ME JESSIE, I'M SORRY, AND KEE, MR. KEE.

MR. BURKOW: HERE'S SPANN.

THE COURT: ALL RIGHT. MADDEN.

MS. MADER: ON MADDEN I WOULD LIKE TO ADD THAT THIS WOMAN IS 19 YEARS OLD, I BELIEVE. AND I DIDN'T BELIEVE --

THE COURT: CAN YOU HEAR THIS, MR. INGBER?

MR. INGBER: YES.

THE COURT: ARE YOU ABLE TO HEAR?

MR. INGBER: SOMETHING ABOUT SHE WAS 19 YEARS OLD AND SHE DIDN'T THINK. THEN I LOST IT.

THE COURT: YOU SEEMED SORT OF DISTANT.

MR. INGBER: I WAS BUSY LOOKING. I'M SORRY, JUDGE.

THE COURT: I JUST DIDN'T KNOW IF YOU HEARD WHAT SHE SAID.

MS. MADER: DIDN'T FEEL SHE WAS MATURE ENOUGH TO BE ABLE TO MAKE THIS DECISION. AND HER VIEWS WERE NOT THOUGHT OUT AT ALL.

THE COURT: ALL RIGHT. LET ME SEE MISS JESSIE AND MR. KEE.

I CAN'T RECONSTRUCT MUCH FROM THE QUESTIONNAIRE FROM MISS JESSIE.

MS. MADER: MISS JESSIE WAS VERY, VERY STUPID. IN ADDITION TO THAT SHE COULDN'T SEE HERSELF EVER GIVING THE DEATH PENALTY.

THE COURT: IF THAT WERE THE CASE, I'M SURE I WOULD

HAVE --

MS. MADER: SHE WAS AS BAD AS YOU COULD GET.

THE COURT: I REMEMBER HER. SHE'S THE ONE I REMEMBER. OF ALL OF THOSE, SHE IS THE ONE I REMEMBER. THE OTHER ONES I HAVE TO REFRESH MY MEMORY.

HOW ABOUT MR. KEE?

MS. MADER: I DON'T HAVE THE CARD, BUT I CAN GET IT.

THE COURT: OKAY.

MS. MADER: IS THAT THE ONLY ONE THAT YOU WANT?

THE COURT: YES.

(PAUSE.)

MS. MADER: MR. KEE STATED THAT HE WOULD CONSIDER THE DEATH PENALTY IF THE CRIME WAS PARTICULARLY BRUTAL. BUT, AND I HAVE THAT UNDERLINED, HE DOESN'T WANT THE DEATH PENALTY UNLESS THE DEFENDANT WOULD KILL AGAIN IN PRISON.

AND I DIDN'T FEEL THAT WAS A REALISTIC PROSPECT FOR THE DEFENDANT IN THIS CASE.

THE COURT: DO YOU HAVE YOUR CARD ON MR. TALBERT, THE LAST GENTLEMAN THAT YOU JUST EXCUSED BEFORE MR. WELCH?

WHAT I FEEL THE NEED TO DO IS GO THROUGH EACH OF THESE PEOPLE BECAUSE BASED ON THE NUMBER OF BLACK JURORS THAT HAVE BEEN EXCUSED, I MAY BE PREPARED TO FIND THAT YOU HAVE ESTABLISHED A PRIMA FACIE CASE. AND I HAVE TO GO THROUGH EACH EXPLANATION TO SEE IF THERE IS ANY REASONABLE BASIS FOR THE EXERCISE OF THE CHALLENGE.

MS. MADER: MR. WELCH?

THE COURT: I HAVE NOW REVIEWED IN EACH INSTANCE -- I AM CONCERNED, FRANKLY, ABOUT THE NUMBER OF BLACK JURORS THAT HAVE BEEN EXCUSED AND ARE PREPARED AND DO FIND AND HAVE OPERATED ON THE ASSUMPTION THAT I WOULD FIND THAT THE DEFENSE HAS MADE A PRIMA FACIE CASE.

AND I AM CONSIDERING THAT IN RESPONDING TO A NUMBER OF THE QUESTIONS THAT I HAVE ASKED YOU, MS. MADER.

WHAT I AM DOING IS LOOKING AT ALL THE QUESTIONNAIRES OF BLACK JURORS WHO HAVE BEEN EXCUSED AND LISTENING TO YOUR EXPLANATIONS AND TRYING TO SEE IF THERE IS A REASONABLE RELATIONSHIP BETWEEN THE REASON FOR THE EXCUSAL AND THE VIEWPOINTS OF THE JURORS.

YOU WANT TO BE HEARD ANY FURTHER?

MS. MADER: I WOULD LIKE TO SAY ONE MORE THING THAT IN ADDITION TO THE EXPLANATIONS WHICH I HAVE PROVIDED TO THE COURT WITH RESPECT TO EACH ONE OF THESE JURORS WHICH HONESTLY WOULDN'T HAVE MADE ANY DIFFERENCE TO ME WHAT THEIR RACE WAS, GIVEN SOME OF THEIR VIEWS, I ALSO TOOK INTO ACCOUNT THE FACT THAT I BELIEVE THAT ALL THESE JURORS WEREN'T NECESSARILY OPPOSED TO THE DEATH PENALTY, BUT THAT I HAD A POOL OF JURORS OUT IN THE AUDIENCE WHO I THOUGHT WERE MORE IN FAVOR OF THE DEATH PENALTY THAN THESE PARTICULAR JURORS. AND THAT IT WAS NO REASON TO KEEP THEM.

I DIDN'T FEEL THEY WOULD BE GOOD PROSECUTION JURORS ON THE ISSUE OF THE DEATH PENALTY.

AND I WOULD HAVE PREFERRED, FRANKLY, TO HAVE A NUMBER OF BLACK JURORS ON THIS CASE BECAUSE OF THE FACT THAT THE DEFENDANT MAKES RACIST REMARKS WHICH WILL BE COMING INTO

MS. MADER: JUST A MOMENT, PLEASE.

MR. INGBER: THE ALTERNATES I MEANT. I'M SORRY.

THE COURT: I KNOW WHAT YOU MEANT.

MS. MADER: WE WOULD LIKE TO THANK AND EXCUSE ALTERNATE NUMBER 1, MR. JENNINGS.

THE COURT: ALL RIGHT. THANK YOU, MR. JENNINGS. YOU ARE EXCUSED.

THE CLERK: JULIE KOLBEINS, K-O-L-B-E-I-N-S.

MR. INGBER: MAY I HAVE ONE MOMENT, YOUR HONOR?

THE COURT: SURE.

Q. YOU HAVE TO SAY YES FOR THE COURT REPORTER.
A. YES.
Q. DO YOU RECALL WHERE THE MEETING WAS?
A. AT THEIR HOME IN VAN NUYS.
Q. WAS THAT ON KILLION STREET YOU RECOLLECT?
A. YES.
Q. WHAT WAS THE SUBJECT OF THE MEETING?
A. TO INSURE THE TWO OF THEM WITH LIFE OR MORTGAGE INSURANCE TO COVER THE BALANCE OF THE HOUSE.
Q. DID YOU UNDERSTAND WHETHER OR NOT THE TWO OF THEM OWNED THIS HOUSE TOGETHER?
A. YES. FROM WHAT I UNDERSTOOD THEY BOTH OWNED IT JOINTLY.
Q. HOW MUCH INSURANCE WERE THEY EACH GOING TO BUY?
A. 100,000 APIECE.
Q. COULD YOU TELL US, PLEASE, OR TELL THE JURY HOW THAT PARTICULAR INSURANCE THAT YOU WERE MEETING ABOUT WORKS?
A. IT IS BASICALLY A LIFE INSURANCE POLICY, AND IT IS JUST TAKEN OUT SPECIFICALLY TO COVER THE MORTGAGE BALANCE.
Q. SO IF ONE PERSON DIES, THE OTHER PERSON GETS THE MORTGAGE PAID OFF OR THEY GET $100,000 OR WHAT DO THEY GET?

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MR. INGBER: OBJECTION.
LEADING AND SUGGESTIVE.
THE COURT: NO, I WILL PERMIT IT.

THE WITNESS: IF EITHER OF THEM DIES, THE $100,000 GOES DIRECTLY TO THE BENEFICIARY.

Q. BY MS. MADER: AS A RESULT OF THAT MEETING, DID YOU, IN FACT, FILL OUT ALL THE PAPERWORK FOR THE MORTGAGE INSURANCE?

A. YES, I DID.

Q. AND WITH WHAT COMPANY WAS THAT?

A. U.S. LIFE.

Q. DO YOU RECALL WHAT THE DATE WAS THAT THE LIFE INSURANCE BECAME EFFECTIVE?

A. I BELIEVE IT WAS DECEMBER 18TH.

Q. LET ME SHOW YOU SOME PAPERWORK.

Q WELL, DO YOU REMEMBER BEING ADVISED OF YOUR RIGHTS BY THEM?
A YES.
Q DO YOU REMEMBER WAIVING YOUR RIGHTS?
A YES.
Q DID YOU TELL THEM THE TRUTH IN REGARDS TO WHAT HAD HAPPENED ON THESE NIGHTS?
A NO.
Q DO YOU REMEMBER A COUPLE OF WEEKS LATER BEING VISITED BY DETECTIVE RIEHL AND THE DISTRICT ATTORNEY WHO WAS ON THE CASE WHOSE NAME WAS BEVERLY CAMPBELL?
A YES.
Q WHERE WAS THAT?
A CHINO.
Q DID YOU TALK TO THEM AT THAT TIME?
A NO.
Q NOW, AFTER YOU WERE IN CHINO, WAS THERE A POINT IN WHICH YOU WERE AT THE COUNTY JAIL IN 1985?
A YES.
Q WERE YOU VISITED IN THE COUNTY JAIL BY THE SAME DISTRICT ATTORNEY, BEVERLY CAMPBELL, AND ALSO A DETECTIVE BY THE NAME OF MAYER?
A YES.
Q COULD YOU TELL US, PLEASE, WHAT THE NATURE OF THAT CONVERSATION WAS.
A THEY CAME TO SEE ME AND TALK TO ME ABOUT THE CRIME, THE ELDRIDGE GUY, SO I TOLD THEM I DON'T KNOW ANYTHING ABOUT IT. AND DETECTIVE MAYER OFFERED ME IMMUNITY

FOR TO TESTIMONY, FOR STATEMENT.

Q WHAT DID YOU SAY?

A I TOLD HIM IF HE GETS THE PAPER FOR IMMUNITY, I'LL GIVE HIM A STATEMENT.

Q DID YOU SEE HIM LATER THAT DAY?

A YES.

Q DID HE HAVE SOMETHING WITH HIM?

A YES.

Q WHAT WAS THAT?

A IMMUNITY PAPERS.

Q AND THEN WHAT HAPPENED?

A I GAVE A STATEMENT.

Q DID YOU TELL DETECTIVE MAYER, THAT'S M-A-Y-E-R, AND BEVERLY CAMPBELL THE EVENTS OF WHAT YOU HAD DONE?

A I TALKED TO DETECTIVE MAYER. I DIDN'T TALK TO BEVERLY CAMPBELL. SHE WASN'T THERE.

Q WHEN YOU TOLD THE STORY FOR THE FIRST TIME TO DETECTIVE MAYER, DID YOU TELL HIM THE COMPLETE TRUTH?

A YES -- NO.

Q OKAY.

MR. BURKOW: WELL, WHAT IS THE ANSWER, YES AND NO?

THE WITNESS: NO.

Q BY MS. MADER: WHAT PART DID YOU NOT TELL THE TRUTH ON?

A MY BROTHER.

Q TELL US, PLEASE, WHAT YOU LEFT OUT.

A I JUST DIDN'T -- I TOLD HIM EVERYTHING EXCEPT FOR MY BROTHER WAS THERE.

SUMMARIES OF THAT TAPE RECORDED CONVERSATION THAT DAY?

A NO.

Q ON THAT DATE DURING THE COURSE OF THAT CONVERSATION, DO YOU RECALL DETECTIVE MAYER INDICATING TO YOU THAT YOU WERE BEING GRANTED IMMUNITY FROM ANY AND ALL CHARGES CONNECTED WITH THIS HOMICIDE?

A YES.

Q PRIOR TO HIM STATING THAT, HAD YOU ASKED FOR IMMUNITY FROM HIM?

A NO, BECAUSE I DIDN'T KNOW WHAT IT WAS.

Q SO YOUR ANSWER IS, NO, YOU DIDN'T ASK FOR IMMUNITY. THEY JUST CAME IN AND SAID, "HEY, DARNELL, WE ARE GOING TO GIVE YOU IMMUNITY FOR THE MURDER OF STEPHEN ELDRIDGE. WE WANT TO TALK TO YOU"?

IS THAT HOW IT HAPPENED?

A YES.

Q HAD YOU KNOWN THEY WERE COMING?

A NO.

Q WOULD IT BE FAIR TO STATE THAT YOU WERE SURPRISED TO SEE THEM THERE?

A WELL, THE NIGHT BEFORE, YOU KNOW --

Q FIRST OF ALL, COULD YOU TELL US WHETHER OR NOT --

MS. MADER: COULD HE BE ALLOWED TO ANSWER AND ALSO EXPLAIN HIS ANSWER?

MR. INGBER: LET HIM ANSWER YES OR NO.

MS. MADER: HE WAS ASKED WHETHER OR NOT HE WAS SURPRISED. AND I BELIEVE IT CALLS FOR MORE THAN JUST A

Q AND IT GOES THROUGH THE CHAIN OF COMMAND UP TO YOU OR DOES IT GO DIRECTLY TO YOU?

A THROUGH CHAIN OF MANAGEMENT.

Q AS A RESULT OF HER RECOMMENDATION AND THE FOLLOWING CHAIN OF COMMAND ACTION, DID YOU MAKE A DECISION WHETHER OR NOT TO CONCUR WITH MISS MADER'S RECOMMENDATION?

A YES.

Q AND HER RECOMMENDATION WAS WHAT?

A PLEA OF GUILTY TO MURDER WITH SPECIAL CIRCUMSTANCES FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Q AND YOU UNDERSTOOD, OF COURSE, THAT IN CONSIDERATION OF MR. LUNA PLEADING GUILTY HE WOULD NOT BE RECEIVING THE DEATH PENALTY AS HAD BEEN EXISTENT ALMOST FROM THE TIME OF THE BEGINNING UP UNTIL JUNE OF 1989?

A YES.

Q WAS THERE ANY OTHER FACTOR MENTIONED IN CONNECTION WITH MR. LUNA'S PLEADING GUILTY?

MS. MADER: OBJECTION. VAGUE.

THE COURT: SUSTAINED.

Q BY MR. INGBER: WAS THERE ANY OTHER POSITION TAKEN BY THE DISTRICT ATTORNEY'S OFFICE IN CONSIDERATION OF MR. LUNA TESTIFYING AGAINST MISS MC DERMOTT?

A WELL, THERE WERE --

Q THAT'S VAGUE, TOO, ISN'T IT?

A YES. THERE WERE OTHER ITEMS MENTIONED IN MADER'S MEMO TO ME.

Q OKAY. I'M TALKING ABOUT WHAT THE DISTRICT ATTORNEY --

VAN NUYS, CALIFORNIA, WEDNESDAY, FEBRUARY 21, 1990, 1:35 PM

DEPARTMENT NORTHWEST "M" HON. ALAN HABER, JUDGE

-000-

THE COURT: ALL JURORS AND ALTERNATES ARE PRESENT.

MISS MC DERMOTT IS PRESENT, MR. BURKOW, MR. INGBER, DETECTIVE RIEHL AND MISS MADER.

YOU MAY ADDRESS THE JURY.

MS. MADER: GOOD AFTERNOON, LADIES AND GENTLEMEN.

I HAVE BEEN LOOKING FORWARD FOR SEVERAL YEARS TO ADDRESSING A JURY ON THIS CASE AND TO BE ABLE TO SUMMARIZE THE EVIDENCE FOR YOU.

AS THE CASE PROGRESSED AND ALL THE DIFFERENT DETAILS SEEMED TO PILE UP, YOU MUST HAVE WONDERED HOW YOU WILL EVER REMEMBER ALL OF THE DIFFERENT FACTS THAT WERE BROUGHT OUT TO YOU IN COURT, SOME OF THE SIGNIFICANT ONES AND SOME OF THE ONES THAT MAYBE WERE NOT SO SIGNIFICANT, BUT FACTS THAT ALSO MADE A DIFFERENCE.

AND I AM SURE YOU WERE PROBABLY ASKING YOURSELF AS SOME OF THESE FACTS WERE PRESENTED WHY IN THE WORLD DID WE PRESENT SOME OF THE FACTS THAT WE DID BECAUSE THEY DIDN'T MAKE A LOT OF LOGICAL SENSE AT THE TIME.

SO THIS IS MY OPPORTUNITY TO HOPEFULLY SHOW YOU AT LEAST FROM THE PROSPECTIVE OF THE PROSECUTION HOW ALL OF THESE FACTS DO FIT TOGETHER AND HOW ALL OF THE FACTS POINT TO THE CONCLUSIONS FROM THE VIEWPOINT OF THE PROSECUTION THAT THE DEFENDANT, IN FACT, MAUREEN MC DERMOTT IS GUILTY OF KILLING MR. ELDRIDGE.

EVEN AS YOU REALIZE THAT THE BURDEN IN A CASE

ALTHOUGH YOU WERE INSTRUCTED DURING THE GUILT PHASE OF THIS TRIAL THAT YOU MUST SET ASIDE ANY SYMPATHY OR PITY FOR A DEFENDANT IN DETERMINING HIS OR HER GUILT OR INNOCENCE, THIS RULE DOES NOT APPLY TO THE PENALTY PHASE OF THE TRIAL.

YOU MAY CONSIDER SYMPATHY OR PITY FOR A DEFENDANT IF YOU FEEL IT IS APPROPRIATE TO DO SO IN DETERMINING WHETHER TO IMPOSE EITHER THE DEATH PENALTY OR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

AND NOW THE LAST INSTRUCTION BEFORE MISS MADER WILL BE ALLOWED TO ARGUE, PRESENT HER CLOSING STATEMENT TO YOU.

THE DEFENDANT ACTING ON THE ADVICE OF HER COUNSEL ELECTED NOT TO TESTIFY IN ANY PHASE OF THIS TRIAL.

IT IS THE CONSTITUTIONAL RIGHT OF A DEFENDANT NOT TO TESTIFY IN EITHER PHASE OF THIS TRIAL.

YOU ARE INSTRUCTED NOT TO CONSIDER THE FACT THAT THE DEFENDANT ELECTED NOT TO TESTIFY IN EITHER THE PENALTY OR THE GUILT PHASE OF THIS CASE.

THAT IS A MATTER WHICH MUST NOT IN ANY WAY AFFECT YOUR VERDICT AS TO PENALTY.

MISS MADER.

MS. MADER: THANK YOU. GOOD MORNING, LADIES AND

GENTLEMEN.

WE HAVE NOW ARRIVED AT WHAT IS OBVIOUSLY THE MOST UNPLEASANT PART OF THESE PROCEEDINGS, THE PART WHERE WE HAVE TO CONFRONT THE HORROR OF WHAT THE DEFENDANT HAS DONE IN THIS CASE AND DECIDE WHAT THE PROPER PUNISHMENT IS FOR HER.

AS EACH ONE OF YOU ENTERED THE COURTROOM A NUMBER OF MONTHS AGO, YOU WERE MOST LIKELY UNAWARE OF THE AMOUNT OF INJURY OR PAIN OR TERROR THAT ONE HUMAN BEING CAN SUBJECT ANOTHER HUMAN BEING TO.

AND THEN AS WE SAT HERE IN THE COURTROOM OVER THESE NUMBERS OF MONTHS AND WE LISTENED TO WITNESS AFTER WITNESS, IT'S ALMOST AS THOUGH A CARPENTER WHO IS CONSTANTLY USING A HAMMER DEVELOPING A CALLUS FROM USING THE HAMMER ON THE SAME SPOT OF THEIR HAND, IT ALMOST BECOMES THE SAME SITUATION FOR US BECAUSE WE HEAR WITNESS AFTER WITNESS AND WE ALMOST DEVELOP A LITTLE BIT OF A CALLUS BECAUSE OF THE HORRIBLE NATURE OF THE EVENTS. AND IT BECOMES HARDER AND HARDER FOR THEM TO PENETRATE.

THE TIME HAS NOW ARRIVED FOR US TO TRY TO SCRUB AWAY THOSE CALLUSES AND LOOK EXACTLY AT WHAT ONE HUMAN BEING DID TO ANOTHER.

AND I USE THE TERM HUMAN BEING IN A LITERAL SENSE BECAUSE I'M NOT SO SURE THAT MAUREEN MC DERMOTT REALLY SHOULD BE CATEGORIZED AS A HUMAN BEING.

BECAUSE HUMAN BEINGS HAVE A HEART AND HUMAN BEINGS HAVE A SOUL. AND NOBODY WITH A HEART AND NOBODY WITH A SOUL COULD HAVE DONE WHAT MAUREEN MC DERMOTT HAS DONE IN THIS CASE.

MR. INGBER: TO WHICH I WOULD OBJECT, YOUR HONOR. IT'S AN EDITORIALIZATION.

THE COURT: APPROACH THE SIDE BAR.

THAT'S THE RULE. IF YOU HAVE AN OBJECTION, MAKE IT AT THE SIDE BAR.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: LET ME UNDERSTAND YOUR OBJECTION.

MR. INGBER: MY OBJECTION, FIRST OF ALL, GOES TO THE CHARACTERIZATION OF MISS MC DERMOTT NOT AS A HUMAN BEING. THAT'S FIRST OF ALL. I LET THAT TO GO BY.

I THINK YOU MEANT THAT WOULD JUST BE AN OPENING. BUT WHEN COUNSEL CONTINUED TO CHARACTERIZE, EDITORIALIZE THAT SHE WAS AS SOMETHING OTHER THAN A HUMAN BEING, THAT'S IMPERMISSIBLE UNDER GHENT, G-H-E-N-T, 43 CAL 3RD 772. SHE IS REFERRING TO SOMETHING OTHER THAN HUMAN, ANIMAL OR WHATEVER.

THE COURT: I DIDN'T HERE THE WORD ANIMAL. THAT OBVIOUSLY WOULD NOT --

MR. INGBER: SHE DID REFER, AN EDITORIALIZATION OF HER OPINION OF WHAT WHAT SOMEONE WAS.

THE COURT: IF I HEARD THE TERM ANIMAL I WOULDN'T HAVE HAD TO HAVE YOU OBJECT, OKAY?

MR. INGBER: I REALIZE THAT, JUDGE.

THE COURT: I THINK IT'S PROPER FOR A PROSECUTOR TO ARGUE WHAT SOMEONE DID WAS INHUMANE OR INHUMAN. THERE IS A BIG DIFFERENCE.

I UNDERSTAND YOUR CONCERN AND I ASSUME YOU HAVE NO INTENTION OF REFERRING TO MISS MC DERMOTT AS AN ANIMAL.

MS. MADER: NO.

MR. INGBER: BUT YOU SEE, WHAT THE COURT IS SAYING IS IF YOU DON'T USE THE PRESCRIBED WORDS, THAT YOU CAN GET AWAY WITH USING NON PRESCRIBED WORDS FOR THE SAME THING AND THAT ISN'T CORRECT.

IT WAS THE CONCEPT THAT WAS DISPARAGED AND NOT

THE EXACT WORD. IT'S THE EDITORIALIZATION OF HER OPINION OF WHAT SOMETHING ELSE IS THAT WAS DISPARAGED BY THE SUPREME COURT SAYING THAT COUNSEL IN ARGUMENT, EITHER ONE, CAN'T REFER TO A PERSON, THEIR OPINIONS OF WHAT THAT PERSON IS.

IN EFFECT, THAT'S WHAT THEY ARE DOING.

THE COURT: WELL, UNFORTUNATELY, IT GETS INVOLVED IN HAIR SPLITTING. THE EXACT WORDS THAT ARE USED BECOME IMPORTANT.

DO YOU NEED TO BE HEARD? DO YOU WANT TO BE HEARD?

MS. MADER: NO.

THE COURT: SO LONG AS IT'S NOT DONE IN AN INFLAMMATORY MANNER AND THERE IS NO REFERENCE TO ANIMAL, I'M GOING TO ~~OFFER RULE~~ OVERRULE mlb THE OBJECTION.

MR. INGBER: OKAY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: YOU MAY CONTINUE.

MS. MADER: AS I WAS SAYING, HUMAN BEINGS HAVE A HEART. HUMAN BEINGS HAVE A SOUL. AND NOBODY WITH A HEART OR A SOUL COULD POSSIBLY HAVE DONE WHAT MAUREEN MC DERMOTT DID IN THIS CASE.

SHE MAY BE A MUTATION OF A HUMAN BEING, BUT SHE IS NOT A HUMAN BEING IN THE MANNER THAT WE KNOW HUMAN BEINGS.

IT IS DIFFICULT TO THINK OF A LARGER BETRAYAL THAN WHAT SHE DID IN THIS CASE. STEPHEN ELDRIDGE, HER FRIEND, HER ROOMMATE, HER PARTNER, A MAN THAT TRUSTED HER. TO METHODICALLY PLAN HIS DEATH.

DE WAYNE BELL, ANOTHER FRIEND, WHO SHE SOCIALIZED WITH, WHO SHE WORKED WITH. ANOTHER PERSON WHO TRUSTED HER. TO PLAN AN ATTACK UPON HIM.

AND BOTH WERE MOTIVATED ONLY BY HER GREED. ONLY MOTIVATED BY HER BELIEF THAT THE SANCTITY OF HUMAN LIFE IS SOMEHOW SUBSERVIENT TO HER WANTING MONEY.

IF YOU THINK ABOUT HER ABILITY TO CONSOLE STEPHEN ELDRIDGE AT THE SAME TIME THAT SHE WAS PLOTTING HIS MURDER, IF YOU THINK ABOUT HER OFFER TO REMOVE DE WAYNE BELL'S STITCHES FROM AN ATTACK THAT SHE HERSELF HAD CAUSED, YOU HAVE TO ASK YOURSELF WHAT KIND OF PERSON COULD POSSIBLY DO SUCH A THING?

CAN YOU REALLY THINK OF A MORE EVIL MIND AND A MORE EVIL HEART THAN WHAT HAPPENED IN THIS CASE?

IT TAKES A VERY, VERY SPECIAL PERSON TO DO WHAT MAUREEN MC DERMOTT DID. AND IT'S THE TYPE OF SPECIAL PERSON

THAT YOU DO NOT SEE VERY OFTEN IN YOUR LIFE. IT TAKES THE TYPE OF PERSON THAT PLACES ABSOLUTELY NO VALUE AT ALL ON THE LIFE OF A FELLOW HUMAN BEING.

NOW, DURING THE JURY SELECTION PROCESS WE TALKED ABOUT EACH ONE OF YOUR ABILITY TO VOTE FOR THE DEATH PENALTY IN A PROPER CASE.

AND ALL OF YOU SIT HERE ON THE JURY TODAY BECAUSE YOU ASSURED US THAT IN THE PROPER CASE YOU WOULD BE ABLE TO VOTE FOR THE DEATH PENALTY.

ALL OF US TOGETHER CAN SAY THAT WE HATE THE IDEA OF CAPITAL PUNISHMENT. BUT IT'S IN FACT, AS WE ALL KNOW, ON THE BOOKS.

AND JUST AS IT'S MY DUTY AND RESPONSIBILITY AS A PROSECUTOR TO MAKE THIS ARGUMENT TO YOU, AND AS IT'S THE JUDGE'S RESPONSIBILITY TO PRESIDE OVER SUCH A TRIAL, IT'S YOUR RESPONSIBILITY ALSO TO VOTE FOR THE DEATH PENALTY IF YOU FEEL THAT THIS IS A PROPER CASE FOR THE DEATH PENALTY.

NOW, THE PENAL CODE AND THE LEGISLATION PROVIDES, AS WE ALL KNOW, THAT ONE WHO IS FOUND GUILTY OF FIRST DEGREE MURDER WILL SUFFER EITHER THE DEATH PENALTY OR LIFE WITHOUT POSSIBILITY OF PAROLE.

OBVIOUSLY, THERE IS A REASON FOR THERE BEING DIFFERENT SENTENCES. AND IT'S ALSO OBVIOUS THAT FOR THE MOST SERIOUS TYPES OF CRIMES THE DEATH PENALTY IS WHAT'S APPROPRIATE.

LET'S LOOK AT THE DIFFERENT TYPES OF MURDER WHERE THE LAW SAYS THAT THE DEATH PENALTY CAN IN FACT BE IMPOSED.

WELL, THERE ARE MANY, MANY DIFFERENT TYPES OF
AND THEY GO EVERYWHERE FROM A MURDER THAT'S
TED ON THE SPUR OF THE MOMENT WHEN YOU ROB A
NIENCE STORE AND KILL THE CLERK TO A MURDER THAT OCCURS
RESULT OF A BURGLARY OF A HOME OR A RAPE.

IT GOES FROM THAT TYPE OF MURDER TO A PLANNED IN DETAIL EXECUTION LIKE WE HAVE IN THIS CASE FOR FINANCIAL GAIN.

CERTAINLY, WE ALL HAVE TO ACKNOWLEDGE THAT ON THE DEATH PENALTY SCALE, AN EXECUTION THAT IS PLANNED AND ONE THAT IS DONE FOR FINANCIAL GAIN HAS TO BE WAY UP THERE IN TERMS OF SERIOUSNESS.

LET'S LOOK NOW AT WHAT TYPE OF MURDERS THERE ARE THAT EXIST FOR FINANCIAL GAIN.

WELL, WE HAVE AND I'M SURE WE HAVE ALL READ ABOUT SITUATIONS WHERE A SPOUSE MIGHT DECIDE TO HAVE THE OTHER SPOUSE KILLED. PERHAPS THERE IS MARITAL STRIVE. PERHAPS THERE'S AN INSURANCE POLICY INVOLVED. BUT WE HAVE READ ABOUT SUCH SITUATIONS.

HOW ABOUT A SITUATION, FOR INSTANCE, WHERE A BUSINESS PARTNER HIRES SOMEBODY TO HAVE A COMPETITOR KILLED? OR BUSINESS PARTNER HIRES SOMEBODY TO HAVE A PARTNER KILLED?

AT LEAST IN THOSE TYPES OF SITUATIONS WHEN YOU LOOK AT MURDER FOR FINANCIAL GAIN YOU CAN IN SOME WAY UNDERSTAND THE EMOTIONAL CONTEXT IN WHICH THE ENTIRE CRIME IS CARRIED OUT.

BUT TO HAVE A FRIEND HIRE SOMEONE TO KILL ANOTHER TRUSTING FRIEND, IT'S REALLY INCOMPREHENSIBLE. THERE IS NO POSSIBLE JUSTIFICATION. THERE IS NO POSSIBLE MORAL JUSTIFICATION OR ANY OTHER TYPE OF JUSTIFICATION IN THIS CASE.

STEVE DIDN'T HAVE A CHANCE WHEN SHE DECIDED THAT SHE WAS GOING TO EMBARK UPON HER CAMPAIGN OF TERROR TO ELIMINATE HIM. IT WAS, BASICALLY, A ONE SIDED WAR THAT SHE WAS WAGING.

AND YOU HAVE TO ASK YOURSELF WHEN YOU TALK ABOUT MURDERS FOR FINANCIAL GAIN AND THIS TYPE OF MURDER, A FRIEND OF A FRIEND JUST FOR MONEY, IF THIS TYPE OF MURDER FOR FINANCIAL GAIN DOES NOT CALL FOR THE IMPOSITION OF THE DEATH PENALTY, WHAT TYPE OF MURDER WOULD?

OBJECT (JK)

MR. INGBER: TO WHICH I [illegible] .. THAT IS AGAIN OPINION OF --

THE COURT: APPROACH THE SIDE BAR. PLEASE, APPROACH THE SIDE BAR.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

THE COURT: MR. INGBER, YOUR OBJECTION?

MR. INGBER: IT'S HER OPINION AGAIN AS TO WHAT KIND OF MURDER. CALLS FOR HER OPINION WHICH IS IRRELEVANT.

SHE SAYS, "IF THIS TYPE OF MURDER DOESN'T CALL FOR THE DEATH PENALTY, WHAT KIND DOES?"

SHE IS INFERRING WITHIN HER STATEMENT THAT HER OPINION IS THAT IF THIS TYPE OF MURDER IS MOST --

THE COURT: WHAT'S WRONG WITH THAT? I'M MISSING SOMETHING.

MR. INGBER: SHE CAN'T SAY, "I BELIEVE THAT THIS IS THE KIND OF CASE THAT CALLS FOR THE DEATH PENALTY," CAN SHE?

THE COURT: SHE IS ABLE TO ARGUE. ARE YOU SAYING THAT -- ARE YOU SAYING SHE IS INJECTING HER PERSONAL BELIEF TO WHAT'S APPROPRIATE?

MR. INGBER: THAT WHAT SHE IS SUBLIMINALLY DOING BY RHETORICALLY ASKING, "IF THIS DOESN'T FIT THE CATEGORY, I CAN'T THINK OF ANY THAT DOES," THAT'S THE BOTTOM INFERENCE THAT'S COMING FROM HER.

THE COURT: I THINK THAT'S MUCH TOO LITERAL. I THINK IT'S PROPER ARGUMENT. JUST AS YOU ARE ABLE TO ARGUE --

YOU ARE CERTAINLY NOT OBLIGATED TO TELL ME, BUT I EXPECT YOU WOULD BE ABLE TO ARGUE SCALES AND WHAT KIND OF ACTUAL CASES QUALIFIED.

MR. INGBER: BUT I CAN'T GET UP AND SAY "I BELIEVE, IT'S MY OPINION THAT THIS IS SO AND SO," ANYMORE THAN --

MS. MADER: OH, COME ON. I DIDN'T SAY THAT. AND I'M TIRED OF THIS. IT'S NOT FAIR.

MR. INGBER: YOUR HONOR, I DON'T CARE HOW TIRED SHE IS. IF I BELIEVE SHE IS SUBLIMINALLY DOING IT, AND I CERTAINLY SERIOUSLY THINK THAT SHE IS, I MEAN, IF YOU STOP AND THINK, SHE IS SAYING, "SOCIETY HAS SET FORTH CERTAIN THINGS AND, THEREFORE, THESE ARE WHAT THEY WOULD BE. AND SOCIETY GRADATION OF IT MAY WELL BE IN YOUR OPINION, LADIES AND GENTLEMEN -- " SHE SUBLIMINALLY SAID, "IT'S MY OPINION THAT IF THERE IS A REASON FOR THE DEATH PENALTY, THIS CASE CALLS FOR IT."

THAT IS REALLY WHAT SHE IS SAYING.

THE COURT: NO. I THINK THAT'S PROPER FOR HER TO ARGUE. IF I'M WRONG, I'M WRONG. OVERRULED.

MR. INGBER: ALL I'M SAYING --

THE COURT: YOU HAVE MADE YOUR POINT.

(THE FOLLOWING PROCEEDINGS
WERE HELD IN THE PRESENCE
AND HEARING OF THE JURY:)

MS. MADER: I'D LIKE TO REPEAT AGAIN WHAT I JUST SAID WHICH WAS IF THIS TYPE OF CATEGORY OF MURDER FOR FINANCIAL GAIN DOES NOT QUALIFY FOR THE DEATH PENALTY, YOU HAVE TO ASK YOURSELF WHAT TYPE OF MURDER FOR FINANCIAL GAIN WOULD EVER QUALIFY IN SOMEONE'S MIND FOR THE DEATH PENALTY?

NOW, LET'S TALK ABOUT THE LAW. THE LAW SHOWS NO PREFERENCE FOR DEATH OVER LIFE OR FOR LIFE OVER DEATH. AND IT WOULD BE UNFAIR TO MAUREEN MC DERMOTT TO HAVE YOU BEGIN YOUR DELIBERATIONS WITH A PREDISPOSITION TOWARDS ONE

OR ANOTHER.

I WOULD SUGGEST TO YOU THAT YOU START NEUTRAL, AND THAT YOU DISCUSS THE REASONS WHY SHE DESERVES THE DEATH PENALTY AND WHY SHE DOES NOT DESERVE THE DEATH PENALTY.

THE INSTRUCTIONS THAT YOU WILL HAVE WITH YOU IN THE JURY ROOM WILL GIVE YOU A NUMBER OF DIFFERENT FACTORS THAT YOU CAN TAKE INTO ACCOUNT.

AND AS THE JUDGE SAID, YOU CAN CONSIDER EACH ONE OF THESE FACTORS. YOU CAN GIVE THEM EITHER GREATER OR LESSER WEIGHT. IT'S AN INDIVIDUAL CHOICE ON EACH ONE OF YOUR PARTS.

BUT THE BOTTOM LINE IS THAT IN ORDER FOR YOU TO RETURN A VERDICT OF DEATH, EACH OF YOU MUST BE PERSUADED THAT THE AGGRAVATING CIRCUMSTANCES ARE SO SUBSTANTIAL IN COMPARISON TO THE MITIGATING CIRCUMSTANCES THAT DEATH IS WARRANTED.

SO LET US REVIEW THE AGGRAVATING AND THE MITIGATING CIRCUMSTANCES.

THE FIRST ONE, SUBSECTION A, AS THE JUDGE READ TO YOU WAS BASICALLY YOU'RE TO LOOK AT THE CIRCUMSTANCES OF THE CRIME AND YOU ARE TO LOOK AT THE EXISTENCE OF THE SPECIAL CIRCUMSTANCES.

NOW, ALL OF US ARE FAMILIAR WITH THE FACTS OF THE CRIME AND I'M NOT GOING TO GO INTO THEM IN DETAIL. BUT I DO WANT TO MENTION THE FACT THAT YOU DID IN YOUR VERDICT COME TO THE CONCLUSION THAT TWO SPECIAL CIRCUMSTANCES WERE VIOLATED.

AND I THINK THAT'S IMPORTANT FOR YOU TO

CONSIDER. THAT YOU FOUND THAT BOTH MURDER FOR FINANCIAL GAIN AND LYING IN WAIT WERE VIOLATED.

AND EACH ONE OF THOSE CIRCUMSTANCES CONTAINS A DIFFERENT SOCIETAL INTEREST. ANY ONE OF THEM INDIVIDUALLY WOULD HAVE BEEN ENOUGH TO QUALIFY MAUREEN MC DERMOTT TO RECEIVE THE DEATH PENALTY. BUT THE FACT THAT YOU FOUND TWO OF THEM IS SOMETHING THAT YOU SHOULD CONSIDER WHEN YOU CONSIDER HOW AGGRAVATED THE CRIME IN FACT WAS.

NOW, LET'S TALK A LITTLE BIT ABOUT THE CRIME. THERE WERE SOME THINGS THAT CAME OUT DURING THE PENALTY PHASE THAT MIGHT HAVE RESOLVED SOME QUESTIONS IN YOUR MIND THAT WERE LEFT AFTER THE GUILT PHASE.

FOR INSTANCE, WE HEARD DURING THE GUILT PHASE THAT MAUREEN MC DERMOTT WAS GIVING JIMMY LUNA SMALL SUMS OF MONEY FOR A LONG PERIOD OF TIME PRIOR TO STEVE ELDRIDGE'S MURDER.

WELL, NOW, WE KNOW, NOW THAT YOU HAVE HEARD ABOUT THE DE WAYNE BELL EPISODE, THAT PERHAPS SHE WAS NOT GIVING JIMMY LUNA MONEY JUST OUT OF GENEROSITY, BUT PERHAPS SHE WAS ALSO PAYING BACK JIMMY LUNA IN SMALL SUMS OVER A COUPLE OF YEAR PERIOD FOR HIS HELP IN GETTING HER THE JOB PERMANENTLY AT BETTY LA PORTE'S.

NOW, WE ALSO KNOW, DON'T WE, WHY MAUREEN MC DERMOTT CHOSE JIMMY LUNA TO COMMIT THE MURDER FOR HER OF STEPHEN ELDRIDGE. AND THE REASON, OF COURSE, WAS THAT BECAUSE JIMMY LUNA DID WHAT HE WAS SUPPOSED TO DO IN THE DE WAYNE BELL INCIDENT.

AND MORE THAN DOING WHAT HE WAS SUPPOSED TO DO, HE KEPT HIS MOUTH SHUT. AND HE KEPT HIS MOUTH SHUT FOR TWO YEARS. SO SHE KNEW THAT SHE COULD TRUST JIMMY LUNA. AND THAT'S WHY JIMMY LUNA WAS USED TO KILL STEPHEN ELDRIDGE.

WE ALSO KNOW AFTER HEARING ABOUT THE DE WAYNE BELL INCIDENT THAT MAUREEN MC DERMOTT KIND OF HAD AN EASY TIME OF THE WHOLE THING AFTER DE WAYNE BELL. WASN'T MUCH OF A POLICE INVESTIGATION AND SHE MUST HAVE THOUGHT TO HERSELF, "THIS IS PRETTY EASY. I CAN GETAWAY WITH THIS."

AND THAT'S WHY SHE DID THE ATTEMPTED MURDER, WHICH SHE ALSO GOT AWAY WITH, AND THAT'S WHY SHE WAS SO BOLD TO KEEP PRESSING FORWARD AND FINALLY HAVING STEVE EXECUTED.

I'D LIKE YOU TO THINK FOR A FEW MINUTES NOW ABOUT MAUREEN MC DERMOTT AND ABOUT HER CONDUCT IN THIS MURDER. THINK ABOUT WHAT HAPPENED.

THINK ABOUT THE PLANNING THAT MUST HAVE GONE INTO STEPHEN'S MURDER. THINK ABOUT PRACTICING FOR IT. THINK ABOUT HER DRIVING OUT TO JIMMY LUNA'S HOUSE ALL THE WAY FROM SHERMAN OAKS TO DOWNEY AND MEETING WITH HIM IN THE CAR.

THINK ABOUT BUYING THE KNIVES WHICH SHE DID ON TWO OCCASIONS. THINK ABOUT THE MIND THAT WOULD MAKE SURE THAT JIMMY LUNA NOT TOUCH ANYTHING IN HER CAR. HOW SHE WAS CONSTANTLY TRYING TO THINK OF EVERY DETAIL.

THINK ABOUT THE NIGHT OF THE ATTEMPTED MURDER AND HER GOING TO A CHINESE RESTAURANT WITH STEPHEN ELDRIDGE AND SITTING WITH HIM AND HAVING A MEAL.

THINK ABOUT WHAT THEY MUST HAVE TALKED ABOUT OVER THAT MEAL. THINK ABOUT WHAT AN INCREDIBLE ACTRESS THIS WOMAN MUST BE TO HAVE A MEAL WITH THE MAN KNOWING THAT HIS KILLERS ARE WAITING TO FIND HIM AS SOON AS THEY RETURNED FROM DINNER. KNOWING THAT THIS IS GOING TO BE HIS LAST MEAL THAT HE IS EVER GOING TO EAT.

THINK ABOUT THE MIND AND THE HEART AND THE SOUL OF SOMEBODY THAT COULD DO SUCH A THING.

THINK ABOUT WHEN SHE SEES STEVE THE MORNING AFTER THE ATTACK AND HE'S LYING IN BED AND HE HAS BANDAGES

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ALL OVER HIS HEAD AND HE IS SCARED TO DEATH AND HE HAS A RIFLE NEXT TO HIM TO PROTECT HIMSELF. THINK ABOUT THE WOMAN THAT SEES HIS FEAR AND GOES TO THE PAY PHONE AND CALLS JIMMY LUNA AND SAYS, "WHY DID YOU SCREW UP? YOU BETTER DO IT RIGHT THE NEXT TIME."

THINK ABOUT THE TIMES THAT SHE CALLED TO ASK STEVE, TRUSTING SOUL THAT HE WAS, TO COME HOME FROM WHEREVER HE WAS TO BE AT HOME WITH HER.

THINK ABOUT SEEING STEVE ON THE NIGHT OF THE MURDER. AND STEVE GOING OUT TO DINNER AND HER SAYING, "SURE, YOU CAN BORROW MY CAR. I'LL SEE YOU LATER, STEVE."

THINK ABOUT GETTING A PHONE (SK) CALL FROM JIMMY LUNA THAT NIGHT. MR. LUNA SAYS, "WELL, I TALKED TO MARVIN LEE. HE'S ON HIS WAY."

THAT WAS HER LAST CHANCE AT THAT POINT TO CALL IT OFF.

THINK ABOUT THE HEART AND THE SOUL OF A WOMAN THAT COULD DO SOMETHING LIKE THAT.

THINK ABOUT THIS WOMAN WHO WAS HIDING AND WAITING IN THE BEDROOM OF HER HOME. THINK ABOUT THE WOMAN THAT HAS HERSELF CUT BEFORE ANYTHING EVEN HAPPENS SO THAT SHE IS GOING TO BE ABLE TO HAVE A PHONY STORY FOR THE POLICE.

THINK ABOUT WHAT MUST HAVE BEEN GOING THROUGH HER MIND WHEN SHE HEARS STEVE'S KEY OPENING UP THE FRONT DOOR OF THE HOUSE.

THINK ABOUT HER. SHE IS IN BACK OF THAT DOOR AND SHE IS KNOWING THAT A FEW FEET AWAY IN THE HALLWAY STEPHEN ELDRIDGE IS BEING STABBED TO DEATH.

AND THINK ABOUT THE WOMAN THAT COULD JUST STAY BEHIND THAT DOOR AND NOT DO ANYTHING TO HELP HIM.

AND THINK ABOUT THE WOMAN WHO HAD TO MAKE SURE THAT STEVE'S PENIS WAS AMPUTATED RIGHT AFTER HE DIED SO THAT IT WOULD DIVERT SUSPICION, AGAIN, AWAY FROM HERSELF.

LET'S THINK ALSO FOR A MINUTE, AND WE HAVEN'T REALLY THOUGHT ABOUT THIS BEFORE, THE LAST FEW MINUTES OF STEVE'S LIFE.

ALL YOU SAW WAS A PHOTOGRAPH OF STEPHEN ELDRIDGE. I DON'T KNOW IF YOU REMEMBER SEEING IT TOO MUCH. IN FACT, I'LL PUT IT UP.

MR. INGBER: YOUR HONOR, MAY WE APPROACH THE SIDE BAR?

THE COURT: MAY I SEE THE PHOTOGRAPH, PLEASE.

(THE FOLLOWING PROCEEDINGS
WERE HELD AT THE BENCH:)

THE COURT: YES?

MR. INGBER: OKAY. THIS IS PRECISELY THE OBJECT THAT WAS CONSIDERED IN SOUTH CAROLINA VERSUS GATHERS THAT WAS INTRODUCED IN THE FIRST PHASE OF THE TRIAL FOR PURPOSES OF IDENTIFICATION. AS IN SOUTH CAROLINA VERSUS GATHERS, THE ITEMS THAT FELL RIGHT NEAR THE GROUND. DO YOU REMEMBER THE CASE I CITED TO YOU?

THE COURT: YES.

MR. INGBER: OKAY. THIS PHOTOGRAPH THAT WAS INTRODUCED AT THE FIRST PHASE APPARENTLY FOR IDENTIFICATION IS NOW BEING USED FOR THE JURY TO ASSESS THE CRIME FROM THE VICTIM'S STANDPOINT WHICH IS FROWNED UPON IN PEOPLE VERSUS PASTKIT AND BOOTH VERSUS MARYLAND. AND THE EVIDENCE THAT'S BEING USED IS ONE THAT IS INADMISSIBLE UNDER GATHERS IN THE PENALTY PHASE OF THE TRIAL.

THE COURT: WELL, YOU CERTAINLY ARE FREE TO TALK ABOUT WHAT HAPPENED TO THE VICTIM IN THE LAST MINUTES OF HIS LIFE. YOU HAVE TO BE CAREFUL NOT TO LET THAT SLIP OVER INTO TRYING TO ELICIT SYMPATHY FOR THE VICTIM.

MR. INGBER: AND I WOULD OBJECT TO THE USE OF THAT PHOTOGRAPH AS INADMISSIBLE EVIDENCE TO BE USED IN THIS PHASE UNDER THE DICTATES OF SOUTH CAROLINA --

THE COURT: DO YOU FEEL IT IS APPROPRIATE TO USE IT?

MS. MADER: I THOUGHT SO FOR A COUPLE OF MINUTES AS I TALK ABOUT STEPHEN AND THE LAST MINUTES OF HIS LIFE.

MR. INGBER: THAT'S THE PROBLEM, YOUR HONOR. THE CASES HAVE SAID THAT IF COUNSEL DOESN'T DWELL ON IT TOO MUCH DURING THE PENALTY PHASE IT GETS TO BE OKAY. BUT THEY DON'T EVER SAY HOW MUCH DWELLING ON EACH ONE OF THESE THINGS. CUMULATIVE IS A PROBLEM AND THAT'S WHY I MUST OBJECT TO IT RIGHT NOW.

THE COURT: YOU MEAN THE USE OF THE PHOTOGRAPH IN ARGUMENT?

MR. INGBER: THAT'S CORRECT.

THE COURT: IS IT ESSENTIAL TO USE THE PHOTOGRAPH IN YOUR ARGUMENT?

MS. MADER: IT'S NOT ESSENTIAL, BUT IT'S A TRIAL ABOUT THE MURDER OF STEPHEN ELDRIDGE.

THE COURT: I UNDERSTAND.

MR. INGBER: AND I HAVE SERIOUS OBJECTION THAT SHOULD GO BACK TO THE JURY AT THIS PENALTY PHASE.

THE COURT: WELL, I WILL CONSIDER WHETHER IT GOES BACK THERE OR NOT. I WILL LET YOU REFER TO IT. YOU JUST HAVE TO BE CAREFUL NOT TO TRY TO ELICIT SYMPATHY FOR THE VICTIM.

(THE FOLLOWING PROCEEDINGS
WERE HELD IN THE PRESENCE
AND HEARING OF THE JURY:)

MS. MADER: GOING BACK TO WHAT I WAS DISCUSSING WITH YOU BEFORE, I'D LIKE YOU TO THINK ABOUT THE LAST SEVERAL MINUTES OF STEPHEN ELDRIDGE'S LIFE.

ALL YOU SAW WAS A PHOTOGRAPH OF STEPHEN ELDRIDGE. BUT HE WAS OBVIOUSLY A LIVING, BREATHING HUMAN BEING. AND ON TWO SEPARATE OCCASIONS BECAUSE OF THE DEFENDANT HE ENDS UP HAVING TO FIGHT FOR HIS LIFE. ONCE, OF COURSE, HE WAS SUCCESSFUL. THE NIGHT OF THE ATTEMPTED MURDER. AND ONCE, OF COURSE, HE WAS NOT.

AND YOU HAVE TO ASK YOURSELF WHAT WAS GOING THROUGH HIS MIND EACH TIME. WHAT WAS GOING THROUGH HIS MIND ON THE NIGHT OF THE MURDER AS THE KNIFE WAS BEING STUCK INTO HIM.

WHAT WAS GOING THROUGH HIS MIND DURING THE SIX WEEK PERIOD, FIVE OR SIX WEEK PERIOD BETWEEN THE ATTEMPTED MURDER AND THE ACTUAL MURDER WHEN HE KNEW THAT THESE STRANGERS WERE OUT THERE TRYING TO KILL HIM, BUT HE HAD NO

IDEA WHO THEY WERE OR WHY THEY WERE TRYING TO KILL HIM.

THINK ABOUT THE TORTURE THAT THE DEFENDANT PUT STEPHEN ELDRIDGE THROUGH. AND IF YOU REMEMBER THE TESTIMONY OF DR. SELSER BACK FROM THE VERY BEGINNING OF THIS TRIAL, SHE INDICATED THAT THERE WAS A POSSIBILITY THAT STEVE ELDRIDGE LIVED FOR FIVE TO 10 MINUTES AFTER THE STABBING BEGAN.

THAT SHE HAS SEEN INSTANCES WHERE PEOPLE DON'T DIE IMMEDIATELY. AND SHE WASN'T SURE EXACTLY WHEN IT WOULD HAVE BEEN THAT HE WOULD HAVE BLACKED OUT.

WHEN YOU THINK OF THE HEART AND THE MIND THAT COULD DO THE KINDS OF THINGS THAT WERE DONE IN THIS CASE TO KILL STEPHEN ELDRIDGE, THAT HEART AND MIND SHOULD NEVER BE ALLOWED TO LIVE IN ANY SOCIETY AND EVEN A PRISON SOCIETY.

DOESN'T THIS CRIME GO TO THE VERY HEART OF WHAT WE ARE AS HUMAN BEINGS?

THE SECOND FACTOR THAT THE LAW ALLOWS YOU TO CONSIDER IS THE PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY BY THE DEFENDANT OTHER THAN THE CRIME ITSELF FOR WHICH THE DEFENDANT HAS BEEN TRIED WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OR VIOLENCE.

AND, OF COURSE, WHAT WE ARE REFERRING TO HERE IS THE DE WAYNE BELL INCIDENT AND THE ASSAULT UPON DE WAYNE BELL.

AND TO TIE UP ANOTHER LOOSE END, IF I MIGHT, IF YOU RECALL DURING THE TESTIMONY OF CURT LIVESAY, HE INDICATED THAT MR. LUNA HAD GIVEN US INFORMATION THAT DID

NOT RELATE TO THE GUILT OR INNOCENCE OF MAUREEN MC DERMOTT. AND NOW LOGICALLY YOU CAN SEE AND PUT IT TOGETHER THAT JIMMY LUNA TOLD US ABOUT HIS PARTICIPATION IN THE DE WAYNE BELL INCIDENT.

THE FIRST JOB THAT I HAVE IN DISCUSSING THE DE WAYNE BELL INCIDENT WITH YOU IS TO MAKE SURE THAT I PROVED IT BEYOND A REASONABLE DOUBT.

WELL, WHAT DO WE KNOW ABOUT THE INCIDENT? WE KNOW THAT DE WAYNE BELL WORKED WITH MAUREEN MC DERMOTT. THAT THEY SHARED A JOB. THAT THEY SOCIALIZED TOGETHER.

AND WE ALSO KNOW THAT DE WAYNE BELL TWO YEARS AFTER HIS ATTACK IDENTIFIES BOTH JIMMY LUNA AND LEROY JONES AS THE PEOPLE WHO ATTACKED HIM. AND HE ALSO GIVES YOU NUMEROUS DETAILS ABOUT THE ATTACK ITSELF SUCH AS THE FACT THAT THERE WAS A LITTLE MEDICAL ID CARD THAT WAS PUT IN THE GATE TO HOLD IT OPEN.

WELL, WE ALSO KNOW FROM THE TESTIMONY OF MR. LUNA, MR. LUNA SAID HE DID IT. AND HE SAID HE DID IT BECAUSE HE WAS HIRED BY MAUREEN MC DERMOTT TO DO IT. AND HE SAID MAUREEN MC DERMOTT WANTED HIM TO DO IT SO THAT SHE COULD GET THIS JOB AT BETTY LA PORTE'S ON A PERMANENT BASIS.

WELL, WHAT DO WE KNOW? WE KNOW THAT DE WAYNE BELL GOT FIRED AFTER THE ATTACK AND AFTER THE THREATENING PHONE CALLS THAT JIMMY LUNA SEEMS TO KNOW EVERYTHING ABOUT. AND MAUREEN MC DERMOTT CONTINUED WORKING AT BETTY LA PORTE'S. AND THERE'S BEEN NO CONTRADICTORY EVIDENCE TO THAT EFFECT.

SO IF IT WASN'T AS JIMMY LUNA DESCRIBED THIS INCIDENT, WHAT OTHER REASONABLE INTERPRETATION AGAIN DO WE HAVE? MR. LUNA DIDN'T KNOW DE WAYNE BELL. DE WAYNE BELL DIDN'T KNOW MR. LUNA. THERE IS, AGAIN, ABSOLUTELY NO INDEPENDENT MOTIVE FOR MR. LUNA TO COME ALL THE WAY FROM DOWNTOWN LOS ANGELES TO VAN NUYS OR SHERMAN OAKS, ACTUALLY IN THE HILLS WHERE BETTY LA PORTE WAS INITIALLY, AND ATTACK DE WAYNE BELL.

NOW, OBVIOUSLY, MR. BELL HAD SOME MEMORY PROBLEMS AS TO WHETHER OR NOT HE HAD SEEN MR. LUNA BEFORE IN THE COMPANY OF MS. MC DERMOTT.

YOU GOT TO REMEMBER THAT MR. BELL IS TESTIFYING TO SOMETHING THAT HAPPENED SEVEN YEARS AGO.

IT WOULD BE NATURAL TO HAVE SOME MEMORY PROBLEMS, BUT THE QUESTION IS REALLY AGAIN SO WHAT.

THERE IS NO QUESTION IN OUR MIND, IS THERE, THAT DE WAYNE BELL WAS ATTACKED.

HE HAS GOT THE SCARS CERTAINLY TO SHOW FOR IT. WE KNOW THAT HE WAS ATTACKED BY MR. LUNA.

BECAUSE MR. LUNA IS AN ACCOMPLICE AGAIN TO MAUREEN MC DERMOTT HIS TESTIMONY NEEDS CORROBORATION AS THE JUDGE STATED TO YOU.

AND I WOULD JUST SUGGEST TO YOU THAT DE WAYNE BELL'S ABILITY TO IDENTIFY IN THE PHOTOGRAPHIC LINEUP BOTH MR. LUNA AND LEROY JONES AS HIS ATTACKERS THAT PROVIDES MORE THAN ENOUGH CORROBORATION TO THE ACCOMPLICE, MR. LUNA.

YOU LISTEN AND SEE WHETHER OR NOT THE DEFENSE CAN COME UP WITH ANY INDEPENDENT REASON THAT MR. LUNA WOULD EVER HAVE HAD TO ATTACK DE WAYNE BELL ON HIS OWN.

THERE IS NONE.

MAUREEN MC DERMOTT IS OBVIOUSLY RESPONSIBLE FOR THE ATTACK UPON DE WAYNE BELL.

AND THIS PARTICULAR INCIDENT IS VERY IMPORTANT IN ASSESSING THE CHARACTER OF MAUREEN MC DERMOTT, BECAUSE IT SHOWS HER WILLINGNESS TO USE VIOLENCE, AND IT AGAIN SHOWS HER LACK OF RESPECT FOR LIFE, AND IT SHOWS THAT THE SERIES OF EVENTS IN RELATIONSHIP TO STEVE ELDRIDGE WAS NOT AN ISOLATED INCIDENT WHEN IT COMES TO MAUREEN MC DERMOTT'S CHARACTER.

THAT THIS WAS NOT WITH RESPECT TO STEPHEN ELDRIDGE LIKE A TWO-MONTH PERIOD THAT SHE JUST KIND OF WENT

CRAZY.

WE HAVE GOT A TWO-YEAR PERIOD HERE THAT WE CAN OBSERVE HER CHARACTER AND SEE HOW ROTTEN, IN FACT, IT TRULY IS.

DE WAYNE BELL AGAIN A CARBON COPY ALMOST OF THE STEPHEN ELDRIDGE.

HER FRIEND, A PERSON WHO TRUSTS HER, BUT HIS PHYSICAL AND MENTAL WELL-BEING IS SOMEHOW SECONDARY TO HER WANTING THAT PERMANENT JOB.

SHE EVEN LAUGHED ABOUT IT LATER, THE ATTACK ON DE WAYNE BELL, IF YOU RECALL JIMMY LUNA'S TESTIMONY.

AND YOU HAVE TO ASK YOURSELF WHAT KIND OF A PERSON COULD ACT LIKE THAT TO SOMEBODY ELSE.

MR. BELL WILL CARRY THOSE SCARS AS HE SHOWED YOU WITH HIM FOR THE REST OF HIS LIFE, AND THEY ARE CERTAINLY NOT SCARS THAT ARE HIDDEN IN ANY WAY, BUT THEY ARE VERY VERY VISIBLE.

HERE WE HAVE ANOTHER MAN, DE WAYNE BELL, WHO IS LYING ON THE PAVEMENT IN HIS APARTMENT HOUSE FIGHTING FOR HIS LIFE FROM INTRUDERS THAT HE ALSO HAS ABSOLUTELY NO IDEA WHERE THESE PEOPLE ARE COMING FROM AND WHY THEY ARE AFTER HIM.

HE HAD THE SAME FEARS AS STEPHEN ELDRIDGE DID.

STEPHEN ELDRIDGE HAD A PERIOD OF WEEKS. DE WAYNE BELL HAD A PERIOD OF YEARS WHERE HE DIDN'T UNDERSTAND WHAT WAS GOING ON.

CAN YOU IMAGINE THE PRESSURE THAT DE WAYNE BELL MUST HAVE FELT. WHAT A HORRIBLE PRESSURE TO LIVE UNDER TO

THINK THAT ANY TIME YOU TURN AROUND THESE PEOPLE MIGHT BE COMING BACK TO HURT YOU AGAIN, AND YOU ARE STILL NOT ABLE TO FIGURE OUT WHO THEY ARE AND WHAT IT IS ALL ABOUT.

YOU KNOW, IT BRINGS ME TO AN INTERESTING POINT, WHICH IS THAT YOU KNOW THAT, WE ALL KNOW THAT STEVE ELDRIDGE FELT FOR A FIVE OR SIX WEEK PERIOD THAT DEATH WAS IMMINENT FROM UNKNOWN ATTACKERS.

WE KNOW THAT DE WAYNE BELL FELT FOR A PERIOD OF TIME THAT ANOTHER ATTACK WAS IMMINENT.

YET MAUREEN MC DERMOTT THROUGH THIS PROCEEDING, THROUGH HER ATTORNEYS, SEEKS TO AVOID THAT FEELING THAT DEATH IS IMMINENT, BECAUSE SOMEHOW THAT FEELING, THAT OPPRESSION IS TOO TOUGH OF A PUNISHMENT FOR MAUREEN MC DERMOTT.

MAUREEN MC DERMOTT DOESN'T CARE ABOUT THE HAVOC THAT SHE CREATES IN OTHER PEOPLE'S LIVES.

BOTH DE WAYNE BELL AND STEPHEN ELDRIDGE WERE EXPENDABLE TO HER, AND I WOULD JUST SUGGEST TO YOU THAT THIS PRIOR ACT OF VIOLENCE THAT WAS COMMITTED UPON DE WAYNE BELL SHOULD BE CONSIDERED TO BE EXTREMELY AGGRAVATING.

ANOTHER THING TO LOOK AT IN TERMS OF THE LAPSE OF TIME BETWEEN THESE TWO ATTACKS YOU HAVE HER GETTING AWAY WITH THE ATTACK IN 1983 ON DE WAYNE BELL, GETTING AWAY WITH STEVE'S FIRST ATTACK, AND THEN AFTER STEVE'S MURDER FOR A FOUR-MONTH PERIOD OR SO BEFORE SHE IS APPREHENDED IN PHILADELPHIA GETTING AWAY WITH IT.

WHAT IF SHE HADN'T BEEN ARRESTED FOUR MONTHS LATER?

WHAT TYPE OF A PERSON IS THIS? WHEN WAS IT ALL GOING TO END?

MR. INGBER: I WOULD OBJECT TO THAT.

THE COURT: OVERRULED.

MR. INGBER: APPROACH THE SIDE BAR?

THE COURT: NO, NOT NECESSARY.

YOU MAY CONTINUE.

MS. MADER: THANK YOU.

SO FAR WE HAVE TWO EXTREMELY AGGRAVATING FACTORS, THE NATURE OF THE CRIME, THE EXISTENCE OF TWO SPECIAL CIRCUMSTANCES AND THE PRIOR ACT OF VIOLENCE UPON DE WAYNE BELL.

THE NEXT CIRCUMSTANCE WHICH YOU ARE TO CONSIDER WHICH IS CIRCUMSTANCE C SHOULD BE A MITIGATING FACTOR, WHICH

IS THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY CONVICTIONS OTHER THAN THE CRIMES FOR WHICH THE DEFENDANT HAS BEEN TRIED IN THE PRESENT PROCEEDING.

THAT MEANS THAT YOU CANNOT COUNT THE ATTEMPTED MURDER UPON STEPHEN ELDRIDGE AS A PRIOR CONVICTION BECAUSE YOU CONVICTED HER OF IT IN THIS PROCEEDING, AND MAUREEN MC DERMOTT AS WE ALL KNOW IN THIS PROCEEDING HAD NO PRIOR CRIMINAL RECORD AND ON THE SURFACE ONE WOULD THINK THAT WOULD BE EXTREMELY IMPORTANT AND A MITIGATING FACTOR.

BUT I WOULD ASK YOU HOW SIGNIFICANT IS THAT CIRCUMSTANCE REALLY IN LIGHT OF THE FACT OF WHAT WE KNOW ABOUT DE WAYNE BELL.

SHE WAS NEVER CAUGHT FOR THE DE WAYNE BELL ATTACK, AND ASSAULT WITH A DEADLY WEAPON WOULD CERTAINLY HAVE BEEN A PRIOR FELONY CONVICTION.

SO WHILE, OF COURSE, IT IS A FACTOR IN MITIGATION THAT SHE CAME TO US IN THIS TRIAL WITH NO PRIOR FELONY CONVICTIONS, HOW SIGNIFICANT IS THAT AND HOW MUCH WEIGHT SHOULD YOU, IN FACT, GIVE TO THAT.

NOW, LET'S LOOK AT SOME OF THE OTHER MITIGATING FACTORS THAT EXIST IN THE LAW.

I THINK IT IS IMPORTANT TO LOOK AT THEM SO THAT YOU SEE WHAT KIND OF THINGS THE LEGISLATURE THOUGHT WAS IMPORTANT IN DECIDING MITIGATING FACTORS, AGGRAVATING FACTORS AND WHETHER SOMEBODY SHOULD LIVE OR NOT LIVE.

WHETHER OR NOT THE OFFENSE WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

MR. INGBER: TO WHICH I WOULD OBJECT.

I ASK TO APPROACH THE SIDE BAR.

THE COURT: I CAN'T IMAGINE -- ALL RIGHT.

JUST BE CAUTIOUS. COME ON UP. LET'S DO IT AGAIN.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH:)

MR. INGBER: MELTON SAYS YOU ARE REQUIRED TO READ THEM.

MELTON DOES NOT SAY THAT COMMENTS MAY BE MADE WHEN THEY ARE TOTALLY INAPPLICABLE AND FOR THE JURY TO THEN INFER THAT THE FACT THAT THE LEGISLATURE SET THEM FORTH THAT THEY ARE COMMENTABLE WHEN THEY DON'T APPLY.

THE COURT: WELL, YOU SEE, SO FAR MISS MADER HAS AND I DON'T EXPECT THAT SHE IS GOING TO ARGUE THAT AN ABSENCE OF A FACTOR IS AN AGGRAVATING FACTOR.

MR. INGBER: NO, NO.

BUT SHE IS, IN EFFECT, ARGUING THAT WHEN SHE SAYS THE LEGISLATURE CONSIDERED THESE FACTORS AS FACTORS IN MITIGATION.

LET'S SEE IF ANY OF THEM APPLY TO MISS MC DERMOTT IN HERE, AND SINCE THEY ARE NOT HERE AND DON'T APPLY, THEREFORE, YOU CAN CONSIDER THAT THESE ARE IMPORTANT FACTORS THAT THE LEGISLATURE HAS CONSIDERED, MISS MC DERMOTT IS NOT ENTITLED TO CONSIDER, TO HAVE CONSIDERED.

NOW, I AGREE THAT YOU SHOULDN'T, BUT MY CONCERN IS THAT THE MELTON CASE SIMPLY SAYS THE JURY BE INSTRUCTED ON ALL OF THOSE FACTORS.

THERE IS NOT A CASE THAT SAYS COUNSEL MAY COMMENT THAT THE LEGISLATURE HAS SET THEM FORTH AS FACTORS AND THAT COUNSEL MAY POINT OUT IF THEY ARE NOT APPLICABLE THAT THAT IS A CRITERIA THAT THE LEGISLATURE WANTED TO APPLY IN THIS CASE.

THE COURT: WHAT IS WRONG WITH ONE SIDE OR THE OTHER TALKING ABOUT WHETHER A FACTOR EXISTS OR DOESN'T EXIST, OKAY.

SO LONG AS YOU DON'T MAKE THE LEAP AND ARGUE, THEREFORE, THAT THEY ARE AGGRAVATING CIRCUMSTANCES.

I THINK IT IS PROPER TO ARGUE ON THE CRITERIA THAT THE LEGISLATURE GAVE JURIES TO DECIDE WHETHER TO IMPOSE THE DEATH PENALTY.

MR. INGBER: I DON'T THINK SO, AND THE REASON I DON'T THINK SO, JUDGE, IS BECAUSE THE VERY ONE THAT YOU WERE CONCERNED WITH WHICH IS -- THERE IS NO QUESTION IN ANYONE'S MIND DOESN'T APPLY THAT THE VICTIM HIMSELF WAS A PARTICIPANT IN THE CRIME, IF COUNSEL COULD ARGUE THAT THAT FACTOR AS SET FORTH BY THE LEGISLATURE IS RELEVANT TO DETERMINE MITIGATION, BUT WE DON'T HAVE THAT HERE.

IN EFFECT, WHAT THEY ARE SAYING IS THAT ALL OF THESE THAT THERE ARE NO MITIGATING FACTORS SET FORTH EXCEPT IF NONE OF THEM APPLY, AND THAT IS AN INFERENCE TO BE USED THAT NONE OF THE MITIGATING FACTORS ARE APPLICABLE, AND, THEREFORE, YOU CAN'T CONSIDER ANY OF THESE FOR THE DEFENDANT.

IF ANY OF THEM APPLIED, THAT'S FINE, BUT WHEN THEY DON'T APPLY, I DON'T THINK THERE IS ANY COMMENT THAT IS PERMITTED ON THEM AND I HAVE YET TO SEE A CASE THAT SAYS THAT YOU CAN LIST THEM ALL AND SAY, HEY, THIS IS WHAT THE LEGISLATURE BELIEVES ARE FACTORS IN MITIGATION --

THE COURT: WELL, I UNDERSTAND YOUR ARGUMENT.

THE QUESTION IS ALSO IS IT PROSECUTORIAL MISCONDUCT.

YOU HAVE A CASE THAT TELLS ME IT IS PROSECUTORIAL MISCONDUCT AND/OR IMPROPER FOR A PROSECUTOR TO ARGUE TO THE JURY THAT CERTAIN FACTORS DO NOT APPLY?

MR. INGBER: WELL, I DON'T THINK THAT THERE IS ANY CASE THAT SAYS THAT THE D.A. MAY ARGUE THOSE FACTORS IF THEY DO NOT APPLY AND CANNOT BE COLLATED TO THE DEFENDANT IN THIS CASE.

THE ONLY REASON THAT THEY ARE EVEN GIVEN ACCORDING TO MELTON WAS THAT THE JURY SHOULD BE INSTRUCTED ON THE ENTIRE CONCEPT OF THE DEATH PENALTY LAW.

THE COURT: ALL RIGHT. I UNDERSTAND.

YOU WISH TO BE HEARD?

MS. MADER: NO REASON WHY I CAN'T MENTION THE FACTORS.

THE COURT: ALL RIGHT.

NO, I JUST THINK IT IS PERMISSIBLE.

AGAIN I DON'T WANT TO REPEAT MYSELF MORE THAN ONCE OR TWICE.

SO AS LONG AS THERE IS NO INFERENCE THAT THEY ARE AGGRAVATING, AND I DON'T EXPECT MISS MADER IS GOING TO DO THAT, I THINK IT IS PERMISSIBLE FOR HER TO COMMENT ON THE EXISTENCE OR NONEXISTENCE OF FACTORS, JUST AS IT IS PROPER FOR YOU TO ARGUE AS TO WHETHER OR NOT AGGRAVATING FACTORS EXIST OR DON'T EXIST.

MR. INGBER: BUT THERE IS, THERE IS A BIG DIFFERENCE, JUDGE.

THERE IS A BIG DIFFERENCE, AND I JUST WANT TO BE UP HERE AT THIS POINT TO VOICE MY OBJECTION AS TO ALL OF THESE THAT DO NOT APPLY INCLUDING THE VICTIM'S PARTICIPATION.

I KNEW YOU WERE UNHAPPY ABOUT MY COMING UP HERE, AND I HOPE YOU FEEL IT WAS DONE IN GOOD FAITH, BECAUSE I REALLY BELIEVE IT.

THE COURT: I LISTENED TO YOU AND I HAD AN OPEN MIND.

I UNDERSTAND YOUR ARGUMENT.

I THINK IT IS PROPER FOR MISS MADER TO ARGUE THAT.

OKAY. IF I AM WRONG, I AM WRONG.

MR. INGBER: OKAY.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: EXCUSE ME JUST ONE SECOND.

DO ANY OF THE JURORS FEEL THE NEED FOR A BREAK?

YOU DO. OKAY.

I HAD A FEELING THAT THAT MIGHT BE THE CASE.

ALL RIGHT. LET'S MAKE IT -- LET'S MAKE IT 15 MINUTES.

OKAY. WE WILL RESUME THEN.

(RECESS.)

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

MR. INGBER: COULD I ASK THE COURT A QUESTION BEFORE THE JURY IS BROUGHT IN?

THE COURT: WE WILL GO ON THE RECORD OUTSIDE THE JURY'S PRESENCE.

THE RECORD WILL SHOW MISS MC DERMOTT IS PRESENT, ALL COUNSEL, DETECTIVE RIEHL.

YES.

MR. INGBER: IN THE COURT'S READING OF 9.02, THAT IS THE DEFINITION OF ASSAULT WITH A DEADLY WEAPON, I BELIEVE THE COURT READ THE LAST PARAGRAPH IN THE INSTRUCTION ABOUT IT STARTS ACTUAL BODILY INJURY IS NOT NECESSARY TO THE ELEMENT OF THE CRIME.

I THINK THAT IS A CORRECT STATEMENT, BUT I

THINK THE OTHER PART OF THAT INSTRUCTION SOLELY RELATES TO ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY, AND I DON'T THINK WE ARE DEALING --

THE COURT: UNFORTUNATELY THIS IS THE PROBLEM WITH MY LETTING THE INSTRUCTIONS LEAVE THE BENCH.

JOAN, WHERE ARE THE INSTRUCTIONS?

THE REPORTER: THEY ARE IN MY OFFICE. I CAN GET THEM.

MR. INGBER: I HAVE A COPY OF CALJIC.

THE COURT: LET ME TAKE A LOOK AT IT.

MR. INGBER: I DID NOT WANT TO INTERRUPT THE COURT WHEN IT READ IT AT THE TIME.

THE COURT: I APPRECIATE THAT. IF THERE IS A PROBLEM, I WILL CORRECT IT.

I WILL DELETE IT. WELL, YOU ARE RIGHT THE FIRST PART REMAINS.

MR. INGBER: YES. I SAID THE FIRST SENTENCE.

THE COURT: I WILL DELETE THE OTHER PART.

CERTAINLY IT IS NOT NECESSARY FOR EITHER SIDE TO ARGUE THE MATTER.

MR. INGBER: NO, NO.

I JUST WANTED TO MAKE SURE.

THE COURT: WHEN I SAY ARGUE, I MEAN ARGUE TO THE JURY.

IT IS NOT AN ELEMENT, AND IT IS SORT OF A MOOT ISSUE, BUT IT OUGHT TO BE DELETED.

YOU ARE RIGHT.

I AM JUST TRYING TO CONSIDER WHETHER OR NOT IT WOULD HAVE AN IMPACT ON THE WAY THE MATTER IS ARGUED AND I CAN'T SEE HOW IT WOULD.

MR. INGBER: NO.

IT HAS NOTHING TO DO WITH ARGUMENT, BUT WE REALLY DIDN'T GO INTO THE DETAILS OF 9.02 WHEN WE DISCUSSED THE COURT GIVING IT.

THE COURT: WELL, IT IS MY OVERSIGHT, AND I WILL CORRECT IT.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, IN THE PRESENCE AND HEARING

OF THE JURY:)

THE COURT: ALL JURORS AND ALTERNATES ARE BACK IN THE COURTROOM.

MISS MADER, YOU MAY RESUME.

MS. MADER: THANK YOU.

WHERE I LEFT OFF, I WAS GOING TO GO THROUGH WITH YOU THE DIFFERENT FACTORS THAT THE LEGISLATURE HAS THOUGHT WERE IMPORTANT FACTORS FOR EACH OF YOU TO CONSIDER TO DETERMINE WHETHER OR NOT THESE FACTORS EXIST IN A DEATH PENALTY TRIAL.

SO WE HAVE WHETHER OR NOT THE OFFENSE WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

WE CERTAINLY HAVE NO EVIDENCE OF THAT AND CERTAINLY IF SHE WAS, WE COULD HAVE HEARD FROM WITNESSES TO THAT EFFECT.

THE NEXT ONE IS WHETHER OR NOT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE HOMICIDAL ACTS.

WELL, THERE IS, OF COURSE, NO EVIDENCE OF THAT.

I DON'T THINK WE WOULD EVER FIND A MORE INNOCENT VICTIM THAN STEPHEN ELDRIDGE.

THE NEXT ONE IS WHETHER OR NOT THE OFFENSE WAS COMMITTED UNDER CIRCUMSTANCES WHICH THE DEFENDANT REASONABLY BELIEVED WOULD BE A MORAL JUSTIFICATION OR EXTENUATION OF HER CONDUCT.

THAT WOULD BE A TYPE OF SITUATION IF A HUSBAND

COMES HOME AND FINDS HIS WIFE IN BED WITH HER LOVER AND SHOOTS THEM.

THERE IS NO WAY THAT MAUREEN MC DERMOTT IN HER WILDEST DREAMS COULD FEEL THAT SHE WAS MORALLY JUSTIFIED IN KILLING STEPHEN.

WHETHER OR NOT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

WELL, IF THERE WERE TO BE A PENALTY PHASE WITH RESPECT TO JIMMY LUNA, WE COULD EXPECT HIS ATTORNEYS TO HAVE RAISED THE QUESTION OF WHETHER OR NOT HE WAS UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

BUT CERTAINLY WE KNOW HERE THAT THERE IS NO WAY THAT MAUREEN MC DERMOTT WAS UNDER THE DOMINATION OF ANYBODY.

THAT SHE WAS CLEARLY THE ONE WHO WAS CALLING THE SHOTS.

THAT ABSOLUTELY NO EVENT WOULD HAVE OCCURRED IN THIS CASE WITHOUT HER INITIATION.

WHETHER OR NOT AT THE TIME OF THE OFFENSE THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HER CONDUCT OR TO CONFORM HER CONDUCT TO THE REQUIREMENTS OF LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE OR DEFECT OR THE EFFECTS OF INTOXICATION.

WELL, WE DON'T HAVE ANY EVIDENCE OF MENTAL DISEASE, DEFECT OR INTOXICATION, BUT IT IS EASY TO SAY TO OURSELVES THAT SOMEBODY WHO IS THIS COLD TO OTHER PEOPLE, THIS BRUTAL, MUST BE SOMEHOW SICK IN THE HEAD.

WELL, WE KNOW FROM PEOPLE THAT HAVE BEEN BROUGHT IN THAT WORKED WITH HER AND SUCH AND HAVE SEEN HER IN THE JAIL THAT EVERYBODY THINKS MAUREEN MC DERMOTT IS JUST FINE.

THAT SHE IS NOT MENTALLY ILL.

THE LACK OF A CONSCIENCE, THE LACK OF MORALITY, WHICH SEEMS TO BE HER PROBLEM IS A MORAL FLAW BUT NOT A MENTAL FLAW AS IT COMES TO THE LAW HERE.

NOW, THE NEXT FACTOR IS AN INTERESTING ONE BECAUSE IT IS THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME, AND THAT COULD GO EITHER WAY.

IN A CASE WHERE YOU HAVE A YOUNG PERSON, A PERSON WHO IS 18 OR 19 YEARS OLD AND THEY COMMIT A HORRIBLE

CRIME, IT MIGHT BE POSSIBLE FOR THE ATTORNEY FOR THAT PERSON TO ARGUE, WELL, IT WAS KIND OF LIKE THE RASH IMPULSE OF A CHILD THAT COMMITTED THIS OFFENSE.

BUT WE DON'T HAVE THAT HERE. MAUREEN MC DERMOTT WAS 37 YEARS OLD, ALMOST 38, AT THE TIME SHE COMMITTED THIS OFFENSE.

WE HAVE THE MATURE, DELIBERATE, THOUGHTFUL PLANNING OF AN ADULT.

SO IT IS CERTAINLY NOT A FACTOR IN MITIGATION, AND THERE IS SOME QUESTION AS TO WHETHER OR NOT HER AGE MIGHT BE EVEN AN AGGRAVATING FACTOR IN THIS CASE.

I WOULD NOT BE PRESUMPTUOUS ENOUGH TO ARGUE THAT IT IS AN IMPORTANT AGGRAVATING FACTOR, BUT HER MATURITY LEVEL IS SOMETHING THAT I THINK YOU SHOULD CONSIDER.

THE NEXT FACTOR IS WHETHER OR NOT THE DEFENDANT WAS AN ACCOMPLICE TO THE OFFENSE AND HER PARTICIPATION IN THE COMMISSION OF THE OFFENSE WAS RELATIVELY MINOR.

WELL, WE KNOW THAT THE LAW TECHNICALLY CONSIDERS MAUREEN MC DERMOTT TO BE AN ACCOMPLICE BECAUSE SHE DIDN'T STICK IN THE KNIFE.

BUT THIS FACTOR CANNOT BE USED AS A MITIGATING FACTOR, BECAUSE IT REQUIRES THAT YOU WOULD ALSO FIND THAT HER PARTICIPATION WAS RELATIVELY MINOR, AND AS I JUST MENTIONED BEFORE, WE ALL KNOW THAT WITHOUT MAUREEN MC DERMOTT THERE WOULD HAVE BEEN NO OFFENSE.

MR. LUNA WOULD HAVE STOPPED AT ANY TIME IF ONLY SHE WOULD HAVE TOLD HIM TO STOP.

IT WAS HER UNRELENTING ACTIONS ON A DAY TO DAY

BASIS THAT CAUSED THIS OFFENSE TO HAPPEN.

THE LAST FACTOR IS FACTOR K, AND FACTOR K IS ANY OTHER CIRCUMSTANCE WHICH EXTENUATES THE GRAVITY OF THE CRIME.

THAT MEANS KIND OF BRINGS IT DOWN A BIT EVEN THOUGH IT IS NOT A LEGAL EXCUSE FOR THE CRIME, AND ANY SYMPATHETIC OR OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD THAT THE DEFENDANT OFFERS AS A BASIS FOR A SENTENCE LESS THAN DEATH WHETHER OR NOT RELATED TO THE OFFENSE FOR WHICH SHE IS ON TRIAL.

NOW, IT IS FACTOR K THAT GIVES THE DEFENSE IN THIS CASE ANYTHING TO ARGUE AT ALL, AND UNDER FACTOR K I WOULD SAY THE FOLLOWING AS HAS BEEN PRESENTED BY THE DEFENSE.

THAT SHE HAS BEEN A COMPASSIONATE NURSE. THAT SHE HAS BEEN A DAUGHTER WHO SENDS MONEY TO HER MOTHER. THAT SHE HAS BEEN A GOOD INMATE AND ANY OTHER THING THAT YOU MIGHT WANT TO CONSIDER IN OFFERING SYMPATHY TO HER.

NOW, THERE'S NO QUESTION, OF COURSE, THAT SHE WAS A GOOD NURSE. THERE IS NO QUESTION THAT SHE NURSED STEVE AFTER HIS ATTACK. AND SHE ALSO WANTED TO TAKE OUT DE WAYNE BELL'S STITCHES.

AND THE QUESTION THAT I ASK YOU TO ASK YOURSELF IS HOW GOOD OF A NURSE WOULD SHE NECESSARILY BE WITH A PERSON WITH WHOM SHE HAS A FINANCIAL RELATIONSHIP?

AND I FURTHER ASK YOU TO ASK THE QUESTION WHETHER OR NOT IT REALLY MATTERS WHAT A GOOD NURSE SHE IS IF HER SKILLS IN NURSING WOULD NEVER BE USEABLE IN A PRISON SETTING.

I WANT TO SPEND SOMETIME DISCUSSING THE ISSUE OF COMPASSION. BECAUSE THE DEFENSE HAS CLEARLY PUT INTO ISSUE THE IDEA THAT SHE WAS A COMPASSIONATE PERSON TO SOME. THAT SHE WAS GENEROUS TO SOME.

AND I'D ASK YOU TO ASK YOURSELF WHETHER OR NOT SHE WOULD ACTUALLY HAVE COMMITTED THESE CRIMES IF SHE REALLY CARED ABOUT HURTING HER FRIENDS AND HURTING HER FAMILY. OR WHETHER OR NOT DOING THESE CRIMES THEMSELVES REALLY INDICATE THAT SHE REALLY CARED ABOUT NOBODY BUT HERSELF.

I WOULD SUGGEST TO YOU THAT THERE WERE TRUE ACTS OF COMPASSION THAT SHOWED UP IN THIS CASE.

AS FOR AN EXAMPLE, YOU REMEMBER DURING GARY VENTURINI'S TESTIMONY WHEN GARY TALKED ABOUT HOW EVERYDAY

AFTER WORK HE WENT TO THE HOSPITAL TO BE WITH HIS FRIEND WHO WAS DYING OF AIDS AND SPENT MOST EVERY EVENING UNTIL 11:00 OR 12 O'CLOCK AT NIGHT AT THE HOSPITAL. THAT WAS A TRUE ACT OF COMPASSION.

YET, LOOK AT MAUREEN MC DERMOTT'S CONDUCT IN THAT REGARD. SHE KNEW THAT GARY VENTURINI'S FRIEND HAD DIED. HIS FORMER LOVER HAD DIED, I BELIEVE IT WAS, IN APRIL.

YET SHE HAD NO HESITATION TO KILL STEVE ALSO IN APRIL SO THAT GARY VENTURINI COULD ATTEND THE FUNERALS OF THE TWO PEOPLE WHO WERE CLOSEST TO HIM IN HIS LIFE DURING THAT MONTH IN 1985.

SO ASK YOURSELF HOW COMPASSIONATE IN FACT IS MAUREEN MC DERMOTT?

HOW ABOUT WHAT WE HEARD ABOUT STEPHEN ELDRIDGE ABOUT HOW HE STAYED HOME BECAUSE HE THOUGHT THAT THE ATTACKERS MIGHT COME BACK? AND HE WANTED HER TO NOT BE HOME ALONE. THAT WAS ANOTHER TRUE ACT OF COMPASSION. BUT CERTAINLY MAUREEN MC DERMOTT DIDN'T HESITATE IN DECEIVING STEPHEN ELDRIDGE.

HOW ABOUT J. R. LOVEALL WHO TESTIFIED HOW HE RUSHED OVER TO THE POLICE STATION WHEN HE FOUND OUT THAT MAUREEN MC DERMOTT WAS THE VICTIM OF THIS ATTACK AND HOW HE SPENT THE WHOLE NIGHT AWAKE AND I BELIEVE ALL THE NEXT DAY AND ALL THE NEXT NIGHT AWAKE. AND HE STAYED ON A BENCH IN THE POLICE STATION FOR HOURS. AND HOW WHEN MAUREEN MC DERMOTT ASKED HIM, HE TOOK HER TO A PAY PHONE BECAUSE SHE HAD TO MAKE A PERSONAL PHONE CALL AND DROVE HER ACROSS

SHERMAN OAKS TO MAKE THAT CALL BECAUSE HE TRUSTED HER AND BECAUSE HE WAS A COMPASSIONATE PERSON.

LOOK AT TWYLA, TWYLA HACKLER, WHO TOOK HER IN RIGHT AFTER THE MURDER ITSELF. PUT HER IN HER BEDROOM. TOOK HER TO THE BANK. COMFORTED HER FOR DAYS.

AND HER OTHER FRIENDS KATHY AND JOANIE THAT SHE STAYED AT RIGHT AFTER SHE STAYED AT TWYLA'S HOUSE WHO COMFORTED HER FOR A PERIOD OF TIME. AND ALL THE WHILE SHE WAS ABUSING THIS FRIENDSHIP OR THESE FRIENDSHIPS BY USING THEIR TELEPHONES TO TALK TO THE KILLER SO THAT IT WOULD APPEAR ON THEIR TELEPHONE BILLS.

AND HOW ABOUT ANOTHER WAY TO LOOK AT IT. AND THE WAY SHE BETRAYED TWO OTHER PEOPLE IN THE SENSE OF BETTY LA PORTE.

HERE WAS A WOMAN WHO REALLY CARED ABOUT MAUREEN MC DERMOTT. WHO WAS A WEAK PERSON BECAUSE SHE WAS CLEARLY AN ALCOHOLIC. WE HEARD HOW MUCH SHE DRANK A DAY AND IT WAS AWESOME.

YET MAUREEN MC DERMOTT DIDN'T HAVE ANY HESITATION TO HAVE ONE OF HER EMPLOYEES ATTACKED, DE WAYNE BELL. TO MAKE THREATENING CALLS TO THE HOUSE THAT BETTY LA PORTE WOULD IN FACT ANSWER THE PHONE. TO HAVE ANOTHER ONE OF HER EMPLOYEES WHO WAS WORKING AS HER GARDENER, STEPHEN ELDRIDGE, KILLED.

SHE ZEROED IN ON BETTY LA PORTE JUST LIKE SHE ZEROED IN ON JIMMY LUNA. BECAUSE THEY ARE BOTH IN DIFFERENT WAYS VERY WEAK PERSONALITIES THAT SHE COULD MANIPULATE AND SHE COULD USE TO HER OWN ENDS.

IT WAS INTERESTING, WAS IT NOT, THAT NOT ONE OF HER FRIENDS SHOWED UP TO TESTIFY ON HER BEHALF IN THE PENALTY PHASE.

MR. INGBER: TO WHICH I WOULD OBJECT, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: APPROACH THE SIDE BAR.

(THE FOLLOWING PROCEEDINGS
WERE HELD AT THE BENCH:)

MR. INGBER: YOUR HONOR, THERE IS NO REQUIREMENT THAT THE DEFENSE INTERPOSE ANYTHING IN THE PENALTY PHASE TO START WITH. IF THE DEFENSE HAS CHOSEN TO INTERPOSE ANYTHING UNDER ANY ONE OF THE CODE SECTIONS, IT'S NOT COMMENTABLE ABOUT

HUNDREDS OF PEOPLE THAT SHE DIDN'T CALL IN.

AS IF TO INFER THAT SHE HAS BETRAYED ALL THOSE PEOPLE.

THERE ISN'T ANY EVIDENCE IN THIS CASE THAT SHOWS ONE IOTA OF AN INDICATION OF BETRAYAL TO ANY OF THE FRIENDS THAT DIDN'T COME IN DURING THE TRIAL.

AS A MATTER OF FACT, THERE WERE PLENTY OF PEOPLE THAT WERE HERE. NOT A LOT OF THEM, BUT A FEW.

THE COURT: IT'S YOUR POSITION MS. MADER IS NOT ALLOWED TO ARGUE THAT THE DEFENSE PUT ON NO FRIENDS --

MR. INGBER: NO. SHE'S NOT ALLOWED TO ARGUE THAT WE FAILED TO CALL WITNESSES THAT WOULD -- THAT WE SHOULD HAVE CALLED IN THE PENALTY PHASE.

THE COURT: WHY NOT?

MR. INGBER: WHAT IS THAT ADDRESSED TO?

THE COURT: I'M TRYING TO BREAK DOWN THE ISSUE. I'M HAVING DIFFICULTY WITH IT.

MR. INGBER: I'M TRYING TO INDICATE WHAT IS IT RELEVANT FOR?

MS. MADER: HER CHARACTER AS A COMPASSIONATE HUMAN BEING.

THE LAW HAS ALWAYS BEEN CLEAR THAT A PROSECUTOR IN CLOSING ARGUMENT CAN COMMENT ON THE FAILURE TO CALL LOGICAL WITNESSES.

MR. INGBER: WELL, WAIT A MINUTE. LOGICAL WITNESSES IN TRIAL ARE DIFFERENT.

MS. MADER: THERE IS NO DEATH PENALTY SPECIAL EXCEPTION TO THAT THAT SAYS I CAN'T COMMENT ON THAT.

MR. INGBER: PEOPLE VERSUS FORD SAYS THAT THE DEFENSE SHOULD CALL THOSE LOGICAL WITNESSES IN THE GUILT PHASE OF ANY CASE THAT SHOULD BE CALLED. THAT'S PEOPLE VERSUS FORD.

BUT IN THE PENALTY PHASE, TO INFER THAT WITNESSES WERE NOT CALLED AND INFER FROM THAT THAT IS SOME KIND OF BETRAYAL IS A TERRIBLE MISUSE.

LET'S ASSUME WE CALL EVERY SINGLE WITNESS AND WE LEFT ONE OUT. THEN THE PEOPLE WOULD BE ABLE TO COMMENT, "WHY WASN'T SO AND SO HERE?"

ABSOLUTELY NOT.

THE COURT: I'M TRYING TO UNDERSTAND WHY NOT?

MR. INGBER: WHAT IS IT RELEVANT TO, JUDGE? IT'S RELEVANT TO NOTHING THAT'S PERMISSIBLE UNDER THE CODE OR PERMISSIBLE UNDER ANY FACTOR THAT'S RELEVANT TO ANYTHING.

THE COURT: WELL, THERE WAS DEFENSE EVIDENCE AS TO DURING THE PENALTY PHASE AS TO MISS MADER'S CHARACTER.

MR. INGBER: MS. MADER?

THE COURT: I MISSPOKE MYSELF. MISS MC DERMOTT'S CHARACTER TRAIT FOR COMPASSION.

MR. INGBER: IN A HOSPITAL SETTING. AND IN THE JAIL SETTING.

MS. MADER: SO WHY NOT IN THE HOME SETTING?

MR. INGBER: JUST A MINUTE.

MS. MADER: WHY CAN'T I COMMENT ON IT?

MR. INGBER: YOUR HONOR, BECAUSE I VERY NARROWLY RESTRICTED THE PENALTY PHASE AREAS TO THOSE SPECIFIC SETTINGS.

AND FOR HER TO BE ABLE TO COMMENT IN GENERAL WITHOUT THERE BEING ANY EVIDENCE TO POINT THAT OUT IS AN IMPROPER COMMENT ON EVIDENCE THAT WAS NEVER INTRODUCED.

I'M JUST AT A TOTAL LOSS OF HOW THE COURT CAN ALLOW HER TO SAY THEY DIDN'T CALL WITNESSES, THEREFORE, THESE WITNESSES WERE BETRAYED BECAUSE OF MISS MC DERMOTT'S CHARACTER TRAIT?

THE COURT: I THINK YOU'RE MAKING AN ASSUMPTION ABOUT THE BETRAYAL. I THINK THE --

MS. MADER: I'M TALKING ABOUT WHETHER SHE IS A COMPASSIONATE PERSON.

THE COURT: THERE'S WHERE YOU'RE MAKING AN ASSUMPTION THAT SOMEHOW FAILURE TO CALL THOSE WITNESSES MEANS THERE'S BEEN A BETRAYAL OF THOSE FRIENDSHIPS.

MR. INGBER: I'M ALSO MAKING THE ASSUMPTION BECAUSE

SHE WASN'T CALLED THAT THESE PEOPLE WOULD HAVE SAID -- NOT HAVE SAID SOMETHING ABOUT HER COMPASSIONATE BEHAVIOR. THERE IS NO REQUIREMENT. THERE IS NOTHING TO INDICATE THAT I HAVE TO CALL THEM. I RESTRICTED THE AREA VERY SPECIFICALLY.

THE COURT: I UNDERSTAND YOUR ARGUMENT. WELL, LET ME JUST GIVE IT SOME THOUGHT, OKAY?

MR. INGBER: THE REASON I ASKED THE COURT TO CONSIDER IT IS BECAUSE WHEN WE KEPT TRYING TO GET IN EVIDENCE DURING THE TRIAL OF THE PENALTY PHASE OF AREAS EXTENSIVE BEYOND THE COURT --

THE COURT: WHAT?

MR. INGBER: OF GOING BEYOND --

THE COURT: I UNDERSTAND.

MR. INGBER: THE COURT WAS VERY CAREFUL TO POINT OUT TO MISS MADER, "WAIT A MINUTE THE SCOPE IS NARROWED."

NOW, JUST BECAUSE SHE DIDN'T GET ANY EVIDENCE ABOUT IT, SHE'S COMMENTING ON IT WITHOUT THERE BEING ANY EVIDENCE ALONG THAT LINE.

THE COURT: ALL RIGHT. I UNDERSTAND THE ISSUE. LET ME JUST GIVE IT SOME THOUGHT WHILE YOU GO BACK OUT THERE AND I WILL RULE. I WILL LET YOU KNOW HOW I RULE.

(THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: ALL RIGHT. THE OBJECTION IS OVERRULED. YOU MAY CONTINUE.

MS. MADER: THANK YOU.

TO REITERATE, IT WAS INTERESTING THAT DURING THE PENALTY PHASE WE HEARD THAT SHE WAS COMPASSIONATE IN JAIL. WE HEARD THAT SHE WAS COMPASSIONATE AT THE HOSPITAL. BUT WE NEVER HEARD FROM ANY OF HER FRIENDS REGARDING ANY OTHER PART OF HER LIFE WITH RESPECT TO HER COMPASSION.

BUT I WOULD SUGGEST TO YOU THAT IF HER FRIENDS WERE TO HAVE COME IN, THEY WOULD STILL SAY THAT SHE WAS A WARM, CARRYING PERSON.

AND THE SCARY THING ABOUT ALL OF THAT IS THAT DE WAYNE BELL THOUGHT THOUGHT THAT SHE WAS A WARM, NICE PERSON. AND STEPHEN ELDRIDGE THOUGHT THAT SHE WAS A WARM, NICE PERSON. AND THAT'S PRECISELY THE REASON WHY MC DERMOTT, MAUREEN MC DERMOTT, SHOULD NOT BE KEPT ALIVE.

BECAUSE I WOULD SUGGEST TO YOU THAT MAUREEN MC DERMOTT IS MUCH MORE DANGEROUS THAN THE ORDINARY MURDERER. BECAUSE WITH AN ORDINARY MURDERER, IF THERE REALLY IS SUCH A THING, WHAT YOU SEE IS WHAT YOU GET. AND WITH MAUREEN MC DERMOTT WHAT YOU SEE IS NOT WHAT YOU GET. SHE IS A TRUE WOLF IN SHEEP'S CLOTHING. AND THAT MAKES HER AN EXTREMELY TREACHEROUS PERSON TO KEEP ALIVE.

SOCIETY HAS A RIGHT TO PROTECT ITSELF AGAINST FORMS OF HUMAN BEINGS SUCH AS MAUREEN MC DERMOTT. SOCIETY CANNOT SURVIVE WITH A TRAITOR LIKE MAUREEN MC DERMOTT IN ITS MIDST. AND IT DOESN'T MATTER WHETHER OR NOT THIS TRAITOR EXISTS ON THE OUTSIDE OR EXISTS INSIDE THE PRISON POPULATION.

THE DIFFICULT ISSUE TO ADDRESS IS SOMETHING THAT I TALKED ABOUT IN THE JURY SELECTION. I ADDRESSED IT AGAIN IN THE CLOSING ARGUMENT WHICH IS THAT MAUREEN MC DERMOTT DOES NOT LOOK LIKE SHE WOULD BE CAPABLE OF THE VIOLENCE THAT WE KNOW THAT SHE IS CAPABLE OF.

WE WANT TO BELIEVE THAT MAUREEN MC DERMOTT IS A CARING, COMPASSIONATE PERSON EVEN THOUGH WE RATIONALLY KNOW THAT SHE IS NOT.

AND AS A RESULT THIS TRIAL HAS A BIT OF A ~~SERIALISTIC~~ surrealistic ASPECT TO IT. AND IT'S ALMOST AS THOUGH SOME DAYS WE THINK OR I THINK THAT AS THE WITNESSES ARE TAKING THE STAND THEY ARE NOT TALKING ABOUT THE SAME CALM, DECENT APPEARING WOMAN THAT SITS HERE AT THE COUNSEL TABLE.

MC DERMOTT MAY IN FACT APPEAR TO SOME PEOPLE AS COMPASSIONATE AND KIND AS SHE DID TO THE VICTIMS IN THIS

CASE. BUT TO KNOW MAUREEN MC DERMOTT IS TO UNDERSTAND THAT SHE IS TWO SEPARATE PEOPLE.

AND TO KNOW HER IS TO UNDERSTAND THAT THE MALICIOUS SIDE, THE EVIL SIDE OF HER CHARACTER WILL CONTINUE SO LONG AS MAUREEN MC DERMOTT IS ALIVE. THAT IT'S NOT CURABLE WHATEVER IT IS THAT MAUREEN MC DERMOTT HAS.

YOU KNOW, ANOTHER SIDE TO BEING A COMPASSIONATE PERSON AND TO BEING A GOOD FRIEND IS FEELING BAD ABOUT THE WRONGS THAT YOU DO TO OTHER PEOPLE.

AND I KNOW THAT EACH ONE OF US HAS BEEN IN SITUATIONS WHERE WE HAVE HURT SOMEBODY'S FEELINGS EVEN INADVERTENTLY. AND WE FEEL BAD ABOUT IT AFTERWARDS. WE WANT TO FIGURE OUT WHAT WE CAN DO TO CORRECT IT. MOST HUMAN BEINGS HAVE REGRETS.

BUT IF YOU LOOK AT MAUREEN MC DERMOTT'S CONDUCT IN THE TWO YEARS AFTER THE BELL INCIDENT, YOU SEE THAT SHE APPARENTLY HAD NO REGRETS ABOUT WHAT SHE DID.

YOU LISTEN TO MR. LUNA'S TESTIMONY ABOUT HOW HE WENT TO THE PAY PHONE RIGHT AFTER HE ATTACKED DE WAYNE BELL AND HE WAS CRYING BECAUSE HE HAD NEVER DONE ANYTHING LIKE THAT TO ANYBODY BEFORE. AND HE CALLS HER UP ON THE PHONE AND SHE SAYS, BASICALLY, "DON'T WORRY. THINGS ARE GOING TO TURN OUT OKAY."

AND SO FOR THE NEXT TWO YEARS OR SO WE KNOW THAT SHE DIDN'T HAVE ANY REGRETS BECAUSE SHE STARTED THE WHOLE CAMPAIGN OF TERROR AGAINST STEPHEN ELDRIDGE. AND YOU LOOK AT THE SIX WEEK PERIOD AFTER THE FIRST ATTACK ON STEPHEN ELDRIDGE AND YOU SEE AGAIN THIS WOMAN HAD NO REGRETS

AT ALL.

SO WHAT SORT OF A COMPASSIONATE, CARING PERSON ARE WE DEALING WITH IN THIS CASE?

I KEPT TRYING TO THINK OF AN ANALOGY TO UNDERSTAND OR TRY TO PUT IT IN A LITTLE BIT DIFFERENT TERMS MC DERMOTT'S COMPASSIONATE, WARM SIDE. AND THIS IS WHAT COMES TO MIND.

IS IT REALLY ANY DIFFERENT THAN TRYING TO UNDERSTAND HOW NAZIS COULD ENJOY LISTENING TO MOZART?

THE SAME BRUTAL PEOPLE WHO COULD WORK IN THE CREMATORIUMS OR THE GAS CHAMBERS DURING THE DAY, KISS THEIR WIFE AND CHILDREN GOODBYE WHEN THEY LEFT FOR WORK IN THE MORNING AND WENT TO A CONCERT AT NIGHT AND ENJOYED LISTENING TO BEAUTIFUL MUSIC.

BUT DOES THAT MAKE THE PEOPLE ANY LESS EVIL? DOES IT MAKE MAUREEN MC DERMOTT ANY LESS EVIL THAT SHE COULD SHOW COMPASSION TO A PERSON IN THE HOSPITAL THAT SHE CARES FOR?

NOW, LET'S LOOK AT THE NEXT CONCEPTS THAT THE DEFENSE HAS TO WORK WITH UNDER FACTOR K.

THE FACT THAT SHE WAS SENDING MONEY HOME TO HER MOTHER AND THE SYMPATHY FACTOR WHICH I WOULD SUGGEST TO YOU ALL KIND OF WORKS TOGETHER.

I KNOW THAT ALL OF YOU ARE COMPASSIONATE, SYMPATHETIC PEOPLE. AND WE SHOULD ALL FEEL SYMPATHY FOR THE DEFENDANT'S RELATIVES AND FOR HER FRIENDS AND FOR EVERYBODY WHO WAS CLOSE TO HER AND HAS TO LIVE WITH KNOWING WHAT SHE HAS DONE.

BUT LET ME SUGGEST TO YOU THAT WE SHOULD NOT MISPLACE THAT SYMPATHY. THIS SYMPATHY THAT WE MIGHT FEEL FOR HER MOTHER AND HER FATHER WHO ARE ILL DOES NOT BELONG TO MAUREEN MC DERMOTT. IT BELONGS TO HER MOTHER AND HER FATHER AND HER OTHER RELATIVES AND HER FRIENDS AND ALL OF THE PEOPLE WHO HAVE TO CONFRONT THE HORROR OF WHO MAUREEN MC DERMOTT IN FACT IS.

IT'S THE JOB OF THE DEFENSE ATTORNEYS IN THIS CASE TO CREATE SYMPATHY DURING THIS PHASE FOR MAUREEN MC DERMOTT JUST LIKE IN THE GUILT PHASE IT'S THEIR JOB TO ARGUE THAT SHE IS NOT INVOLVED IN THESE CRIMES.

HER ATTORNEYS WILL MOST LIKELY ARGUE --

MR. INGBER: I OBJECT AGAIN AND ASK TO APPROACH THE SIDE BAR.

THE COURT: ALL RIGHT. APPROACH THE SIDE BAR.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MR. INGBER: BY REFERRING TO THE DUTY OF THE DEFENSE ATTORNEYS TO CREATE SYMPATHY, COUNSEL IS CREATING THE IMAGE THAT WAS DISPARAGED IN PEOPLE VERSUS MC LAIN, 46 CAL 3RD 113 IN WHICH THE PROSECUTOR DURING THE COURSE OF THE TRIAL, PENALTY ARGUMENT, SAID, "THE DEFENSE ATTORNEYS, THEY ARE INTENTIONALLY HERE TO TRY TO MISLEAD YOU. THEY ARE HERE TO TRY TO CREATE AN IMAGE THAT'S TOTALLY DIFFERENT."

THE COURT: WELL, THAT'S NOT EVEN CLOSE TO WHAT HAPPENED THUS FAR. I MEAN, THAT'S HARDLY EVEN A PARALLEL.

MR. INGBER: WELL, I THINK IT IS.

THE COURT: WELL, I UNDERSTAND.

OVERRULED.

MR. INGBER: I THINK IT IS.

THE COURT: OKAY.

MR. INGBER: THERE IS ANOTHER CASE. PEOPLE VERSUS BAIN, 5 CAL 3RD 847. THAT AGAIN REFERS TO THE SAME TYPE OF ALLUSION TO WHAT THE DEFENSE ATTORNEY IS CREATING, THE DEFENSE ATTORNEY IS FALSELY PRESENTING. AND THAT'S WHAT THE VICE OF IT IS. BOTH OF THOSE CASES DO STAND --

THE COURT: BUT THERE IS NOTHING THAT MS. MADER SUGGESTIONS, THAT SHE IS INTIMATING THAT YOU ARE BEING FRAUDULENT OR PHONY OR --

MR. INGBER: WORD IS "CREATING." I'M COMPLAINING THAT CREATION IMPLIES PRESENTING WITHOUT BASIS. IF SHE HAD SAID, "THE DEFENSE ATTORNEYS HAVE AN OBLIGATION TO PRESENT TO YOU

THAT SIDE," THAT'S A DIFFERENT STORY.

MY CONCERN IS WHEN YOU USE VIVID WORDS LIKE CREATING, IT COULD WELL BE TO THIS JURY THAT WHAT THEY ARE TALKING ABOUT IS OUT OF WHOLE CLOTH AND THERE IS NO BASIS FOR IT AT ALL. AND THAT IS EXACTLY WHAT IS DISPARAGED.

THE COURT: I UNDERSTAND THE PRINCIPAL THAT YOU ARE URGING. I THINK YOU'RE GOING TO HAVE TO BE CAREFUL WITH YOUR CHOICE OF VERBS.

BUT I HAVEN'T HEARD ANYTHING YET THAT TELLS ME THAT IT'S IMPROPER ARGUMENT. BUT I WILL BE ON THE WATCH FOR IT.

(THE FOLLOWING PROCEEDINGS
WERE HELD IN THE PRESENCE
AND HEARING OF THE JURY:)

MS. MADER: IT'S THE JOB OF THE DEFENSE ATTORNEYS TO CREATE SYMPATHY FOR THEIR CLIENT IN THIS PART OF THE CASE, AS I JUST SAID, AND PRESUMABLY THEY ARE GOING TO ARGUE TO YOU THAT MAUREEN MC DERMOTT DESERVES A BREAK. AND THEY ARE GOING TO WANT YOU TO SHOW MERCY, WHICH YOU ARE ALLOWED TO DO, FOR MAUREEN MC DERMOTT.

AND I WOULD ASK YOU TO ASK YOURSELVES WHEN THEY MAKE THAT ARGUMENT WHETHER OR NOT MAUREEN MC DERMOTT GAVE STEPHEN ELDRIDGE A BREAK.

DID MAUREEN MC DERMOTT SHOW ANY MERCY TO STEPHEN ELDRIDGE WHEN HE WAS SO FRIGHTENED OF HIS LIFE AND WHEN HE WAS IN PAIN DURING THAT SIX WEEK PERIOD?

SHE SHOWED NO SYMPATHY FOR STEPHEN ELDRIDGE. SHE SHOWED NO SYMPATHY FOR DE WAYNE BELL WHEN THEY HAD THE FEAR OF DEATH HANGING OVER THEM. AND NOW SHE DOESN'T WANT TO HAVE THAT SAME FEAR.

HOW CAN WE SYMPATHIZE WITH HER PREDICAMENT IN THIS CASE?

NOW, LET'S LOOK AT THE EVIDENCE THAT MAUREEN MC DERMOTT HAS BEEN A GOOD INMATE. WE HEARD TWO WITNESSES FROM THE SHERIFF'S DEPARTMENT THAT MAUREEN MC DERMOTT IN THE YEARS IN WHICH SHE HAS BEEN FIGHTING THIS CASE HAS BEEN A MODEL INMATE. BOTH OF THESE WOMEN FROM THE SHERIFF'S DEPARTMENT, IT'S IMPORTANT I THINK FOR YOU TO UNDERSTAND, HAVE WORKED IN THE SYBIL BRAND INSTITUTE FOR FIVE YEARS.

FROM THE WAY THEY DESCRIBED THEIR BACKGROUNDS, THEY HAVE NEVER WORKED ON THE STREET. THEY LEFT SYBIL BRAND AND THEY ARE NOW WORKING IN THE MARSHAL'S OFFICE. THEY

NEVER WORKED ON THE STREET. THEY NEVER MET VICTIMS OF CRIME ON THE STREET.

ONE OF THEM SMILED AT THE DEFENDANT. THEY CALLED HER MIKI. THEY LIVED OR THEY WERE IN A SITUATION WHERE SHE WAS LIVING FOR A PERIOD OF YEARS AND BECAME VERY FRIENDLY WITH HER.

AND THAT WAS MIKI MC DERMOTT THAT WAS FIGHTING HER CASE AND WHO WAS VERY SMART, AS WE ALL KNOW, AND KNOWS THAT IT'S VERY IMPORTANT TO BE ON GOOD BEHAVIOR BECAUSE ANYTHING THAT YOU DO THAT IS NOT WE WOULD HEAR ABOUT IN THIS TRIAL.

WE HEARD THAT SHE FUNCTIONS VERY WELL IN AN INSTITUTIONAL SETTING. VERY SIMILARLY TO WHAT WE HEARD ABOUT WHEN SHE WORKS AS A NURSE. THAT SHE FUNCTIONS VERY WELL.

BUT THE PROBLEM WITH THAT TESTIMONY IS THAT MAUREEN MC DERMOTT IS NOW IN A VERY DIFFERENT SITUATION.

NOW, SHE IS CONVICTED AND NOW SHE IS TRAPPED AND NOW SHE HAS TO CONFRONT THE FACT OF LIVING THE REST OF HER LIFE IN A PRISON SETTING. SHE DOESN'T NEED TO BEHAVE WELL. SHE ALREADY HAS A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE. THE SITUATION CAN'T GET MUCH WORSE.

ONE THING WE KNOW ABOUT MAUREEN MC DERMOTT IS THAT MAUREEN MC DERMOTT HAS THE CAPACITY TO BIDE HER TIME. THE FACT THAT THERE WERE TWO YEARS BETWEEN THE DE WAYNE BELL INCIDENT AND THE STEPHEN ELDRIDGE INCIDENT CERTAINLY TELLS US THAT.

MAUREEN MC DERMOTT IS NOT A LIKE A COMPULSIVE

ROBBER, BURGLAR OR COMPULSIVE SERIAL KILLER.

WE DON'T KNOW WHAT'S GOING TO CATCH HER FANCY NEXT. WHO WILL SHE TURN ON NEXT?

THE ATTACK ON DE WAYNE BELL CAME TOTALLY OUT OF LEFT FIELD BECAUSE SHE WANTED HIS JOB. IT WAS SO TOTALLY FAR-FETCHED THAT THAT IS THE MEANS THAT SHE WOULD USE TO GET A JOB.

WHAT IF MAUREEN MC DERMOTT WANTS A JOB IN THE INSTITUTION THAT SHE CAN'T GET? WHAT MEANS WOULD MAUREEN MC DERMOTT RESORT TO IN THE INSTITUTION?

YOU KNOW, THERE ARE PRISONERS OF ALL TYPES IN THE INSTITUTION. AND AS WE HEARD YESTERDAY, AND I WAS HAPPY THAT MR. ENOMOTO WAS HERE BECAUSE HE ENABLED US TO LEARN A LITTLE BIT MORE ABOUT THE INSTITUTION, JUST BECAUSE YOU ARE SERVING LIFE WITHOUT POSSIBILITY OF PAROLE DOESN'T MEAN THAT YOU ARE ISOLATED IN ANY WAY.

IF ANY OF YOU THOUGHT THAT SHE WAS GOING TO BE IN A JAIL CELL FOR THE REST OF HER LIFE CONTEMPLATING WHAT SHE HAD DONE, AS YOU HEARD THAT'S NOT THE CASE.

SHE WILL BE MINGLING WITH EVERYBODY IN THE PRISON POPULATION. SHE WILL BE MINGLING WITH PEOPLE WHO WROTE BAD CHECKS. SHE WILL BE MINGLING WITH PEOPLE WHO ARE NARCOTICS OFFENDERS. SHE WILL BE MINGLING WITH GUARDS. SHE WILL BE MINGLING WITH CIVILIAN EMPLOYEES OF THE INSTITUTIONS.

WHY SHOULD THESE PEOPLE HAVE TO WATCH THEIR BACKS.

WHAT IF SHE WANTS SOMETHING THEY HAVE?

WOULD MAUREEN MC DERMOTT BE IN SUCH A RUSH TO DISLODGE THE APPLE FROM THE THROAT OF ANOTHER INMATE IF THE PERSON OWED HER SOME MONEY OR IF THE PERSON OWED HER A CIGARETTE, OR WOULD MAUREEN MC DERMOTT STAND BY OR WOULD SHE HIDE BEHIND THE DOOR.

WOULD SHE RUSH TO STOP THE BLEEDING OF A STABBING VICTIM IN THE PRISON IF PERHAPS SHE KNEW SOMETHING ABOUT OR WAS SOMEHOW TO BENEFIT BY THE FACT THAT THIS PERSON WAS STABBED?

YOU KNOW, JERRY ENOMOTO FINALLY WAS CANDID ENOUGH TO SAY THAT HE CAN'T REALLY PREDICT HER FUTURE DANGEROUSNESS.

BUT I WOULD SUGGEST TO YOU THAT WE CAN, AND WE KNOW A LOT MORE ABOUT MAUREEN MC DERMOTT THAN JERRY ENOMOTO WOULD EVER KNOW.

WE KNOW HOW CUNNING SHE IS. WE KNOW HOW DEVIOUS SHE IS.

WE KNOW HOW MALICIOUS SHE IS.

SHOULD THE PRISON AUTHORITIES AND THE OTHER INMATES BE DECEIVED INTO TRUSTING HER.

SHOULD THEY BE DECEIVED INTO THINKING THAT SHE IS A POSITIVE MORAL FORCE TO HAVE IN THE INSTITUTION WHEN THEY DON'T KNOW THAT SHE ONLY SAVES THE LIVES OF PEOPLE SHE WANTS TO SAVE.

AND THERE IS ANOTHER THOUGHT THAT KIND OF GOES

ALONG WITH THIS.

IF A NURSE AS SHE IS DOES WHAT SHE IS TRAINED TO DO SUCH AS DISLODGING THE APPLE FROM THE PRISONER'S THROAT, IF SHE DOES THAT SORT OF THING IN AN EMERGENCY, DOES THAT GIVE HER A PASS WITH RESPECT TO THE DEATH PENALTY.

ARE WE SUPPOSED TO OVERLOOK THE VICIOUSNESS AND THE CRUELTY OF THE OTHER ACTS THAT SHE HAS COMMITTED.

AND IF YOU SAY, WELL, MAYBE WE SHOULD, THEN YOU HAVE TO ASK YOURSELF SHOULD A SURGEON GET A PASS;

SHOULD A POLICE OFFICER WHO SAVED SOMEBODY'S LIFE GET A PASS;

SHOULD A DEFENSE ATTORNEY WHO SAVES AN INNOCENT PERSON FROM BEING CONVICTED, SHOULD THEY GET A PASS FROM THE DEATH PENALTY IF THEY COMMIT A HORRIBLE ACT.

SHOULD A PARAMEDIC WHO SAVES LIVES ON A DAILY BASIS GET A PASS.

ALL OF THESE PEOPLE SAVE LIVES, BUT THAT SHOULDN'T INSULATE THEM FROM THE VICIOUSNESS OF THE ACT THAT THEY MIGHT COMMIT AND THE CRUELTY OF THEIR OWN BEHAVIOR.

IT WAS INTERESTING ALSO IN THE PENALTY PHASE, BECAUSE THE DEFENSE DOES HAVE THE OPPORTUNITY TO SHOW YOU BACKGROUND, THAT WE REALLY DON'T KNOW ANYTHING ABOUT MAUREEN MC DERMOTT OTHER THAN THE FACT THAT SHE IS FROM PHILADELPHIA AND THAT SHE HAS THREE BROTHERS.

WE DON'T KNOW ANYTHING ABOUT HER SCHOOLING.

WE DON'T KNOW ANYTHING ABOUT HOW SHE WAS ARRESTED.

WE DON'T KNOW ANYTHING ABOUT REALLY HOW SHE ENDED UP WITHOUT A CONSCIENCE AND HOW SHE WENT WRONG.

THE QUESTIONING OF HER BROTHER WAS EXTREMELY LIMITED AS YOU SAW.

WE DIDN'T HAVE ANYBODY THAT WAS BROUGHT IN THAT KNEW HER WELL THAT COULD TELL US ANYTHING REALLY ABOUT HER.

FOR SOME REASON THEY DIDN'T REALLY WANT US TO FOCUS ON ANYTHING OTHER THAN SHE IS A GOOD NURSE AND A GOOD INMATE, AND WE COULD ONLY GUESS THAT THAT IS BECAUSE THERE WAS NOTHING THAT WAS PARTICULARLY HELPFUL TO HER IN HER BACKGROUND.

BUT ONE OF THE THINGS YOU KNOW THAT WE DO KNOW ABOUT HER TO SOME EXTENT IS THAT WE ARE NOT TALKING ABOUT A POOR DEPRIVED INDIVIDUAL.

SHE HAD A PROFESSION.

SHE HAD A JOB.

BY HURTING DE WAYNE BELL SHE HAD TWO JOBS.

WE KNOW SHE OWNED A HOME. WE KNOW SHE HAD FRIENDS.

WE KNOW SHE HAD FAMILY.

WHEN YOU LOOK AT THOSE THINGS, YOU CAN SEE THAT THIS IS A WOMAN WHO HAD EVERY OPPORTUNITY REALLY THAT SHE WANTED.

BUT FOR SOME REASON SHE CHOSE TO TURN HER BACK ON THOSE OPPORTUNITIES.

SHE COULD HAVE MADE ANY CHOICE THAT SHE WANTED IN HER LIFE.

SHE WAS NOT HELPLESS BY ANY STRETCH OF THE IMAGINATION.

HER PREDICAMENT AND THE WAY SHE FACES YOU TODAY IS A RESULT OF WILLFUL CHOICES THAT SHE MADE IN HER LIFE. SHE CREATED HER OWN PROBLEM.

SHE MADE A CONSCIOUS DECISION SOME YEARS AGO THAT HER MATERIAL WELL-BEING WAS SUPREME TO LIVES OF OTHER HUMAN BEINGS, AND SHE ACTED OUT THOSE CHOICES NOT OVER A PERIOD OF WEEKS, NOT OVER A PERIOD OF MONTHS, BUT OVER A PERIOD OF YEARS.

AND IN DOING SO AND IN MAKING THOSE CHOICES THAT SHE MADE SHE IS, IN EFFECT, SIGNING HER OWN DEATH

WARRANT.

SO AFTER CAREFUL REVIEW I THINK YOU WILL SEE THAT THERE ARE AGGRAVATING CIRCUMSTANCES THAT ARE SUBSTANTIAL IN THIS CASE;

THAT YOU HAVE A RIGHT TO ASSIGN WHATEVER WEIGHT YOU WANT TO THEM AND ALSO TO THE MITIGATING FACTORS UNDER FACTOR K, AND I WOULD SUBMIT TO YOU THAT THERE IS NO QUESTION IN THIS CASE THAT THE AGGRAVATING FACTORS GREATLY OUTWEIGH THE MITIGATING.

WOULD YOU LIKE TO TAKE A FIVE-MINUTE BREAK?

THE COURT: NOT ON MY ACCOUNT, BUT IF YOU NEED TO.

MS. MADER: MAYBE THE JURORS NEED TO BECAUSE I HAVE MAYBE ANOTHER HALF HOUR, 45 MINUTES.

THE COURT: ALL RIGHT.

LET'S TAKE A BREAK.

MS. MADER: MAYBE JUST A STRETCH.

THE COURT: ANYONE NEED TO TAKE A REAL BREAK?

LET'S MAKE IT FIVE MINUTES. TRY TO LIMIT IT TO FIVE MINUTES.

I MEAN IT, FIVE.

(RECESS.)

THE COURT: THE RECORD WILL SHOW MISS MC DERMOTT IS PRESENT, ALL COUNSEL, DETECTIVE RIEHL, ALL JURORS AND ALTERNATES.

MISS MADER, YOU MAY RESUME.

MS. MADER: THANK YOU.

AS THE COURT DESCRIBED TO YOU, THIS IS AN UNUSUAL PROCEDURE THE WAY WE ARGUE IN A DEATH PENALTY CASE.

BECAUSE THE PROSECUTION HAS NO BURDEN OF PROOF, I WILL ONLY ARGUE ONE TIME, AND THE DEFENSE WILL ARGUE LAST.

AND IT IS ONLY PROBABLY LOGICAL THAT THEY SHOULD ARGUE LAST BECAUSE THE PERSON WHO ARGUES LAST IT IS GENERALLY THOUGHT OF HAS THE ADVANTAGE AND THEY ARE, IN FACT, ARGUING FOR THEIR CLIENT'S LIFE.

IT DOES THOUGH PUT ME IN A POSITION OF NOT BEING ABLE TO RESPOND TO WHAT THEY SAY, AND THEM BEING ABLE TO RESPOND TO WHAT I SAY.

SO WHAT I NEED TO DO NOW FOR A LITTLE BIT IS TO ANTICIPATE WHAT THEIR ARGUMENTS MIGHT BE AND TO GIVE YOU MY PERCEPTION OF THOSE ARGUMENTS.

I WOULD SUGGEST TO YOU THAT THE MAIN ARGUMENT THAT THEY WILL MAKE IS THAT LIFE WITHOUT POSSIBILITY OF PAROLE IS A DREADFUL, DREADFUL SENTENCE, AND THAT THE ONLY QUESTION LEFT IN THIS CASE IS WHEN MAUREEN MC DERMOTT WILL DIE, BECAUSE WE KNOW THAT SHE WILL DIE BEHIND BARS.

ON THE SURFACE THAT IS A VERY PERSUASIVE ARGUMENT, BECAUSE PSYCHOLOGICALLY IT IS APPEALING, BECAUSE YOU DON'T REALLY HAVE TO CONFRONT THE DIFFICULTY OF HAVING TO LOOK SOMEBODY IN THE FACE AND SAY I HAVE MADE A DECISION THAT YOU SHOULD DIE FOR YOUR CRIMES.

BUT I THINK IT IS IMPORTANT TO LOOK AT WHAT LIFE ON A DAY TO DAY BASIS WOULD BE FOR MAUREEN MC DERMOTT IF SHE WERE TO BE KEPT ALIVE IN THE PRISON SYSTEM.

WE KNOW THAT SHE IS NOW IN HER EARLY FORTIES.

WE ALSO KNOW BY THE WAY THAT STEVE ELDRIDGE WHEN HE DIED WAS IN HIS LATE TWENTIES.

WHEN SHE WENT INTO THE SYSTEM, SHE ALREADY HAD ABOUT TEN YEARS MORE UNDER HER BELT THAT SHE HAD GOTTEN TO LIVE THAN STEPHEN ELDRIDGE DID.

IF YOU EXPECT A SHORTER LIFE SPAN POSSIBLY FOR SOMEBODY BECAUSE THEY ARE IN THE STATE PRISON SYSTEM, AND SHE LIVES INTO HER EARLY '70'S, LET'S SAY, BY GIVING HER A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE, YOU WOULD BE GIVING HER A 30-ODD YEAR SENTENCE.

AND WHAT WOULD IT MEAN ON A DAY TO DAY BASIS.

WELL, ONE WE ALL KNOW ABOUT IN PRISON THAT IS THE STRONG DOMINATE THE WEAK, AND WE ALSO KNOW THAT MAUREEN MC DERMOTT WOULD THRIVE IN THAT ENVIRONMENT, BECAUSE MAUREEN MC DERMOTT IS A SURVIVER.

YOU SEE HER AFTER FOUR AND A HALF YEARS OF COUNTY JAIL, WHICH IS MUCH MORE RESTRICTIVE THAN WHAT WE HAVE HEARD LIFE WOULD BE LIKE IN STATE PRISON, AND WE KNOW THAT EVEN IN THE COUNTY JAIL SHE CAN -- SHE HAS JEWELRY TO WEAR TO COURT.

SHE HAS HER HAIR STYLED. SHE WEARS MAKEUP.

SHE IS NOT MALNOURISHED.

SHE WEARS NICE CLOTHES, AND AS ODD AS IT SEEMS TO ALL OF US, IT IS POSSIBLE TO ADJUST TO A LIFE IN PRISON.

AND AS WE HEARD IN PRISON, JUST KIND OF UNBELIEVABLE, SHE WON'T HAVE TO WEAR ANY KIND OF PRISON GARB.

SHE WEARS WHATEVER SHE FEELS LIKE WEARING. SHE CAN HAVE A JOB TO EARN MONEY.

SHE CAN BUY WHAT SHE WANTS WITH THAT MONEY.

SHE CAN HAVE HER OWN TELEVISION.

SHE CAN GO TO THE LIBRARY. SHE CAN SUBSCRIBE TO MAGAZINES.

SHE CAN GET VISITS. SHE CAN STUDY FROM CORRESPONDENCE SCHOOLS.

YOU KNOW, I THINK THERE MIGHT HAVE BEEN SOME PERCEPTION UNTIL MR. ENOMOTO TOLD US THAT LIFE WITHOUT POSSIBILITY OF PAROLE MEANT THAT SHE WAS ACTUALLY PUT IN A

CELL FOR THE REST OF HER LIFE.

WELL, SHE IS LOCKED IN A CELL TO SLEEP, AND THE REST OF THE TIME SHE HAS THE FREEDOM TO WANDER THE PRISON GROUNDS WHERE THERE ARE GREEN BELTS, AND SHE CAN SIT AROUND WITH HER FRIENDS AND TALK UNTIL THE SUN GOES DOWN WHEN SHE GOES INTO HER COTTAGE, AS IT WAS DESCRIBED, AND SHE CAN SIT IN THE DAY ROOM AND ENGAGE IN RECREATIONAL ACTIVITIES.

DON'T GET ME WRONG.

I THINK ANYBODY WOULD HAVE TO AGREE THAT KNOWING THAT YOU ARE NEVER GOING TO GET OUT OF A PLACE FOR THE REST OF YOUR LIFE WOULD BE HORRIBLE, BUT THE ONLY PLACE WHERE SHE WOULD BE CONFINED TO A CELL AND HAVE TO THINK ABOUT HER CRIMES WOULD BE IF SHE DID, IN FACT, RECEIVE THE DEATH PENALTY BECAUSE THEN, IN FACT, YOU DO HAVE A CELL AND THAT'S WHERE YOU STAY.

AS HUMAN BEINGS WE ALL HAVE THE CAPABILITY TO COPE WITH SITUATIONS, AND MAUREEN MC DERMOTT WOULD COPE WITH THE SITUATION IN THE JAIL.

SHE WOULD WRITE NOTES.

SHE WOULD HAVE FRIENDS AND SHE WOULD EXCHANGE CHRISTMAS CARDS AND BIRTHDAY CARDS AND GREETINGS AND HAVE VISITORS.

AND YOU THINK ABOUT THAT IN CONTRAST TO STEPHEN ELDRIDGE, ABOUT THE FACT THAT OBVIOUSLY THERE IS NO CHRISTMAS ANYMORE FOR STEPHEN ELDRIDGE. THERE IS NO BIRTHDAYS.

MR. INGBER: YOUR HONOR, I AM GOING TO OBJECT TO THIS.

MAY WE APPROACH THE SIDE BAR?

THE COURT: NO.

IT IS ALL RIGHT.

YOU MAY CONTINUE.

MS. MADER: THERE IS NO BIRTHDAY FOR STEPHEN ELDRIDGE.

THINK ABOUT WHEN ALL OF US ARE CELEBRATING THE HOLIDAYS OR SUCH, THINK ABOUT STEPHEN ELDRIDGE'S FRIENDS,

THINK ABOUT GARY VENTURINI.

THINK ABOUT CAROL STANFORD-BOND AND WHAT THEY WILL BE THINKING ABOUT AND THE PRESENCE THAT WILL HAVE BEEN TAKEN OUT OF THEIR LIVES, WHEN YOU CONTRAST IT WITH MAUREEN MC DERMOTT LIVING ON THE CAMPUS OF CALIFORNIA INSTITUTE FOR WOMEN.

AND YOU HAVE TO ASK YOURSELF WHETHER OR NOT IT IS FAIR FOR MAUREEN MC DERMOTT TO HAVE ALL OF THOSE ADVANTAGES AND TO STAY ALIVE WHEN STEPHEN ELDRIDGE IS DEAD.

THE NEXT ARGUMENT THAT I THINK THAT THE DEFENSE WILL SURELY BRING UP IS THE FAMOUS CASE ARGUMENT.

IF ANGELO BUONO, WHO WAS FOUND TO BE ONE OF THE HILLSIDE STRANGLERS, AND RAPED AND TORTURED, STRANGLED NINE SEPARATE WOMEN, IF HE DIDN'T GET THE DEATH PENALTY, WHY SHOULD MAUREEN MC DERMOTT.

AND PERHAPS HE WILL EVEN GO THROUGH SOME OF THE GOREY DETAILS OF THAT CRIME, AND PERHAPS HE WILL DO IT WITH SOME OTHER CRIMES.

BUT THE PROBLEM IS THAT YOU DIDN'T HEAR THOSE OTHER CASES.

YOU DIDN'T HEAR THE GRUESOME, VIOLENT DETAILS OF THOSE CASES.

YOU HEARD THE GRUESOME, VIOLENT DETAILS OF THIS CASE, AND YOU WERE THE JUDGE IN THIS CASE, AND YOU ARE NOT THE JUDGES IN ANY OTHER CASES.

YOU KNOW, IT WAS INTERESTING YESTERDAY THAT THE DEFENSE ACTUALLY BROUGHT UP THROUGH MR. ENOMOTO THE CASE OF

A COUPLE OF DIFFERENT WOMEN WHO HAVE, IN FACT, BEEN EXECUTED IN CALIFORNIA.

AND IT WAS INTERESTING THAT THEY BROUGHT UP THE NAMES BECAUSE, IN FACT, IT DOESN'T HELP THEIR CAUSE I WOULD SUGGEST ONE BIT.

BARBARA GRAHAM WAS ONE OF THEM.

BARBARA GRAHAM WAS A YOUNG WOMAN WHO WENT WITH HER BOYFRIEND AND ANOTHER INDIVIDUAL INTO A HOUSE IN THE SAN FERNANDO VALLEY HERE TO COMMIT A ROBBERY AND ENDED UP KILLING AN ELDERLY WOMAN IN THE HOUSE.

SHE RECEIVED THE DEATH PENALTY ALONG WITH THE OTHER PEOPLE IN THE CASE.

AND MA DUNCAN, THE OTHER WOMAN THAT WAS REFERRED TO YESTERDAY, MA DUNCAN HIRED A KILLER TO HAVE HER DAUGHTER-IN-LAW KILLED BECAUSE SHE DIDN'T LIKE HER.

SHE ENDED UP WITH THE DEATH PENALTY.

FOR EVERY CASE OF MULTIPLE VICTIMS WHERE THE KILLER MAY NOT HAVE GOTTEN THE DEATH PENALTY, I CAN SHOW YOU CASES WHERE THERE IS A SINGLE VICTIM WHERE, IN FACT, THE DEATH PENALTY WAS IMPOSED.

BUT, PLEASE, DON'T GIVE THE DEATH PENALTY TO MAUREEN MC DERMOTT BASED UPON WHAT SOME OTHER PERSON GOT OR DIDN'T GET, BECAUSE THAT WOULD NOT BE RIGHT.

YOU SHOULD GIVE THE DEATH PENALTY TO MAUREEN MC DERMOTT BECAUSE SHE DESERVES IT IN THIS CASE.

THE PURPOSE OF OUR PENALTY PHASE IS TO LOOK AT THE ACTS THAT WERE INVOLVED AND TO ASSESS THE CHARACTER OF MAUREEN MC DERMOTT.

THAT'S WHAT WE ARE DOING HERE.

AND FOR THE SAME REASON THAT I SUGGEST THAT IT WOULD BE INAPPROPRIATE TO COMPARE WHAT HAPPENED IN OTHER CASES, IT ALSO WOULD BE LEGALLY WRONG FOR YOU TO LOOK AT WHAT HAPPENED TO JIMMY LUNA, MARVIN LEE OR DONDELL LEE, AND I THINK YOU HEARD THAT INSTRUCTION FROM THE JUDGE.

THE PROPER TIME TO CONSIDER THAT, WHAT HAPPENED TO THEM, IS ON THE ISSUE OF CREDIBILITY.

DURING THE GUILT PHASE OF THE TRIAL IT WAS WHETHER OR NOT THEIR SENTENCES HAD AN IMPACT ON WHETHER OR NOT THEY TOLD THE TRUTH HERE.

NOW, BECAUSE IN THE SECOND PHASE OF THE

TRIAL THAT WE ARE IN NOW WE HAVE THE DE WAYNE BELL INCIDENT THAT JIMMY LUNA TESTIFIED TO, HIS CREDIBILITY IS AGAIN IN ISSUE.

AND I AM SURE THAT DEFENSE COUNSEL WILL ARGUE THROUGH THE BACK DOOR TO MAKE IT APPEAR AS THOUGH IT SOUNDS LIKE IT IS ON CREDIBILITY WHAT JIMMY LUNA'S SENTENCE WAS, THE FACT THAT HE GOT LIFE WITHOUT POSSIBILITY OF PAROLE, AND THAT THE DISTRICT ATTORNEY WILL REMAIN SILENT AT THE TIME OF SENTENCING.

I CAN ASSURE YOU IT IS GOING TO COME UP DURING THEIR ARGUMENT, AND I CAUTION YOU TO USE IT TO ASSESS HIS CREDIBILITY AS TO WHETHER OR NOT HE TOLD THE TRUTH ABOUT THE DE WAYNE BELL INCIDENT, BUT THE LAW JUST LIKE THE LAW SAYS YOU CAN'T CONSIDER WHETHER OR NOT MAUREEN MC DERMOTT TESTIFIED IN THIS CASE, YOU CANNOT CONSIDER WHAT HAPPENED TO THE ACCOMPLICES IN THIS CASE.

SO WHAT OTHER ARGUMENTS MIGHT YOU HEAR FROM THE DEFENSE?

WELL, I EXPECT TO HEAR FROM THEM MAUREEN MC DERMOTT DIDN'T DO THE STABBING, SO YOU SHOULD BE LENIENT TOWARDS HER.

AND I WOULD ASK YOU WHETHER OR NOT MAUREEN MC DERMOTT DESERVES A BREAK BECAUSE SHE DIDN'T HAVE THE PERSONAL FORTITUDE TO STICK THAT KNIFE IN HERSELF.

BECAUSE SHE ONLY BOUGHT THE KNIVES AND BECAUSE SHE -- HERE AS WOMAN WHO STAYS SIX FEET AWAY BEHIND A DOOR WHILE STEVE IS BEING STABBED IN THE HALLWAY AND SOMEHOW IS THAT SUPPOSED TO INSULATE HER FROM GETTING THE DEATH

PENALTY.

DOES THAT MAKE HER ANY LESS CULPABLE.

THEY WANT TO TALK ABOUT WHAT A LIFE SAVER MAUREEN MC DERMOTT IS.

WHAT DID SHE DO FOR STEVE WHEN HE IS IN THE HALLWAY BLEEDING TO DEATH?

ABSOLUTELY NOTHING. SHE IS A WONDERFUL LIFE SAVER.

AS I SAID BEFORE, THERE IS NO QUESTION I DON'T THINK IN ANYBODY'S MIND THAT NONE OF THIS WOULD HAVE HAPPENED IF MAUREEN MC DERMOTT HAD NOT HAD A SHRED OR HAD HAD A SHRED OF MORAL DECENCY AND WOULD HAVE SAID STOP AT ANY POINT.

SHE IS MORE THAN AN IDEAL PERSON. SHE IS MORE THAN JUST THE INITIATOR. SHE WAS ON AN UNRELENTING MISSION TO HAVE STEPHEN KILLED ON A DAILY BASIS AND THAT IS AS EVIL AND AS DESERVING OF THE ULTIMATE RESPONSIBILITY AS THERE EVER IS IN A CRIME.

NOW, PERHAPS THEY WILL ARGUE LINGERING DOUBT. IT'S CALLED LINGERING DOUBT. AND SAY TO YOU, "ARE YOU REALLY SURE?" OF COURSE, YOU WOULDN'T WANT TO KILL ANYBODY UNLESS YOU WERE SURE BEYOND ALL DOUBT.

AND I WOULD ASK YOU HOW COULD YOU NOT BE SURE IN THIS CASE? IS THERE ANY QUESTION IN YOUR MINDS THAT THE VERDICTS WERE TRUE AND JUST?

YOU HAVE A RIGHT TO FEEL CONFIDENCE OR CONFIDENT IN THE VERDICT THAT YOU GAVE. THERE WERE MOUNTAINS OF EVIDENCE AGAINST MAUREEN MC DERMOTT. OF COURSE, INCLUDING THOSE DEVASTATING TELEPHONE RECORDS.

THIS IS NOT A CLOSE CASE. THIS IS NOT A CASE WHERE THE DEFENSE EVEN OFFERED A DEFENSE. AND WHAT YOU ALSO KNOW IS THAT THIS IS NOT A CASE WHERE EVIDENCE WILL EVER SHOW UP IN THE FUTURE TO CLEAR MAUREEN MC DERMOTT.

IN YOUR HEARTS YOU KNOW THAT NOTHING WILL EVER CLEAR HER.

PERHAPS THE DEFENSE WOULD ARGUE THE BIBLE. NOW, I'M AN BIBLICAL SCHOLAR. I DON'T KNOW MUCH ABOUT THE BIBLE. BUT MOST BIBLICAL SCHOLARS, AS I UNDERSTAND IT, INTERPRET THE COMMANDMENT THOU SHALL NOT KILL AS IN ACTUALLY MEANING THOU SHALL NOT COMMIT MURDER.

AND THERE ARE IN FACT SEVERAL REFERENCES TO THE

DEATH PENALTY IN THE BIBLE. IN EXODUS 21, VERSE 12 THE BIBLE STATES, "WHOEVER STRIKITH A MAN A MORTAL BLOW MUST BE PUT TO DEATH."

AND IN VERSE 14, WHICH I WOULD SUGGEST TO YOU IS INCREDIBLY APROPOS FOR THIS SITUATION, "WHEN A MAN KILLS ANOTHER AFTER MALICIOUSLY SCHEMING TO DO SO, YOU MUST TAKE HIM FROM MY ALTER AND PUT HIM TO DEATH."

NOW, THERE ARE SOME INTANGIBLE FORCES WORKING IN THIS CASE THAT I WOULD ALSO LIKE TO ADDRESS. WE HAVE THE FACTOR, OF COURSE, OF MAUREEN MC DERMOTT BEING FEMALE WHICH IS A VERY SUBTLE FACTOR, BUT I THINK IT'S SOMETHING THAT WE NEED TO TALK ABOUT BECAUSE SOCIETY HAS TRAINED MANY OF US, OBVIOUSLY MOSTLY MEN, TO GIVE DEFERENCE TO WOMEN.

AND ALL OF YOU ASSURED ME IN THE QUESTIONNAIRES WHEN WE STARTED OUT THIS TRIAL AND AT THE BEGINNING OF THE TRIAL THAT YOU WOULD TREAT HER JUST LIKE EVERYBODY ELSE.

CERTAINLY, HER CONDUCT IN THIS CASE IS EVERY BIT AS EVIL AS A MAN COULD EVER THINK OF COMMITTING. BUT I WOULD SUGGEST TO YOU THAT AS A FEMALE SHE HAD AN UNIQUE ADVANTAGE IN COMMITTING THIS CRIME. BECAUSE AS A FEMALE SHE COULD SUCK STEVE INTO BELIEVING THAT SHE WAS REALLY CARING FOR HIM AND KEEP HIM AT THE HOUSE DURING THE PERIOD OF TIME THAT SHE WAS ACTUALLY PLOTTING HIS MURDER.

BECAUSE SHE WAS A NURSE AND BECAUSE SHE WAS A FEMALE, PERHAPS HE BELIEVED A LITTLE BIT MORE READILY THAT SHE WAS ACTUALLY NURTURING AND NURSING HIM.

WOULD A MAN HAVE BEEN ABLE TO DO THAT SO EFFECTIVELY? I THINK NOT.

AND SO I WOULD JUST SUGGEST TO YOU THAT SOMEONE WHO HAS USED HER SEX TO DESTROY ANOTHER HUMAN BEING, HOW COULD WE USE THAT SAME FACTOR OF HER SEX TO GIVE HER MERCY?

THERE IS ANOTHER FACTOR THAT I WOULD LIKE TO ADDRESS AND IT'S SOMETHING THAT THE JUDGE HAS ALLUDED TO YOU WHEN HE TALKS ABOUT THE DEATH PENALTY ARTICLES THAT ARE APPEARING IN THE PAPER.

I'M SURE IT HAS NOT ESCAPED MOST OF OUR NOTICE THAT THERE IS FOR THE FIRST TIME IN 23 YEARS A SCHEDULED EXECUTION TO TAKE PLACE NEXT WEEK. AND IT CERTAINLY BRINGS IT HOME, DOES IT NOT, THAT THE DEATH PENALTY IS REAL. AND THAT IT'S NOT AN INTELLECTUAL EXERCISE THAT WE GO THROUGH HERE.

I THINK IT'S IMPORTANT IN FACT THAT THAT EXECUTION TAKE PLACE BECAUSE I THINK ALL OF YOU SHOULD REALIZE THAT IF IN FACT YOU VOTE FOR THE DEATH PENALTY IT WILL IN FACT HAPPEN IN THIS CASE.

I WOULD HATE TO THINK THAT YOU WOULD MAKE A DECISION TO VOTE FOR THE DEATH PENALTY THINKING THAT MAYBE IT'S NOT REALLY GOING TO HAPPEN SO THAT SOMEHOW MAKES IT ANY EASIER.

I KNOW IT WOULD BE VERY DIFFICULT FOR YOU TO VOTE FOR THE DEATH PENALTY BECAUSE YOU ARE ALL -- WE ARE ALL, I HOPE, COMPASSIONATE PEOPLE AND CAPITAL PUNISHMENT IS NOT A PLEASANT THING.

BUT I WOULD JUST SUGGEST TO YOU IT'S SUBSTANTIALLY LESS REPULSIVE THAN THE ACT WHICH BROUGHT ABOUT IT'S USE IN THIS CASE.

NOW, TO CONCLUDE MY REMARKS, IN A SENSE, I HAVE ABOUT 10 MORE MINUTES OR SO, MAUREEN MC DERMOTT IMPOSED THE DEATH PENALTY HERSELF IN THIS CASE JUST BECAUSE SHE WANTED TO. JUST BECAUSE SHE DIDN'T CARE ABOUT HUMAN FEELINGS AND JUST BECAUSE SHE DIDN'T CARE ABOUT THE SANCTITY OF HUMAN LIFE.

SHE HAD, IN EFFECT, RESIGNED FROM THE HUMAN RACE. AND THAT IS WHY THIS IS SUCH AN AGGRAVATED CASE AND THAT IS WHY MORALITY, HUMANITY AND THE LAW REQUIRE THAT THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT.

SHE HAS BEEN GIVEN EVERY POSSIBLE LEGAL RIGHT IN THIS CASE. FROM THE PRESUMPTION OF INNOCENCE SHE'S HAD TWO ATTORNEYS EVERY STEP OF THE WAY. SHE HAS HAD A PRELIMINARY HEARING. SHE HAS HAD HER JURY TRIAL. SHE HAS HAD ALL HER DIFFERENT RIGHTS DURING THE PENALTY PHASE. THE OPPORTUNITY TO CALL FRIENDS AND FAMILY AND SUCH TO EVOKE COMPASSION.

WHAT RIGHTS DID SHE GIVE STEPHEN ELDRIDGE? WHAT RIGHTS DID SHE GIVE DE WAYNE BELL? SHE STALKED THESE PEOPLE LIKE ANIMALS, PARTICULARLY AS JIMMY LUNA TOLD US THE STORY.

MR. INGBER: I OBJECT TO THE USE OF THAT WORD AGAIN.

THE COURT: WELL, IT'S NOT A GOOD CHOICE OF WORDS, I'M SORRY TO SAY. AND IT REALLY OUGHT TO BE AVOIDED.

MS. MADER: MAUREEN MC DERMOTT STALKED DE WAYNE BELL AND STALKED JIMMY LUNA -- DE WAYNE BELL AND STALKED STEPHEN ELDRIDGE.

AND WE HEARD FROM JIMMY LUNA ABOUT HOW SHE WOULD DRIVE HIM AROUND AND SHOW HIM EXACTLY WHERE DE WAYNE BELL WAS FROM MINUTE TO MINUTE AND HOW HE WOULD WALK TO THE BUS STOP AND WHERE HE LIVED AND WHERE HE USED TO HANG OUT. I MEAN, SHE STALKED THESE PEOPLE.

FIRST SHE STALKS BELL AND THEN SHE STALKS STEPHEN ELDRIDGE. AND SHE HAS HIM MURDERED IN THE MOST BRUTAL WAY IMAGINABLE AND THEN HAS HIS BODY MUTILATED AT HER REQUEST. SHE TAKES IT UPON HERSELF TO BE THE JUDGE, THE JURY, THE EXECUTIONER WHEN IT COMES TO STEPHEN ELDRIDGE.

SHE PLAYED FOR VERY HIGH STAKES AND SHE PUT HER

LIFE ON THE LINE WHEN SHE ENTERED INTO THIS GAME.

I WOULD SUGGEST TO YOU THAT IF IN FACT YOU BRING BACK A DEATH VERDICT IN THIS CASE, THAT NOT EVEN MAUREEN MC DERMOTT WOULD THINK THAT IT WAS REALLY UNFAIR OF YOU.

EVERY SOCIETY IN THE WORLD FROM OUR TRIBAL BEGINNINGS HAS A RIGHT TO KILL OUR ENEMIES SO THAT WE CAN SURVIVE. WE HAVE A RIGHT TO KILL GERMS. WE HAVE A RIGHT ~~THE~~ TO KILL MAD DOGS. WE HAVE A RIGHT TO KILL SNAKES. WE HAVE KILLED HUNDREDS IF NOT THOUSANDS OF PEOPLE TO SURVIVE AS A NATION.

SOCIETY HAS A RIGHT OF SELF-DEFENSE AND IT BELONGS TO EVERY ONE OF US. EVERY ONE OF US HAS A RIGHT TO LIVE. AND IT'S A VERY IMPORTANT RIGHT. AND IT TRANSCENDS THE RIGHT OF ANY INDIVIDUAL RIGHTS.

WE ALL HAVE A RIGHT TO GO TO BED AT NIGHT AND KNOW THAT WE ARE GOING TO WAKE UP IN THE MORNING.

WE ALL HAVE A RIGHT TO USE OUR KEY TO ENTER THE FRONT DOOR OF OUR HOUSE AND KNOW THERE IS NOT GOING TO BE SOMEBODY WHO IS LURKING BEHIND THAT DOOR.

AND WE HAVE THAT RIGHT WHETHER WE ARE ON THE OUTSIDE OR WHETHER WE ARE IN THE INSIDE IN THE PRISON POPULATION IN HAVING TO DEAL WITH SOMEBODY LIKE MAUREEN MC DERMOTT.

THOSE PEOPLE THAT THREATEN OUR RIGHTS, THOSE PEOPLE WHO KILL WHILE WE ARE ASLEEP, THOSE PEOPLE WHO HIDE BEHIND THE DOORS, THOSE PEOPLE WHO BUY DEATH WHILE WE INNOCENTLY GO ABOUT OUR LIVES, THOSE PEOPLE ARE OUR ENEMIES.

AND OUR RIGHT TO SURVIVE IS PARAMOUNT TO THEIR RIGHT TO SURVIVE. AND IT'S THAT SIMPLE. AND NO MATTER HOW HARD OR HOW UNCHARITABLE IT IS TO CONCLUDE PERHAPS THAT THERE ARE SOME PEOPLE THAT DON'T BELONG AMONG US, THERE ARE SOME PEOPLE THAT WE DON'T HAVE A RIGHT TO TAKE A CHANCE ON.

WE DON'T HAVE A RIGHT TO TAKE A CHANCE ON MAUREEN MC DERMOTT AND THE PRISON POPULATION DOESN'T HAVE TO TAKE A CHANCE ON MAUREEN MC DERMOTT.

A UNITED STATES SUPREME COURT JUSTICE BY THE NAME OF POTTER STEWART WHO IS NOW RETRIED WROTE A VERY FAMOUS OPINION ABOUT OBSCENITY. AND THAT OPINION IS -- IN THAT OPINION HE STATES, "WHAT IS A DIRTY BOOK, A DIRTY MAGAZINE, A DIRTY FILM? I CANNOT DEFINE WHAT IS OBSCENE, BUT I KNOW IT WHEN I SEE IT."

I MIGHT NOT HAVE BEEN ABLE TO DESCRIBE TO YOU NECESSARILY WITH MY WORDS OR PICTURES DURING THE TRIAL WHAT IS A CRIME OR WHAT IS A CRIMINAL WHO HAS EARNED THE PENALTY OF DEATH, BUT I WOULD SUGGEST TO YOU THAT YOU KNOW IT WHEN YOU SEE IT.

AND FOR THE LAST SEVEN MONTHS IN THIS COURTROOM YOU HAVE SEEN IT. AND YOU HAVE HEARD IT. AND YOU HAVE SEEN IT IN THE PERSON OF MAUREEN MC DERMOTT.

AND I WOULD ASK YOU AGAIN THAT IF THE PENALTY OF DEATH FOR THIS PARTICULAR MURDER FOR FINANCIAL GAIN AND LYING IN WAIT DOES NOT FIT MAUREEN MC DERMOTT, WHO WOULD THAT PENALTY FIT?

AS YOU SIT HERE IN THIS COURTROOM YOU ARE REPRESENTATIVES OF THE MILLIONS OF PEOPLE IN CALIFORNIA WHO DO IN FACT BELIEVE IN THE DEATH PENALTY IN THE PROPER CASE. AND ON BEHALF OF THOSE PEOPLE I WOULD ASK YOU TO DO JUSTICE AND TO GIVE MAUREEN MC DERMOTT THE PENALTY THAT SHE AND ONLY SHE HAS EARNED IN THIS CASE.

I WOULD ASK YOU TO RETURN TO THIS COURTROOM AND TELL MAUREEN MC DERMOTT THAT SHE MUST DIE FOR HER CRIMES.

THANK YOU.

THE COURT: ALL RIGHT. WE ARE GOING TO BE IN RECESS AND WE WILL HAVE ALL OF YOU BACK TOMORROW MORNING AT TEN O'CLOCK. WE WILL CONCLUDE WITH THE CLOSING STATEMENTS THEN.

ALL RIGHT. THANK YOU VERY MUCH.

MR. INGBER: I HAVE TO RAISE SOMETHING BEFORE WE LEAVE, YOUR HONOR.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: MR. INGBER, ALL THE JURORS HAVE LEFT THE

VAN NUYS, CALIFORNIA; FRIDAY, MARCH 30, 1990; 10:00 A.M.

DEPARTMENT NORTHWEST "I" HON. ALAN B. HABER, JUDGE

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(APPEARANCES AS HERETOFORE NOTED.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: LET ME GO ON THE RECORD.

THE RECORD WILL SHOW PRESENT IS MISS MC DERMOTT, MR. BURKOW, MR. INGBER, MS. MADER.

JUST TO SATISFY MY CURIOSITY, DO YOU HAVE A REVISED TIME ESTIMATE? THIS IS NOT TO INDICATE A LIMITATION.

MR. INGBER: ABOUT TWO HOURS.

THE COURT: ALL RIGHT.

MR. INGBER: IF THE COURT WISHES OR IF I FEEL THE COMPULSION AT SOME POINT TO ASK FOR JUST A BRIEF HIATUS FOR A COUPLE MINUTES --

THE COURT: SURE. ABSOLUTELY.

MR. INGBER: OR IF THE COURT FEELS THE JURORS NEED IT, FEEL FREE.

OR IF THE COURT GIVES ME AN INDICATION WHILE IT'S LOOKING THAT YOU WANT -- FINE.

(THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: ALL RIGHT. GOOD MORNING. THE RECORD WILL SHOW ALL JURORS AND ALTERNATES ARE PRESENT IN THE COURTROOM.

MR. INGBER YOU MAY ADDRESS THE JURY.

MR. INGBER: THANK YOU VERY MUCH, YOUR HONOR.

GOOD MORNING, LADIES AND GENTLEMEN. IT'S BEEN ABOUT 260 SOME DAYS. I MUST BE CANDID WITH YOU. I'M REALLY NERVOUS. YOU MAY NOT HAVE BELIEVED IT SOMETIME DURING THE VOIR DIRE, BUT I GOT TO TELL YOU HONESTLY I AM.

I TRIED TO FIGURE OUT HOW I COULD SPEAK TO YOU AND HOW I COULD START OFF SPEAKING TO YOU. AND I WAS READY KIND OF YESTERDAY, BUT I DIDN'T GET TO SPEAK TO YOU YESTERDAY. IT'S NOT YOUR FAULT. IT'S NO ONE ELSE'S FAULT. JUST MY OWN.

AND LAST NIGHT IN TRYING TO REVIEW WHAT I COULD TALK TO YOU ABOUT I STARTED LOOKING OVER SOME OF MY NOTES AND MY WIFE'S IN THE OTHER ROOM AND I HEAR THIS NOISE. AND I GO OUT THERE ABOUT TEN O'CLOCK AND I GO OUT THERE AND SHE HAS GOT THE L.A. LAW PROGRAM JUST ABOUT TO COME ON.

YOU KNOW HOW THEY PAN THE COURT BUILDING DOWNTOWN, THE CIVIL COURTHOUSE DOWN THERE. I SAW SOMETHING THAT ATTRACTED MY ATTENTION. AND IT SAID "EQUAL JUSTICE UNDER THE LAW."

AND IT OCCURRED TO ME THAT IT'S VERY IMPORTANT

FOR ALL OF US IN THE SYSTEM, JURORS, JUDGES, LAWYERS, LITIGANTS, PARTIES, FAMILIES, THAT THERE BE THE CONCEPT OF EQUAL JUSTICE UNDER THE LAW. AND WE HAVE GOT TO WORK VERY HARD TO STRIVE FOR THAT.

AND THEN IT OCCURRED TO ME THAT I HAD JUST READ AN ARTICLE YESTERDAY IN THE LOS ANGELES TIMES. AND THE ARTICLE DEALT WITH TWO BROTHERS STEWART AND NEIL WOODMAN. AND HOW THEY HIRED TWO OTHERS WHO IN TURN HIRED TWO OTHERS, THE FOUR OF THEM, TO KILL THEIR PARENTS AS THE PARENTS CAME HOME FROM TEMPLE ON YOM KIPPUR NIGHT.

AND THE ARTICLE THAT I READ INDICATED THAT THE MOTIVE WAS FINANCIAL GAIN. AND THE FIRST TWO PEOPLE OF THE SIX PEOPLE INVOLVED WENT TO TRIAL DOWNTOWN LOS ANGELES.

AND AFTER THIS TRIAL STEWART WOODMAN WAS CONVICTED ALONG WITH ANTHONY MAJOY, ONE OF THE OTHER MEN.

AND ON THE DATE THAT THEY WERE PREPARING TO START THE PENALTY PHASE OF THEIR TRIAL, STEWART WOODMAN IS TOLD BY THE PROSECUTION THAT, "IN EXCHANGE FOR SOMETHING WE ARE NOT GOING TO PURSUE THE DEATH PENALTY ON YOU."

THIS IS AFTER THEY HAVE GONE THROUGH THE WHOLE COMPLETE GUILT PHASE OF THE TRIAL FOR SEVERAL MONTHS.

AND IN THE ARTICLE THE DISTRICT ATTORNEY HANDLING THE CASE SAYS, "I BELIEVE BOTH WOODMAN BROTHERS PARTICIPATED EQUALLY IN THE MURDER SCHEME."

AND WHEN I REFLECTED UPON WHAT I SAW LAST NIGHT OF EQUAL JUSTICE UNDER THE LAW, IT OCCURRED TO ME SOMETIMES IT IS DIFFICULT TO CONCEIVE BUT, NEVERTHELESS, THAT'S SOMETHING WE STRIVE FOR.

LET ME START OFF, LADIES AND GENTLEMEN, BY ACKNOWLEDGING THAT YOUR VERDICT IN THE FIRST PHASE OF THIS TRIAL IS A FACT OF LIFE. A REALITY OF LIFE. WE ACKNOWLEDGE THAT YOU WORKED HARD AND THAT YOU ARRIVED AT WHAT YOU FELT WAS A PROPER VERDICT AND WE ACCEPT IT. WE MUST ACCEPT IT. THE WAY THE SYSTEM WORKS IS THAT DECISION IS YOURS. LAWYERS HAVE TO ACCEPT IT AND GO ON FROM THERE AS TO WHAT'S NOW APPROPRIATE.

I THINK THAT ALL OF YOU ARE CONSCIENTIOUS PEOPLE AND YOU ARE ALL GOING TO DO WHAT YOU BELIEVE IS RIGHT

REGARDLESS OF WHAT THE DISTRICT ATTORNEY MAY SAY OR WHAT I MAY SAY.

YOU MAY COME UP WITH SOME REASONS THAT WE HAVE NOT DISCUSSED AND THAT I WILL NOT DISCUSS. AND I URGE YOU TO HELP EACH OTHER TO INDIVIDUALLY DECIDE WHAT'S THE RIGHT THING TO DO IN THIS CASE.

WHAT'S REALLY THE FUNCTION OF THE JURY NOW? AND IT REALLY BOILS DOWN TO YOU HAVE TO DECIDE WHETHER MAUREEN MC DERMOTT STAYS IN PRISON FOR THE REST OF HER LIFE AND DIES AT THE END NATURALLY, OR DO YOU AND WE AS A SOCIETY KILL MISS MC DERMOTT AT AN EARLIER DATE.

OF COURSE, WE AS A SOCIETY USUALLY DON'T KILL OTHER HUMAN BEINGS WITHOUT SOME NECESSITY. WE DON'T UNLESS IT'S ABSOLUTELY NECESSARY TO DO SO.

SOME ILLUSTRATIONS, OF COURSE, ARE IN TIME OF WAR WE DO SO. WHEN OUR LIVES ARE THREATENED AND IT'S IN SELF-DEFENSE WE DO SO.

BUT IS THERE REALLY A NECESSITY IN THIS CASE TO KILL MAUREEN MC DERMOTT?

IS THERE A NECESSITY TO PROTECT SOCIETY BY KILLING HER? IS THERE A NECESSITY TO KILL HER BECAUSE SOCIETY WANTS TO PUNISH HER?

LET ME ASSURE YOU THAT YOUR VERDICT THAT YOU HANDED DOWN THE OTHER DAY GUARANTEES THAT MISS MC DERMOTT WILL NEVER, EVER GET OUT OF PRISON ALIVE. THAT'S A PROTECTION THAT YOU BY YOUR VERDICT ASSURED SOCIETY THAT IT WOULD HAVE.

SO I RHETORICALLY ASK YOU IS SPENDING THE REST

OF HER LIFE IN PRISON PUNISHMENT? AND WHAT KIND OF PUNISHMENT MAY IT BE?

AS YOU LOOK AT MISS MC DERMOTT, SHE IS NOW AGE 42. AND SHE IS PROBABLY GOING TO HAVE 10, 20 OR MAYBE 30 MORE YEARS OF LIFE ACCORDING TO THE ACTUARIAL TABLES. AND SHE IS GOING TO SPEND THOSE, IF YOU SENTENCE HER TO LIFE IN PRISON WITHOUT ANY HOPE OF PAROLE, IN A CLOSED CONFINEMENT SETTING. LEVEL FOUR.

I THINK MR. ENOMOTO TOLD US SHE IS GOING TO BE IN A ROOM THAT'S GOT A TOILET IN IT. MAYBE ANOTHER CELL MATE. AND SHE IS NEVER GOING TO HAVE PRIVACY THE REST OF HER LIFE.

SHE IS NOT GOING TO GO OUT TO DINNER. SHE'S NOT GOING TO GO FOR A DRIVE EVER AGAIN. SHE WILL NEVER TAKE A TRIP. SHE MAY NOT EVER GO FOR A WALK. SHE IS NOT GOING TO GO SWIMMING. SHE WILL NEVER SEE THE OCEAN AGAIN FACE TO FACE. NOR WILL SHE EVER HAVE A CHANCE TO SEE THE STARS EXCEPT IN A MOVIE IF SHE SEES THAT.

IT'S A CLOSED, CONFINED SETTING WITH WALLS AND BARBED WIRES. IT'S NOT A COUNTRY CLUB AS THE DISTRICT ATTORNEY TRIED TO GET MR. ENOMOTO TO CONCUR. IT'S NOT A COLLEGE CAMPUS EITHER.

SHE KNOWS THAT IF IN THAT CLOSED SETTING SHE HAS ANY KIND OF INFRACTION OR WRITE-UP SHE IS GOING TO LEARN WHAT THE HOLE OR SEGREGATION LOOKS LIKE.

AND EVERYDAY SOMEONE WILL BE TELLING HER WHEN TO GET UP, WHERE TO GO, WHEN TO GO TO SLEEP, WHEN TO WAKE UP AND NEVER HAVE AN OPPORTUNITY AGAIN TO MAKE A DECISION FOR HERSELF IN THAT CLOSED, CONFINED SETTING.

YOU KNOW, I RECALL DURING VOIR DIRE WHEN WE FIRST STARTED THIS CASE BOTH MS. MADER AND MYSELF AND MR. BURKOW ASKED SOME OF YOU, I THINK IT'S BEEN SO LONG AGO IT MAY HAVE BEEN SOME OF THE OTHERS WHO ARE NO LONGER HERE, ABOUT WHETHER YOU FELT LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE MIGHT EVEN HAVE BEEN A WORSE PUNISHMENT THAN THE DEATH PENALTY.

AS I RECALL, SOME PEOPLE FELT THAT IT WAS OR THAT IT MIGHT WELL BE.

WELL, RIGHT NOW, LADIES AND GENTLEMEN, MISS MC DERMOTT IS IN FACT DEAD AS FAR AS FREEDOM IS EVER CONCERNED.

AND THE ONLY QUESTION REALLY IS WHEN WILL SHE ULTIMATELY PHYSICALLY DIE.

WELL, LET'S REFLECT A MOMENT UPON WHAT KIND OF A PERSON SHE IS IN A STRUCTURED SETTING.

WE KNOW THAT IN THE HOSPITAL SETTING WHERE SHE WORKS, ACCORDING TO DR. MERRITT WHO SAID THAT THE WORST OF THE WORST END UP IN THE WARD THAT THEY ARE AT. AND WHO WAS CHOSEN, SELECTED OR ASKED FOR BY BOTH THE PATIENTS AND WHOSE DECISION WAS MADE TO APPLY MISS MC DERMOTT TO THE HANDLING OF THOSE PATIENTS?

I'M NOT GOING TO REPEAT THE GLOWING TERMS THAT THEY SAID THEY THOUGHT SHE PERFORMED. MISS KELLY WHO HAD THE OPPORTUNITY TO PERSONALLY SUPERVISE MISS MC DERMOTT TALKED ABOUT HOW SHE WAS WILLING TO WORK EXTRA HOURS. HOW HER SENSE OF HUMOR MADE THE STAYS OF THESE PATIENTS MORE MEANINGFUL AND SHORTER.

AND THEN MISS KELLY INDICATED THAT THERE WERE A COUPLE INSTANCES IN WHICH MISS MC DERMOTT DIDN'T HAVE TO DO THINGS, BUT DID THINGS FOR THE PATIENTS LIKE BAKING A CAKE, GOING AND GETTING SOMEBODY A BURRITO.

SHE WASN'T DOING THAT BECAUSE SHE WANTED TO IMPRESS YOU PEOPLE ON THIS DATE OR HER SUPERVISOR. IT WAS AN ACT OF A PERSON WHO IN A HOSPITAL SETTING, STRUCTURED SETTING FELT THE NECESSITY TO CONDUCT THEMSELVES IN A PARTICULAR WAY.

WHAT'S THE OTHER STRUCTURED SETTING THAT WE HAVE MISS MC DERMOTT? WELL, WE KNOW FOR PROBABLY THE LAST FOUR AND A HALF TO FIVE YEARS SHE'S BEEN IN CUSTODY.

I ASK ANYONE OF YOU TO JUST POSSIBLY ENVISION SOMEONE WHO HAS NEVER BEEN IN TROUBLE BEFORE IN THEIR LIFE TO ALL OF A SUDDEN HAVE YOUR FREEDOM TAKEN AWAY AND BE CONFINED FOR A SHORTER PERIOD OF TIME.

WE HAVE HEARD TESTIMONY OF LUNA, MARVIN LEE, DONDELL LEE. THEY HAVE BEEN IN AND OUT OF PRISON OR IN AND OUT OF JAIL SO MUCH THAT DOESN'T MEAN ANYTHING TO THEM. THEY ARE OUT A COUPLE MONTHS AND THEY GO BACK IN.

BUT THERE IS A LADY WHO HAS NEVER RUN AFOUL OF THE LAW FOR ONE MINUTE. HAS NEVER SPENT A MOMENT IN CUSTODY. AND ALL OF A SUDDEN THAT CONCEPT OF FREEDOM WAS SUDDENLY TAKEN AWAY FROM HER. IS IT A WONDER THAT SHE PROBABLY DIDN'T LOSE HER SANITY WHILE IN CUSTODY ALL THE TIME?

BUT WHAT DO WE HEAR FROM TWO PEOPLE WHO CAME IN HERE AND TALKED TO YOU? AND BEAR IN MIND MS. MADER MAY DEMEAN THOSE TWO LAW ENFORCEMENT PEOPLE ALL SHE WANTS. THEY DIDN'T HAVE TO COME IN HERE. THEY DIDN'T HAVE TO JEOPARDIZE THEIR CAREERS IN LAW ENFORCEMENT THAT THEY ARE STILL IN BY COMING IN HERE JUST TO TELL YOU THE TRUTH OF WHAT THEY SAW.

AND TO BE INSULTED BY BEING ASKED WAS THERE SOME FINANCIAL RELATIONSHIP BETWEEN THEM AND AN INMATE THAT THEY HAD SUPERVISION OF.

BUT THEY DID. THEY CAME IN HERE AND THEY HAD THE INTESTINAL FORTITUDE TO TELL YOU THAT THEY HAD THE OPPORTUNITY TO PERSONALLY SEE HER IN THIS STRUCTURED SETTING. THE WORST SETTING. EVEN MS. MADER SAYS IT IS WORSE IN SYBIL BRAND THAN WHERE SHE MIGHT BE GOING.

THE WORST OPPORTUNITY, SHE ROSE TO THE OCCASION BY STAYING TO HERSELF. AVOIDING PROBLEMS. NOT GETTING INVOLVED IN FACTIONS AND SPENT ALMOST FIVE YEARS WITHOUT SO MUCH AS A SINGLE WRITE-UP OR INFRACTION.

IS THAT ALMOST UNHEARD OF FOR SOMEONE WHO HAS NEVER HAD THEIR FREEDOM TAKEN AWAY BEFORE?

NOW, IF THAT'S NOT A TESTIMONIAL TO ADAPTABILITY AND SUITABILITY, I DON'T KNOW WHAT IS.

BUT YOU KNOW, WHILE THERE SHE COULD HAVE CONTINUED JUST TO DO THINGS IN HER OWN WAY VERY QUIETLY AND INNOCUOUSLY. BUT A COUPLE INSTANCES OCCURRED WHILE SHE WAS THERE THAT LED HER TO CONDUCT HERSELF IN AWAY THAT MS. MADER CHARACTERIZED AS SHE SAVES LIVES OF ONLY THE PEOPLE THAT SHE WANTS TO SAVE.

I THINK IT IS A LITTLE BIT OUT OF CHARACTER FOR MISS MC DERMOTT TO BE SITTING AT A TABLE AND ALL OF A SUDDEN SOMEONE APPEARS TO BE CHOKING AND WITHOUT BEING ASKED JUST INSTINCTIVELY DOES WHAT SHE KNOWS IS A LIFE SAVING MANEUVER TO SAVE ANOTHER HUMAN BEING'S LIFE. SOMEONE WHO IS JUST IN JAIL WITH HER.

WHAT IS THAT REFLECTIVE OF? THAT SHE METHODICALLY PLANNED TO SAVE THAT LIFE? IT HAPPENED. THAT'S PART OF WHAT THESE PEOPLE SAW OF MISS MC DERMOTT. THESE PEOPLE BEING MISS STOKES AND MISS SAMANIEGO.

IT'S INTERESTING THAT MISS SAMANIEGO TOLD US ABOUT A TOTALLY ISOLATED WOMAN WHO ATTEMPTED TO COMMIT SUICIDE. NOT SITTING AT A TABLE WITH MISS MC DERMOTT.

AT THAT PARTICULAR POINT WHAT DOES MISS MC DERMOTT DO? IT'S NONE OF HER BUSINESS. IT'S NOT HER CONCERN. THIS IS NOT SOMEBODY SITTING AT A TABLE NEXT TO HER.

SHE REALIZES THIS WOMAN NEEDS HELP. AND SHE TAKES THIS WOMAN TO THE SHERIFFS AND POINTS OUT THE MARKS ON THE NECK. INVOLVES HERSELF UNNECESSARILY NOT BECAUSE SHE WANTED TO DO SO THAT I COULD STAND HERE AND TALK TO YOU, FOR EXAMPLE, ABOUT IT. BUT BECAUSE THAT'S THE RIGHT THING TO DO.

AND THEN WE HAVE MR. ENOMOTO WHO SPENDS 28 YEARS IN CORRECTIONS. AND HE HAS THE ABILITY, SO TO SPEAK, TO TALK ABOUT THE THOUSANDS OF PEOPLE HE HAS SEEN. AND THERE ISN'T ANYONE WHO CAN COME IN HERE AND SAY, "I PREDICT. I GUARANTEE." AND HE WAS HONEST ENOUGH TO DO THAT.

HE SAID, "BASED UPON EVERYTHING THAT I KNOW ABOUT MISS MC DERMOTT, BASED UPON HER CUSTODIAL STATUS, BASED UPON HER CONDUCT IN THE CUSTODIAL STATUS, THAT MY BEST OPINION AFTER 28 YEARS WAS THAT SHE WOULD ADAPT AND BE ACCEPTABLE AND WOULDN'T POSE A PROBLEM IN A CORRECTIONAL SETTING SUCH AS LEVEL FOUR WHERE SHE WOULD GO."

SO, AGAIN, I ASK YOU IS IT NECESSARY TO KILL MISS MC DERMOTT TO DO JUSTICE IN THIS CASE?

YOU KNOW, IF VENGEANCE IS ALL WE ARE AFTER, THEN LET'S REALLY LOOK AT HOW VENGEANCE IS EXTRACTED. AND IS THERE A QUESTION THAT IN SEEKING VENGEANCE WHETHER EQUAL JUSTICE IS BEING APPLIED TO MISS MC DERMOTT.

LET'S LOOK AT SOME COMPARISONS JUST BRIEFLY. I'M SURE THAT I'M GOING TO MENTION SOME CASES THAT YOU DIDN'T HEAR ALL THE FACTS OF THE CASES AND, THEREFORE, AREN'T BEING ASKED TO DECIDE YOURSELF WHAT OCCURRED IN THOSE CASES.

IF THAT WERE THE CASE WE WOULD HAVE TO SIT AS JURORS IN EVERY SINGLE CASE TO RENDER ANY KIND OF AN OPINION. BUT WE DO KNOW THAT THERE ARE SOME PUBLIC INFORMATION THAT'S AVAILABLE TO ALL OF US. SIMPLE INFORMATION THAT ARE UNREFUTABLE.

LET'S TAKE A LOOK AT KENNETH BIANCHI AND ANGELO BUONO, TWO PEOPLE, RAPED, KILLED AND WERE CONVICTED OF KILLING NINE BEAUTIFUL YOUNG LADIES WHOSE ONLY FAULT WERE THAT THEY HAPPENED TO RUN INTO THOSE TWO.

A JURY JUST LIKE YOU SAT, HEARD THE EVIDENCE AND CAME TO A CONCLUSION THAT LIFE IN PRISON WITHOUT PAROLE WAS THE APPROPRIATE PUNISHMENT FOR ANGELO BUONO. LIOT

NOW, IT'S TRUE WE DON'T KNOW ALL THE DETAILS, BUT WE DO KNOW ONE THING. THAT IMPLICIT IN THAT IS THAT THEY FELT THAT ANGELO BUONO HAD TO SIT IN PRISON THE REST OF HIS NATURAL LIFE AND THINK ABOUT THOSE NINE LIVES THAT HE WAS RESPONSIBLE FOR.

YOU MAY OR YOU MAY NOT HAVE HEARD OF A YOUNG MAN NAMED BOBBY JOE MAXWELL WHO A FEW YEARS PRIOR TO ANGELO BUONO DOWN IN SKID ROW IN LOS ANGELES WAS TRIED BY A JURY JUST LIKE YOU, CONVICTED OF 10 SEPARATE MURDERS BY SLASHING THE THROATS OF SKID ROW DERELICTS WHO HAD NO MONEY ON THEM.

A JURY JUST LIKE YOU SAID, "BOBBY JOE MAXWELL WILL SUFFER MORE, IN OUR OPINION, BY BEING IN PRISON THE REST OF HIS LIFE TO THINK ABOUT THAT EVERY DAY THAT HE SITS IN PRISON."

SOME OF YOU MAY KNOW OF A MAN NAMED BRIAN THOLMER. HE WAS CHARGED WITH AND CONVICTED OF THE KILLING

AND RAPING OF SIX WOMEN ALL OVER THE AGE OF 60.

HE WAS TRIED BY A JURY JUST LIKE YOU. AND THAT JURY LIKEWISE INDICATED THAT BRIAN THOLMER SHALL SIT IN A CONFINED SETTING FOR THE REST OF HIS LIFE WITHOUT EVER GETTING OUT.

AND SINCE WE DON'T KNOW ALL THE DETAILS, WE DON'T KNOW IF A JURY JUST LIKE YOU WOULD THINK SITTING IN PRISON CONFINED IS WORSE THAN THE DEATH PENALTY.

WASN'T VENGEANCE SATISFIED WHEN ALL THREE OF THESE PEOPLE WOULD BE KEPT IN PRISON THE REST OF THEIR LIVES WITHOUT EVER FACING THE GAS CHAMBER.

LADIES AND GENTLEMEN, JURORS SOMETIMES QUESTION WHETHER OR NOT THEY HAVE AN OBLIGATION TO IMPOSE THE DEATH PENALTY, AND MANY TIMES DISTRICT ATTORNEYS TELL THEM THAT THIS CASE CRIES OUT FOR IT; THAT THIS CASE MANDATES IT.

IF ANYBODY EVER DESERVED IT, THIS IS IT.

LET ME ASSURE YOU, LADIES AND GENTLEMEN, THAT YOU TOOK AN OATH TO FOLLOW THE LAW AND THERE IS NOTHING ABOUT THAT JURORS' OATH THAT COMPELS YOU TO IMPOSE AND SEND MISS MC DERMOTT TO THE GAS CHAMBER.

YOU HAVE AN OBLIGATION TO CONSIDER THE FACTS, YOUR OWN INNER FEELINGS, YOUR CONSCIENCE, YOUR SENSE OF MORALITY, YOUR CONCEPT OF FAIRNESS.

AND AS YOU THINK ABOUT YOUR CONCEPT OF FAIRNESS, EACH ONE OF YOU MUST TELL YOURSELVES IS WHAT I AM DOING FAIR WITHIN MY UNDERSTANDING OF WHAT IS RIGHT IN THIS CASE.

AND THERE ISN'T ANY CONCEPT THAT IS MORE IMPORTANT, MORE DEAR, THAN EACH ONE OF YOU MUST BE IN YOUR OWN HEART FAIR TO YOUR CONSCIENCE.

YESTERDAY WE HEARD FOR SEVERAL HOURS BY MISS MADER SO MANY THINGS AND I WROTE FEVERISHLY AS I LISTENED, NOT BECAUSE I AGREED WITH HER, BUT BECAUSE I WANTED TO TRY

TO SEPARATE THE WHEAT FROM THE CHAFE.

THERE ARE SOME THINGS I DO WANT TO RESPOND TO, BUT I AM NOT GOING TO DIGNIFY EVERYTHING SHE SAID, AND DON'T LET THAT BE AN INDICATION THAT I CONCUR WITH WHAT SHE SAID.

I THINK I HEARD HER SAY YESTERDAY THAT A SPECIAL CIRCUMSTANCES AS FINANCIAL GAIN IS THE WORST OF ALL OF THEM, THE HIGHEST.

IT ELEVATES IT ABOVE ALL, MOST OF THE OTHERS.

WELL, TO THE DECEDENT OF ANY OTHER SPECIAL CIRCUMSTANCES HOMICIDE FINANCIAL GAIN IS NO DIFFERENT.

IN OUR SCHEME OF THE LAW OF WHAT FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES APPLIES IT IS EQUALLY THAT WHEN A POLICE OFFICER IS KILLED IN THE SCOPE OF HIS PERFORMANCE, WE ARE JUST AS MUCH CONCERNED ABOUT THAT AS A LEVEL OF RESPONSIBILITY AND SPECIAL CIRCUMSTANCES AS SOMEBODY WHO ASKS SOMEONE ELSE TO KILL SOMEONE FOR MONEY.

DID THE FAMILY OF THOSE DECEDENTS OF THE POLICE OFFICERS SUFFER ANY MORE THAN ANYONE ELSE.

SOCIETY CANNOT SURVIVE SO LONG AS MISS MC DERMOTT IS ALIVE.

THAT WAS THE UTTERANCE BY MISS MADER YESTERDAY.

SOCIETY CAN'T COPE WITH THE FACT THAT SHE MAY LIVE THE REST OF HER LIFE IN PRISON.

WHERE DID THAT COME FROM.

YOUR FELLOW JURORS IN THIS SOCIETY APPARENTLY WEREN'T THAT WORRIED ABOUT KENNETH BIANCHI, ANGELO BUONO, ROBERT MAXWELL, BRIAN THALMER AND MANY OTHERS, AND IT IS

TRUE PERHAPS MISS MADER CAN POINT OUT TO YOU CASES WHERE ONE PERSON KILLS ONE INDIVIDUAL AND DOES GET THE DEATH PENALTY, BUT THAT DOESN'T MAKE YOUR SENSE OF FAIRNESS THAT IS REQUIRED ANY DIFFERENT AND THE CONCEPT OF EQUAL JUSTICE HAS TO BE DETERMINED ON THE BASIS OF WHAT WE ALL KNOW TO BE TRUE.

WE HEARD MISS MC DERMOTT -- EXCUSE ME -- MISS MADER USE SUCH A SIGNIFICANT ILLUSTRATION.

I THINK SHE SAID, YOU KNOW, I TRIED TO THINK OF MISS MC DERMOTT, AND THE ONLY THING THAT COMES TO ME IS THE NAZI TROOPERS GOING OFF TO DO THEIR JOB AND COMING HOME AT NIGHT AND LISTENING TO MOZART.

AND THAT'S HOW MISS MC DERMOTT WANTED YOU TO PORTRAY -- EXCUSE ME -- MISS MADER WANTED YOU TO PORTRAY MISS MC DERMOTT AS.

A NAZI STORM TROOPER GOING OUT TO KILL AND COMING BACK AND LISTENING TO MOZART.

WELL, DID MISS MADER SPEND A MOMENT OR TWO TELLING YOU ABOUT HOW JIMMY LUNA BATHED, SHAMPOOED AND CLEANED UP AND WASHED UP THAT DAY ON APRIL 28TH WHILE AWAITING THE ARRIVAL OF MARVIN LEE, PREPARATORY TO GOING OUT TO LISTEN TO MOZART.

DID MISS MADER MENTION AT ALL THAT MARVIN LEE AND DONDELL LEE THEY HAD TO STOP BY AND SEE GRANDMA FOR A LITTLE SOCIAL CALL ON THEIR WAY OUT TO THE VALLEY BEFORE THEY HAD TO GO LISTEN TO MOZART.

NO.

AND THE REASON YOU DIDN'T HEAR IT IS BECAUSE THE ATTENTION IS TO FOCUS ON MISS MC DERMOTT BY THE PROSECUTION AND TO ELIMINATE FOCUS OF MR. LUNA AND MR. LEE.

MISS MADER TOLD YOU YESTERDAY THAT I AND MR. BURKOW ARE HERE TO CREATE SYMPATHY.

LADIES AND GENTLEMEN, NONE OF US TESTIFIED. THE WITNESSES TESTIFIED. THE WITNESSES TOLD YOU WHAT THEY WERE AWARE OF.

THEY INDICATED TO YOU WHAT THEY KNEW OF MISS MC DERMOTT.

THERE WAS NO NEED FOR US TO CREATE SYMPATHY AS IF A DEFENSE ATTORNEY CAN BECAUSE SOMEONE WOULD TESTIFY TO

CREATE SOMETHING THAT DOESN'T EXIST.

YOU FOLKS ARE MUCH SMARTER THAN THAT.

SEE, THE REASON THAT WE DIDN'T NEED TO CREATE IT IS BECAUSE WE HAD A CLIENT WHO FOR TEN TO FIFTEEN YEARS GOT INTO NURSING, GOT INTO RESPIRATORY THERAPY.

SHE DIDN'T GET INTO IT BECAUSE ON APRIL 28TH SOMETHING WAS GOING TO HAPPEN.

SHE SERVED THE NECESSITY OF HELPING ILL PEOPLE FOR MANY YEARS.

WE CERTAINLY KNOW THAT SHE WORKED IN THE WORST HOSPITAL FROM AROUND '78 OR '79 TO '85.

WE KNOW ALSO THAT SHE IS A DEVOTED DAUGHTER TO HER MOTHER AND FATHER.

WE HEARD THAT FROM HER BROTHER.

WHAT LITTLE MONEY SHE EVER HAD SHE WOULD SEND THEM EVEN WHEN SHE IS IN JAIL.

AND WE ALSO HEARD FROM THE OFFICERS THAT SHE WAS A MODEL INMATE.

DID THE DEFENSE CREATE ALL OF THOSE THINGS OR WERE THEY THE REALITIES, THE ACTUALITIES OF LIFE.

THOSE ARE THE FACTORS THAT YOU MUST CONSIDER IN DECIDING YOUR FAIRNESS AND EQUAL JUSTICE.

I DON'T UNDERSTAND, AND THE LAST POINT I AM GOING TO AT LEAST COMMENT ON, IS HOW MISS MADER CAN SAY THAT MISS MC DERMOTT SAVES ONLY THE LIVES SHE WANTS TO SAVE.

I HAVE ALREADY COMMENTED ON THE TWO PEOPLE THAT SHE DID.

APPARENTLY THERE WAS NO RELATIONSHIP BETWEEN

THESE PEOPLE OTHER THAN THE FACT THAT THEY ARE INMATES.

WELL, LET'S TAKE A LOOK AT THE POSITIVE SIDE OF MISS MC DERMOTT.

COMMENTING IN ARGUMENT IS KIND OF LIKE A CAMPAIGN FOR POLITICAL OFFICE.

YOU ARE BETTER OFF TALKING ABOUT THE POSITIVE SIDES RATHER THAN THE NEGATIVE SIDES THAT THE OTHER PARTY HAS POINTED OUT.

IN DECIDING WHICH IS THE APPROPRIATE PUNISHMENT YOU ARE GOING TO HAVE TO LOOK AT MISS MC DERMOTT AS A TOTAL PICTURE.

YOU ARE GOING TO HAVE TO DETERMINE WHAT WAS HER LIFE BEFORE 1985, WHAT WAS HER LIFE AFTER 1985.

I AM NOT GOING TO REPEAT WHAT YOU HEARD FROM THE WITNESSES.

I THINK THAT THAT IS QUITE OBVIOUS THAT PRIOR TO 1985 DESPITE WHAT MISS MADER SAYS THAT SHE WAS STALKING AND, OF COURSE, MISS MADER, THE WORD STALKER IS PART OF HER LANGUAGE.

EXHIBITS QQQQ AND PPPP ARE TWO ASPECTS OF THE POSITIVE SIDE OF MISS MC DERMOTT.

OH, YOU HEARD TESTIMONY FROM MR. WAYNE MC DERMOTT THAT MIKI WOULD BRING PRESENTS, THAT MIKI WOULD COME BACK; SHE WOULD SEND MONEY.

BUT IT WOULD HAVE BEEN NICE TO HEAR FROM THE MOTHER AND FATHER OF MISS MC DERMOTT THEMSELVES.

BUT THESE PICTURES PORTRAY WHAT WAYNE MC DERMOTT TOLD US.

HER MOTHER SUFFERS FROM A HEART CONDITION, DIVERTICULITIS AND CAN'T TRAVEL.

HARDLY EVER LEAVES HOME. REMAINS IN THE HOUSE MOST OF THE TIME.

HER FATHER 77 HAS TWO DIFFERENT TYPES OF CANCER.

OH, AND THERE WAS AN ATTEMPT BY MISS MADER TO TAKE A SWIPE AT THE FATHER THAT HE DIDN'T LIVE FOR THE 44 YEARS ALL OF HIS LIFE AT HOME.

BUT HE CERTAINLY SITS THERE RIGHT NOW IN THE HOME. GOES NOWHERE WITH HIS ALZHEIMERS DISEASE BECAUSE HE DISAPPEARS, AND WHO SENDS HIM A FEW BUCKS AND WHO SENDS THEM A FEW BUCKS WHENEVER SHE CAN. MISS MC DERMOTT.

LET ME COMMENT VERY BRIEFLY, LADIES AND GENTLEMEN, ABOUT THAT WHOLE EPISODE WITH DE WAYNE BELL.

HE CAME IN HERE AND WE SAW WHAT HAPPENED TO HIS FACE.

I DON'T THINK THERE IS ANY DISPUTE THAT SOMETHING HAPPENED.

I DON'T THINK THERE IS ANY DISPUTE MR. LUNA WAS INVOLVED IN IT.

BUT WHAT THERE IS IN DISPUTE, LADIES AND GENTLEMEN, IS WHY.

WHY.

I WANT TO POSE TO YOU THE FOLLOWING SCENARIO WHY MISS MC DERMOTT NOT ONLY DIDN'T BUT HAD NO REASON TO DO SO.

IT IS IRONIC THAT WE HAVE TO DO THIS, AND I AM SURE THAT YOU FOLKS PICKED UP ON IT VERY EASILY BECAUSE IT WAS SO OBVIOUS.

DE WAYNE BELL WORKED THE DAY SHIFT, RIGHT. MAUREEN MC DERMOTT REPLACING PHILIP LA CHANCE WORKED THE NIGHT SHIFT.

MAUREEN MC DERMOTT COULDN'T WORK THE DAY SHIFT. SHE WAS WORKING FULL TIME AT THE HOSPITAL.

WHY BOTHER WITH DE WAYNE BELL? SHE COULD NEVER REPLACE HIM.

BETTY LA PORTE SAID SO IN HER TESTIMONY HERE IN THE FIRST PART OF THE CASE.

READ IT TO YOU.

"PHILIP WOULD WORK THE EVENING SHIFT

FROM 5:00 OR 6:00 TO 10:00. HE WAS IN JAIL IN 1983, EARLY IN JANUARY, TO THE END OF APRIL.

"MISS MC DERMOTT WORKED FIVE DAYS A WEEK. SOMEONE CAME IN ON THE WEEKEND.

"WHEN PHILIP RETURNED AT THE END OF APRIL, THEY SPLIT THE EVENING SHIFT TWO OR THREE DAYS EACH."

SHE WAS AWARE MISS MC DERMOTT COULD NEVER WORK ANY OTHER SHIFT BECAUSE SHE WAS WORKING FULL TIME AND PHILIP WANTED TO WORK LESS TIME BECAUSE OF HIS HEALTH.

REMEMBER HER TESTIMONY. IF YOU HAVE ANY PROBLEM WITH THAT, YOU CAN HAVE THIS REREAD.

HE HAD A PROBLEM. HE HAD A HEART CONDITION AND ALCOHOLISM.

WANTED TO A CUT DOWN AND THEY WERE BOTH SATISFIED WITH THE ARRANGEMENTS OF WORKING A COUPLE OF NIGHTS A WEEK IN THE NIGHT SHIFT.

MS. MADER: I WOULD OBJECT TO THIS.

CAN WE APPROACH THE BENCH, PLEASE?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH:)

MS. MADER: I OBJECT TO THIS BECAUSE I WAS NOT ALLOWED TO ASK BETTY LA PORTE ABOUT DE WAYNE BELL.

DE WAYNE BELL WAS A FORBIDDEN SUBJECT DURING THAT TESTIMONY, AND THE ENTIRE DE WAYNE BELL INCIDENT AND WHAT HAPPENED AFTER HER EMPLOYEE GOT ATTACKED AND HOW IT WAS DIVIDED UP.

I KNOW THAT DURING THAT PERIOD OF TIME I MADE ENUMERABLE OFFERS OF PROOF, AND IN FACT I THINK WE HAD AN ARGUMENT ABOUT WHETHER OR NOT HE OPENED IT UP BY SAYING SOMETHING AND YOU SAID NO. HE DIDN'T OPEN IT UP.

AND SO I DON'T THINK IT IS FAIR TO TALK ABOUT HOW THIS WAS EXACTLY DIVIDED UP AFTER DE WAYNE BELL LEFT WHEN I DIDN'T HAVE AN OPPORTUNITY TO BRING OUT THE TRUTH ABOUT THAT, BECAUSE THE INCIDENT WAS PRECLUDED.

MR. INGBER: WAIT A MINUTE. I AM QUOTING FROM THE TRIAL TRANSCRIPT.

THE COURT: QUOTING WHO?

MR. INGBER: MISS LA PORTE. FROM HER TESTIMONY AT THE GUILT PHASE.

THE COURT: I AM AT A DISADVANTAGE.

IT HAS BEEN QUITE SOMETIME AND I DON'T INDEPENDENTLY RECALL.

MR. INGBER: OKAY.

SHE TESTIFIED TO WHAT I AM SAYING. I HAVE THE PAGE AND LINE.

MS. MADER: I DON'T HAVE ANY QUESTION ABOUT THAT.

MR. INGBER: AND THE JURY IS ENTITLED TO CONSIDER WHAT TOOK PLACE DURING THE GUILT PHASE IN RELATION TO THE DEATH PENALTY.

THE COURT: THAT'S OBVIOUS. OKAY.

MR. INGBER: THAT'S ALL I AM DOING.

THE COURT: THERE IS AN OBJECTION AND I HAVE TO CONSIDER IT.

MR. INGBER: I DON'T UNDERSTAND THE OBJECTION.

IS IT THAT I MAY NOT QUOTE FROM TESTIMONY DURING THE GUILT PHASE OF THE TRIAL AS IT RELATES TO WHAT SHE ELICITED IN THE PENALTY PHASE.

THAT'S WHAT SHE IS SAYING; THAT BECAUSE SHE COULDN'T DO IT DURING THE GUILT PHASE, AND SHE INTRODUCED IT ALL DURING THE PENALTY PHASE, THAT I CAN'T QUOTE FROM THE GUILT PHASE.

I DON'T UNDERSTAND THAT.

MS. MADER: ALL I AM SAYING IT IS DECEPTIVE BECAUSE OF THE FACT THE COURT DID NOT ALLOW ME TO PUT IN THE DE WAYNE BELL INCIDENT.

I COULDN'T TALK ABOUT HOW WITH BETTY LA PORTE HOW THE WHOLE THING GOT DIVIDED UP AFTER DE WAYNE BELL LEFT HER EMPLOY, AND THE CIRCUMSTANCES UNDER WHICH HE LEFT AND THE THREATENING PHONE CALLS AND THE WHOLE THING AND THERE JUST SEEMS TO BE SOMETHING WRONG WITH --

THE COURT: JUST ONE MINUTE.

YOU PUT ON EVIDENCE DURING THE PENALTY PHASE AS TO THE BELL INCIDENT OBVIOUSLY.

I UNDERSTAND DURING THE GUILT PHASE THERE WAS A LIMIT AS TO HOW FAR YOU COULD GO WITH MISS LA PORTE'S TESTIMONY.

MR. INGBER: BUT SHE PUT ALL OF THAT ON IN THE PENALTY PHASE.

THE COURT: BUT I THOUGHT IT WENT FORWARD IN THE PENALTY PHASE.

MS. MADER: YEAH. THE DE WAYNE BELL INCIDENT DID.

BUT IF HE QUOTES FROM THAT TRANSCRIPT AS TO HOW THE JOB WAS DIVIDED UP WHEN I WASN'T ALLOWED TO ASK BETTY LA PORTE ANYTHING ABOUT HOW DE WAYNE'S RESPONSIBILITIES WERE DIVIDED UP, AND PURPORTS TO MAKE THE ARGUMENT, WELL, OBVIOUSLY SHE COULDN'T HAVE ATTACKED DE WAYNE BELL BECAUSE SHE OBVSIOULY DIDN'T WANT DE WAYNE BELL'S JOB, SEEMS LIKE IT IS UNFAIR SOMEHOW.

THE COURT: WELL, MY RESPONSE IS YOU HAD THE OPPORTUNITY TO PUT IT ON DURING THE PENALTY PHASE.

TRUE OR NOT?

I MEAN --

MS. MADER: I GUESS I COULD HAVE RECALLED BETTY LA PORTE.

THE COURT: RIGHT.

SO IF MR. INGBER -- I ADMIT AS I DID BEFORE THAT I DON'T INDEPENDENTLY RECALL THE TESTIMONY.

I KNOW EXACTLY WHAT IS BEING REFERRED TO.

IF THE OBJECTION IS IT IS NOT FAIR, THE ONLY STRAIGHT CALL FOR ME TO MAKE IS THAT YOU DID HAVE THE OPPORTUNITY TO PUT ON FURTHER EVIDENCE WITH LA PORTE OR OTHER WITNESSES DURING THE PENALTY PHASE.

MS. MADER: THE JURY HAS NEVER BEEN TOLD THAT IT WAS DECISION OF THE COURT THAT THE PROSECUTION COULD NOT

REFER TO THE DE WAYNE BELL EPISODE DURING THE GUILT PHASE OF THE TRIAL.

MR. INGBER: WHY SHOULD THEY BE TOLD?

MS. MADER: BECAUSE I AM SAYING THAT I THINK THAT IS IMPORTANT FOR THEM TO UNDERSTAND.

MR. INGBER: I DON'T SEE WHY THEY SHOULD BE TOLD THAT.

THE COURT: I DON'T SEE THE NEED FOR THAT.

MS. MADER: ALL RIGHT.

THE COURT: I AM JUST DOING THE BEST I CAN, BUT YOU HAD THE OPPORTUNITY TO DURING THE PENALTY PHASE AND THAT'S HOW I HAVE TO RESOLVE IT.

MS. MADER: ALL RIGHT.

(THE FOLLOWING PROCEEDINGS
WERE HAD IN OPEN COURT, IN
THE PRESENCE AND HEARING
OF THE JURY:)

MR. INGBER: I THINK THERE WAS AN OBJECTION. I DIDN'T HEAR THE COURT'S RULING.

THE COURT: YOU THINK THERE WAS. WHAT DO YOU THINK WE WERE UP HERE FOR.

MR. INGBER: I DIDN'T HEAR ANY RULING BY THE COURT.

THE COURT: I RULED AT THE SIDE BAR. YOU MAY CONTINUE.

MR. INGBER: OKAY.

I THINK WE ARE AT THE POINT WHERE I WAS

EXPLAINING TO YOU THAT BETTY LA PORTE TESTIFIED RIGHT HERE IN THE COURTROOM, AND YOU HAVE AN OPPORTUNITY TO LOOK AT THIS WHOLE TESTIMONY, THAT WHEN MR. LA CHANCE RETURNED FROM JAIL IN '83 BECAUSE OF HIS HEALTH AND THE ALCOHOL PROBLEMS, HE DETERMINED AND MISS LA PORTE DETERMINED THAT HE DIDN'T HAVE TO WORK FIVE DAYS A WEEK.

SO HE AND MISS MC DERMOTT DIVIDED THE EVENING SHIFT. OKAY.

AND THAT REMEMBER WHEN SHE SAID IN OCTOBER HE HAD -- HE WAS IN THE HOSPITAL AGAIN, AND MISS MC DERMOTT WORKED THE NIGHT SHIFT AGAIN.

WELL, LET'S STOP AND THINK A MINUTE. MISS MC DERMOTT IS ACCUSED OF HAVING MR. BELL QUOTE END QUOTE DISABLED.

GOSH, WHAT BENEFIT IS THAT TO HER.

SHE DOESN'T GET ANY JOB WORKING DAYS.

DID YOU HEAR ANY TESTIMONY ABOUT HER GETTING A JOB WORKING DAYS HERE.

COUNSEL SAID THAT IN ARGUMENT, BUT IT IS NOT VALID. IT NOT TRUE.

AND YET WHAT HAPPENS BECAUSE OF DE WAYNE BELL? SHE NOW IS RELEGATED TO TWO OR THREE DAYS A WEEK INSTEAD OF FIVE DAYS A WEEK.

SO INSTEAD OF HAVING A PERMANENT JOB SHE IS WORKING LESS HOURS.

AND ASK YOURSELF WHAT IS THE MOTIVATION FOR THAT, TO WORK LESS, MAKE LESS, BECAUSE SOMEBODY IN THE DAYTIME HAS TO BE REPLACED.

AND BEING REPLACED YOU WILL RECALL THERE WAS AN EFFORT MADE BY MISS MADER -- THERE IS A LITTLE PICTURE. I THINK IT IS 109 -- TO IMPUTE SOME SINISTER MOTIVATION TO A PICTURE OF MISS MC DERMOTT WITH JOHN PHILLIPS.

YOU TAKE A LOOK AT THAT PICTURE.

IT SHOWS THE TWO OF THEM, MR. PHILLIPS WHO WORKED DAYS, STILL WORKS DAYS, AND MISS MC DERMOTT WHO WORKED A COUPLE OF NIGHTS A WEEK.

SO LET'S STOP AND THINK, LADIES AND GENTLEMEN, WHAT IS THE SMOKE SCREEN THAT WAS PRESENTED TO YOU.

WHAT DID WE HEAR IN THE PENALTY PART OF THIS PHASE FROM THE PROSECUTION.

WE HEARD DE WAYNE BELL TESTIFY. OKAY.

HE TOLD US ABOUT THAT HE HAD MET JIMMY LUNA IN

THE IN TOUCH BAR AND WAS INTRODUCED BY MAUREEN MC DERMOTT. REMEMBER THAT.

IF YOU HAVE ANY PROBLEMS, HAVE IT REREAD.

THAT HE AGAIN MET JAMES LUNA AND THIS OTHER BLACK GUY IN THE CANYON ROOM PRIOR TO THE EVENING OF APRIL 8TH. THEY WERE INTRODUCED AGAIN. TALKED AGAIN.

THAT HE SAW JAMES LUNA AND THE OTHER GUY THAT HE HAD BEEN INTRODUCED ON THE EVENING OF APRIL 9TH, 1983, IN THE IN TOUCH BAR.

MAY HAVE TALKED TO THEM. MAY HAVE SOCIALIZED. MIGHT EVEN HAVE PLAYED POOL.

WHAT DID OUR PROFESSIONAL KILLER WHO DOESN'T KNOW THE TRUTH FROM ANYTHING ELSE COME IN AND TELL US?

REMEMBER JAMES LUNA SITTING UP HERE ON THE STAND IN THE PENALTY PHASE.

I NEVER MET THOSE GUYS BEFORE. I NEVER SAW THEM BEFORE. I NEVER KNEW OF THEM.

FIRST NIGHT I SAW THEM WAS THAT NIGHT. WAIT A MINUTE. I MAY HAVE SEEN HIM ON A BUS BENCH.

DURING A BRIEF RECESS YOU RECALL WE BROUGHT MR. BELL BACK UP ON THE STAND.

WE STOPPED MR. LUNA'S TESTIMONY FOR A FEW MINUTES AND PUT MR. BELL BACK ON SO HE COULD GET BACK TO FLORIDA WHERE HE WAS WORKING.

PUT HIM ON THE STAND. ASKED MR. LUNA TO COME OUT. REMEMBER THAT.

MR. BELL, DO YOU SEE THE GENTLEMAN THAT JUST CAME OUT HERE.

IS THAT THE PERSON YOU HAVE IDENTIFIED IN THE PHOTOGRAPHS AS THE PERSON THAT YOU MET AT THE IN TOUCH, SAW IN THE CANYON ROOM, TALKED TO?

YEAH. THAT'S HIM.

WHY WOULD MR. LUNA LIE?

MISS MC DERMOTT -- EXCUSE ME -- MISS MADER YESTERDAY SAID BELL HAS A LAPSE OF OPINION.

HE DOESN'T HAVE HIS MEMORY. DOESN'T RECALL THAT.

LUNA, OF COURSE, KNOWS ALL THE TRUTH. HIS BITS AND PIECES MEMORY WHEN IT SERVES HIS NEEDS, HE IS MUCH MORE ACCURATE THAN MR. BELL.

IS THAT MAN GOING TO SIT THERE, MR. BELL, AND TELL YOU UNDER OATH THAT HE MET MR. LUNA TWO OR THREE OCCASIONS AND LUNA IS GOING TO STAND RIGHT UP HERE AND LIE JUST AS EASY AS HE CAN TO YOU.

HE IS A COLD FISH. HE DOESN'T CARE ABOUT THE TRUTH.

BUT HE HAS GOT EVEN A WORSE MOTIVATION. PART OF HIS ARRANGEMENT WITH THE PROSECUTION IS THAT HE HAS TO COME IN AND TESTIFY.

PART OF HIS DEAL IS THAT HE HAS GOT TO COME IN AND TESTIFY.

SO WHAT DOES MR. LUNA DO?

HE HAS GOT TO SATISFY THAT CONDITION BY COMING IN IN THE GUILT PHASE, AND I ACCEPT THAT AS A FACT, BUT WHAT HAPPENS HERE IN THE PENALTY PHASE.

HE CAN'T TELL THE TRUTH HERE ON A SIMPLE THING.

OH, LET'S TALK A LITTLE BIT ABOUT POOR MR. LUNA.

HE BREAKS DOWN AND CRIES PERIODICALLY, AND HE WANTS YOU, LADIES AND GENTLEMEN, TO BELIEVE THAT HE DOES THIS, HE GOES OUT TO DISABLE HIM WITHOUT ANY WEAPON.

PICKS ONE UP SUPPOSEDLY AND THROWS IT AWAY ON THE WAY HOME.

AND LET ME ASK YOU DO YOU REMEMBER HEARING HIS TESTIMONY AND SEEING THE LOOK ON HIS FACE WHEN HE SAID, YEAH, WE DROVE HOME, BUT WE GOT OFF THE FREEWAY.

WE WENT TO ALISO VILLAGE AND I PICKED UP THE PHONE AND I WAS CRYING, AND I MADE A PHONE CALL AND I TOLD

MIKI AND THEN I GUESS THEY GOT BACK IN THE CAR, AND THEY WENT BACK OUT TO LA PUENTE.

AND HE SAT THERE RIGHT THERE IN FRONT OF YOU AND WANTS YOU TO BELIEVE THAT THAT IS TRUE.

YESTERDAY MISS MADER INDICATED THAT FINANCIAL GAIN SPECIAL CIRCUMSTANCES IS THE WORST. NOBODY GETS A PASS ON THAT. NOBODY SHOULD GET A PASS ON IT.

NO NURSE, NO DOCTOR, NO LAWYER, AND THEN SHE SAID NOT EVEN A POLICEMAN SHOULD GET A PASS FOR BEING INVOLVED IN A MURDER FOR FINANCIAL GAIN.

I ALMOST DIDN'T BELIEVE MY EARS WHEN I HEARD THAT, WHEN SHE SAID NOT EVEN A POLICEMAN, BECAUSE, LADIES AND GENTLEMEN, RIGHT DOWN THE HALL HERE ABOUT 50 FEET TO 75 FEET AWAY THERE IS A DEPARTMENT KNOWN AS DEPARTMENT S PRESIDED OVER BY JUDGE DARLENE SCHEMPP.

IN THAT COURTROOM A COUPLE OF YEARS AGO BEING TRIED FOR THE EXACT SAME CHARGE, MURDER FOR FINANCIAL GAIN, WERE TWO POLICE OFFICERS, FORD AND VON VILLAS.

THEY HAD ALREADY BEEN TRIED DOWNTOWN LOS ANGELES ON ONE TRIAL OF SOLICITATION TO COMMIT MURDER ON A SEPARATE CHARGE.

BOTH HAVING BEEN CONVICTED, FORD AND VON VILLAS THEN WERE BROUGHT OUT HERE TO BE TRIED UNDER SPECIAL CIRCUMSTANCES FOR FINANCIAL GAIN.

A JURY JUST LIKE YOU FROM THIS COMMUNITY SAT THERE AND HEARD TESTIMONY THAT TWO OFFICERS WITH ABOUT FORTY YEARS OF POLICE EXPERIENCE WENT OUT AND KILLED A PERSON AT THE BEHEST OF A YOUNG LADY, A YOUNG LADY WHO WAS PERMITTED

TO PLEAD TO SECOND DEGREE MURDER TO TESTIFY AGAINST THEM.

THAT JURY HAD A DISTRICT ATTORNEY WHO WAS ARGUING DON'T GIVE HIM A PASS. DON'T GIVE EITHER ONE OF THESE A PASS.

IF ANYONE DESERVES TO DIE, IT IS A LAW ENFORCEMENT OFFICER WHO IS SWORN TO UPHOLD THE LAW AND THAT IS FAIR. EXECUTE THEM.

WHAT HAPPENED?

THE JURY RIGHT DOWN THE HALLWAY HERE CHOSE INSTEAD TO SENTENCE BOTH OF THEM TO SERVE THE REST OF THEIR NATURAL LIFE IN PRISON, LIFE WITHOUT PAROLE, BECAUSE THEY FELT THAT IS THE WAY YOU PUNISH THEM.

MISS MC DERMOTT DOESN'T HAVE A SOLICITATION FOR MURDER CONVICTION.

WOULD THIS BE AN APPROPRIATE PLACE JUST FOR A BRIEF MOMENT?

THE COURT: IF YOU LIKE.

LET'S TRY TO RESUME AT FIVE AFTER THE HOUR. ABOUT SEVEN MINUTES.

YOU ARE EXCUSED.

(RECESS.)

THE COURT: ALL RIGHT. WE WILL RESUME.

THE RECORD WILL SHOW THAT MISS MC DERMOTT IS PRESENT, ALL COUNSEL ARE HERE, DETECTIVE RIEHL, ALL JURORS AND ALTERNATES.

ALL RIGHT. YOU MAY RESUME.

MR. INGBER: THANK YOU VERY MUCH, YOUR HONOR.

SOMETIMES WITH A BREAK YOU GET A CHANCE TO REFLECT ON WHAT YOU SHOULD HAVE SAID, SHOULD NOT HAVE SAID.

AND THERE WERE MANY THINGS THAT I PROBABLY SHOULD HAVE SAID THAT I WILL HAVE FORGOTTEN OR JUST OVERLOOKED THEM.

I HOPE THAT IN THE COLLECTIVE WISDOM THAT ALL, I GUESS IT'S 15 OF YOU NOW, WILL AS YOU TRY TO ARRIVE AT THIS TERRIBLY DIFFICULT INDIVIDUAL OPINION EACH ONE OF YOU MUST MAKE IN YOUR OWN HEART, THAT IF SOME OF YOU THINK SOMETHING THAT SHOULD HAVE BEEN RAISED OR SHOULD BE TALKED ABOUT THAT I DIDN'T MENTION, I THINK YOUR OWN CONSCIENCES WILL URGE YOU TO DO SO BECAUSE IN THE PROCESS OF TRYING TO DECIDE WHAT'S RIGHT EVERYTHING SHOULD COME OUT.

NOW, THE JUDGE READ SOME INSTRUCTIONS TO YOU YESTERDAY ABOUT WHAT FACTORS YOU HAVE TO POSSIBLY CONSIDER IN CONNECTION WITH WHICH IS THE APPROPRIATE PUNISHMENT.

AND THE FIRST TWO THAT HE READ ARE GENERALLY CALLED FACTORS IN AGGRAVATION. IN OTHER WORDS, IF THE INCIDENT ITSELF IS A FACTOR, IF YOU FIND IN ADDITION TO HAVING FOUND HER GUILTY THAT IT'S AN ADDITIONAL FACTOR IN AGGRAVATION, YOU CAN CONSIDER ANY OTHER CRIMINAL ACTIVITY THAT SHE MAY HAVE BEEN INVOLVED IN IF PROVEN BEYOND A

REASONABLE DOUBT.

AND THOSE ARE GENERALLY THE ONLY TWO FACTORS THAT ARE GENERALLY CONSIDERED FACTORS IN AGGRAVATION. ALL THE REST ARE SUPPOSEDLY FACTORS IN MITIGATION, IF THEY APPLY.

YOU KNOW, THERE'S ONE OF THEM I THINK THE JUDGE READ THAT IF THE VICTIM WAS RESPONSIBLE IN SOME WAY FOR HIS OWN DEATH. ABOUT ONE IN ABOUT 50 MILLION THAT'S GOING TO HAPPEN, BUT IT'S ONE OF THE FACTORS THE LEGISLATURE SAID.

SO JUST BECAUSE THEY THREW IT IN THERE AND THE JUDGE READ IT TO YOU DOESN'T MEAN IT APPLIES TO THIS CASE AND YOU CAN JUST DISREGARD THAT.

AND IT'S TRUE THE MOST IMPORTANT ONE FROM THE DEFENSE STAND POINT IS WHAT IS CALLED THE LAST FACTOR. ANYTHING THAT YOU HEAR ABOUT THE CRIME ITSELF THAT EXTENUATES OR DOESN'T EXCUSE IT, BUT IT EXPLAINS IT.

AND MOST EVERYTHING THAT WE HEAR IN THIS CASE FALLS INTO A OR K.

THE PROSECUTION IN THIS CASE WANTS YOU TO EMPHASIZE THE FACTS OF THE FIRST PART OF THE CRIME WHICH YOU HAVE ALREADY FOUND HER GUILTY OF. AND THAT'S WHAT SHE SPENT ALL OF HER TIME ON YESTERDAY.

AND THE DEFENSE WOULD LIKE YOU TO CONSIDER K. ANYTHING ABOUT THE DEFENDANT THAT CAUSES YOU TO BE CONCERNED WITH WHAT'S THE APPROPRIATE PENALTY.

BUT IT REALLY BOILS DOWN TO THIS LADIES AND GENTLEMEN. THE PROSECUTRIX IN THIS CASE WANTS YOU TO KILL MISS MC DERMOTT BASED UPON THE LIPS AND THE UTTERANCES OF

JIMMY LUNA, MARVIN LEE AND DONDELL LEE.

WE KNOW A LITTLE BIT ABOUT JIMMY LUNA. WE KNOW THAT HE'S GOT A PRIOR FELONY CONVICTION. AND WE DO KNOW THAT A CONDITION OF HIS DEAL WITH REGARD TO HIS CREDIBILITY IS THAT HE HAS TO TESTIFY TO CONVICT -- EXCUSE ME, HE HAS TO TESTIFY IN THE TRIAL OF MISS MC DERMOTT.

HE ALSO HAS TO COME BACK AND TESTIFY AGAIN IN THE SECOND PHASE. AND IT'S THROUGH HIS LIPS THAT THE PROSECUTION WANTS YOU TO COME TO THE CONCLUSION THAT MAUREEN MC DERMOTT DESERVES TO DIE.

MARVIN LEE. HE'S ONLY A CONVICTED ROBBER PREVIOUS TO THIS INCIDENT. WASN'T EVEN OUT OF PRISON VERY LONG BEFORE HE QUOTE UNQUOTE TOLD US ABOUT A ROBBERY HE DIDN'T DO ANYTHING, BUT HE PLED GUILTY TO IT AND HOW HIS CODEFENDANT GOT SOMETHING LIKE SIX OR SEVEN YEARS AND HE GOT, I THINK, WAS COUNTY JAIL, TIME SERVED OR SOMETHING LIKE THAT.

HE'S ALSO GUILTY, LADIES AND GENTLEMEN, ISN'T HE OF ATTEMPTED MURDER THAT YOU FOUND IN THE INCIDENT OF MARCH 21ST?

HE'S ALSO GUILTY OF THE ACTUAL MURDER UNDER SEVERAL DIFFERENT APPROACHES. CERTAINLY, AS AN AIDER AND ABETTOR.

AND IF YOU BELIEVE RANDY HOWARD OF WHAT JIMMY LUNA TOLD HIM, THAT MARVIN LEE STABBED HIM A NUMBER OF TIMES TOO. OR IF YOU EVEN WANT TO BELIEVE JIMMY LUNA, HE CHOKED HIM UNTIL HE LOOKED PURPLE.

AND THAT'S FOR ABSOLUTELY NO REASON. HE DIDN'T KNOW THE MAN. NEVER GOT ANY MONEY FOR IT. AND IT'S THROUGH HIS LIPS THAT THE PROSECUTION SAYS MAUREEN MC DERMOTT DESERVES TO DIE.

DONDELL LEE. WONDERFUL PILLAR OF SOCIETY. CONVICTED FELON. WAS BROUGHT HERE IN CUSTODY BECAUSE HE'S BEEN A DOPE DEALER IN NEVADA. AND AS AN AIDER AND ABETTOR ISN'T HE LIKEWISE GUILTY OF THE MURDER IN THIS CASE?

HE POINTED THE GUN. TOLD HIM TO MOVE OVER. DIDN'T HE AID AND FACILITATE WHAT LATER ON BECAME THE MURDER?

AND FOR ABSOLUTELY NO REASON. NO MC HE EVEN BEGGED TO GO. HE JUST QUOTE UNQUOTE HAPPENED AT GRANDMA'S. THE GUYS SAID, "WE ARE GOING TO GO OUT AND SOMETHING."

"LET ME GO ALONG. COME ON. LET ME GO ALONG. OH, IT'S A ROBBERY. OH, SURE. THAT'S MY BAG. I CAN DO THAT."

AND IT'S THROUGH HIS LIPS, LADIES AND GENTLEMEN, THE PROSECUTRIX ASKS YOU TO EXECUTE MAUREEN MC DERMOTT.

YOU CAN, LADIES AND GENTLEMEN, LOOK TO THESE THREE INDIVIDUALS IN DECIDING MISS MC DERMOTT'S FATE. TO THEIR HONESTY, THEIR MOTIVES, THEIR BIAS AND, YES, THROUGH THE MOUTH OF THESE PROFESSIONAL KILLERS YOU CAN DECIDE WHETHER YOU BELIEVE THEM THAT MISS MC DERMOTT DESERVES TO DIE. IS THAT ENOUGH FOR YOU TO BE SATISFIED?

YESTERDAY MISS MADER QUOTED FROM THE BIBLE. I GUESS I QUOTED FROM THE BIBLE IN THE GUILT PHASE. I SHOULDN'T HAVE BEEN TO SURPRISED SHE QUOTED FROM THE BIBLE IN THIS PHASE.

BUT THERE IS THE CONCEPT OF AN EYE FOR AN EYE, TOOTH FOR A TOOTH. BIBLICAL. BUT OUR LEGISLATURE SUPPOSEDLY IS A LITTLE MORE SOPHISTICATED THAN SIMPLY TO EXTRACT FROM THE BIBLE WHICH MURDERS QUALIFY FOR THE DEATH PENALTY AND WHICH ONES DON'T.

YOU CAN START OFF WITH THE PREMISE THAT IF A PERSON TAKES A LIFE THEY OUGHT TO LOSE THEIR LIFE. AND THERE ARE A LOT OF PEOPLE THAT BELIEVE THAT.

AND IN THE SCOPE OF THINGS THAT SOUNDS PRETTY APPROPRIATE. WE KNOW THAT IN IRAN AND SOME OF THE OTHER COUNTRIES THAT STILL HAVE THE DEATH PENALTY, RUSSIA, SOUTH AFRICA, AN EYE FOR AN EYE IS PRETTY MUCH THE UNDERSTANDING.

BUT WE HERE IN CALIFORNIA HAVE SOMETHING DIFFERENT THAN THAT. WE HAVE A SCHEME SET FORTH BY THE LEGISLATURE THAT THERE ARE MURDERS, THERE ARE HOMICIDES, THERE ARE KILLINGS FOR WHICH THE TAKING OF A LIFE MAY IN SOME CIRCUMSTANCES CAUSE THE TAKER TO LOSE THEIR LIFE.

MANY OF YOU ARE FAMILIAR WITH THE CONCEPT THAT IN MANSLAUGHTER A LIFE HAD BEEN TAKEN. BUT UNDER CIRCUMSTANCES THAT WARRANT THAT, A PERSON MAY TAKE A LIFE, MAY END UP IN THE COUNTY JAIL FOR A YEAR OR SPEND 11 YEARS IN PRISON. AND YET THEY HAVE TAKEN ALIVE.

WE KNOW THAT THERE IS SUCH A THING AS A SECOND DEGREE MURDER ON A NON PEACE OFFICER VICTIM AND THAT PERSON SPENDS 15 YEARS TO LIFE IN PRISON. THAT PERSON TOOK A LIFE. THAT PERSON IS ELIGIBLE FOR PAROLE.

WE KNOW THAT THERE ARE FIRST DEGREE MURDER WITHOUT SPECIAL CIRCUMSTANCES. AND YOU RECALL IN THE ILLUSTRATIONS WHEN WE WERE TRYING TO SELECT YOU THAT I ILLUSTRATED IF I WALKED UP TO MR. BURKOW, BECAUSE I DIDN'T LIKE HIM, POINTED A GUN AT HIM AND PREMEDITATEDLY PLANNED TO KILL HIM AND SHOT HIM IN THE HEAD, OUR LEGISLATURE SAID THAT'S A FIRST DEGREE MURDER. AND I WOULD HAVE TAKEN A LIFE HAD I DONE SO.

BUT IT'S WITHOUT SPECIAL CIRCUMSTANCES. AND, THEREFORE, THE SENTENCE FOR THAT IS 25 YEARS TO LIFE WITH THE ELIGIBILITY FOR PAROLE. AND, YES, I HAD TAKEN A LIFE.

YOU WILL NOTICE THEN AS WE MOVE UP THE TRIANGLE AS WE GET CLOSER TO THE TIP THE SITUATIONS BEGIN TO GET RARER AND RARER. WE FIND THAT THERE ARE SOME MURDERS THAT FIT INTO THE SPECIAL CIRCUMSTANCES THAT ARE CALLED FIRST DEGREE MURDER FOR WHICH THE SENTENCE OF THAT CRIME ARE BUT TWO THINGS.

WE HAVE ONE THING WHICH MANDATES A LIFE IN PRISON WITHOUT PAROLE. AND THEN WE HAVE RESERVED AT THE TOP OF THIS TRIANGLE A SELECT FEW OF ALL OF THOSE THAT WE CHARGE WITHIN OUR SOCIETY. JUST A FEW CASES IN WHICH THE DEATH PENALTY BECOMES APPROPRIATE.

IN ALL OF THESE CASES A LIFE HAS BEEN TAKEN. SOCIETY HAS SUFFERED. BUT NOT IN EVERY CASE DO WE EVEN

THINK ABOUT THE DEATH PENALTY.

WE RESERVE IN OUR SCHEME OF THINGS THAT IT HAS TO BE THE MOST OUTRAGEOUS OF THE OUTRAGEOUS BEFORE WE CONSIDER THAT THAT ULTIMATE FUNCTION, THAT ULTIMATE PUNISHMENT BECOMES APPROPRIATE.

AND JURORS SUCH AS YOURSELF ARE GUIDED BY THE INSTRUCTIONS THAT TELL YOU THAT IT'S ONLY IN THE RARE CASE THAT YOU SELECT THE TOP OF THE TRIANGLE.

HOW DO I KNOW THAT? BECAUSE I REMEMBER IN THE INSTRUCTIONS THAT YOU GOT YESTERDAY THAT YOU WILL HAVE BACK IN THE JURY ROOM THAT THERE IS A SPECIFIC INSTRUCTION THE COURT GAVE YOU. TOLD YOU ABOUT THE MITIGATING FACTORS AND THE AGGRAVATING FACTORS.

AND THEN LET ME READ TO YOU WHAT IT SAID. IT SAYS TO RETURN A JUDGMENT OF DEATH, EACH OF YOU, NOT THE COLLECTIVE, EACH OF YOU MUST, NOT MAY, MUST BE PERSUADED THAT THE AGGRAVATING CIRCUMSTANCES ARE SO SUBSTANTIAL, NOT JUST OUTWEIGH, NOT JUST IN THE SCHEME OF THINGS, ARE SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT PAROLE.

SO YOU WILL HAVE A BIG JOB TO DETERMINE, FIRST OF ALL, IF IT'S EVEN CONSIDERED BY YOU, AND SECOND OF ALL IS IT SO SUBSTANTIAL IN THE SCHEME OF ALL THE THINGS OF FAIRNESS, IN THE SCHEME OF THINGS OF YOUR CONSCIENCE THAT THIS IS SO SUBSTANTIAL THAT IT WARRANTS THE IMPOSITION OF THAT LAST ULTIMATE PUNISHMENT THAT'S RESERVED FOR ONLY THE WORST.

AND STOP AND THINK OF WHAT YOUR FELLOW JURORS

HAVE HAD THE SAME INSTRUCTIONS GIVEN THEM IN THE BUONO, THE BIANCHI, THE MAXWELL. EVEN THE FORD AND VON VILLAS, THE TWO OFFICERS RIGHT DOWN THE HALL HERE. THE SAME LAW GIVEN TO THEM.

I SUBMIT THE EVIDENCE IN THIS CASE DOES NOT CLEARLY SHOW IN ANY WAY THAT THE AGGRAVATING FACTORS SO SUBSTANTIALLY OUTWEIGHED THE MITIGATING FACTORS, IF THEY DO AT ALL, BECAUSE YOU HAVE TO REMEMBER THERE IS ANOTHER INSTRUCTION HERE THAT MAY CAUSE YOU TO CONSIDER THE WHOLE BELL INCIDENT AS NOT EXISTENT.

DO YOU REMEMBER THE INSTRUCTION THE JUDGE SAID ABOUT YOU HAVE TO BE PERSUADED BEYOND A REASONABLE DOUBT BASED UPON THE TESTIMONY OF MR. LUNA THAT MISS MC DERMOTT WAS INVOLVED IN THE BELL INCIDENT BEFORE YOU WILL EVEN CONSIDER THAT AS AN AGGRAVATING FACTOR?

AND IN ORDER TO CONSIDER IT YOU HAVE TO DETERMINE LUNA AS A HIGHLY CREDIBLE WITNESS. SO THAT YOU DON'T HAVE ANYTHING IN THIS PENALTY PHASE THAT'S PRESENTED TO YOU, IF YOU DON'T BELIEVE HIM, THAT MISS MC DERMOTT DID IT OR HIRED HIM. YOU DON'T HAVE ANYTHING IN THE AGGRAVATING ASPECT. ALL YOU HAVE IS WHAT YOU HEARD IN THE FIRST PART. AND THAT, I SUBMIT, IS NOT SO SUBSTANTIAL THAT IT WARRANTS IT.

NOW, THERE WAS AN INSTRUCTION REPEATED YESTERDAY, IF YOU WILL RECALL, ABOUT THE TESTIMONY OF AN ACCOMPLICE IS TO BE VIEWED WITH CAUTION AND HAS TO BE CORROBORATED.

DO YOU REMEMBER YOU HEARD THAT THE FIRST TIME IN THE FIRST PHASE OF THE TRIAL? IT WAS REPEATED AGAIN YESTERDAY. AND THERE IS A GOOD REASON WHY IT NEEDS REPEATING.

YOU SAW THE WAY HE TESTIFIED HERE AGAIN. ARE YOU PREPARED TO SEND MISS MC DERMOTT TO THE GAS CHAMBER ON THE VOICE AND LIPS OF JAMES LUNA THE WAY HE TESTIFIED HERE?

ARE YOU PERSUADED BEYOND A REASONABLE DOUBT? I SUBMIT NO HUMAN BEING COULD BE.

REASONABLE DOUBT WAS A CONCEPT THAT WE HAD DURING THE FIRST PHASE OF THE TRIAL. REASONABLE DOUBT IS

NOT THE CONCEPT THAT WE ARE DEALING WITH IN THIS PHASE OF THE TRIAL.

WE ARE DEALING WITH FAIRNESS. WE ARE DEALING WITH EQUAL JUSTICE EQUALLY APPLIED. AND WE ARE ALSO DEALING WITH THE FACT THAT YOU KNOW NOTHING IN LIFE IS 100 PERCENT PERFECT, 100 PERCENT CERTAIN.

EVEN THOUGH MS. MADER WOULD LIKE TO TELL YOU THAT THERE'S ABSOLUTELY NO DOUBT ANYWHERE IN THIS CASE, THAT'S HER BELIEF. DON'T ACCEPT MY BELIEF ANYMORE THAN YOU ACCEPT HERS. SHE IS A PAID ADVOCATE. I'M A PAID ADVOCATE.

CONCEPT YOU HAVE TO CONCERN YOURSELF WITH, LADIES AND GENTLEMEN, IS THIS: IN ORDER TO CONVICT MISS MC DERMOTT YOU HAD TO BE SATISFIED BEYOND A REASONABLE DOUBT. THAT'S THE TEST AND APPARENTLY YOU WERE.

BUT THE TEST IN DECIDING WHETHER SHE SHOULD GO TO THE GAS CHAMBER IS MORE THAN THAT. MUCH MORE THAN THAT. YOU HAVE GOT TO BE SATISFIED WITHIN YOURSELF THAT THERE IS NO DOUBT IN YOUR MIND THAT THAT'S THE ONLY AVAILABLE PUNISHMENT THAT SHE DESERVES.

IF YOU HAVE SOMEWHERE BETWEEN REASONABLE DOUBT AND ALMOST PERFECT BELIEF, THAT CONCEPT OF THAT KIND OF A DOUBT, THEN THE LAW SAYS YOU INDIVIDUALLY DECIDE THAT DEATH IS NOT MANDATED.

CAN YOU BE ABSOLUTELY CERTAIN BASED UPON THE TESTIMONY OF THE THREE INDIVIDUALS IN THIS CASE THAT DEATH IS THE ONLY ANSWERS THAT'S MANDATED?

LAWYERS ARE NOT PERMITTED TO GIVE YOU THEIR OPINIONS. I DON'T PURPORT TO TELL YOU MINE NOR WILL MS.

MADER GIVE YOU HERS.

THE ULTIMATE DECISION IS YOURS, LADIES AND GENTLEMEN. AND I WILL TELL YOU WHY IT'S SO DIFFICULT IN THIS CASE.

BECAUSE YOU MAY SAY TO YOURSELF, "WELL, I FOUND HER GUILTY BASED UPON WHAT LUNA SAID IN THE FIRST CASE," OR YOU MAY HAVE THROWN IT OUT. WHO KNOWS. BUT WHATEVER.

AND HE COMES BACK IN HERE AND HE PATENTLY TELLS YOU A STORY THAT YOU CAN'T SWALLOW THIS TIME. YOU DON'T HAVE TO SAY, "THAT BECAUSE WE FOUND HER GUILTY, THAT HE TESTIFIED THEN, THAT WE ARE BOUND TO FOLLOW THROUGH WITH IT IN ORDER TO BE LOGICAL." YOU DON'T HAVE TO DO THAT AT ALL.

ALL YOU HAVE TO DECIDE IS, "IN MY OWN HEART DO I HAVE A DOUBT? DO I HAVE A LINGERING DOUBT THAT DEATH IS THE ONLY ANSWER IN THIS CASE?"

AND IF YOU DO, THE LAW MANDATES THAT EACH ONE OF YOU IN YOUR OWN HEART MAKE THE DECISION THAT I CAN'T IN THE FAIR CONSCIOUS OF APPLYING EQUAL JUSTICE TO MISS MC DERMOTT SEND HER TO DEATH BASED UPON THE TESTIMONY OF A WITNESS WHO SAT UP THERE AND TOLD YOU, "I THINK I STABBED HIM A FEW TIMES. I'M NOT SURE."

"WELL, COULD YOU HAVE STABBED HIM 44 TIMES?"

"OH, HOW COULD I HAVE DONE THAT? I DON'T REMEMBER DOING THAT. YOU HAVE TO BE A MANIAC TO DO THAT."

AND THEN HE HAD THE AUDACITY TO SAY, "WELL, YOU KNOW, THEY SAY THAT I CUT OFF THE PENIS. BUT I DON'T REMEMBER THAT."

BUT HE REMEMBERS BITS AND PIECES THAT ARE

NECESSARY TO SAVE HIS LIFE.

YES, CLEARLY, THERE IS THAT KIND OF A DOUBT THAT DEATH IS APPROPRIATE IN THIS CASE. AND THAT MISS MC DERMOTT UNDER THE EQUAL JUSTICE CONCEPT, UNDER THE FAIRNESS THAT'S IN YOUR HEART, SHE DOES NOT DESERVE THE DEATH PENALTY.

AND YOU KNOW THE ALTERNATIVE OF SERVING LIFE IN PRISON. ACCORDING TO MR. ENOMOTO WHO IS PROBABLY -- NO MATTER HOW HARD MS. MADER TRIED TO MAKE HIM LOOK LIKE A HIRED HAND FOR EIGHT $85 AN HOUR OR A TOTAL OF ABOUT $400, SHE TRIED TO IMPUTE THAT HE WOULD COME DOWN HERE AND TELL US A STORY AND TELL -- SAID SOME OF THE SAME THINGS MISS MOORE DID THE DAY BEFORE. HE WAS HONEST. HE WAS TOTALLY HONEST. AND YET THERE WAS THE INTIMATION THAT, "OH, YOU KNOW, YOU'RE A PAID HIRED HAND TO COME DOWN HERE."

HE SAID THAT IN HIS 28 YEARS IN CORRECTIONS THAT LADY SITTING RIGHT THERE WOULD BE, IN HIS OPINION, A MODEL PRISONER AND NO THREAT TO ANYONE IN THE CORRECTIONAL SYSTEM BASED UPON HER TRACK RECORD.

LASTLY, LADIES AND GENTLEMEN, WHY IS LIFE IN PRISON MOST APPLICABLE TO MISS MC DERMOTT? BECAUSE I THINK YOU CAN HONESTLY PUNISH HER BY TELLING HER THE FOLLOWING:

"MAUREEN MC DERMOTT, YOU'RE 42 YEARS OLD. IF WE SEND YOU TO PRISON NOW, FOR ABOUT THE NEXT FIVE TO 10 YEARS YOU'RE GOING TO HAVE TO FIGHT TO STAY ALIVE IN A SYSTEM THAT YOU HAVE NO IDEA EXISTS BUT FOR THE FIVE YEARS YOU WERE IN SYBIL BRAND."

SHE IS NOT STRONG. SHE IS NOT SOPHISTICATED. SHE HAS NEVER BEEN IN CUSTODY BEFORE. SHE DOESN'T KNOW WHAT THAT'S LIKE.

SHE IS GOING TO FIGHT OFF FOR THE NEXT FIVE YEARS OR SO, FIVE TO EIGHT YEARS. AND THEN ABOUT AGE 50 SHE IS GOING TO GET A LITTLE OLDER. SHE IS GOING TO HAVE SOME BODILY FUNCTIONS THAT AREN'T GOING TO WORK SO WELL FOR HER.

THOSE BODILY FUNCTIONS AREN'T GOING TO BE TREATED BY THE COUNTY HOSPITAL DR. MERRITT OR BEVERLY HILLS PHYSICIANS THAT COME THERE.

AND FOR THE NEXT 10 YEARS AFTER THAT SHE IS GOING TO SEE, AS AGE TENDS TO DO, AND THE LOSS OF FREEDOM TENDS TO WORK ON THE PSYCHOLOGY OF A HUMAN BEING, THAT SHE WILL NOT RECEIVE THE MEDICAL TREATMENT SHE'S RECEIVED, IF AT ALL.

AND THEN AFTER THAT, IF SHE LIVES ANOTHER 10 YEARS AFTER THAT SHE WILL BE LIVING HER REMAINING YEARS WONDERING, "WHAT DID I DO? WHAT MUST I PAY FOR MY TRANSGRESSION OF MARCH 21ST OF 1985 AND APRIL 28, 1985?"

THAT WAY SHE SITS AND THINKS ABOUT IT EVER SINGLE DAY OF THE LOSS OF FREEDOM OF WHAT YOU HAVE FOUND HER TO BE RESPONSIBLE FOR. THAT'S PUNISHMENT. AND THAT'S WHAT REFLECTIVE PUNISHMENT IS REALLY ALL ABOUT.

I'M SURE NONE OF US CAN CONSIDER WHAT THAT'S LIKE. BUT, YES, THAT'S WHAT MISS MC DERMOTT DESERVES. I THINK THAT YOUR SENSE OF FAIRNESS AND I THINK THAT YOUR SENSE OF APPLYING EQUAL JUSTICE SUFFICIENTLY PROVIDES YOU WITH THE OPPORTUNITY OF RETURNING THAT TERRIBLE, TERRIBLE VERDICT OF HAVING HER SPEND 10, 20 OR 30 YEARS IN LEVEL FOUR ONLY TO SOME DAY WHEN HER BODILY FUNCTIONS CEASE TO EXIST EXIT IN A CASKET FROM STATE PRISON AT WHO KNOWS WHAT DATE.

THANK YOU VERY MUCH.

THE COURT: JUST CONCLUDING PARTS OF AN INSTRUCTION.

"YOU SHALL NOW RETIRE -- " AND THIS IS THE LANGUAGE THAT THE LAW REQUIRES THAT I READ. IT SAYS "-- AND

APPEAL,CLOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:04-cv-00457-DOC

Maureen McDermott v. Gwendolyn Mitchell
Assigned to: Judge David O. Carter
Case in other court: 9th Circuit, 17-99005
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 01/26/2004
Date Terminated: 08/15/2017
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

Petitioner

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Date Filed	#	Docket Text
01/26/2004	1	REQUEST for Appointment of Counsel and MOTION for Stay of -Execution Date filed by petitioner Maureen McDermott. (jag,) (mgu). (Entered: 01/29/2004)
01/26/2004	2	DECLARATION in support of MOTION for Appointment of Counsel MOTION for Execution Date 1 filed by petitioner Maureen McDermott. (jag,) (mgu). (Entered: 01/29/2004)
01/26/2004	3	NOTICE of filing of Death Penalty Habeas Corpus petition (jag,) (mgu). (Entered: 01/29/2004)
01/26/2004		Judge Audrey B. Collins added. Judge David O. Carter no longer assigned to case. (rrey,) (Entered: 01/30/2004)
01/26/2004		Judge David O. Carter added. Judge Audrey B. Collins no longer assigned to case. (rrey,) (Entered: 01/30/2004)
01/27/2004	4	ORDER TO REASSIGN CASE due to self-recusal pursuant to Section 3.3 of General Order 224 by Judge Audrey B. Collins. Case transferred to the calendar of Judge David O. Carter for all further proceedings. Case number now reads as CV 04-457 DOC.(rn,) (Entered: 01/30/2004)
02/04/2004	5	ORDER APPOINTING COUNSEL by Judge Audrey B. Collins: Ordered that the

		Federal Public Defender is appointed as counsel for petitioner Maureen McDermott in this action 1 ; Appointing Counsel Maria E. Stratton for Maureen McDermott. (gk,) (Entered: 02/18/2004)
03/11/2004	6	NOTICE of Appearance filed by attorney Grace J McLean on behalf of Petitioner Maureen McDermott (rm,) (mgu). (Entered: 03/15/2004)
01/06/2005	7	NOTICE of Appearance filed by attorney Craig A Harbaugh on behalf of Petitioner Maureen McDermott (dw,) (mgu). (Entered: 01/10/2005)
01/14/2005	8	PETITION for Writ of Habeas Corpus by a Person In Federal Custody (28:2241) (Filing fee $ 5.) , filed by Petitioner Maureen McDermott.(pbap,) (Additional attachment(s) added on 2/21/2017: # 1 doc 8 - Part 2, # 2 doc 8 - Part 3) (mgu). (Entered: 01/20/2005)
01/14/2005	9	EXHIBIT in Support of Petition for Writ of Habeas Corpus (2241) 8 Filed filed by Petitioner Maureen McDermott. Volume 1 of 5; Exhibits 1-29. (pbap,) (Additional attachment(s) added on 3/3/2017: # 1 doc 9 - Part 2, # 2 doc 9 - Part 3) (mgu). (Entered: 01/20/2005)
01/14/2005	10	EXHIBITS in Support of Petition for Writ of Habeas Corpus (2241) 8 Filed filed by Petitioner Maureen McDermott. Volume 2 of 5; Exhibits 30-43. (pbap,) (Additional attachment(s) added on 3/3/2017: # 1 doc 10 - Part 2) (mgu). (Entered: 01/20/2005)
01/14/2005	11	EXHIBITS in Support of Petition for Writ of Habeas Corpus (2241) 8 filed by Petitioner Maureen McDermott. Volume 3 of 5; Exhibit 44. (pbap,) (Additional attachment(s) added on 2/21/2017: # 1 doc 11 - Part 2) (mgu). (Entered: 01/20/2005)
01/14/2005	12	EXHIBITS in Support of Petition for Writ of Habeas Corpus (2241) 8 filed by Petitioner Maureen McDermott. Volume 4 of 5; Exhibits 45-53. (pbap,) (Additional attachment(s) added on 2/21/2017: # 1 doc 12 - Part 2, # 2 doc 12 - Part 3) (mgu). (Entered: 01/20/2005)
01/14/2005	13	EXHIBITS in Support of Petition for Writ of Habeas Corpus (2241) 8 filed by Petitioner Maureen McDermott. Volume 5 of 5; Exhibit 54-59. (pbap,) (mgu). (Entered: 01/20/2005)
01/14/2005	14	NOTICE of Lodging of State Exhaustion Petition and Five Volumes of Exhibits filed by Petitioner Maureen McDermott. (pbap,) (mgu). (Entered: 01/20/2005)
01/24/2005	15	NOTICE of Appearance filed by attorney G Tracey Letteau on behalf of Respondent Gwendolyn Mitchell (dw,) (mgu). (Entered: 01/27/2005)
02/15/2005	16	NOTICE of Lodging Under Seal filed by Respondent Gwendolyn Mitchell. (dw,) (mgu). (Entered: 02/23/2005)
02/15/2005	17	NOTICE of Lodging of Documents filed by Respondent Gwendolyn Mitchell. (dw,) (Additional attachment(s) added on 10/24/2014: # 1 Lodg 2, # 2 Lodg 3, # 3 Lodg 4 Vol 1 - Part 1, # 4 Lodg 4 Vol 1 - Part 2, # 5 Lodg 4 Vol 2, # 6 Lodg 4 Vol 3, # 7 Lodg 4 Vol 4 - Part 1, # 8 Lodg 4 Vol 4 - Part 2, # 9 Lodg 4 Vol 5 - Part 1, # 10 Lodg 4 Vol 5 - Part 2, # 11 Lodg 5 Vol 1 - Part 1, # 12 Lodg 5 Vol 1 - Part 2, # 13 Lodg 5 Vol 2 - Part 1, # 14 Lodg 5 Vol 2 - Part 2, # 15 Lodg 5 Vol 3 - Part 1, # 16 Lodg 5 Vol 3 - Part 2, # 17 Lodg 6, # 18 Lodg 7, # 19 Lodg 8, # 20 Lodg 9, # 21 Lodg 10, # 22 Lodg 11, # 23 Lodg 12 Vol 1, # 24 Lodg 12 Vol 1a, # 25 Lodg 12 Vol 2, # 26 Lodg 12 Vol 3, # 27 Lodg 12 Vol 5, # 28 Lodg 12 Vol 6, # 29 Lodg 12 Vol 7, # 30 Lodg 12 Vol 8, # 31 Lodg 12 Vol 9, # 32 Lodg 12 Vol 10, # 33 Lodg 12 Vol 11, # 34 Lodg 12 Vol 12, # 35 Lodg 12 Vol 13, # 36 Lodg 12 Vol 14, # 37 Lodg 12 Vol 15, # 38 Lodg 12 Vol 16, # 39 Lodg 12 Vol 17, # 40 Lodg 12 Vol 18, # 41 Lodg 12 Vol 19, # 42 Lodg 12 Vol 20, # 43 Lodg 12 Vol 21, # 44 Lodg 12 Vol 22, # 45 Lodg 12 Vol 23, # 46 Lodg 12 Vol 24, # 47 Lodg 12 Vol 25, # 48 Lodg 12 Vol 26, # 49 Lodg 12 Vol 27, # 50 Lodg 12 Vol 28, # 51 Lodg 12 Vol 29, # 52 Lodg 12

		Vol 30, # 53 Lodg 12 Vol 31, # 54 Lodg 12 Vol 32, # 55 Lodg 12 Vol 33, # 56 Lodg 12 Vol 34, # 57 Lodg 12 Vol 35, # 58 Lodg 12 Vol 36, # 59 Lodg 12 Vol 37, # 60 Lodg 12 Vol 38, # 61 Lodg 12 Vol 39, # 62 Lodg 12 Vol 40, # 63 Lodg 12 Vol 41, # 64 Lodg 12 Vol 42, # 65 Lodg 12 Vol 43, # 66 Lodg 12 Vol 44, # 67 Lodg 12 Vol 45, # 68 Lodg 12 Vol 46, # 69 Lodg 12 Vol 47, # 70 Lodg 12 Vol 48, # 71 Lodg 12 Vol 49, # 72 Lodg 12 Vol 50, # 73 Lodg 12 Vol 51, # 74 Lodg 12 Vol 52, # 75 Lodg 12 Vol 53, # 76 Lodg 12 Vol 54, # 77 Lodg 12 Vol 55, # 78 Lodg 12 Vol 56, # 79 Lodg 12 Vol 57, # 80 Lodg 12 Vol 58, # 81 Lodg 12 Vol 59, # 82 Lodg 12 Vol 60, # 83 Lodg 12 Vol 61, # 84 Lodg 12 Vol 62, # 85 Lodg 12 Vol 63, # 86 Lodg 12 Vol 64, # 87 Lodg 12 Vol 65, # 88 Lodg 12 Vol 66, # 89 Lodg 12 Vol 67, # 90 Lodg 12 Vol 68, # 91 Lodg 12 Vol 69, # 92 Lodg 12 Vol 70, # 93 Lodg 12 Vol 71, # 94 Lodg 12 Vol 72, # 95 Lodg 12 Vol 73, # 96 Lodg 12 Vol 74, # 97 Lodg 12 Vol 75, # 98 Lodg 12 Vol 76, # 99 Lodg 12 Vol 77, # 100 Lodg 12 Vol 78, # 101 Lodg 12 Vol 79, # 102 Lodg 12 Vol 80, # 103 Lodg 12 Vol 81, # 104 Lodg 12 Vol 82, # 105 Lodg 12 Vol 83, # 106 Lodg 12 Vol 84, # 107 Lodg 12 Vol 85, # 108 Lodg 12 Vol 86, # 109 Lodg 12 Vol 87, # 110 Lodg 12 Vol 88, # 111 Lodg 12 Vol 89, # 112 Lodg 12 Vol 90, # 113 Lodg 12 Vol 91, # 114 Lodg 12 Vol 92, # 115 Lodg 12 Vol 93, # 116 Lodg 12 Vol 94, # 117 Lodg 12 Vol 95, # 118 Lodg 12 Vol 96, # 119 Lodg 12 Vol 97, # 120 Lodg 12 Vol 98, # 121 Lodg 12 Vol 99, # 122 Lodg 12 Vol 100, # 123 Lodg 13 - Part 1, # 124 Lodg 13 - Part 2, # 125 Lodg 13 - Part 3, # 126 Lodg 14 - Part 1, # 127 Lodg 14 - Part 2, # 128 Lodg 15, # 129 Lodg 16, # 130 Lodg 17, # 131 Lodg 18, # 132 Lodg 19, # 133 Lodg 20, # 134 Lodg 21, # 135 Lodg 22, # 136 Lodg 23 - Part 1, # 137 Lodg 23 - Part 2) (nl). (Main Document 17 replaced on 6/12/2017) (lr). (Entered: 02/23/2005)
02/15/2005	18	JOINT STATEMENT on Exhaustion filed by Petitioner Maureen McDermott, Respondent Gwendolyn Mitchell (dw,) (mgu). (Entered: 02/23/2005)
02/15/2005	19	MOTION to Dismiss Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities filed by Respondent Gwendolyn Mitchell. Motion set for hearing on 3/28/2005 at 08:30 AM before Honorable David O. Carter. (pbap,) (mgu). (Entered: 02/24/2005)
03/11/2005	20	STIPULATION AND ORDER regarding continuance of motions hearing by Judge David O. Carter 19 . Motion set for hearing on 4/25/2005 at 08:30 AM before Honorable David O. Carter.(twdb,) (Entered: 03/16/2005)
03/11/2005	21	NOTICE OF MOTION AND MOTION to Stay Case pending resolution of state habeas proceedings filed by petitioner Maureen McDermott. Motion set for hearing on 4/25/2005 at 10:00 AM before Honorable David O. Carter. (dmjr,) (mgu). (Entered: 03/21/2005)
03/11/2005	22	MEMORANDUM in Support of MOTION to Stay Case pending resolution of state habeas proceedings 21 filed by petitioner Maureen McDermott. (dmjr,) (mgu). (Entered: 03/21/2005)
03/11/2005	23	OPPOSITION to MOTION to Dismiss Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities 19 filed by petitioner Maureen McDermott. (dmjr,) (mgu). (Entered: 03/21/2005)
04/12/2005	24	OPPOSITION to MOTION to Stay Case pending resolution of state habeas proceedings 21 Memorandum of points and authorities filed by respondent Gwendolyn Mitchell. (bg,) (mgu). (Entered: 04/20/2005)
04/12/2005	25	REPLY to opposition to MOTION to Dismiss Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities 19 filed by respondent Gwendolyn Mitchell. (bg,) (mgu). (Entered: 04/20/2005)
04/18/2005	26	REPLY to respondent's Opposition to petitioner's MOTION to Stay Case pending

		resolution of state habeas proceedings 21 filed by petitioner Maureen McDermott. (twdb,) (mgu). (Entered: 04/21/2005)
04/20/2005	29	JOINT REQUESTfor Oral Argument and Proposed Order filed by respondent Gwendolyn Mitchell. (bg,) (mgu). (Entered: 05/04/2005)
04/21/2005	27	ORDER by Judge David O. Carter : The request for waiver of oral argument for the motion to dismiss and motion to stay is hereby GRANTED. The court hereby takes the 4/25/05 motions hearing off-calendar and takes the pending motions under submission.Taking under advisement 19 Motion to Dismiss, taking under advisement 21 Motion to Stay Case (twdb,) (Entered: 04/22/2005)
04/27/2005	28	ORDER RE Respondent's Motion to Dismiss and Petitioner's Motion to Stay Federal Proceedings by Judge David O. Carter : For the reasons stated above, the court hereby GRANTS a stay of the federal litigation of the state habeas petition. Respondent's motion to dismiss because the petition contains some unexhausted claims is hereby DENIED. Petitioner shall file quarterly status reports regarding the progress of the state habeas litigation. The first report is due 6/1/05.denying 19 Motion to Dismiss, granting 21 Motion to Stay Case (twdb,) (Entered: 04/27/2005)
08/01/2005	30	STATUS REPORT filed by Petitioner Maureen McDermott. (bg,) (mgu). (Entered: 08/04/2005)
09/02/2005	31	STATUS REPORT filed by Petitioner Maureen McDermott. (jp,) (mgu). (Entered: 09/13/2005)
10/05/2005	32	NOTICE of Appearance filed by attorney Linda L Griffis on behalf of Petitioner Maureen McDermott (bg,) (Entered: 10/12/2005)
12/01/2005	33	Petitioner's STATUS REPORT #3 filed by Petitioner Maureen McDermott. (shb,) (mgu). (Entered: 12/07/2005)
03/02/2006	34	STATUS REPORT No 4 filed by Petitioner Maureen McDermott. (ln,) (mgu). (Entered: 03/07/2006)
05/31/2006	35	STATUS REPORT #5 filed by Petitioner Maureen McDermott. (gk,) (mgu). (Entered: 06/09/2006)
08/31/2006	36	STATUS REPORT #6 filed by Petitioner Maureen McDermott. (bg,) (mgu). (Entered: 09/01/2006)
12/04/2006	37	STATUS REPORT # 7 filed by Petitioner Maureen McDermott. (dmjr,) (mgu). (Entered: 12/15/2006)
01/08/2007	38	NOTICE of decision by CA Supreme Court filed by petitioner Maureen McDermott. (dmjr,) (mgu). (Entered: 01/23/2007)
01/25/2007	39	MINUTES OF IN CHAMBERS ORDER held before Judge David O. Carter : the stay of federal habeas proceedings is hereby lifted, Set Deadlines:Joint Status Report due by 2/12/2007.Court Reporter: none. (dmjr,) (Entered: 01/26/2007)
02/21/2007	40	Joint status report and ORDER by Judge David O. Carter, petitioner's amended petition be filed within 30 days of the date of this order and respondent's response be filed 30 days thereafter(dmjr,) (Entered: 02/22/2007)
03/23/2007	41	FIRST AMENDED PETITON FOR WRIT OF HABEAS CORPUS against Respondent Deborah L Patrick, amending Petition for Writ of Habeas Corpus (2241) 8 ,filed by petitioner Maureen McDermott (esa,) (Additional attachment(s) added on 2/21/2017: # 1 doc 41 - Part 2, # 2 doc 41 - Part 3) (mgu). (Entered: 04/02/2007)

03/23/2007	42	EXHIBITS Volume 6 of 7 in support of First Amended Petition for Writ of Habeas Corpus 41 filed by Petitioner Maureen McDermott. (esa,) (mgu). (Additional attachment(s) added on 3/3/2017: # 1 doc 42 - Part 1, # 2 doc 42 - Part 3, # 3 doc 42 - Part 4) (mgu). (Entered: 04/02/2007)
03/23/2007	43	EXHIBITS Volume 7 of 7 in support of First Amended Petition for Writ of Habeas Corpus 41 filed by Petitioner Maureen McDermott(esa,) (mgu). (Additional attachment(s) added on 3/13/2017: # 1 doc 43 - Part 2, # 2 doc 43 - Part 3) (mgu). (Entered: 04/02/2007)
04/19/2007	45	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME for Thirty-Day Enlargement of Time to file Answer to Amended Petition for Writ of Habeas Corpus filed by respondent Gwendolyn Mitchell. (bg,) (mgu). (Entered: 05/15/2007)
04/20/2007	44	ORDER by Judge David O. Carter granting exparte application, answer is due 5/22/07(dmjr,) (Entered: 04/23/2007)
05/14/2007	46	STIPULATION AND ORDER by Judge David O. Carter : for litigation plan beyond respondent's filing of the answer(dmjr,) (Entered: 05/15/2007)
05/22/2007	47	ANSWER to First Amended Petition for Writ of Habeas Corpus 41 filed by respondent Gwendolyn Mitchell.(bg,) (mgu). (Entered: 05/31/2007)
05/22/2007	48	SUPPLEMENT to Notice of Lodging 17 filed by Respondent Gwendolyn Mitchell. Lodged with chambers (bg,) (mgu). (Entered: 05/31/2007)
05/24/2007	49	NOTICE of Change of Attorney Information: Attorney Grace McLean and Maria Stratton will no longer receive service of documents from the Clerks Office for the reason indicated in the G-06 Notice.Grace Mclean and Maria Stratton are no longer attorneys of record in this case for the reason indicated in the G-06 Notice; Filed by petitioner Maureen McDermott. (esa) (mgu). (Entered: 06/12/2007)
06/21/2007	50	TRAVERSE to Amended Petition for Writ of Habeas Corpus 41 filed filed by Petitioner Maureen McDermott. (dmjr) (Additional attachment(s) added on 2/21/2017: # 1 doc 50 - Part 2, # 2 doc 50 - Part 3, # 3 doc 50 - Part 4) (mgu). (Entered: 07/12/2007)
09/21/2007	51	JOINT NOTICE OF MOTION AND MOTION for Discovery filed by petitioner Maureen McDermott, respondent Gwendolyn Mitchell.Motion set for hearing on 10/22/2007 at 08:30 AM before Judge David O. Carter. (ad) (mgu). (Entered: 10/05/2007)
09/24/2007	52	STIPULATION AND ORDER by Judge David O. Carter: RE DISCOVERY: (See document for details.) IT IS SO ORDERED.(rla) (Entered: 10/05/2007)
09/24/2007	53	STIPULATION AND ORDER by Judge David O. Carter: RE: PROTECTIVE ORDER: 4) Documents and testimony that Petitioner contends are privileged shall be clearly designated as such by labeling the documents or testimony in a manner that does not prevent reading the test of the document. 5) All documents and testimony designated as privileged by Petitioner that are submitted to this Court shall be submitted under seal in a manner reflecting their confidential nature and designed to ensure that the privileged material will not become part of the public record. (See document for further details.) IT IS SO ORDERED.(rla) (Entered: 10/05/2007)
10/11/2007	54	RESPONDENT'S SUPPLEMENTAL Memorandum to Joint Stipulation Re: Discovery, Re Motion for Order for Discovery 51 ; filed by Respondent Deborah L. Patrick, Warden of Central California Women's Facility. (te) (mgu). (Entered: 10/15/2007)
10/18/2007	55	ORDER RE DISCOVERY by Judge David O. Carter re: Joint Motion for Discovery 51 . Petitioner has demonstrated good cause for a portion of the requested discovery as set

		forth above. The remainder of the requested discovery for which there were disputes is hereby denied. All discovery shall be completed within six months, as agreed upon in paragraph 3 of the parties' Joint Stipulation for Litigation Plan Beyond Respondents Filing of the Answer to the Amended Petition for Writ of Habeas Corpus, filed on May 14, 2007. (kh) (Entered: 10/19/2007)
12/04/2007	56	NOTICE OF MOTION AND MOTION for Reconsideration of Order Re: Discovery 55 ; filed by Petitioner Maureen McDermott. Motion set for hearing on 1/7/2008 at 8:30 AM before Judge David O. Carter. (te) (mgu). (Entered: 12/05/2007)
12/17/2007	58	OPPOSITION to MOTION for Reconsideration Order Re Discovery 55 56 filed by Respondent Gwendolyn Mitchell. (ad) (mgu). (Entered: 12/28/2007)
12/26/2007	57	MINUTES OF IN CHAMBERS ORDER TAKING MATTER UNDER SUBMISSION held before Judge David O. Carter re: Motion by Petitioner for Reconsideration of Order Re: Discovery 56 . Court finds matter appropriate for decision without oral argument. Hearing set January 7, 2008 at 8:30 a.m. is removed from the calendar. Parties will be served with the Courts ruling. (kh) (Entered: 12/26/2007)
12/28/2007	59	REPLY to Respondent's Opposition to MOTION for Reconsideration 56 filed by Petitioner Maureen McDermott. (ad) (mgu). (Entered: 01/08/2008)
01/14/2008	60	ORDER by Judge David O. Carter, DENYING MOTION for Reconsideration of Order re Discovery 56 . (See document for details.) for the reasons set forth above, McDermott's motion for reconsideration of order re discovery is DENIED. IT IS SO ORDERED. (rla) (Entered: 01/18/2008)
03/26/2008	61	NOTICE of Appearance filed by attorney Catherine Okawa Kohm on behalf of Respondent Gwendolyn Mitchell (Kohm, Catherine) (Entered: 03/26/2008)
04/14/2008	62	Joint STIPULATION for Discovery as to Regarding Status of Discovery And Request for Extension of Discovery Cut-Off filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Letteau, G) (Entered: 04/14/2008)
04/16/2008	63	ORDER by Judge David O. Carter GRANTING Stipulation for Discovery 62 . IT IS HEREBY ORDERED that all authorized discovery shall be completed within an additional 6 months to and including 10/18/08. (ade) (Entered: 04/17/2008)
06/18/2008	64	NOTICE OF MOTION AND MOTION for Leave to file Second Amended Petition for Writ of Habeas Corpus to Include Newly Exhausted Claims filed by petitioner Maureen McDermott. Motion set for hearing on 7/21/2008 at 08:30 AM before Judge David O. Carter. (Attachments: # 1 Second Amended Petition for Writ of Habeas Corpus)(Griffis, Linda) (Entered: 06/18/2008)
07/03/2008	65	OPPOSITION *to Petitioner's Motion for Leave to File Second Amended Petition for Writ of Habeas Corpus to Include Newly Exhausted Claims; Memorandum of Points and Authorities* filed by Respondent Gwendolyn Mitchell. (Kohm, Catherine) (Entered: 07/03/2008)
07/11/2008	66	REPLY in response to opposition to MOTION for Leave to file Second Amended Petition for Writ of Habeas Corpus to Include Newly Exhausted Claims 64 filed by Petitioner Maureen McDermott. (Harbaugh, Craig) (Entered: 07/11/2008)
07/14/2008	67	ORDER by Judge David O. Carter, Denying MOTION for Leave to file Second Amended Petition for Writ of Habeas Corpus to Include Newly Exhausted Claims 64 . (twdb) (Entered: 07/15/2008)
08/28/2008	68	NOTICE of Taking Deposition of Joe Ingber on 10/14/08 filed by Respondent Gwendolyn Mitchell. (Kohm, Catherine) (Entered: 08/28/2008)

10/06/2008	69	APPLICATION for Issuance of Writ of Habeas Corpus Ad Testificandum, Application for Writ of Habeas Corpus ad Testificandum as to Randy Lee Howard, CDCR #K 07878 filed by Petitioner Maureen McDermott. (Attachments: # 1 Order on Application of Writ of AdTestificandum, # 2 Writ of Habeas Corpus Ad Testificandum)(Griffis, Linda) (Additional attachment(s) added on 10/9/2008: # 3 writ) (ade). (Entered: 10/06/2008)
10/07/2008	70	ORDER by Judge David O. Carter. Granting APPLICATION for Issuance of Writ of Habeas Corpus Ad TestificandumApplication for Writ of Habeas Corpus ad Testificandum as to Randy Lee Howard, CDCR #K 07878 69 . RANDY LEE HOWARD, CDCR #K07878 to testify on 10/17/08 at 1:00 p.m. before Judge David O. Carter. (rla) (Entered: 10/08/2008)
10/07/2008		Writ of Habeas Corpus ad Testificandum (ade) (Entered: 10/09/2008)
10/16/2008	71	STIPULATION for Discovery as to Objection at Deposition of Randy Howard filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order for Joint Stipulation re: Objection at Deposition of Randy Howard)(Kohm, Catherine) (Entered: 10/16/2008)
10/16/2008	72	NOTICE of Taking Deposition of Randy Howard on October 17, 2008 filed by Petitioner Maureen McDermott. Subpoena Issued. (Harbaugh, Craig) (Entered: 10/16/2008)
10/20/2008	73	ORDER by Judge David O. Carter, STIPULATED ORDER: Good cause appearing, the Court adopts the Joint Stipulation re: Objection at Deposition of Randy Howard 71 . IT IS SO ORDERED. (rla) (Entered: 10/20/2008)
01/12/2009	74	EX PARTE APPLICATION to Continue - Unopposed - for an Order Continuing Filing Date of Petitioner's Motion for Evidentiary Hearing; Memorandum of Points and Authorities; Declarations of Linda L. Griffis and Craig A. Harbaugh from January 20, 2009 to April 20, 2009 filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 01/12/2009)
01/14/2009	75	ORDER GRANTING CONTINUATION OF FILING DATE OF PETITIONERS MOTION FOR EVIDENTIARY HEARING by Judge David O. Carter Granting Exparte Application to Continue 74 . GOOD CAUSE APPEARING IT IS ORDERED that Petitioner shall file her Motion for Evidentiary hearing on or before April 20, 2009. (smi) (Entered: 01/15/2009)
04/16/2009	76	EXPARTE APPLICATION for Extension of Time to File Petitioner's Motion for Evidentiary Hearing; Memorandum of Points and Authorities; Declaration of Linda L. Griffis filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Griffis, Linda) (Entered: 04/16/2009)
04/17/2009	77	ORDER by Judge David O. Carter: GRANTING CONTINUATION OF FILING DATE OF PETITIONER'S MOTION FOR EVIDENTIARY HEARING: re 76 Ex Parte Application: IT IS ORDERED that Petitioner shall file her Motion for Evidentiary hearing on or before April 27, 2009. (rla) (Entered: 04/17/2009)
04/27/2009	78	NOTICE OF MOTION AND MOTION for Hearing (Evidentiary Hearing) *Date: To be set by Court, 8:30 a.m., Courtroom 9-D (Santa Ana)* filed by Petitioner Maureen McDermott. (Attachments: # 1 Exhibit 141, 143-150)(Griffis, Linda) (Entered: 04/27/2009)
06/19/2009	79	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Petitioner's Motion for Evidentiary Hearing ; *Declaration of G. Tracey Letteau* filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Letteau, G) (Entered: 06/19/2009)
06/30/2009	80	ORDER Granting Ex Parte Application for Enlargement of Time 79 by Judge David O.

		Carter: Having considered Respondent's application for enlargement of time, and good cause appearing, IT IS HEREBY ORDERED that the application is GRANTED and that Respondent is granted to and including July 26, 2009, in which to file and serve the Opposition to Petitioner's Motion for Evidentiary Hearing. (lwag) (Entered: 07/01/2009)
07/24/2009	81	OPPOSITION *to Motion for Evidentiary Hearing* filed by Respondent Gwendolyn Mitchell. (Letteau, G) (Entered: 07/24/2009)
07/24/2009	82	NOTICE OF LODGING filed *(Second Supplemental Notice)* re Response in Opposition to Motion 81 (Letteau, G) (Entered: 07/24/2009)
08/18/2009	83	EX PARTE APPLICATION to Continue Filing Date of Petitioner's Reply to Respondent's Opposition to Motion for Evidentiary Hearing from August 24, 2009 to September 25, 2009 *; Memorandum of Points and Authorities; Declaration of Linda L. Griffis* filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Griffis, Linda) (Entered: 08/18/2009)
08/20/2009	84	ORDER Granting Ex Parte Application to Continue 83 by Judge David O. Carter: IT IS ORDERED that Petitioner shall file her Reply to Respondent's Opposition to Motion for Evidentiary Hearing on or before September 25, 2009. (lwag) (Entered: 08/20/2009)
09/25/2009	85	REPLY in Support of MOTION for Hearing (Evidentiary Hearing) *Date: To be set by Court, 8:30 a.m., Courtroom 9-D (Santa Ana)* 78 filed by Petitioner Maureen McDermott. (Attachments: # 1 Exhibit 151)(Griffis, Linda) (Entered: 09/25/2009)
09/25/2009	86	NOTICE OF LODGING filed *-Deposition Transcripts of Joe Ingber and Randy Howard* re MOTION for Hearing (Evidentiary Hearing) *Date: To be set by Court, 8:30 a.m., Courtroom 9-D (Santa Ana)* 78 (Griffis, Linda) (Entered: 09/25/2009)
02/05/2010	87	SUPPLEMENT *Petitioners Notice of Recent Case Law Which Supports Petitioners Motion for Evidentiary Hearing* filed by Petitioner Maureen McDermott. (Griffis, Linda) (Entered: 02/05/2010)
06/25/2010	88	ORDER by Judge David O. Carter: re Petitioner's Motion for an Evidentiary Hearing 78 : (See document for details.) The Court orders: 1) The Court will conduct an evidentiary hearing as to Claim Three, Subclaims D.3, D.4.g, D.8, and D.10 (its allegations pertaining to Juror Halpin-Shower), and Subclaim E; and Claim Four. 2)Claim One; Claim Two; Claim Three, Subclaims D.1,D.2, D.4 (excluding D.4.g), D.5, D.6, D.7, D.9, D.10 (all remaining allegations that do not pertain to Juror Halpin-Shower), D.11, and D.12; and Claim Eight are Denied. 4) No later than 60 days, the parties shall file a joint stipulation regarding any remaining discovery, including a suggested discovery cut-off date, and an estimate of the date by which the parties will be ready for the evidentiary hearing. (rla) (Entered: 06/25/2010)
07/13/2010	89	NOTICE OF MOTION AND MOTION for Reconsideration *Partial Reconsideration of June 25, 2010 Order Re: Petitioner's Motion For An Evidentiary Hearging; Memorandum of Points And Authorities* filed by Respondent Gwendolyn Mitchell. Motion set for hearing on 8/9/2010 at 08:30 AM before Judge David O. Carter. (Letteau, G) (Entered: 07/13/2010)
07/19/2010	90	STIPULATION to Continue Filing Opposition to Motion from July 26, 2010 to August 23, 2010 Re: MOTION for Reconsideration *Partial Reconsideration of June 25, 2010 Order Re: Petitioner's Motion For An Evidentiary Hearging; Memorandum of Points And Authorities* 89 filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 07/19/2010)
07/21/2010	91	ORDER by Judge David O. Carter, RE: BRIEFING AND HEARING DATES ON RESPONDENT'S MOTION FOR PARTIAL RECONSIDERATION: Upon the

		stipulation 90 of counsel, IT IS ORDERED that: 1. Petitioner's Opposition to Respondent's Motion for Reconsideration shall be filed on or before August 23, 2010; 2. Respondent's Reply to Petitioners Opposition shall be filed on or before August 30, 2010; 3. Thirty (30) days after the filing of this Courts Order on Respondent's Motion for Reconsideration, the parties shall filed their Joint Stipulation re Discovery, requested in this Court's June 24, 2010 Order. (rla) (Entered: 07/21/2010)
08/23/2010	92	PETITIONERS OPPOSITION TO RESPONDENTS MOTION FOR PARTIAL RECON-SIDERATION OF JUNE 25, 2010 ORDER RE PETITIONERS MOTION FOR AN EVIDENTIARY HEARING in opposition to re: MOTION for Reconsideration *Partial Reconsideration of June 25, 2010 Order Re: Petitioner's Motion For An Evidentiary Hearging; Memorandum of Points And Authorities* 89 filed by Petitioner Maureen McDermott. (Griffis, Linda) (Entered: 08/23/2010)
08/24/2010	93	NOTICE of Appearance filed by attorney Douglas L Wilson on behalf of Petitioner Maureen McDermott (Wilson, Douglas) (Entered: 08/24/2010)
08/24/2010	94	NOTICE OF ERRATA Re: Docket Document No. 93 filed by Respondent Gwendolyn Mitchell. (Wilson, Douglas) (Entered: 08/24/2010)
08/25/2010	95	NOTICE of Change of Attorney Information for attorney Catherine Okawa Kohm counsel for Respondent Gwendolyn Mitchell. Catherine Okawa Kohm will no longer receive service of documents from the Clerks Office for the reason indicated in the G-06 Notice.Catherine Okawa Kohm is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-06 Notice. Filed by Respondent Gwendolyn Mitchell (Kohm, Catherine) (Entered: 08/25/2010)
08/30/2010	96	REPLY Reply to Petitioner's Opposition to Motion *For Partial Reconsideration of June 25, 2010 Order Re: Petitioner's Motion For An Evidentiary Hearing* filed by Respondent Gwendolyn Mitchell. (Letteau, G) (Entered: 08/30/2010)
10/07/2010	97	ORDER by Judge David O. Carter Denying 89 Respondent's Motion for Partial Reconsideration of June 25, 2010 Order Re: Petitioner's Motion for an Evidentiary Hearing. (nbo) (Entered: 10/08/2010)
11/22/2010	98	STIPULATION for Hearing re Evidentiary Hearing filed by Petitioner Maureen McDermott.(Griffis, Linda) (Entered: 11/22/2010)
12/03/2010	99	DEATH PENALTY SCHEDULING ORDER by Judge David O. Carter. (Evidentiary Hearing set for 8/2/2011 10:00 AM before Judge David O. Carter., Pre-hearing Status Conference set for 7/18/2011 11:00 AM before Judge David O. Carter.) See Order for further deadlines. (twdb) (Entered: 12/03/2010)
12/07/2010	100	NOTICE of Appearance filed by attorney Sarah Jean Farhat on behalf of Respondent Gwendolyn Mitchell (Farhat, Sarah) (Entered: 12/07/2010)
01/20/2011	101	NOTICE of Appearance filed by attorney John Yang on behalf of Respondent Gwendolyn Mitchell (Yang, John) (Entered: 01/20/2011)
01/21/2011	102	NOTICE of Change of Attorney Information for attorney Sarah Jean Farhat counsel for Respondent Gwendolyn Mitchell. Sarah J. Farhat will no longer receive service of documents from the Clerks Office for the reason indicated in the G-06 Notice.Sarah J. Farhat is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-06 Notice. Filed by Respondent Gwendolyn Mitchell (Farhat, Sarah) (Entered: 01/21/2011)
01/25/2011	103	STIPULATION for Protective Order filed by petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Harbaugh, Craig) (Entered: 01/25/2011)

01/26/2011	104	ORDER ON STIPULATION FOR PROTECTIVE ORDER FOR DISTRICT ATTORNEY'S FILES by Judge David O. Carter. Upon reading the Stipulation for Protective Order for District Attorney's Files 103 , and good cause appearing therefor, IT IS HEREBY ORDERED that 1. The Stipulation sets forth the full agreement of the parties; 2. The Protective Order terms, therein contained, shall be retroactive to the date of the initial disclosure of documents made by the DA in this matter. 3. This Protective Order is entered into without prejudice to the right of any party and/or the DA to file any motion for relief from the Court from any restriction hereof or for any other or further restriction on the production, exchange, or use of any documents, testimony, or other information produced, given, or exchanged in the course of discovery in this action. 4. This Order may be modified, amended, or vacated only by further Order of the Court. 5. This Protective Order shall survive the final determination for this action and shall remain in full force and effect after conclusion of all proceedings herein, and the court shall have continuing jurisdiction to enforce its terms. Any modification or vacation of this order shall only be made upon notice to and an opportunity to be heard from both parties, shall be retroactive to the date of the initial disclosure of documents made by the DA in this matter. (dro) (Entered: 01/28/2011)
01/31/2011	105	Petitioner's Non-Expert Witnesses Who Will Provide Direct Testimony by Declaration filed by Petitioner Maureen McDermott (Griffis, Linda) (Entered: 01/31/2011)
02/15/2011	106	NOTICE of Change of Attorney Information for attorney G Tracey Letteau counsel for Respondent Gwendolyn Mitchell. G. Tracey Letteau will no longer receive service of documents from the Clerks Office for the reason indicated in the G-06 Notice.G. Tracey Letteau is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-06 Notice. Filed by Respondent JAVIER CAVAZOS, Acting Warden of Central California Women's Facility (Letteau, G) (Entered: 02/15/2011)
03/02/2011	107	STIPULATION to Produce --Joint Stipulation for Order Ordering Trial Counsel to Produce Portion of Trial File Withheld From Production -- filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 03/02/2011)
03/03/2011	108	ORDER by Judge David O. Carter, ORDERING CARL BURKOW TO PRODUCE DOCUMENTS WITHHELD FROM PRODUCTION AS WORK PRODUCT TO PETITIONER'S COUNSEL HEREIN re Stipulation to Produce 107 : IT IS ORDERED that Carl Burkow shall produce within seven days of receiptof this order the documents from his trial file that he withheld from production on the grounds of work product. The documents will be subject to the Protective Order of September 24, 2007 (docket no. 53) and Petitioner shall make the documents available to Respondent's counsel. (rla) (Entered: 03/03/2011)
03/30/2011	109	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Guy C Iversen on behalf of Petitioner Maureen McDermott. Filed by Petitioner Maureen McDermott. (Iversen, Guy) (Entered: 03/30/2011)
04/01/2011	110	Proof of Service filed by Petitioner Maureen McDermott (Iversen, Guy) (Entered: 04/01/2011)
04/05/2011	111	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Miscellaneous Document 110 . The following error(s) was found: Incorrect event selected.Title page is missing. The correct event is: Proof of Service (subsequent documents). In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (db) (Entered: 04/05/2011)
04/18/2011	112	Witness List filed by Respondent Gwendolyn Mitchell.. (Yang, John) (Entered:

		04/18/2011)
04/18/2011	113	Witness List filed by Petitioner Maureen McDermott.. (Griffis, Linda) (Entered: 04/18/2011)
04/22/2011	114	EX PARTE APPLICATION to Reschedule Pre-Hearing Filing Schedule *Unopposed Ex Parte Application for a Revised Pre-Hearing Filing Schedule; Declaration of Linda L. Griffis* filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Griffis, Linda) (Entered: 04/22/2011)
04/25/2011	115	MINUTE ORDER IN CHAMBERS by Judge David O. Carter: SETTING SUPPLEMENTAL BRIEFING SCHEDULE: The Court vacates the Scheduling Order on Petitioner's evidentiary hearing that was set for August 2, 2011. On or before May 30, 2011, Petitioner shall file a Supplemental Brief addressing her entitlement to an evidentiary hearing in view of the Supreme Court's holding in Cullen v. Pinholster, 2011 WL 1225705 (April 4, 2011). Respondent shall file an Opposition limited to the arguments raised in Petitioner's Supplemental Brief on or before June 27, 2011. Petitioner shall file a Reply in support of her Supplemental Brief on or before July 11, 2011. Court finds that this matter is appropriate for decision without oral argument. (rla) (Entered: 04/26/2011)
05/24/2011	116	EX PARTE APPLICATION to Continue Petitioner's Filing Deadline from May 30, 2011 to July 6, 2011 filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 05/24/2011)
05/25/2011	117	ORDER by Judge David O. Carter: CONTINUING FILING DEADLINE FOR PETITIONER'S PINHOLSTER BRIEF, granting 116 Ex Parte Application: IT IS ORDERED: Petitioner shall file her opening brief addressing Cullen v. Pinholster on July 6, 2011. Respondent shall file a response on or before August 5, 2011. Petitioner shall file a reply on or before August 19, 2011. (rla) (Entered: 05/26/2011)
07/06/2011	118	Supplemental BRIEF filed by Petitioner Maureen McDermott. *PETITIONER'S SUPPLEMENTAL BRIEF ADDRESSING CULLEN V. PINHOLSTER* (Griffis, Linda) (Entered: 07/06/2011)
08/05/2011	119	OBJECTIONS to Brief (non-motion non-appeal) 118 / *OPPOSITION TO PETITIONER'S POSITION REGARDING PETITIONER'S ENTITLEMENT TO AN EVIDENTIARY HEARING IN VIEW OF THE UNITED STATES SUPREME COURT'S RECENT DECISION IN CULLEN v. PINHOLSTER, 563 U.S. ___, 131 S. Ct. 1388 (2011); EXHIBITS* filed by Respondent Gwendolyn Mitchell. (Wilson, Douglas) (Entered: 08/05/2011)
08/16/2011	120	EX PARTE APPLICATION to Continue Filing Date from August 19, 2011 to August 26, 2011 Re: Brief (non-motion non-appeal) 118 , Objections - non-motion, 119 filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 08/16/2011)
08/17/2011	121	ORDER by Judge David O. Carter: granting 120 Ex Parte Application for an extension of petitioner's rely filing date to 8/26/11 (twdb) (Entered: 08/18/2011)
08/26/2011	122	REPLY filed by Petitioner Maureen McDermott *Petitioner's Reply to Respondent's Brief Addressing Cullen v. Pinholster* (Griffis, Linda) (Entered: 08/26/2011)
03/29/2012	123	MINUTE ORDER IN CHAMBERS by Judge David O. Carter: Proceedings: Supplemental Briefing Addressing Cullen v. Pinholster: (See document for details.) Thus, the parties shall brief the merits of Petitioners remaining claims (i.e., those claims that were not previously denied in the June 25, 2010 Order) under 28 U.S.C. 2254(d) based solely upon the state court record. In connection with Claim 4, the parties shall submit a

		comparative juror analysis. On or before May 1, 2012, Petitioner shall file an Opening Brief. On or before June 15, 2012, Respondent shall file an Opposition. On or before July 15, 2012, Petitioner shall file a Reply. (rla) (Entered: 03/30/2012)
04/25/2012	124	APPLICATION for Extension of Time to File Opening Brief filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 04/25/2012)
04/26/2012	125	ORDER by Judge David O. Carter: GRANTING CONTINUATION OF FILING DATE OF PETITIONER'S OPENING BRIEF, RE 124 Application: IT IS ORDERED that Petitioner shall file her opening brief regarding the application of 2254(d) on or before June 29, 2012. (rla) (Entered: 04/27/2012)
06/26/2012	126	EX PARTE APPLICATION for Order for continuing filing date of petitioner's opening brief filed by petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Harbaugh, Craig) (Entered: 06/26/2012)
06/27/2012	127	ORDER by Judge David O. Carter: GRANTING CONTINUATION OF FILING DATE OF PETITIONER'S OPENING BRIEF: IT IS ORDERED that Petitioner shall file her opening brief regarding the application of 2254(d) on or before July 30, 2012. re 126 Ex Parte Application for Order. (rla) (Entered: 06/27/2012)
07/24/2012	128	EXPARTE APPLICATION for Extension of Time to File Opening Brief regarding the application of 28 U.S.C. § 2254(d) to Petitioner's remaining claims filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 07/24/2012)
07/25/2012	129	ORDER by Judge David O. Carter: GRANTING CONTINUATION OF FILING DATE OF PETITIONER'S OPENING BRIEF: Granting 128 Ex Parte Application. IT IS ORDERED that Petitioner shall file her opening brief regarding the application of 2254(d) on or before August 29, 2012. (rla) (Entered: 07/25/2012)
08/20/2012	130	NOTICE OF APPEARANCE OR REASSIGNMENT Filed by (Richardson-Royer, Elizabeth) (Entered: 08/20/2012)
08/23/2012	131	EXPARTE APPLICATION for Extension of Time to File Petitioner's Opening Brief filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 08/23/2012)
08/29/2012	132	ORDER by Judge David O. Carter, GRANTING CONTINUATION OF FILING DATE OF PETITIONER'S OPENING BRIEF 131 . IT IS ORDERED that Petitioner shall file her opening brief regarding the application of Section 2254(d) on or before October 29, 2012. (rla) (Entered: 08/30/2012)
09/17/2012	133	NOTICE OF APPEARANCE OR REASSIGNMENT Filed by (Richardson-Royer, Elizabeth) (Entered: 09/17/2012)
10/22/2012	134	EX PARTE APPLICATION for Order for Continuing Filing Date of Petitioner's Opening Brief filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Richardson-Royer, Elizabeth) (Entered: 10/22/2012)
10/22/2012	135	ORDER by Judge David O. Carter: GRANTING CONTINUATION OF FILING DATE FOR PETITIONER'S OPENING BRIEF re 134 Ex Parte Application: IT IS HEREBY ORDERED that Petitioner shall file her opening brief on or before January 14, 2013. (rla) (Entered: 10/23/2012)
01/14/2013	136	BRIEF filed by Petitioner Maureen McDermott. *Petitioner's Opening Brief re Application of 28 U.S.C. § 2254(d) to Claims for Which the Court Has Ordered an Evidentiary Hearing* (Attachments: # 1 Exhibit 152)(Griffis, Linda) (Entered: 01/14/2013)

02/27/2013	137	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File a Reply to Petitioner's Opening Brief; Declaration of Deputy Attorney General Douglas L. Wilson filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Wilson, Douglas) (Entered: 02/27/2013)
03/06/2013	138	ORDER by Judge David O. Carter: IT IS ORDERED Respondent is granted up to and including 4/29/13 in which to file a Reply to Petitioner's Opening Brief Re Application of 28 U.S.C. 2254(d). Granting 137 Ex Parte Application for Enlargement of Time to File. (rla) (Entered: 03/06/2013)
03/06/2013	139	NOTICE by Judge David O. Carter: The parties are reminded that courtesy copies of all documents submitted to the Court shall be delivered to chambers and to the Capital Habeas Staff Attorneys located at 312 N. Spring Street, Room 1027, Los Angeles, California 90012 by Judge David O. Carter THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY.(db) TEXT ONLY ENTRY (Entered: 03/07/2013)
04/22/2013	140	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File REPLY TO PETITIONER'S OPENING BRIEF filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Yang, John) (Entered: 04/22/2013)
04/23/2013	141	ORDER by Judge David O. Carter: Granting Respondent's Unopposed Ex Parte Application for Enlargement of Time 140 . (mt) (Entered: 04/23/2013)
06/28/2013	142	APPLICATION to Exceed Page Limitation OPPOSITION TO PETITIONER'S OPENING BRIEF ADDRESSING THE REMAINING CLAIMS UNDER 28 U.S.C. SEC. 2254(D) WITH A MEMORANDUM OF POINTS AND AUTHORITIES IN EXCESS OF TWENTY-FIVE PAGES; DECLARATION OF DOUGLAS L. WILSON filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Wilson, Douglas) (Entered: 06/28/2013)
06/28/2013	143	MEMORANDUM of Points and Authorities in Opposition filed by Respondent Gwendolyn Mitchell. *OPPOSITION TO PETITIONER'S OPENING BRIEF ADDRESSING THE REMAINING CLAIMS UNDER 28 U.S.C. SEC. 2254(d); MEMORANDUM OF POINTS AND AUTHORITIES; PUBLIC REDACTED VERSION* Re: Brief (non-motion non-appeal) 136 (Wilson, Douglas) (Entered: 06/28/2013)
06/28/2013	144	NOTICE of Manual Filing filed by Respondent Gwendolyn Mitchell of APPLICATION TO FILE UNDER SEAL THE UNREDACTED VERSION OF OPPOSITION TO PETITIONER'S OPENING BRIEF AND PROPOSED ORDER; OPPOSITION TO PETITIONER'S OPENING BRIEF ADDRESSING THE REMAINING CLAIMS UNDER 28 U.S.C. SECT, 2254(d);MEMORANDUM OF POINTS AND AUTHORITIES. (Wilson, Douglas) (Entered: 06/28/2013)
07/02/2013	145	ORDER by Judge David O. Carter: granting 142 Application for Leave to File Excess Pages. (twdb) (Entered: 07/02/2013)
07/22/2013	146	EXPARTE APPLICATION for Extension of Time to File Petitioners Reply to Opposition to Petitioners Opening Brief Addressing Application of 28 U.S.C. § 2254(d) to Claims for Which the Court has Ordered an Evidentiary Hearing; Memorandum of Points and Authorities; Declaration of Linda L. Griffis filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 07/22/2013)
07/29/2013	147	ORDER by Judge David O. Carter: granting 146 Ex Parte Application for Extension of Time to File Reply Brief. IT IS ORDERED that Petitioner shall file her reply brief regarding the application of § 2254(d) on or before September 27, 2013. (twdb) (Entered: 07/29/2013)
08/28/2013	148	APPLICATION to Seal the Unredacted version of opposition to petitioner's opening brief

		addressing the remaining claims filed by respondent Gwendolyn Mitchell. (twdb) (Entered: 08/30/2013)
08/29/2013	149	ORDER by Judge David O. Carter: granting 148 Application to Seal the Unredacted Version of the Opposition to Petitioner's Opening Brief Addressing the Remaining Claims (twdb)n (Entered: 08/30/2013)
08/29/2013	150	SEALED DOCUMENT OPPOSITION to petitioner's opening brief addressing the remaining claims under 28 USC 2254(d) (twdb) (Entered: 09/12/2013)
08/29/2013	151	SEALED DOCUMENT OPPOSITIONS TO PETITIONER'S OPENING BRIEF ADDRESSING THE REMAINING CLAIMS (twdb) (Entered: 09/12/2013)
09/26/2013	152	APPLICATION for Leave to File *Oversized Reply Brief* filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Griffis, Linda) (Entered: 09/26/2013)
09/26/2013	153	BRIEF *PETITIONERS REPLY TO RESPONDENTS OPPOSITION TO PETITIONERS OPENING BRIEF RE APPLICATION OF 28 U.S.C. § 2254(d) TO CLAIMS FOR WHICH THE COURT HAS ORDERED AN EVIDENTIARY HEARING; DECLARATION OF LINDA L. GRIFFIS; EXHIBITS* (Attachments: # 1 Exhibits No. 153-161, # 2 Exhibits No. 162-170, # 3 Exhibits No. 171-177)(Griffis, Linda) (Entered: 09/26/2013)
09/30/2013	154	ORDER by Judge David O. Carter: granting 152 Application for Leave RE Oversize Reply Brief. (twdb) (Entered: 09/30/2013)
09/30/2013	155	Notice of Appearance or Withdrawal of Counsel: for attorney Linda L Griffis counsel for Petitioner Maureen McDermott. Craig A. Harbaugh is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Petitioner Maureen McDermott. (Griffis, Linda) (Entered: 09/30/2013)
05/22/2014	156	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Michael David Weinstein on behalf of Petitioner Maureen McDermott. Filed by Petitioner Maureen McDermott. (Attorney Michael David Weinstein added to party Maureen McDermott(pty:pet))(Weinstein, Michael) (Entered: 05/22/2014)
05/22/2014	157	NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Lauren Collins on behalf of Petitioner Maureen McDermott. Filed by Petitioner Maureen McDermott. (Attorney Lauren Collins added to party Maureen McDermott(pty:pet)) (Collins, Lauren) (Entered: 05/22/2014)
07/21/2014	158	APPLICATION for Order for TO LODGE DOCUMENT UNDER SEAL filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order)(Wilson, Douglas) (Entered: 07/21/2014)
07/23/2014	159	ORDER by Judge David O. Carter: granting 158 Application for Order LODGING DOCUMENT UNDER SEAL CLERKS TRANSCRIPT CONFIDENTIAL: Clerks Supplemental III, Volume I, pages 161-252. (twdb) (Entered: 07/23/2014)
01/05/2015	160	ORDER RE: PETITIONERS BRIEF RE: APPLICATION OF 28 U.S.C. § 2254(d) by Judge David O. Carter: Now the Court issues the following Order. For all of the reasons set forth above, Petitioner has not demonstrated a violation of § 2254(d) as to any of her claims in the Brief. Accordingly, Claims Three.D.3, Three.D.4, Three.D.8, Three.D.10, Three.E, and Four are DENIED, and no evidentiary hearing is warranted. (see document for details) (mu) (Entered: 01/06/2015)
02/27/2015	161	APPLICATION for Extension of Time to File OPENING 28 U.S.C.§ 2254 (d) BRIEF ON REMAINING CLAIMS; DECLARATION OF COUNSEL filed by petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Collins, Lauren) (Entered: 02/27/2015)

03/02/2015	162	ORDER by Judge David O. Carter Granting 161 Application for Extension of Time. Petitioner Maureen McDermott is granted an enlargement of time of 60 days, to and including 05/05/15, in which to file and serve her Opening Brief as to the merits of the her remaining claims. (nbo) (Entered: 03/02/2015)
04/27/2015	163	APPLICATION for Extension of Time to File OPENING 28 U.S.C.§ 2254 (d) BRIEF ON REMAINING CLAIMS; DECLARATION OF COUNSEL filed by petitioner Maureen McDermott. (Attachments: # 1 Proposed Order)(Collins, Lauren) (Entered: 04/27/2015)
04/30/2015	164	ORDER by Judge David O. Carter: granting 163 Application for Extension of Time to File. See Order for more information. (twdb) (Entered: 05/01/2015)
06/04/2015	165	Opening Merits BRIEF filed by petitioner Maureen McDermott. (Attachments: # 1 Exhibit)(Collins, Lauren) (Entered: 06/04/2015)
07/13/2015	166	EX PARTE APPLICATION for Enlargement of Time to File an Opposition Brief to Petitioner's Opening Brief; Declaration of Deputy Attorney General Douglas L. Wilson filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order) (Wilson, Douglas) (Entered: 07/13/2015)
07/14/2015	167	ORDER by Judge David O. Carter: Granting EX PARTE APPLICATION 166 . IT IS ORDERED that Respondent is granted up to and including September 17, 2015, in which to file an Opposition Brief to Petitioner's Opening Brief addressing the remaining unadjudicated claims raised in the Petition. (mt) (Entered: 07/14/2015)
09/04/2015	168	EX PARTE APPLICATION for Extension of Time to File an Opposition Brief filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order) (Wilson, Douglas) (Entered: 09/04/2015)
09/09/2015	169	ORDER by Judge David O. Carter: granting 168 EX PARTE APPLICATION for Extension of Time to File an Opposition Brief. (twdb) (Entered: 09/09/2015)
11/06/2015	170	Third EX PARTE APPLICATION for Enlargement of Time to File an Opposition Brief to Petitioner's Opening Brief filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order) (Wilson, Douglas) (Entered: 11/06/2015)
11/16/2015	171	ORDER by Judge David O. Carter: granting 170 EX PARTE APPLICATION for Enlargement of Time to File. (twdb) (Entered: 11/16/2015)
12/15/2015	172	APPLICATION for Leave to file OPPOSITION IN EXCESS OF TWENTY-FIVE PAGES TO PETITIONERS OPENING BRIEF ADDRESSING UNADJUDICATED CLAIMS IN THE FIRST AMENDED PETITION; DECLARATION OF DOUGLAS L. WILSON filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order) (Wilson, Douglas) (Entered: 12/15/2015)
12/15/2015	173	OPPOSITION *TO PETITIONERS OPENING BRIEF ADDRESSING UNADJUDICATED CLAIMS IN THE FIRST AMENDED PETITION* filed by Respondent Gwendolyn Mitchell. (Wilson, Douglas) (Entered: 12/15/2015)
12/16/2015	174	ORDER by Judge David O. Carter: Granting APPLICATION 172 , it is HEREBY ORDERED that Respondent may file a Memorandum of Points and Authorities in support of her Opposition to Petitioner's Opening Brief Addressing Unadjudicated Claims in the First Amended Petition for Writ of Habeas Corpus which exceeds twenty-five pages in length. (mt) (Entered: 12/16/2015)
01/08/2016	175	REQUEST for Extension of Time to File Reply Brief filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 01/08/2016)

01/11/2016	176	ORDER by Judge David O. Carter: granting 175 Petitioner's REQUEST for Extension of Time to File her Merits Reply Brief. Petitioner shall file her Merits Reply Brief no later than February 13, 2016. (dv) (Entered: 01/11/2016)
02/16/2016	177	REPLY filed by Petitioner Maureen McDermott to Response in Opposition to Motion 173 , Brief (non-motion non-appeal) 165 (Weinstein, Michael) (Entered: 02/16/2016)
03/11/2016	178	NOTICE of Errata filed by Petitioner Maureen McDermott. *re Petitioner's Merits Reply* (Attachments: # 1 Supplement Revised Document)(Weinstein, Michael) (Entered: 03/11/2016)
08/15/2017	179	ORDER DENYING RELIEF ON REMAINING CLAIMS by Judge David O. Carter. For the foregoing reasons, the remaining claims in the FAP are denied with prejudice, with the exception of Claim 16, which is denied as premature. IT IS SO ORDERED. *Refer to Order. (es) (Entered: 08/16/2017)
08/15/2017	180	JUDGMENT by Judge David O. Carter, Pursuant to the Order re: Petitioners Brief re: Application of 28 U.S.C. § 2254(d) and the Order Denying Relief on Remaining Claims, IT IS HEREBY ORDERED AND ADJUDGED that the First Amended Petition is denied with prejudice and judgment is entered in favor of Respondent and against Petitioner. 179 (MD JS-6, Case Terminated). (es) (Entered: 08/16/2017)
08/15/2017	181	Order by Judge David O. Carter granting certificate of appealability. (mat) Modified on 8/16/2017 (mat). (Entered: 08/16/2017)
08/16/2017	182	NOTICE OF CLERICAL ERROR: Due to clerical error Re: Docket entry 181 was modified to indicate that the Certificate of Appealability was granted. (mat) (Entered: 08/16/2017)
09/13/2017	183	NOTICE OF MOTION AND MOTION to Vacate Judgment, 180 , Order, 179 *; Exhibits* filed by Petitioner Maureen McDermott. Motion set for hearing on 10/16/2017 at 08:30 AM before Judge David O. Carter. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Collins, Lauren) (Entered: 09/13/2017)
09/13/2017	184	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner Maureen McDermott. Appeal of Order, 160 , Judgment, 180 , Order on Motion for Hearing,,, 88 , Order, 179 , Minutes of In Chambers Order/Directive - no proceeding held,, 123 , Order on Petition for Certificate of Appealability 181 , Order 67 , Order, 60 , Order,, 55 . (Appeal Fee - In forma pauperis status granted on 02/04/2004). (Collins, Lauren) (Entered: 09/13/2017)
09/14/2017	185	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: NOTICE OF MOTION AND MOTION to Vacate 183 . The following error(s) was/were found: Proposed Document was not submitted as separate attachment. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (twdb) (Entered: 09/14/2017)
09/14/2017	186	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 17-99005 assigned to Notice of Appeal to 9th Circuit Court of Appeals, 184 as to petitioner Maureen McDermott. (mat) (Entered: 09/14/2017)
09/15/2017	187	APPLICATION for Stay of Execution filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Collins, Lauren) (Entered: 09/15/2017)
09/19/2017	189	ORDER by Judge David O. Carter: GRANTING 187 Stay of Execution Pending Appeal.

		(mba) (Entered: 09/22/2017)
09/21/2017	188	EX PARTE APPLICATION for Enlargement of Time to File a Reply or Opposition to Petitioner's Motion to Alter, Amend, or Vacate the Court's Final Order and Judgment; Declaration of Deputy Attorney General Douglas L. Wilson filed by Respondent Gwendolyn Mitchell. (Attachments: # 1 Proposed Order) (Wilson, Douglas) (Entered: 09/21/2017)
09/22/2017	190	ORDER by Judge David O. Carter: Granting EX PARTE APPLICATION for Enlargement of Time 188 . IT IS ORDERED that Respondent is granted up to October 25, 2017, in which to file either a Reply or Opposition to Petitioner's Motion to Alter, Amend, or Vacate the Court's Final Order and Judgment. (mt) (Entered: 09/22/2017)
10/11/2017	191	SCHEDULING NOTICE by Judge David O. Carter re 183 NOTICE OF MOTION AND MOTION to Vacate Judgment. The Motion Hearing previously scheduled for 10/16/2017 8:30 AM has been CANCELLED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (dgo) TEXT ONLY ENTRY (Entered: 10/11/2017)
10/17/2017	192	STIPULATION to Vacate The Court's Final Order as to Claim 12 (C) NOTICE OF MOTION AND MOTION to Vacate Judgment, 180 , Order, 179 ; *Exhibits* 183 filed by Respondent Deborah K. Johnson. (Attachments: # 1 Proposed Order)(Attorney Douglas L Wilson added to party Deborah K. Johnson(pty:res))(Wilson, Douglas) (Entered: 10/17/2017)
10/23/2017	193	MINUTES (IN CHAMBERS) LODGING OF DOCUMENTS by Judge David O. Carter: re: Stipulation to Vacate, 192 The Court is in receipt of the parties Stipulation, submitted on October 17, 2017, proposing to: (1) grant the Petitioners Motion to Vacate the Courts final order as to Claim 12(C); and (2) allow the parties to submit additional briefing as to whether Claim 12(C) is procedurally barred. Consequently, the Stipulation is rejected, and the parties are directed to complete the briefing on the pending Motion to Vacate. Respondents Opposition shall be due on or before November 6, 2017, and Petitioners Reply, if any, shall be due on or before November 27, 2017. (refer to order for further details.) (es) (Entered: 10/23/2017)
11/06/2017	194	OPPOSITION TO PETITIONER'S MOTION PURSUANT TO FED. R. CIV. P. 59(e) & 60 (b) TO ALTER, AMEND, OR VACATE THE COURT'S FINAL ORDER AND JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES re: NOTICE OF MOTION AND MOTION to Vacate Judgment, 180 , Order, 179 ; *Exhibits* 183 filed by Respondent Deborah K. Johnson. (Wilson, Douglas) (Entered: 11/06/2017)
11/20/2017	195	APPLICATION for Extension of Time to File Reply filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Collins, Lauren) (Entered: 11/20/2017)
11/21/2017	196	ORDER by Judge David O. Carter, GRANTING 195 APPLICATION for Extension of Time. GOOD CAUSE HAVING BEEN SHOWN, Petitioner Maureen McDermotts request for a seven day extension of time to file her Reply in Support of her Motion Pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) is GRANTED. Petitioner shall file her reply no later than December 4, 2017. (es) (Entered: 11/21/2017)
12/04/2017	197	REPLY in Support of NOTICE OF MOTION AND MOTION to Vacate Judgment, 180 , Order, 179 ; *Exhibits* 183 filed by Petitioner Maureen McDermott. (Collins, Lauren) (Entered: 12/04/2017)
04/02/2018	198	ORDER by Judge David O. Carter, DENYING PETITIONER'S NOTICE OF MOTION AND MOTION PURSUANT TO FED.R.CIV.P. 59(e) AND 60(b) TO ALTER, AMEND, OR VACATE THE COURT'S FINAL ORDER AND JUDGMENT 183 . For the foregoing reasons, the Motion is DENIED. 179 180 (twdb) Modified on 4/2/2018 (twdb). (Entered: 04/02/2018)

05/02/2018	199	First AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by Petitioner Maureen McDermott. Amending Notice of Appeal to 9th Circuit Court of Appeals, 184 Filed On: 09/13/2017; Entered On: 09/13/2017; (Collins, Lauren) (Entered: 05/02/2018)
05/02/2018	200	DESIGNATION of Record on Appeal by Petitioner Maureen McDermott re 199 (Weinstein, Michael) (Entered: 05/02/2018)
05/02/2018	201	NOTICE OF MOTION AND MOTION for Order for Expand the Certificate of Appealability filed by Petitioner Maureen McDermott. (Attachments: # 1 Proposed Order) (Collins, Lauren) (Entered: 05/02/2018)
05/10/2018	202	OPPOSITION TO PETITIONER'S MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY re: NOTICE OF MOTION AND MOTION for Order for Expand the Certificate of Appealability 201 filed by Respondent Deborah K. Johnson. (Wilson, Douglas) (Entered: 05/10/2018)
05/11/2018	203	Notice of Appearance or Withdrawal of Counsel: for attorney Douglas L Wilson counsel for Respondent Deborah K. Johnson. Xiomara Costello is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Respondent Deborah K. Johnson, Warden of Central California Women's Facility. (Wilson, Douglas) (Entered: 05/11/2018)
05/14/2018	204	MINUTES (IN CHAMBERS) by Judge David O. Carter: However, because no such showing has been made as to the denial of Petitioners post-judgment motion, it is DENIED. See also Ninth Cir. R. 22-1(e) (explaining how to advance uncertified arguments on appeal). See document for further information. (lwag) (Entered: 05/15/2018)
08/24/2018	205	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 184 filed by Maureen McDermott. CCA # 17-99005. Appellant's unopposed motion for a 90-day extension of time to file the opening brief is granted. [See document for details.] (mat) (Entered: 08/28/2018)
11/21/2018	206	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 184 filed by Maureen McDermott. CCA # 17-99005. Appellant's unopposed motion for a 90-day extension of time to file the opening brief is granted. [See document for all details.] (mat) (Entered: 11/26/2018)
02/20/2019	207	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 184 filed by Maureen McDermott. CCA # 17-99005. Appellant's unopposed motion for a 21-day extension of time to file the opening brief is granted. [See documents for other details.] (mat) (Entered: 02/21/2019)

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