UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARK CHRISTOPHER CREW,

Petitioner,

vs.

RON DAVIS, Warden of San Quentin State Prison

Respondent.

Case No.: 12-CV-4259 YGR

CAPITAL CASE

ORDER

INTRODUCTION

Petitioner Mark Christopher Crew, a California capital prisoner currently incarcerated at San Quentin State Prison, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 6, 2013, through his appointed counsel, Petitioner filed a second amended petition with forty-seven fully exhausted claims. Respondent Ron Davis filed an answer on October 3, 2014 and Petitioner replied on May 29, 2015.

Due to the size of the petition, the parties agreed to proceed to a merits resolution on twenty-five record-based claims in three rounds of no more than nine claims. This Order decides the first round of record-based claims. Petitioner filed his first opening brief, addressing claims 8, 10-11, 13, 23, 33, 37, and 38 on April 4, 2016. Respondent filed an answer on May 4, and Petitioner filed a reply on May 19, 2016. The Court determines that these claims are suitable for decision without oral argument. Having reviewed the parties' papers and the record, and having carefully considered the relevant legal authorities, the Court DENIES claims 8, 10-11, 13, 23, 33, and 37, and DENIES WITHOUT PREJUDICE claim 38.

STATEMENT

1. Statement of Facts

The following facts are taken from the October 29, 2003 opinion of the California Supreme Court on direct appeal from the jury verdict. This summary is presumed correct. *Hernandez v. Small*, 282 F.3d 1132, 1135 n.1 (9th Cir.2002); 28 U.S.C. § 2254(e)(1).

> 1. Prosecution's case
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> Defendant met Nancy Jo Wilhelmi Andrade (Nancy), a nurse, at the Saddle Rack bar in San Jose in 1981, shortly after Nancy's divorce. Nancy owned a purebred horse and a Ford pickup truck. Nancy and defendant were romantically involved until November or December of 1981, after which they did not see each other until April of 1982, when they resumed the relationship.
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> In January 1982, when Nancy and defendant were not romantically involved, Nancy and her friend Darlene Bryant planned a trip across the United States for the summer, and that spring Nancy bought a yellow Corvette for the trip. In May 1982, Richard Elander, one of defendant's best friends, began work at a ranch in Utah run by Richard Glade. Before Elander left for Utah, defendant had talked to him about killing Nancy during a trip across the country. While in Utah, Elander asked Glade about carrying a body into the wilderness of the Utah mountains. Disturbed by the conversation, Glade fired Elander.
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> Defendant asked Nancy to move to Greer, South Carolina, where defendant's mother and stepfather lived. When Nancy replied she did not want to move so far away unless married, defendant agreed to marry her. The wedding took place on June 4, 1982.
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> The marriage soon floundered. Nancy was living with Darlene at the latter's home, but defendant was rarely there. Nancy twice saw defendant with some women at the Saddle Rack bar. She told several friends she was thinking of an annulment of the marriage.
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> Defendant had been romantically involved with Lisa Moody, to whom he proposed marriage in June 1982, the same month he married Nancy. Defendant and Moody did not set a date for the wedding.
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> In July 1982, defendant and his friend Richard Elander moved to Greer, South Carolina, where they stayed with defendant's parents and started a truck service business. That same month, Nancy and her friend Darlene took their planned vacation trip across the country. They stopped in Greer, South Carolina, and Nancy spent the night with defendant.
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> After Nancy's visit to South Carolina, defendant and his stepfather, Bergin Mosteller, decided to return to California to kill Nancy. Defendant discussed with Elander different ways of killing her, including suffocation, hitting her with a large wrench, and "bleeding her in the shower so she wouldn't make any mess." They also discussed leaving her body in the Utah wilderness, where they could bury her or "hang her in a tree, let the bears eat her."

After returning to California in early August 1982, Nancy often spoke on the telephone with defendant. She decided to move to South Carolina in an effort to make the marriage work, and she began to make arrangements to do so. She gave custody of her two children from a prior marriage to their father and closed out her bank account, obtaining $10,500 in cash and a money order for $2,500. When Deborah Nordman, one of Nancy's friends, remarked that Nancy might be left in the desert during the trip with defendant to South Carolina, Nancy replied, "If you don't hear from me in two weeks, send the police."

On August 21, 1982, defendant and his stepfather came to Darlene's house, where Nancy was living, in a station wagon pulling a horse trailer. They loaded Nancy's belongings into the trailer and picked up Nancy's horse from a stable in Gilroy. The plan was for Mosteller to drive the station wagon to Texas, where he would leave the horse with relatives. Nancy and defendant would follow in Nancy's Corvette and truck. They would leave the truck in Texas, where defendant's friend, Richard Elander, would retrieve the truck, the horse, and Nancy's belongings and take them all to South Carolina. Nancy and defendant would then leave Texas in Nancy's Corvette to go on a two-week honeymoon. Mosteller, however, never went to Texas. He boarded the horse in a stable in San Jose, drove to Nevada, and finally flew to South Carolina.

On August 23, Nancy and defendant went to Nancy's parents' home in Santa Cruz, California, where they picked up Nancy's dog and some of her belongings, including a microwave, stereo components still in the original cartons, and personal documents. That same day, Nancy and defendant ostensibly left for South Carolina.

That same night, however, defendant checked into a Motel 6 in Fremont, California, where he registered to stay for two nights. The next day, he arrived at the home of Lisa Moody, the woman who had accepted defendant's marriage proposal shortly after his marriage to Nancy. Over the next two days, defendant gave Lisa a stereo and a microwave, took her to see a horse in a San Jose stable, and arranged for her to convert $5,000 in cash into a cashier's check payable to Bergin Mosteller, defendant's stepfather.

On August 28, 1982, defendant and Lisa left for South Carolina in a pickup truck with a horse in a trailer. They stopped in Texas, where they stayed at defendant's grandmother's house for a couple of days. While there, defendant became upset and agitated after receiving a phone call. After defendant and Lisa arrived in Greer, South Carolina, defendant opened a bank account in which he deposited Nancy's $2,500 money order. Elander and Mosteller sold Nancy's clothing and possessions at a flea market for about $500, burned her documents in a backyard, and sold the horse trailer and Nancy's horse.

Defendant and Lisa returned to San Jose in mid-September. Defendant then sold Nancy's truck for $4,200, giving the purchaser a certificate of title with Nancy's forged signature. On October 13, 1982, defendant told Lisa that the phone call he received in Texas while they were at his grandmother's house was about a woman who loved him and was telling people in South Carolina she was going to marry him. According to defendant, the woman went to the head of the Mafia in Arizona to complain about defendant, but the Mafia killed her instead. Defendant told Lisa that he was forced to dispose of the body to avoid being blamed for the woman's death, and that he buried it in his friend Bruce Gant's backyard. The phone call defendant

had received in Texas was actually from Gant who told him that the "body was beginning to stink." That same day, defendant returned to South Carolina in Nancy's Corvette.

Richard Elander testified under a grant of immunity. He said that on the day defendant and Lisa arrived in Greer, South Carolina, defendant told him the details of Nancy's killing. According to Elander, after defendant and Nancy left San Jose, California, they stopped and walked up a hillside into the woods. While Nancy and defendant were sitting on the hillside talking, defendant shot her in the back of the head and rolled the body down a ravine where he covered it with blankets. Defendant then drove one of the cars to Bruce Gant's house in Campbell, California. Defendant and Gant returned to the scene and retrieved the other vehicle.

The next evening, defendant and Gant got drunk and returned to the site where defendant had shot Nancy. When defendant walked down to her body, it had moved. Defendant "freaked out," ran back to the truck, and told Gant. Gant went down the ravine where he tried to strangle Nancy and break her neck. He eventually cut off Nancy's head. Defendant told Elander that they put Nancy's body in a 55–gallon drum filled with cement and buried it in Gant's backyard. They put her head in a five-gallon bucket filled with cement and threw it off the Dumbarton Bridge between Alameda and San Mateo Counties, California.

A few days after defendant returned to South Carolina, Elander testified, he sold Nancy's Corvette to Marion Mitchell. When Mitchell repeatedly asked for title to the car, Elander told him that defendant had killed his wife by shooting her, cutting off her head, putting the body in a barrel filled with concrete, and burying it in a backyard. Elander then forged defendant's signature on a bill of sale and gave it to Mitchell.

In January 1983, defendant made arrangements to stay in Connecticut with Jeanne Meskell, with whom he previously had a relationship. While there, defendant told Meskell that he had killed a girl, that she was in two pieces in two drums filled with cement, and that one drum was in the San Francisco Bay and one was in a backyard. In March 1983, the San Jose police searched Bruce Gant's house, where they recovered a Tiffany lamp identical to one of Nancy's. A search of Gant's yard with steel probes in March 1983 and again in 1984 did not reveal anything. Nancy's body was never found.

2. Defense case

The defense at the guilt phase consisted primarily of challenges to the credibility of the prosecution witnesses. The defense introduced evidence that Elander was an untrustworthy drug addict who had engaged in "lying contests" with defendant and that a woman with blonde hair and a dog had come to the San Jose stable with defendant. Because Nancy had blonde hair and owned a dog, the evidence was introduced to try to show that Nancy was aware that Mosteller had taken her horse to the San Jose stable. The defense also introduced evidence to raise doubts over the burial of Nancy's body in Gant's backyard in Campbell, California. San Jose Police Officer Demowski testified that officers searched Gant's backyard three times without finding Nancy's body. District attorney investigator Ronald McCurdy testified that he could not find any records tying Gant to the crime or the disposal of the body.

B. Penalty Phase

1. Prosecution case

The prosecution did not introduce any additional evidence in its case in chief at the penalty phase.

2. Defense case

The parties stipulated defendant had no prior felony convictions.

Defendant's father, William Crew, testified that defendant was born in Fort Worth, Texas in 1954. The family moved to Novato, California, in 1957 and to Petaluma, California, in 1966. During this time, defendant did well in school and was involved in sports. Defendant was never physically abused as a child.

Defendant's parents began to experience marital difficulties. His mother became noncommunicative and withdrawn. In 1969, defendant's parents divorced; defendant and his father moved to San Jose. Defendant continued to do well in school.

In 1970, when defendant was 15 years old, defendant's father married Barbara Martin. Defendant did not get along with his stepmother and one of her three children. When defendant's father and stepmother bought a home, his stepmother's children were each given a bedroom while defendant had to sleep on a couch. Defendant's grades in school began to decline. When he was 17 years old, defendant quit high school and joined the Army.

Defendant did well in the Army. He became a squad leader in charge of 12 to 14 men, rose to the rank of sergeant, and became the driver for Colonel Donald Pearce, the base commander. While he was in the Army, defendant married Patty, his high school girlfriend, and they had one daughter. When a friend and fellow-enlistee, James Gilbert, was getting in trouble because of his drinking, defendant showed concern and compassion for him. Before his honorable discharge from the Army in 1976, defendant and Patty divorced.

Thereafter, defendant married Debra Lunde and they moved to Minnesota. When his marriage to Debra ended in 1981, defendant moved to Texas, where he lived with and took care of his grandmother, Irene Watson, who was suffering from cataracts. In 1978, defendant returned to California, where he worked as a truck driver and attended junior college. He then became involved with Emily Bates, whom he treated well.

Part of the testimony of two witnesses, Richard Elander and Kathy Harper, actually given during their guilt phase testimony, was referenced at the penalty phase as well as mitigating evidence about defendant's background. That testimony consisted of Elander's testimony that defendant protected and cared for him when Elander was a young man strung out on drugs. And Kathy Harper testified that when she was financially destitute, defendant moved in with her and provided financial support for her and her son.

Emily Bates testified at the penalty phase that she had a relationship with defendant in 1977 and again in 1980. Defendant treated her well.

Defendant's father, William Crew, asked the jury to spare his son's life because as an intelligent and capable person he could lead a productive life in prison by doing assigned tasks.

Defendant's grandmother, Irene Watson, testified that defendant took care of her for two or three months in 1981 when she was in ill health.

James Gilbert, defendant's friend whom defendant had helped while they were in the Army, described defendant as a caring and generous person.

Colonel Pearce, the base commander for whom defendant was the assigned driver while in the Army, said that defendant was intelligent, dependable, full of common sense, and mature. He described defendant as a top soldier. In his view, defendant should not be put to death because he could lead a productive life in prison by, for instance, teaching auto repair.

The defense also presented evidence from three Santa Clara County Sheriff's Deputies (Ron Yount, Toby Council, and Donald Varnado) who had daily contact with defendant during the four years he spent in the Santa Clara jail awaiting trial. According to them, defendant interacted well with prisoners and staff. Deputy Varnado mentioned that defendant prevented trouble by telling him about a plan by male inmates to overpower a female officer. All three deputies were of the view that if sentenced to life in prison, defendant could lead a productive life by helping other inmates and doing assigned tasks.

Jerry Enomoto, the former head of the California Department of Corrections and an expert on prisons, expressed the view that defendant would not be a high security risk in prison. His opinion was not changed by defendant's alleged participation in a 1985 escape attempt, because it involved an unsupervised outdoor area and was based on informant statements; because the district attorney concluded there was insufficient evidence to prosecute defendant; and because the plan did not involve weapons, violence, or the taking of hostages.

3. Prosecution rebuttal

Clinton Williams, an informant, testified that in 1985, while in the county jail with defendant, the latter discussed an escape plan, which involved cutting a hole in the surrounding fence. Defendant said he wanted to escape because he thought he would be found guilty of the first degree murder of a woman whose body was buried in an orchard outside California.

People v. Crew, 31 Cal.4th 822, 828-34 (2003).

Petitioner was convicted by a jury of one count of murder and the jury found true a special circumstance allegation that the murder was carried out for financial gain. CT 2272, AG 2353. The jury sentenced Petitioner to death. CT 2300, AG 2394.

2. Procedural Background

Petitioner filed a motion for modification of his sentence in the trial court. RT 5158-82, AG 10861-85. The trial court granted the motion, citing, "'1) a lack of any prior criminal activity involving violence or the threat to use force or violence; [¶] 2) the absence of any prior felony conviction; [¶] 3) the defendant's background; [¶] 4) the defendant's interpersonal relationships; [¶]

5) the defendant's custodial conduct; and [¶] 6) the testimony of Jerry Enomoto, an expert witness regarding the Department of Corrections.'" *People v. Crew* ("*Crew II*"), 1 Cal.App.4th 1591, 1598 (6th Dist. 1991). The court sentenced Petitioner to life without the possibility of parole. *Id.* It also imposed the aggravated term on Petitioner's grand theft conviction. RT 5182, AG 10885.

The state appealed the trial court's ruling, arguing that the trial judge improperly compared the facts of Petitioner's case with those of other capital cases over which he had presided. *Crew II*, 1 Cal.App.4th at 1595. The California Court of Appeal found that the trial court's "substantial reliance on the facts of those others cases in ruling on the section 190.4(e) motion was unauthorized and therefore erroneous." *Id.* at 1604. Accordingly, it vacated the judgment and remanded the case to the trial court for "the limited purpose of redetermining the automatic modification motion pursuant to section 190.4(e)." *Id.* at 1609. The California Supreme Court denied Petitioner's petition for review on March 26, 1992. *Id.* at 1610. Following remand, the trial court reinstated the death sentence.

On August 13, 2012, Petitioner initiated the present habeas corpus action. ECF Doc. No. 1. Counsel for Petitioner were appointed on October 29, 2012. ECF Doc. No. 7. Through his appointed counsel, petitioner filed his Amended Petition for Writ of Habeas Corpus on December 6, 2013, asserting forty-seven claims. ECF Doc. No. 20. Respondent filed his Answer on October 3, 2014. ECF Doc. No. 32. In it, Respondent asserted affirmative defenses based on procedural default, cognizability, and summary dismissal. Petitioner filed his Traverse on May 29, 2015, in which he addressed Respondent's affirmative defenses. ECF Doc. No. 38.

The Court addressed Respondent's affirmative responses on November 30, 2015. That Order found claims Five, Eight (specifically the subclaim regarding the prosecutor's commission of misconduct during his opening statement), Eleven D, Eleven F, Thirteen, Thirty and Thirty-One procedurally defaulted, but directed Petitioner to brief the merits of them anyway; dismissed claims

Three, Six, and Forty-Five as not cognizable on federal habeas; and, in the alternative, denied claims Three and Six, as well as related claims Four and Seven. ECF Doc. No. 43.

Subsequently, Petitioner identified twenty-five record-based claims that could proceed to briefing on the merits without a request for an evidentiary hearing. ECF Doc. No. 47. Petitioner was directed to brief those claims in three rounds. ECF Doc. No. 48. Petitioner filed his first brief, covering eight claims, on April 4, 2016. ECF Doc. No. 49. Respondent filed an answering brief on May 4, 2016, and Petitioner filed a reply on May 19, 2016. ECF Doc. Nos. 50 and 51. Those eight claims are now ready for disposition.

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(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). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 407–09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell* ("*Miller-El I*"), 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the

Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

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. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "[E]valuating whether a rule application [i]s unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* "As a condition for obtaining habeas corpus [relief] from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 102.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340. Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011).

DISCUSSION

1. Claim 8: Prosecutorial Misconduct at Guilt Phase of Trial

Petitioner contends that the prosecutor committed two acts of prosecutorial misconduct during the guilt phase of his trial: (1) the prosecutor presented inadmissible evidence about victim Nancy Jo Crew's fear of Petitioner during his opening argument; and (2) the prosecutor elicited

inadmissible testimony regarding the victim's fear of Petitioner from witness Debbie Nordman. Br. on Merits at 7, 8. Petitioner asserts that these two instances of misconduct prejudiced him because it would likely convince the jury that Petitioner did kill the victim. *Id.*

The California Supreme Court denied the first subclaim as procedurally barred because defense counsel failed to object or request an admonition. *Crew*, 31 Cal.4th at 839. It also found that the claim as a whole lacked merit because Petitioner had failed to show prejudice based on the evidence subsequently adduced against him and because the trial court issued cautionary instruction to the jury that limited the scope for which such evidence could be considered. *Id.* Respondent argues that the denial of both subclaims was reasonable. Ans. at 5-7.

A. Legal Standard

Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005); *see also Deck v. Jenkins*, 768 F.3d 1015, 1023 (9th Cir. 2014) (recognizing that *Darden* is the clearly established federal law regarding a prosecutor's improper comments for AEDPA review purposes). A prosecutorial misconduct claim is decided "'on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995); *see Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014) ("Our aim is not to punish society

for the misdeeds of the prosecutor; rather, our goal is to ensure that the petitioner received a fair trial.").

The first factor in determining whether misconduct amounted to a violation of due process is whether the trial court issued a curative instruction. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Darden*, 477 U.S. at 182 (the Court condemned egregious, inflammatory comments by the prosecutor but held that the trial was fair since curative actions were taken by the trial judge); *Trillo*, 769 F.3d at 1000 ("We presume that juries listen to and follow curative instructions from judges."). This presumption may be overcome if there is an "overwhelming probability" that the jury would be unable to disregard evidence and a strong likelihood that the effect of the misconduct would be "devastating" to the defendant. *See Greer*, 483 U.S. at 766 n.8; *Tan*, 413 F.3d at 1115-16 (finding trial fair where jury received instructions five different times to consider only the evidence presented, and not its sympathy for the victim's life story).

Other factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt, *compare United States v. Young*, 470 U.S. 1, 19 (1985) (finding "overwhelming" evidence of guilt) *with United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (in light of prior hung jury and lack of curative instruction, new trial required after prosecutor's reference to defendant's courtroom demeanor); (2) whether the misconduct was isolated or part of an ongoing pattern, *see Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a critical part of the case, *see Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose information showing potential bias of witness especially significant because governments case rested on credibility of that witness); and

(4) whether a prosecutor's comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182.

2. The California Supreme Court Denials Were Reasonable

A. Subclaim One: Prosecutorial Misconduct in the Opening Statement

Petitioner has failed to show that the California Supreme Court's denial on the merits was an unreasonable application of clearly established Federal law or of the facts, as required by 28 U.S.C. § 2254(d)(1), (d)(2). Specifically, Petitioner has failed to show that "'fairminded jurists could [not] disagree' on the correctness of the state court's decision," and that all would conclude the state court decision was unreasonable. *Richter*, 562 U.S. at 101.

The trial court entertained lengthy argument during motions *in limine* regarding exclusion of any hearsay evidence that would indicate that the victim expressed a fear of Petitioner, specifically in the context of statements the victim made to her friend, Jeanette St. Jean. RT 3447-57, AG 9160-70. The trial court ruled to exclude that particular evidence. RT 3457-58, AG 9170-71. The court then heard argument on the admissibility of the victim's statement to Debbie Nordman that if Ms. Nordman did not hear from the victim within two weeks following her departure from California, that Ms. Nordman should call the police. RT 3459-66, AG 9172-79. The court found that the probative value of showing the victim's intent to have people keep track of her following her commencement of the trip to South Carolina with Petitioner outweighed the prejudicial effect of the statement and allowed its admission. RT 3466, AG 9179. Defense counsel then confirmed with the court that the ruling regarding the statement of fear was still in effect. *Id.*

During his opening statement, the prosecutor said, "They [the victim's family] talked to friends of Nancy. And one of them in particular, Nancy had told her that she was very apprehensive about the move. Not only the move, but apprehensive of the defendant, fearful of the defendant. She had told one of her friends, 'If you don't hear from me in two weeks, call the police.'" RT

3506, AG 9219. Defense counsel did not object, though later he advised the trial court during a bench conference that such evidence of fear had been excluded and wanted to ensure that it would not come out again. RT 3514-15, AG 9227-28. Defense counsel noted that the improper argument might have been "inadvertent" and was "sufficient to interrupt the statement." *Id.* The prosecutor indicated that he thought he had said that the victim was in fear of the defendant, not that she had *said* she was in fear of the defendant, and he had not intended for the argument to sound like the latter. *Id.* No admonition was requested and opening statements resumed.

The prosecutor's statement that the victim had told a friend she was fearful of Petitioner was improper because it abridged the trial court's ruling that such evidence was inadmissible. "Improper argument does not, per se, violate a defendant's constitutional rights." *Fields v. Woodford*, 309 F.3d 1095, 1109 (9th Cir. 2002) (quoting *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir.1996)). The relevant question is whether the prosecutor's improper statement rendered Petitioner's trial "fundamentally unfair." *Darden*, 477 U.S. at 181.

The trial court issued two relevant instructions that obviated the damage to Petitioner by the prosecutor's improper statement. First, it instructed the jury at the outset of opening statements that the attorneys' arguments reflected merely expectations about what the evidence would show and were not evidence in and of themselves. RT 3487-88, AG 9200-01. Second, in connection with the exchange that is the subject of Subclaim Two, below, the trial court issued an instruction admonishing the jury from considering any testimony or evidence that the victim "may have expressed either fear or apprehension" of Petitioner as evidence that Mark Crew either killed the victim or that she was dead. RT 3723, AG 9442. The court advised that such evidence could only be considered "for the limited purpose of establishing whether or not it was likely that [the victim] would have travelled to South Carolina with [Petitioner]." RT 3723-24, AG 9442-43. A jury is presumed to "listen to and follow curative instructions." *Trillo*, 769 F.3d at 1000

The evidence of Petitioner's guilt, despite the absence of the victim's body, was substantial. Accomplice Richard Elander testified against Petitioner. He stated that Petitioner expressed a desire to kill Nancy prior to her disappearance and developed a plan to do so with his stepfather, Bergin Mosteller. Additionally, Elander detailed the ways in which Petitioner subsequently attempted to evade detection of the crime.

Following the victim's disappearance, Petitioner sold the victim's car to a business contact and friend of Mr. Elander's. The purchaser of the car testified that after asking Mr. Elander several times for a signed title, Mr. Elander explained that Petitioner would not be returning to South Carolina because he had murdered his wife and described Petitioner's return to the scene where he had left the victim and the subsequent decapitation and disposal of the victim's body. Those details were consistent with the testimony of Jeanne Meskell, a friend of Petitioner's who testified that Petitioner stayed with her in January 1983 and confessed to having murdered someone, severing the victim's head, and putting the body in two separate barrels filled with concrete, then dumping one of them off a bridge and burying the other in a backyard. RT 3869-70, AG 9589-90.

The victim's assets were sold or otherwise divided amongst the participants. Petitioner tried to transfer an Oldsmobile into the victim's name following her disappearance but was unable to do so because the victim was unavailable to sign the paperwork. RT 3899, AG 9619. He also tried to sell her Corvette and horse trailer through auction and was unable to do so because he had not obtained her signature. RT 3901, AG 9621; RT 3903, AG 9623.

Petitioner proposed to a woman, Lisa Moody, the same month he married the victim and took Ms. Moody on the trip that should have been his honeymoon with his wife. A former neighbor of Petitioner's testified that Petitioner primarily had discussed taking Lisa Moody on the trip. RT 3825, AG 9545. While Petitioner had mentioned the possibility of taking the victim, he also said at

one point that if he did take her, he might stop halfway and kick her out into the desert. RT 3825-26, AG 9545-46.

Petitioner's brother testified that a few months before the victim's disappearance, Petitioner said he wanted to kill someone just to see if he could get away with it. RT 4359, AG 10093. Kathy Harper, a woman with whom Petitioner became romantically involved in South Carolina, testified that she overheard Petitioner and Mr. Elander discussing a blue, bloody blanket. RT 3892, AG 9612.

Based on the totality of the evidence presented at trial and the curative instructions from the trial court, Petitioner has failed to show that the California Supreme Court's denial of this subclaim was unreasonable. Accordingly, this subclaim is DENIED.

B. Subclaim Two: Prosecutorial Misconduct in Examination of Debbie Nordman

Similarly, Petitioner has failed to show that the California Supreme Court's denial of this claim was unreasonable under 28 U.S.C. § 2254(d)(1) or (d)(2).

As noted, during motions *in limine*, the trial court precluded the admission of hearsay evidence that the victim had told her friends she feared the Petitioner. The trial court, however, did permit the prosecutor to ask the victim's close friend, Debbie Nordman, about the victim's statement that if Ms. Nordman had not heard from the victim within two weeks of her departure that Ms. Nordman should call the police.

While questioning Ms. Nordman, the prosecutor asked if she recalled the last conversation she had with the victim about not going to South Carolina. RT 3587-88, AG 9301-02. Ms. Nordman replied in the affirmative and the prosecutor then asked, "What did you tell her?" RT 3588, AG 9302. Ms. Nordman responded, "Well, she expressed some concern and some fear, and basically she said to me, 'If you don't hear from me in two weeks, send the police.'" *Id.*

Defense counsel objected (*id.*) and later asked to approach the bench (RT 3594, AG 9308). During the bench conference, the prosecutor explained that the response was non-responsive to his question and that the witness had been instructed not to testify as to any fear of Petitioner the victim had expressed to her. *Id.* The court allowed the defense to craft the instruction detailed in Subclaim One, above, and delivered it.

The California Supreme Court determination that the prosecutor did not commit misconduct because the prosecutor's question did not attempt to elicit the prohibited fear evidence was reasonable. The prosecutor clearly asked Ms. Nordman what she had said to the victim, not what the victim had said to her. The defense was allowed a curative instruction of its choice. And, as noted, the weight of the evidence against Petitioner was substantial. Because Petitioner is unable to show that the California Supreme Court denial of this subclaim was unreasonable, it is DENIED.

2. Claim 10: Improper Admission of Hearsay Statement from the Victim

Petitioner argues that the trial court's admission of Ms. Nordman's statement that the victim advised Ms. Nordman to call the police if she had not heard from the victim within two weeks of her departure for South Carolina, discussed in Claim 8, above, violated Petitioner's Due Process rights because it rendered Petitioner's trial fundamentally unfair. Br. on Merits at 13. As with Claim 8, Petitioner argues that the admission of this evidence allowed the jury to conclude that the victim was killed by Petitioner and had not, in fact, disappeared on her own. *Id.*

The California Supreme Court denied this claim, finding that the evidence was admissible under Cal. Evid. Code § 1250, which provides a hearsay exception for the declarant's then existing state of mind. *Crew*, 31 Cal.4th at 840. The state court held that the evidence was probative of the victim's state of mind in deciding to leave with Petitioner and whether her disappearance was of her own volition. *Id.*

Respondent argues that the California Supreme Court's denial was reasonable because it was consistent with California evidentiary law and did not render Petitioner's trial fundamentally unfair. Ans. at 8-10.

A. Legal Standard

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986). The Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court's admission of irrelevant pornographic materials was "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established Supreme Court precedent under § 2254(d)); *see, e,g., Zapien v. Martel*, 805 F.3d 862, 869 (9th Cir. 2015) (because there is no Supreme Court case establishing the fundamental unfairness of admitting multiple hearsay testimony, *Holley* bars any such claim on federal habeas review).

While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness. *See Henry*, 197 F.3d at 1031 (citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley*, 784 F.2d at 990. But note that only if there are no permissible inferences that the jury may draw from

the evidence can its admission violate due process. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

B. The California Supreme Court Denial Was Reasonable

The California Supreme Court determined that admission of the evidence was correct as a matter of state law. This Court is bound by that determination. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court on habeas review).

Moreover, Petitioner has failed to show that the admission of the statement violated his rights to due process. As noted by the California Supreme Court, there was more than one permissible inference which could be drawn from the statement. *See Jammal*, 926 F.2d at 920. Additionally, as discussed in conjunction with Claim 8, above, the trial court issued a detailed limiting instruction advising the jurors of the proper considerations of the statement. Thus, Petitioner has failed to show that the California Supreme Court denial of this claim was unreasonable pursuant to either 28 U.S.C. 2254 §§ (d)(1) or (d)(2). Accordingly, this claim is DENIED.

3. Claim 11: Introduction of Irrelevant, Inflammatory, and Unreliable Evidence

In this claim, Petitioner challenges the admission of six different items of evidence that he asserts were irrelevant, inflammatory, and/or unreliable as violative of his constitutional rights. Br. on Merits at 14-19. Subclaims D and F were found to be procedurally defaulted in the Court's November 30, 2015 Order. ECF Doc. No. 43. However, as with Claim 8, Petitioner was instructed to brief the merits of the two defaulted subclaims.

The California Supreme Court denied all of these subclaims in its reasoned decision on appeal. *Crew*, 1 Cal.4th at 841-44. Respondent argues that these denials were reasonable. Ans. at 10-16.

A. Subclaim A: Admission of Bergin Mosteller's False Statements

Petitioner argues that the admission of hearsay evidence showing that his stepfather, Bergin Mosteller, made false reports to the police and his insurance agent in connection with a stolen car claim violated Petitioner's right to due process. The evidence, Petitioner asserts, left the jury to speculate about Petitioner's possible involvement in Mr. Mosteller's "illegal schemes," which had nothing to do with the crimes for which Petitioner had been charged. Br. on Merits at 15. Petitioner also states that the prosecution knew the true reason for Mr. Mosteller's lies, primarily that he was afraid to tell his wife that a prostitute had stolen his car, and that "once Mr. Mosteller's true motivation is known, any possible relevance disappears." *Id.*

The California Supreme Court denied this subclaim finding that the evidence was not hearsay because it was not admitted for the purposes of showing that Mosteller was the victim of a robbery and that the evidence was relevant to proving that Mosteller had attempted to establish an alibi because he knew that Petitioner intended to kill the victim. *Crew*, 31 Cal.4th at 841. The court determined that the evidence was not unduly prejudicial because it would not "arouse an emotional bias" against Petitioner. *Id.*

Respondent argues that this decision was reasonable. Ans. at 10-11. He notes that no party was required to accept Mr. Mosteller's rationale for the untrue reports he made. *Id.* at 10.

Petitioner has failed to show that the California Supreme Court's denial of this subclaim was unreasonable. There was a permissible inference the jury could draw from the evidence, namely that Mr. Mosteller was aware of Petitioner's intent to kill the victim and Mr. Mosteller was attempting to establish an alibi for himself. *See Jammal*, 926 F.2d at 920. Thus, this subclaim is DENIED.

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B. Subclaim B: Bruce Gant's Statement to the Victim's Father

In this subclaim, Petitioner challenges the admission of a hearsay statement by co-defendant Bruce Gant to the victim's father, Jake Wilhelmi, that Mr. Wilhelmi should stop looking for his daughter because "[a]ll the men and equipment of the government can't get within 300 feet of her." Br. on Merits at 15-17. Petitioner asserts that the admission of the evidence violated his rights under the Confrontation Clause of the Sixth Amendment. *Id.* at 16. Petitioner argues that the California Supreme Court's silence on the Confrontation Clause subclaim and failure to delineate which harmless error standard it was using does not support the presumption that the state court adjudicated the federal claim on the merits. *Id.* Petitioner also argues that the admission of this evidence was prejudicial and violated his due process rights. *Id.* at 17.

1. Petitioner Failed to Exhaust as a Federal Claim

Petitioner argues that this subclaim should be reviewed *de novo* because the California Supreme Court failed to consider Petitioner's constitutional claim. Br. on Merits at 17. Respondent argues that the California Supreme Court's focus on other issues shows an implicit rejection of Petitioner's Confrontation Clause claim and that *Crawford v. Washington*, 541 U.S. 36 (2004) does not apply to Petitioner's claim because the decision is not retroactive on collateral appeal. Ans. at 12. Petitioner asserts that *Crawford* does apply because the decision issued prior to the finalization of Petitioner's appeal.[1] Br. on Merits at 16.

The Court has reviewed both the record on appeal and on state habeas and has not found an instance where Petitioner raised this claim as a federal one, let alone as one that violated his rights under the Confrontation Clause. The most Petitioner said in this regard was, "Particularly in a case where the issue of whether or not the victim had been killed was in dispute, such a statement, admitted without cross-examination, was devastating to the defense." AG 11938. A litigant

[1] Petitioner is correct that *Crawford* applies to his case, as it issued more than a month before Petitioner's appeal was final.

wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Petitioner cited no federal law in conjunction with this subclaim. Respondent, however, has waived exhaustion.

2. The Admission Did Not Violate Petitioner's Confrontation Clause Rights

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Crawford*, 541 U.S. at 61.

The Confrontation Clause applies to all "testimonial" statements. *See Crawford*, 541 U.S. at 50-51. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (internal quotation and citation omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* The Confrontation Clause applies not only to in-court testimony but also to out-of-court statements introduced at trial, regardless of the admissibility of the statements under state laws of evidence. *Id.* at 50-51. Hearsay that is not testimonial, "while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006); *see also Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (noting that under *Crawford*, "the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.").

Even under a *de novo* review, Petitioner's Confrontation Clause subclaim lacks merit because Gant's statement to Wilhelmi was not testimonial. When the primary purpose of taking an

out-of-court statement is to create an out-of-court substitute for trial testimony, the statement is testimonial hearsay and *Crawford* applies. *Michigan v. Bryant*, 562 U.S. 344, 358-59 (2011). When that was not the primary purpose, "the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.* at 359.

Testimony established that Wilhelmi called numerous people as many times as he could in order to locate his daughter. He testified that he advised Gant that the reason he was calling was to "find [his] daughter so [they] could give her a decent burial and memorial service." RT 3780, AG 9499. Gant's statement in response to the question was an attempt to get Wilhelmi to stop calling him and not an out-of-court substitute for trial testimony.

Further, as noted by the California Supreme Court, Petitioner suffered no prejudice from the admission of the statement because the jury was aware already that the victim's body had never been found. *Crew*, 31 Cal.4th at 842. Petitioner's argument that the California Supreme Court's harmlessness finding was an unreasonable application of the facts because it failed to consider how the prosecutor actually used the evidence is unavailing. Br. on Merits at 17. The question on review is whether this Court could reasonably conclude that the California Supreme Court's finding is supported by the record. *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004). It is. Accordingly, this subclaim is DENIED.

C. Subclaim C: Doug Crew's Statement

This subclaim challenges the trial court's admission of Doug Crew's, Petitioner's brother, testimony that Petitioner said to him, "Doug, I've done so many things. I think I would like to kill someone, just to see if I could get away with it." Br. on Merits at 18. Specifically, Petitioner contends that admission of this statement violated his constitutional rights because it was "too general, too remote in time, and not directed toward any group of persons" to fall within the scope

of California Evidence Code § 1101. Pet. at 83-84. Petitioner also alleges that the evidence improperly suggested Petitioner had a propensity to commit murder. *Id.* at 84.

The California Supreme Court denied this subclaim finding that the statement was not unduly prejudicial and constituted a general threat as defined by California law when considered with other evidence. *Crew*, 1 Cal.4th at 842. Petitioner has failed to show that this denial was unreasonable.

The admission of the statement was not so "arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walters*, 45 F.3d at 1357 (9th Cir. 1995). As noted by Petitioner, the prosecution produced multiple witnesses who testified that Petitioner actually confessed to the murder. In light of this, Petitioner's brother's testimony could not have prejudiced him. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) ("habeas relief is warranted only if the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'"). Accordingly, this subclaim is DENIED.

D. Subclaim D: Elander's Statement About Disposing of the Body in Utah

Petitioner argues that the trial court violated his due process rights by admitting Richard Elander's testimony that he had a discussion with Richard Glade about disposing of a body in a primitive land area in Utah. Pet. at 85-87. Petitioner argues that the lack of any direct connection to him in Elander's testimony rendered the testimony more prejudicial than probative and notes that Glade should not have been called to testify to corroborate Elander on this point because the defense never challenged Elander on the conversation and, thus, corroboration was not required. *Id.* at 85-86.

In addition to denying the subclaim on procedural grounds, the California Supreme Court also denied it on the merits, finding the evidence admissible. *Crew*, 31 Cal.4th at 843. The court noted that in his testimony, Elander stated that he believed he gave the name of the person who

wanted to murder someone to Glade during their discussion. *Id.* Glade then testified that he recalled Petitioner's name coming up during the conversation. *Id.*

As with the other subclaims, Petitioner has failed to show that the state court's denial of his claim was unreasonable. After the prosecutor asked Elander if he recalled telling Glade who wanted to kill the woman to be buried, Elander said he did, though he couldn't be absolutely sure. RT 3969, AG 9690. Similarly, during his questioning, Glade stated that his recollection was that the need to dispose of a body was Petitioner's. RT 4220, AG 9945. Thus, Petitioner's argument that the evidence lacked a connection to him is incorrect. To the extent Petitioner argues that there existed no evidence outside Elander's statement that Petitioner intended to be involved in burying a woman in the wilds of Utah, that argument goes to the weight and credibility of the evidence, which is the province of the jury. *See Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012) (per curiam) (quoting *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011)) ("[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial.").

Similarly, Petitioner's argument that the evidence was prejudicial because it "misled the jury into believing that even prior to Petitioner's marriage to Andrade, he had planned to kill her and was involved in trying to find a suitable place to dispose of her body" is unavailing. Pet. at 87. Petitioner accurately states after that there was no other corroborating evidence aside from Glade's testimony. *Id.* That, however, does not render admission of the evidence a due process violation. It, again, goes to the weight to be given the evidence, which is within the purview of the jury. Moreover, the jury was free to draw its own conclusions from the testimony. *Parker*, 132 S. Ct. at 2152 (2012).

Because Petitioner has failed to show that the admission of the evidence was so "arbitrary or so prejudicial that it rendered the trial fundamentally unfair," this subclaim is DENIED. *Walters*, 45 F.3d at 1357 (9th Cir. 1995).

E. Subclaim E: Elander's Prior Consistent Statement to Marion Mitchell

Petitioner next challenges Marion Mitchell's testimony regarding a conversation he had with Richard Elander, wherein Elander explained that Petitioner would not be returning to South Carolina to transfer title on the victim's Corvette to Mitchell because Petitioner had killed his wife. Petitioner argues that this testimony violated his constitutional rights and rendered his trial fundamentally unfair. Pet. at 91. Petitioner argues that Elander's statement to Mitchell lacked indicia of reliability because Elander knew the police were looking for Petitioner and, thus, wanted to shift all blame to Petitioner and minimize his exposure. *Id.* The prejudice, he says, was exacerbated by the prosecutor's closing argument that Elander told Mitchell of the murder prior to Elander's cooperation with the police and subsequent grant of immunity, thus casting Elander's statement in a more reliable light. *Id.*

The California Supreme Court denied this claim, finding the evidence admissible as a matter of state law. *Crew*, 31 Cal.4th at 843-44. The court noted that Petitioner did not challenge the statement on the ground that Elander knew the police were investigating Petitioner's role in the victim's disappearance at the time he made it. *Id.*

Petitioner has failed to show that this denial was unreasonable. There is no clearly established federal law that prohibits the introduction of such evidence. *See Holley*, 568 F.3d at 1101 (The Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ."). Moreover, to the extent Petitioner argues that the jury was given the impression that Elander made this statement prior to becoming aware that he was also a subject of the investigation, defense counsel elicited from him testimony that he knew the police were looking for Petitioner in connection with the victim's disappearance. RT 4029, AG 9750. The jury was able to weigh this factor when determining the credibility of Elander's statement. The prosecutor's argument that

Elander made the statement before becoming involved in the investigation was not evidence and the jury was instructed as such. Because Petitioner cannot show that the California Supreme Court's denial of this subclaim was unreasonable, it is DENIED.

F: Subclaim F: Testimony Regarding the Blue Blanket

In this final subclaim, Petitioner challenges the admission of a statement by Kathy Harper, a former girlfriend of his, that she overheard Elander and Petitioner discussing a "bloody blue blanket." Pet. at 92-93. Harper testified that she heard only "a bloody blue blanket" and "I got sick" and could not remember which of the two men made the statements. RT 3892, AG 9612. Petitioner argues that this testimony violated his constitutional rights because it was vague, irrelevant, and could not be connected to Elander's prior testimony that Petitioner had told Elander that after he shot the victim, he covered her in blankets. Pet. at 92-93.

The California Supreme Court denied this subclaim both as procedurally barred because defense counsel failed to object and, alternatively, on the merits. *Crew*, 31 Cal.4th at 844. The court held that the admission of the testimony was harmless because Elander had testified that he said he covered the body with a blanket, Harper's testimony was brief, and it added little to the evidence against Petitioner. *Id.*

Petitioner has not shown that this denial was unreasonable. As noted above, there is no clearly established federal law prohibiting the admission of such evidence. In fact, Petitioner's entire argument is predicated on admissibility under the California Evidence Code. The Supreme Court has repeatedly held that federal habeas relief is unavailable for violations of state law or for alleged error in the interpretation or application of state law. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Accordingly, this subclaim is DENIED.

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G. Cumulative Error

In addition to his specific subclaims, Petitioner alleges that the cumulative effect of the erroneously admitted evidence outlined above rendered his trial fundamentally unfair. Br. on Merits at 19. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution). However, where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011). With respect to the subclaims of Claim 11, the California Supreme Court found no errors and Petitioner failed to show that any of those determinations were unreasonable.

Additionally, even if he had shown error, he has not shown that he was prejudiced by one or more errors. The proper question in assessing harm in a habeas case is, "'Do I, the judge, think that the error substantially influenced the jury's decision?'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). If the court is convinced that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. *Id.* at 437. Petitioner has not made such a showing. He, thus, is not entitled to relief for his cumulative error subclaim and it is DENIED.

4. Claim 13: Introduction of Victim Impact Evidence at the Guilt Phase

In this claim, Petitioner argues that testimony by Stacey Andrade, the victim's daughter, and an exchange between the court and Andrade constituted improper victim impact testimony in the guilt phase. Br. on Merits at 20-21. Petitioner states Andrade's testimony regarding her relationship with her mother was false and misleading because there was evidence to show that the victim willingly left her children in the care of her ex-husband and had previously left them in the

care of her parents while she pursued a "single" lifestyle, rendering the evidence of minimal probative value. Pet. at 98-99. He also asserts that it was cumulative of other witnesses' testimony regarding the victim's relationship with her daughter. *Id.* at 99.

The California Supreme Court denied this claim on procedural grounds because defense counsel failed to object to the testimony and on the merits. *Crew*, 31 Cal.4th at 844. The court held that Andrade's testimony was highly relevant to the issue of whether the victim disappeared of her own accord or was murdered. *Id.*

Petitioner has failed to show that this denial by the California Supreme Court was unreasonable. The admission of evidence can violate due process only if there are no permissible inferences that the jury may draw from it. *See Jammal*, 926 F.2d at 920. As noted by the state court, the information was relevant to counter the defense's assertion that the victim willingly disappeared and did not return to her family. Petitioner presented his own evidence to show that the victim had left her children before in order to substantiate the claim that she would do so again without returning. It was the province of the jury to weigh the credibility of each side's evidence on the issue.

As noted by Respondent, the colloquy between the trial court and Andrade, wherein the court asked how Andrade was faring, was less relevant. However, Petitioner has not shown that this exchange rendered his trial fundamentally unfair. *See Estelle*, 502 U.S. at 75. Andrade's response to the trial court was brief, largely positive, and made no reference to Petitioner. The prosecutor made no mention of Andrade's comments in his guilt-phase closing argument.

Petitioner has failed to show that he was prejudiced by any of Andrade's testimony or statements. Accordingly, this claim is DENIED.

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5. Claim 23: Death Penalty Statute Fails to Narrow Class of Death-Eligible Defendants

Petitioner claims the California death penalty scheme fails to narrow the class of first-degree murderers eligible for the death penalty adequately because the statute has enumerated too many special circumstances. Pet. at 156. Petitioner asserts that the financial gain special circumstance for which he was convicted encompasses a broad range of culpability and is overly inclusive.

The California Supreme Court denied this claim on direct appeal stating that this challenge had been rejected numerous times before. *Crew*, 31 Cal.4th at 854. Petitioner has not shown the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law, nor has petitioner shown the opinion relied on an unreasonable determination of the facts.

The United States Supreme Court has held California's death penalty scheme does appropriately narrow the class of death-eligible defendants and does not apply to every defendant convicted of murder. *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (holding that to pass constitutional muster, state's death penalty scheme "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder"). As noted, Petitioner was death-eligible because the jury found true the financial gain special circumstance. Petitioner has not shown that the special circumstance was not sufficiently narrowing.

In his merits briefing, Petitioner supports this claim by drawing upon data compiled in the "Baldus Report." Petitioner states that "[a]mong persons ultimately convicted of first-degree murder based on offenses committed between January 1978 and June 2002, 95 percent were eligible for the death penalty based on the facts of the offense under California law in place as of 2008."[2] Br. on Merits at 26. Petitioner argues that this five percent reduction in the number of death-eligible defendants when compared with the law challenged and found unconstitutional in *Furman v.*

[2] As Petitioner notes, he was convicted under the 1978 law. He does not provide information regarding how this statistic would vary if compared to the prior version of the law.

Georgia, 408 U.S. 238 (1972), shows that California has failed to narrow death eligibility adequately. *Id.* at 26-27. He notes that the Baldus Study also found that 59 percent of defendants convicted of first-degree murder, second-degree murder, and voluntary manslaughter were also death-eligible during the relevant time period. *Id.* at 27. Thus, he notes, the statute fails to limit those who are death-eligible adequately.

The Ninth Circuit considered and rejected a substantially similar "failure to narrow" claim in *Karis v. Calderon*, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002). As the *Karis* court observed, "[t]he California [death penalty] statute satisfies the narrowing requirement set forth by [the U.S. Supreme Court.]" *Id.* "The special circumstances in California apply to a subclass of defendants convicted of murder and are not unconstitutionally vague. . . . California has identified a subclass of defendants deserving of death and by doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id.* (internal quotation marks omitted).

Likewise, in *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001), the Ninth Circuit denied a certificate of appealability on a "failure to narrow" argument. As the court noted, "[a] defendant is eligible for the death penalty under the 1978 statute [as enacted in Cal. Penal Code § 190.2] only if, at the guilt phase, the jury finds him guilty of first degree murder and finds to be true a statutorily defined special circumstance." *Id.* That finding narrows the total set of murderers to a more limited set of defendants eligible for the death penalty. "At the penalty phase, the class of defendants eligible for death is again narrowed by the jury's application of a series of statutorily enumerated aggravating or mitigating factors," which are listed in Cal. Penal Code § 190.3. *Id.* Thus, a "reasonable jurist could not debate . . . that the 1978 California [death penalty] statute, which narrowed the class of death-eligible defendants at both the guilt and penalty phases, was

constitutional." *Id.* Furthermore, district courts have specifically rejected "failure to narrow" arguments that draw upon the data in the Baldus Report.

For example, in *Webster v. Chappell*, 2014 WL 2526857, *56-66 (E.D. Cal. June 4, 2014), the district court entered a lengthy discussion regarding the background of the Baldus Report, what it purported to show, and why that showing was deficient to prove the petitioner's argument that the California death penalty statute failed to narrow the class of death-eligible defendants adequately. Ultimately, the district court found that "the studies petitioner has presented to this court draw conclusions from manufactured comparisons that do not withstand scrutiny. And, . . . in his argument that almost every first degree murder in California would include special circumstances, petitioner never addresses or explains why or how California's division of intentional murder into degrees does not contribute to narrowing the death-eligible class of criminal defendants." *Id.* at 62. The same rationale applies here. Petitioner has failed to show that he is entitled to relief. Accordingly, this claim is DENIED.

6. Claim 33: The California Death Penalty Statute is Unconstitutional

In this claim, Petitioner contends that the California death penalty statute is unconstitutionally deficient. He argues that a combination of jury instructions based on the "deficient statutory scheme" and misleading and improper argument by the prosecutor failed to give the jury the proper guidance to impose an individualized and reliable selection of the death penalty. Pet. at 277. Specifically, Petitioner challenges: (1) the instructions' failure to delineate between mitigating and aggravating factors; (2) treating the absence of certain mitigating factors as evidence in aggravation, particularly considering the rarity with which those factors would be present in mitigation; (3) the undifferentiated and unitary list of sentencing factors, which rendered Cal. Penal Code § 190.3 unconstitutionally vague; (4) the failure to label mitigating factors; (5) the failure to require the jury to find beyond a reasonable doubt that the aggravating factors outweighed the

mitigating factors; (6) the failure to require the jury to find beyond a reasonable doubt that a death sentence was the appropriate sentence; (7) the failure to specify that all aggravating factors be proven beyond a reasonable doubt; (8) the failure of the statute and jury instructions to designate any burden of proof standards; (9) the failure of the statute and instructions to require unanimity of any aggravating factor; (10) the failure of the statute and instructions to require written findings by the jury as to which aggravating factors they used to base the death sentence; (11) the failure to advise the jury that unanimity was not required to make a finding of a mitigating factor; (12) the use of "extreme," "reasonably believed," and "impaired" in the mitigating factors jury instructions; (13) the failure to narrow the class of death-eligible offenders; (14) the unfettered discretion given to prosecutors in deciding whether to seek the death penalty; and (15) the lack of intracase and intercase proportionality review and the failure of the statute to require one on appeal. *Id.* at 278-88.

This California Supreme Court rejected all of Petitioner's arguments challenging the constitutionality of the death penalty statute. *Crew*, 31 Cal.4th at 859-60. Specifically, the state court held that the federal Constitution does not require that sentencing factors be identified as aggravating or mitigating, that prosecutors do not need to show beyond a reasonable doubt that aggravating factors outweigh the mitigating ones, the jury does not need to find capital punishment is appropriate beyond a reasonable doubt, not requiring jury unanimity on an aggravating factor does not render the statute unconstitutional, the jury is not required to make findings on aggravating factors, and California jury instructions do not require jury unanimity on mitigating factors, nor do they mislead the jury into believing unanimity is required. *Id.* at 860.

Petitioner cannot show that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the

facts. Tellingly, Petitioner does not—and cannot—cite a single decision in support of his argument that the California death penalty statutes are unconstitutional under federal law. Without any citation to mandatory or persuasive authority in support of his argument, Petitioner cannot demonstrate that the state court's denial of this claim was objectively unreasonable.

Indeed, the state court's reasoned decision was consistent with clearly established federal law. For example, Petitioner alleges that the penalty phase jury instructions are deficient because they do not designate mitigating and aggravating factors. In *Tuilaepa*, however, the United States Supreme Court held that giving a penalty phase jury a unitary list of sentencing factors that does not designate which factors are mitigating and which are aggravating does not violate the Constitution. 512 U.S. at 978–79. Moreover, the Ninth Circuit has found that California's "death penalty statute's failure to label aggravating and mitigating factors is constitutional." *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir.1995) (citations omitted). The *Williams* court also held that California's death penalty statute "offers constitutionally-sufficient guidance to jurors to prevent arbitrary and capricious application," "ensures meaningful appellate review," and "need not require written jury findings in order to be constitutional." *Id.* (citations omitted). The court also held that "the failure of the statute to require a specific finding that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional." *Id.* Because Petitioner is unable to show an entitlement to relief on this claim, it is DENIED.

7. Claim 37: Petitioner's Prolonged Confinement Violates His Constitutional Rights

Petitioner asserts that his prolonged confinement under a death sentence violates his right to be free from cruel and unusual punishment because the combination of uncertainty and long delay can result in a significant amount of anxiety or other mental illness, which significantly increases the amount of punishment to which Petitioner is subject. Br. on Merits at 33, 36. As Respondent notes, there is no clearly established federal law that entitles Petitioner to relief on this claim.

Moreover, the argument Petitioner raises here was found by the Ninth Circuit to be barred by *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the application of a new rule of law on collateral review. *Jones v. Davis*, 806 F.3d 538, 552 (9th Cir. 2015). The *Jones* court found that "there is a 'simple and logical difference'" between the rule articulated in *Furman v. Georgia*, 408 U.S. 238 (1072), on which Petitioner relies, "prohibiting unfettered discretion by a jury deciding whether to impose the death penalty and a rule prohibiting systemic lengthy delays resulting from a state's post-sentencing procedures in the carrying out of that sentence when permissibly imposed." *Id.* at 551 (citation omitted). Thus, a decision finding the systemic delay constitutes cruel and unusual punishment would constitute a new rule to be applied here on collateral review. Petitioner is not entitled to relief on this claim and it is, accordingly, DENIED.

8. Claim 38: The Method of Execution in California is Forbidden by State, Federal, and International Law

For this claim, both parties acknowledge that absent an approved lethal injection protocol, the claim is not ripe. Accordingly, it is denied without prejudice to renewal upon the approval of a finalized protocol.

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CONCLUSION

For the foregoing reasons, Claims 8, 10, 11, 13, 23, 33, and 37 are DENIED. Claim 38 is DENIED WITHOUT PREJUDICE.

Within ninety (90) days of the filing date of this Order, Petitioner shall file a brief addressing the merits of the next round of claims, which shall include no more than nine claims. Respondent shall file a response within forty-five (45) days of the service of the opening brief. The reply is due within fifteen days of the date of service of the response. The parties are to observe a 40-page limit for their briefs.

IT IS SO ORDERED.

Dated: July 18, 2017

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California